Focus PERSONAL INJURY

Attempt to apply legislation retrospectively fails

Recent amendment to SABS being used as 'old rules-new rules' bargaining chip

Darcy Merkur

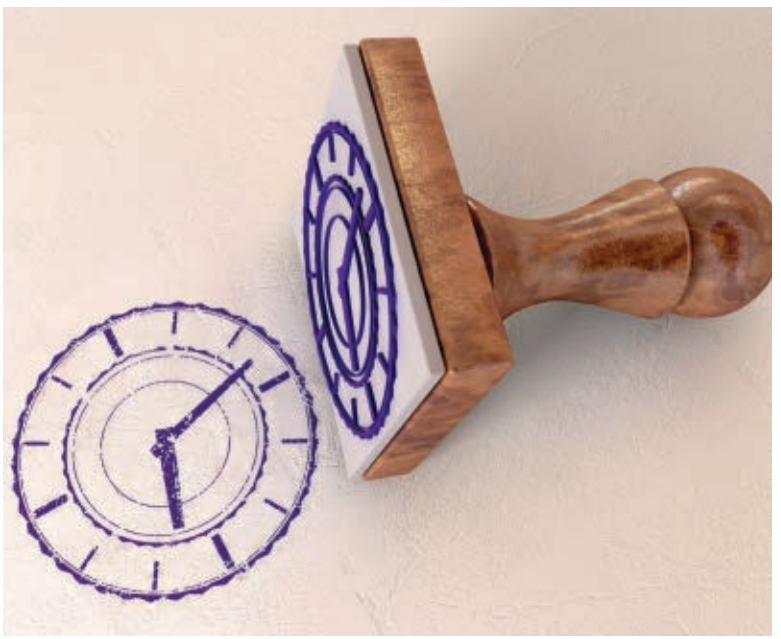
Yet again the insurance industry has been thwarted in its attempt to retrospectively apply insurer friendly legislative changes to ongoing claims.

The issue of the retrospective application of legislative changes was again before the court in the context of automobile insurance rights in *Davis* v. *Wawanesa Mutual Insurance Company* [2015] ONSC 6624.

In *Davis*, Madam Justice Elizabeth Quinlan of the Ontario Superior Court of Justice determined that the February 1, 2014 change to the definition of 'incurred' in the Ontario Statutory Accident Benefit Schedule (SABS) only applies to accidents occurring on or after that date.

In *Davis*, the injured claimant suffered a catastrophic brain injury in an accident on Nov. 15, 2013. She had been determined to need attendant care benefits above the available maximum rate of $6,000 monthly. Upon discharge from hospital on February 6, 2014, the claimant's daughter-in-law took a leave of absence from her job as a financial analyst to care for her injured mother-in-law.

While the daughter-in-law was foregoing a significant income from her employment, her lost income was less than the $6,000 per month available from the insurer for providing needed attendant care services to her mother-in-law.



ALLANSWART / ISTOCKPHOTO.COM

> Conflicting judgments on this issue have resulted.
>
> **Darcy Merkur**
> Thomson, Rogers

On February 1, 2014, the Ontario government amended the SABS to essentially restrict attendant care providers to be paid only up to the extent of their substantiated income loss.

Accordingly, even though the accident pre-dated Feb. 1, 2014, Wawanesa was only prepared to pay the claimant's daughter-in-law up to the full extent of her lost income, rather than at the higher attendant care amount. A dispute about whether the old rules or the new rules applied to the attendant care claim ensued.

In *Davis*, Justice Quinlan reviews the rules of statutory interpretation set by the Supreme Court of Canada in *R. v. Dineley [2012]* S.C.R. 272. Those rules include the notion that it is undesirable to allow legislation to impact substantive rights and the requirement that any attempt to affect substantive rights must be clearly expressed by the legislature.

In the end, Justice Quinlan refused to allow the insurer to take advantage of the legislative change in its favour.

"A clear, legislative intent is required to rebut the presumption against retrospectivity," states Justice Quinlan.

The judge decided that the claimant's rights vested at the time of the accident, in accordance with the terms of the insurance contract then in place.

Justice Quinlan ordered Wawanesa to pay the claimant's daughter-in-law the maximum amount available for attendant care benefits despite her comparatively lower lost income.

The *Davis* case falls on the heels of another attempt by insurers to argue the retrospective application of legislation in the context of the Jan. 1, 2015 changes to the prejudgment interest rate in relation to motor vehicle tort claims.

Conflicting judgments on this issue have resulted. An appellant court will be considering it in the context of *El-Khodr v. Lackie* [2015] ONSC 4766 (contradicting the earlier verdict in *Cirillo v. Rizzo* [2015] ONSC 2440).

Sadly, the retrospective legislative debate has no end in sight. The debate will be raised yet again in relation to the Ontario statutory deductible amount that applies in automobile tort claims.

The amount of the statutory deductible was increased as of August 1, 2015 and insurers are commonly suggesting that this legislative change applies to ongoing claims.

While the wording of the legislation appears to clearly restrict the change to accidents on or after Aug. 1, 2015 (similar to previous amendments that specified a start date), insurers are nonetheless taking a hard line position on this issue.

Practically speaking, insurers are using this increased deductible assertion as a bargaining chip to reduce claimant's settlement demands. Unfortunately, because it will take months to obtain a binding judicial determination on this issue, insurers will be able to continue raising this increased deductible suggestion without fear of penal consequences, and accident victims may be pressured into comprising the value of their claims in order to access needed compensation.

The bottom line is that if the Ontario government, in the course of their continuous strangling of claimant's rights, wishes to further handcuff the rights of accident victims, they will have to do so boldly....and legally.

Darcy Merkur is a partner at Thomson, Rogers in Toronto practicing plaintiff's personal injury litigation, including plaintiff's motor vehicle litigation. He is the creator of the Ontario Personal Injury Damages Calculator.