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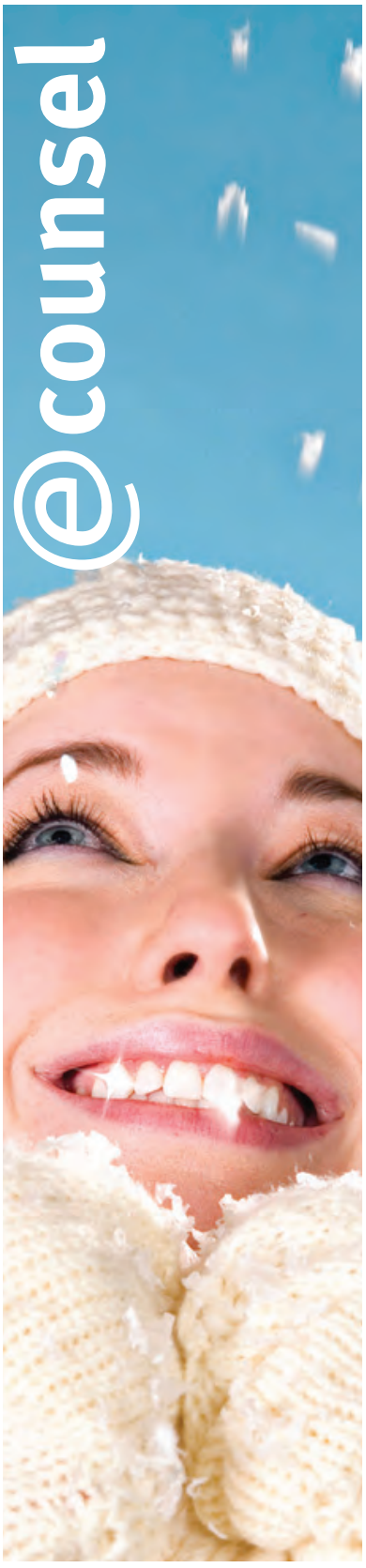

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"Winter is not a season, it's an occupation." ~ Sinclair Lewis

PLAINTIFF'S ARGUMENT RECEIVES ICY RECEPTION AT THE ONTARIO COURT OF APPEAL

The decision in Mader v South East Hope Mutual Insurance Company (2014 ONCA 714) was released on October 21, 2014. In the case the Plaintiff was involved in an accident in July of 2002. She claimed income replacement benefits and benefits were paid until April 24, 2003 when the notice of stoppage of weekly benefits and a request for an assessment by a DAC was sent out by the insurer. The notice confirmed that IRB's would cease as of May 6, 2003. The Plaintiff disagreed with the stoppage and requested a DAC. The insurer stopped paying an IRB on May 6, 2003 but before the DAC could take place on July 14, 2003 a settlement was entered into. The Plaintiff signed a full and final release in return for $3,000.00.

It did not appear that there was any argument made in this case that the release and any other settlement documents did not meet the requirements of the SABS. Much of the evidence that was led in the initial hearing before Justice Nightingale was with respect to the circumstances of entering into the release. The Plaintiff claimed that the release was a nullity because the insurer had not acted in good faith in entering into the release. There were various allegations of conspiracy and fraud. The insurer's position was that the Plaintiff had no right to bring the proceeding at all. Contrary to the Settlement Regulation the Plaintiff had not returned the money payable and had not filed for mediation nor had a failed mediation in accordance with the provisions of the *Insurance Act*. The Plaintiff argued that in a case involving settlement those provisions did not apply.

The appellant then brought a motion for a partial summary judgment for a declaration for IRBs and a requirement that the insurer provide a requested DAC. The insurer also launched a motion for summary judgment based on the argument that the claim was statute barred due to the insured's failure to repay her settlement funds and file for mediation. The insurer's motion for summary judgment was successful and the Plaintiff's motion for partial summary judgment was dismissed. The Court of Appeal upheld the lower court's decision on both fronts.

