

## Focus PERSONAL INJURY

# Clarity on prejudgment interest but not deductible



Darcy Merkur

The debate over whether ongoing Ontario personal injury automobile claims are impacted by recent legislative amendments received some clarity recently, at least when it comes to the issue of prejudgment interest. However, the dispute over the application of annually increasing statutory deductibles to ongoing personal injury automobile claims remains.

Ontarians involved in accidents that predate Jan. 1, 2015, will no longer have to entertain the argument that they are caught by the prejudgment interest rate reduction set out in s. 258.3(8.1) of the *Insurance Act*.

Since its legislative introduction on the first day of 2015, insurance defence lawyers have regularly taken the position that defendants in ongoing automobile claims (associated with accidents prior to 2015) can benefit from the prejudgment interest rate reduction, arguing the legislation has retroactive effect. The legislative amendment served to replace the favourable prejudgment interest rate applicable on general damage claims from the mandated 5 per cent per year rate set out in Rule 53.10 of the Rules of Civil Procedure with the lower *Courts of Justice Act* (CJA) rate set out in s. 130 (a rate that has been between 1.3 per cent and 1 per cent for the last few years).

The higher prejudgment interest rate on general damage claims was a welcome feature for accident victims not only for the obvious reason that it was much higher than the CJA rate but because it gave a financial incentive to insurers to pay out claims efficiently rather than face the 5 per cent annual interest rate. With the lower prejudgment interest rate, plaintiff's personal injury lawyers have feared that insurers would hold on to funds rather than expeditiously pay out claims given that they could earn rates of return far superior than the CJA rate by holding on to the money.

After a series of conflicting judicial decisions relating to the retroactive effect of the legislative amendment, the Divisional Court of the Ontario Superior Court of Justice in *Carr v. Modi* 2016 ONSC 7255, released on Dec. 1, 2016, held that the issue of the applicable prejudgment interest



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rate is a substantive issue and that therefore it is presumed not to have retroactive effect. Accordingly, the Divisional Court decided, in its binding decision, that the 5 per cent prejudgment interest rate continues to apply on general damage claims for motor vehicle cases involving accidents prior to 2015.

Justice Anne Molloy, writing for the unanimous Divisional Court writes: "We agree with the motion judge that the new legislation is substantive not procedural and is presumed not to have retroactive effect. There is no language in the legislation, expressed or implied, to support giving the amendment retroactive effect. For the reasons stated by the motion judge, we find that the applicable rate is 5 per cent."

The issue of whether legislative amendments can impact ongoing claims continues to be a source of major contention throughout the personal injury landscape. The other more significant battle that is underway relates to the application of the statutory deductible on automobile claims in Ontario. The statutory deductibles were recently increased with inflation and there remains uncertainty about whether the new inflated deductibles apply to ongoing and historic claims. A binding decision on this issue has not yet been rendered; however, it seems odd and unfair that a general damage claim resolved for \$124,000 on Dec. 31, 2016, would be worth \$37,385.17 less if it was resolved for that amount one day later (as that general damage amount would be eclipsed by the annually increased vanishing deductible limit as of Jan. 1, 2017).

Imagine what insurers would do if, rather than increasing the deductibles, the government

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elected to remove the deductibles altogether or reduce them to a nominal amount? Insurers

would insist that is unfair because premiums were collected on the basis of the deductibles as they then existed. Doesn't that argument alone make it clear that the deductible quantum must be locked in as of the date of an accident rather than act as a moving target?

Every time there is a dispute about whether a legislative amendment may reduce a claimant's entitlement, accident victims are put under even more pressure to compromise their claims. If the Ontario government is determined to continue to curtail and restrict the rights of innocent motorists, then perhaps when making legislative amendments it can specify that it is not trying to tamper with an accident victim's already limited vested rights.

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## CREDENTIALS MATTER

Choosing a personal injury lawyer is one of the most important decisions an injured person will make.

Help your client ask the right questions:

### Is the lawyer?

- selected by peers for inclusion in Best Lawyers in Canada
- rated 5 out of 5 AV Preeminent - Martindale Hubbell
- selected by peers for inclusion in Lexpert, Canada's Legal Lexpert Directory
- a Director or Past President of the Ontario Trial Lawyers Association
- a Certified Specialist in Civil Litigation

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