The Court of Appeal rejected the Plaintiff's claim that the Settlement Regulation did not apply where a claimant is disputing the validity of the settlement. The Court of Appeal noted that the section did not apply where the Plaintiff claimed that the settlement had been obtained through fraud and misrepresentation.

The Court of Appeal concluded that the Plaintiff had not fulfilled the statutory pre-conditions to the commencement of the court proceeding. The Court of Appeal has clearly confirmed that in any case involving a claim for accident benefits, the Settlement Regulation is applicable and that the insured must repay any monies

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WINTER WONDERLAND

and mediate before he/she can proceed to litigation. However the Court of Appeal also made some other findings which could be of some considerable importance.

The Plaintiff attempted to argue that as she was claiming bad faith that that issue did not have to be mediated and that she could proceed with her claim for bad faith irrespective of the court's conclusion about her right to proceed for the claim for income replacement benefits.

The court held that that was not so, relying on the decision of Justice Abella in *Arsenault v Dumfries Mutual Insurance Company (2002) 57 OR (2d) 625*. In that case the issue had been whether a claim for bad faith damages arising out of insurer's termination for no fault benefits was subject to the 2 year limitation period set out under Section 281 (5) of the *Insurance Act*. Justice Abella held that the legislature had mandated that disputes in respect of any claim to no fault benefits must be resolved in accordance with Section 280 to 283 of the *Insurance Act*. She stated that the phrase used in Section 279 "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. She determined that any and all disputes about an insurer's refusal to pay no fault benefits including disputes which allege bad faith in connection with that refusal are caught by the scheme of Section 280 to 283.

The *Mader* case would appear to suggest that in any claim for bad faith arising from a refusal to pay benefits that that claim in and of itself must be mediated before an insured has the right to litigate. This is something that is not regularly done by the Plaintiff's bar and it may very well be worthwhile to start suggesting that they need to do that.

The other interesting aspect of this case is to what extent the findings noted above have any bearing on whether a claim for bad faith is an independent actionable wrong. The Plaintiff in this case argued that because she pleaded conspiracy she therefore had an independent action separate and apart from the denial of no fault benefits and therefore there was no need to mediate prior to litigation. The Court of Appeal held that the facts underlying the conspiracy claim were the very same as those underlying all the claims with respect to bad faith. The object of the alleged conspiracy as was the bad faith was the denial to the appellant of her benefits.

Philippa Samworth is a partner at Dutton Brock and practices exclusively in insurance defence litigation with a specialty in Accident Benefits.

Why Your List to Santa Needs to be Clear, Concise and at Least Seven Days Before Christmas

In the recent Ontario Court of Appeal decision, *Elbakhiet v. Palmer,* the Court provided clarity on how and when an offer to settle must be drafted and served in order to trigger the cost consequences contained in Rule 49 of the *Rules of Civil Procedure.*

Rule 49.10 indicates that if a defendant makes a written offer to settle at least seven days prior to trial and the plaintiff does not achieve a result at trial that is at least as favourable as the offer, the defendant is entitled to its partial indemnity costs from the date of the offer until the conclusion of trial.

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WINTER DISASTER

In *Elbakhiet,* the defendants served an offer to settle of $145,000, plus interest pursuant to the Courts of Justice Act, plus costs to be agreed upon or assessed. The plaintiffs obtained an award at trial of non-pecuniary damages of $144,013.07. The award included $25,000 for non-pecuniary damages, $87,852.75 for loss of future earnings, $6,160.32 for cost of future care, and $25,000 for the *Family Law Act* claims.

The defendants' offer was made more than 7 days before the first witness was called at trial, but less than seven days before the case was called and the jury was empanelled. The Court of Appeal confirmed that the "start of trial" for the purposes of section 49 was when the first evidence was called.

The Court held, however, that the defendants failed to prove that the plaintiffs obtained a less favorable result at trial than they had been offered. At first blush, the defendants' offer appears to have exceeded the plaintiff's recovery by a slim margin. However, the offer did not make it clear as to what pre-judgment interest rate was to be employed.

Non-pecuniary general damages in personal injury cases attract an interest rate of 5%. Pecuniary damages presently attract a lower rate of interest. As it was not clear whether the defendants were offering to settle based upon the pecuniary interest rate or the non-pecuniary interest rate, it was not clear as to whether the offer exceeded the result obtained by the plaintiff.

The Court noted, however, that the jury largely rejected the case put forward by the plaintiffs and that the defendants very nearly "beat" their offer to settle. The Court held that this was a discretionary factor that ought to have been considered by the trial judge. As such, the Court of Appeal reduced the plaintiff's partial indemnity costs award from $580,000 to $100,000.

The decision in *Elbakhiet v. Palmer* serves as a reminder that offers to settle must be expressed in the clearest of terms to attract the costs consequences set out in Rule 49. A defendant ought to specify what rate of pre-judgment interest applies, for example, so that the total amount payable to the plaintiff on acceptance is clear.

Eric Adams is an associate at Dutton Brock. His practice focuses on insurance coverage disputes, defence and subrogation, including product liability, personal injury, and more.

Scrooge Stole My Costs Award

Hoang v. Vincentini 2014 ONSC 5893 was a personal injury action involving a 6 year old boy who was dropped off at an intersection by his father, one of the co-Defendants, Hoang, and was hit by an oncoming car. The driver of that car was another co-Defendant, Vicentini. Following two mistrials, a 7 week trial resulted in the jury finding Hoang liable and Vicentini not liable.

The jury awarded general damages of $150,000 and a further $684,000 for med/rehab, attendant care and housekeeping.

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The Plaintiffs asked the Court for costs totaling $1,725,000, including $429,000 in disbursements and tax. In a lengthy costs endorsement, Justice Wilson ultimately awarded the Plaintiffs $900,000, including disbursements and tax. She also ordered the Plaintiffs to pay the costs of the successful Defendants, Vicentini and Ford (the owner of the Vicentini vehicle), totaling $610,000 including disbursements and tax. The Plaintiffs' net cost recovery was $290,000 – paltry relative to the amount sought; this included significant reductions to the costs claimed by the Plaintiffs' experts.

Justice Wilson held that a reduction to compensate for "partial indemnity" in the range of 20-25% was reasonable. She also admired counsel's use of one lawyer at trial given the relative simplicity of issues and the fact that counsel was an experienced insurance defence lawyer.

Furthermore, a coverage issue existed and this, in addition to Hoang's ability to pay any award, ought to have been considered by the Plaintiffs at the outset. Terms like "actual value" of the case and "reasonable element of compromise" are objectives to be considered by parties when constructing settlement offers.

Justice Wilson did not fault any of the Defendants for offers which were low relative to the award because they appear to have considered all factors: that liability was contested, that the target Defendant (Hoang) may be uninsured and that payment of any damage and cost award would go unsatisfied following a long trial.

Rather, Justice Wilson concluded that the Plaintiffs' unrealistic expectations drove this lengthy trial. She held that, given that the evidence of the experts was essentially rejected by the jury, the Plaintiffs' view of the claim was inflated and unreasonable. She also noted that the amount sought and recovered were wholly disproportionate and that the amount of costs sought relative to the amount awarded was incongruent.

Although Plaintiffs' counsel specialized in this area of law, Justice Wilson noted that she found it "astonishing that the Plaintiffs would need to spend approximately four times the number of hours that the Defence counsel did for trial and that is not even counting the 534 hours of time that are claimed up to the time preparation for trial commenced."

The Defendants collectively argued that costs ought to be awarded against Plaintiffs' counsel personally. This was based on counsel allegedly having unduly prolonged the matter and based on the conflict of interest they failed to disclose to the Defendants until after trial (this latter factor because Plaintiffs' counsel withheld liability information from the Defendants).

Although recognizing the impropriety of this conduct, Justice Wilson was reticent to provide an award against counsel personally. She noted that these circumstances did not meet the two-part test as reviewed in *Carleton v. Beaverton Hotel (2009, Div Ct)*: First, the specific conduct of a lawyer which might relate to unnecessary costs; and second (on more of a cautionary note), a Courts' obligation to be extremely cautious in awarding costs against a lawyer, which ought only to be done "sparingly, with care and discretion, only in clear cases." (See also *Young v. Young, 1993 (SCC))*

While costs typically follow the cause, Hoang is an important reminder that the winning party does not automatically receive all of its costs and disbursements on a partial indemnity scale. The reasonableness of that party's trial preparation, the costs charged by its experts, its trial strategy, offers to settle and other factors will all be considered when determining costs.

Jordan Black is an associate at Dutton Brock. His principle focus is insurance defence including property, casualty, and construction matters.

Home for the Holidays: Plaintiff's Stay in Hospital Could Extend Limitation Period

In *Landrie v. Congregation of the Most Holy Redeemers*, 2014 ONSC 4008, the elderly plaintiff sustained injuries to her ankle when she slipped and fell outside of St. Patrick's Church in the City of Toronto. The plaintiff was taken to Mount Sinai Hospital and was diagnosed with having sustained a commuted fracture/dislocation of her ankle. On November 24 and 27, 2008, Ms. Landrie underwent operations to treat her ankle.

Ms. Landrie remained in the hospital from November 19 to December 3, 2008. During her treatment at the hospital, Ms. Landrie was given significant doses of medication, which left her confused and disoriented. However, although she was heavily medicated, she he was not unconscious.

Ms. Landrie was discharged from the hospital into the care of Bridgepoint Health for post-operative care, where she remained until March 18, 2009.

On October 28, 2010, Ms. Landrie retained counsel to bring an action against St. Patrick's Church. Ms. Landrie mistakenly advised her lawyers that the accident had occurred on November 24, 2008. Based on that mistaken information, her lawyers issued a Statement of Claim on November 22, 2012, three days and two years after the occurrence of the accident. As such, Ms. Landrie had missed the two-year limitation period pursuant to section 4 of the *Limitations Act.*

Defence counsel moved for summary judgment dismissing the plaintiff's claim as statute barred. Counsel for the plaintiff relied on the principle of discoverability, asserting that due to Ms. Landrie's medical condition after the accident, she was not in a position to fully understand the nature of her claim prior to being released from Bridgepoint Health.

The summary judgment motion ultimately turned on the interpretation of Section 7 of the *Limitations Act,* which states that the 2 year limitation period established by Section 4 of the Act, "does not run during any time in which the person with the claim, is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental, or psychological condition; and is not represented by a litigation guardian in relation to the claim."

According to the Court, the issue that had to be decided was whether Ms. Landrie was incapable of commencing a claim "because of her physical, mental, or psychological condition." In interpreting Section 7, the Court held that the section does not require a plaintiff to be a mental incompetent to stop the running of the limitation period.

In holding that the discoverability rule applied, Justice Perell relied on the recent Supreme Court of Canada decision in *Hryniak v. Mauldin* 2014 SCC 7. It is important to note that the parties did not present expert medical evidence. In its decision, the Court relied on the affidavit evidence of Ms. Landrie to find that she was incapable of commencing an action because of her physical, mental, or psychological condition immediately following her injury and surgery. As such, the Court ruled that section 7 of the Act extended the limitation period for the period of incapacity.

The *Landrie* decision could suggest a move towards a more liberal interpretation of section 7 of the Act. It remains to be seen whether the *Landrie* decision will open a new avenue for plaintiffs that have missed the two-year limitation period deadline.

Leyla Mostafavi is an articling student at Dutton Brock.

Freezing out fraud: Bill 15 - Legislative Update

Since the beginning of the no fault regime, which was created in 1990, the process for pursuing a claim for accident benefits has been mandatory mediation, followed by either a court action, or application for arbitration, at the choosing of the insured person. Proposed Bill 15, the *Fighting Fraud and Reducing Automobile Insurance Rates Act,* which at the time of printing has passed second reading before the Ontario Legislature and been referred to a standing committee, seeks to drastically change the dispute resolution provisions of the *Insurance Act.*

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The main change proposed in Bill 15 is the repealing of sections 279-288 of the *Insurance Act.* This is the entire part that deals with the Dispute Resolution of Statutory Accident Benefit Disputes. The most significant change is the complete removal of FSCO's oversight of Accident Benefit disputes and having all accident benefits disputes transferred to the Lic ence Appeal Tribunal. It is not yet clear whether or not current FSCO Arbitrators will be simply "transferred" to the Licence Appeal Tribunal or whether there will be a complete new body of Arbitrators which will have to learn the entire Statutory Accident Benefit regime.

Some other main changes in Bill 15 include:The right to sue – Bill 15 provides that an insured person shall take all disputes related to accident benefit entitlement or quantum to the Licence Appeal Tribunal essentially removing an insured person's right to sue for accident benefits in Superior Court;

The abolition of the position of Director's Delegate – Bill 15 provides that the only exception where an insured can proceed to court is to appeal a decision of the Licence Appeal Tribunal or to seek Judicial Review, which essentially abolishes the position of Director's Delegate.

The abolition of FSCO mediations – Bill 15 does not refer to FSCO mediations. If the recommendations of the 'Cunningham report' are accepted, the Arbitrator at the "settlement meeting", which is expected to replace pre-hearings, will determine which issues are properly in dispute and will be subject to Arbitration.

The abolition of Special Awards – Currently, section 282(10) of the *Insurance Act* is the authority on which Arbitrators can issue a Special Award where there is a finding that an Insurer has unreasonably withheld or delayed payment of a benefit. If Bill 15 is passed, this section is completely repealed. However, the proposed section 280(6) does provide that regulations can be made to provide for and govern orders, including interim orders, to pay amounts even if these amounts are not costs or amounts to which a party is entitled under the SABS. This suggests that the door still remains open to have some type of punitive/special award system in the new dispute resolution provisions of the *Insurance Act.*

When all is said and done, the most drastic changes in the proposed Bill 15 include the abolition of FSCO's oversight of Accident Benefit disputes and the transition of disputes to the Licence Appeal Tribunal. It is not clear what is going to happen to FSCO if Bill 15 is passed, whether the current disputes will be transferred to the Licence Appeal Tribunal or allowed to stay at FSCO through to resolution.

As always, the field of accident benefits is constantly developing and changing. Despite all of the amendments discussed above to the Dispute Resolution System, the *Statutory Accident Benefits Schedule* will remain in tact. It is also important to keep in mind that Bill 15 has not yet been passed and it may be quite some time before the standing committee is completed. Indeed there may even be further revisions. However, this article has outlined some of the key points to look out for going forward.

David Raposo is a partner at Dutton Brock. His practice is focused on the defence of insurers and first party accident benefit disputes.

WEB-CONTEST

This edition's trivia quiz is based on the contrarian view of winter. The author of the quote: "You can't get too much winter in the winter" has a name synonymous with winter, yet he was born in California. Many people assumed he was British because his work was initially published in England. He was honored with four Pulitzer Prizes for Poetry. One of his most famous poems inspired a 1967 novel by S.E. Hinton which became a movie in 1983 directed by Francis Ford Coppola and noted for its cast of up-and-coming stars, including Matt Dillon, Tom Cruise, and the late Patrick Swayze. His epitaph quotes the last line from one of his poems: "I had a lover's quarrel with the world." Who is this author and what actor (from the Coppola movie above) had a father who starred in Coppola's Apocalypse Now?

Email your answers to dlauder@duttonbrock.com. Do NOT email answers by hitting reply to this email address, as it will get lost in spam-limbo.

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Dutton Brock LLP

438 University Avenue, Suite 1700
Toronto, Canada M5G 2L9
www.duttonbrock.com