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The Beard Winter Defender reports on legal issues related to the insurance industry.

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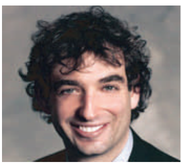
Rule 49 Offers To Settle And The Deductible: "Dazed and Confused"



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Your comments are appreciated and If there are any accident benefits or tort topics that you would be interested in reading about, please feel free to email me and I will certainly explore the possibility of writing an article.

It is very rare that I believe that the Ontario Court of Appeal got it completely wrong. Although I may disagree with the results on occasion, for the most part I believe that their reasoning is sound and that the decisions are well articulated. However, the recent decision in *Rider v. Dydyk* (2007) is incomprehensibly wrong in result and devoid of logic in the reasoning. To make matters worse, this is an important case that will have an all-encompassing impact in tort personal injury litigation concerning Rule 49 offers to settle.

Essentially, the Ontario Court of Appeal has found that a proper Rule 49 offer to settle cannot deduct the statutory deductible for a claim for general damages. So, in a Bill 198 regime, if you wanted to make an offer to settle for $10,000.00 net for general damages in order to protect against cost consequences at trial, you are obligated to include the deductible and put forth an offer to settle for $40,000.00. In this case, a Plaintiff would be entitled to receive a 300% premium over what the legislature had intended if they were to accept the offer.

If the insurer is required to pay a hefty premium in order to effect a settlement, why make a Rule 49 offer to settle? This case must be taken into consideration when making offers to settle and has spawned some legal creativity in order to right a nonsensical wrong.

First a little background. In the *Rider* case (Bill 59 regime), the defendant offered to settle to the injured plaintiffs Kent and Rider $5,000.00 each (plus, plus). At trial, Kent was awarded $15,000.00 (gross) in general damages and Rider $20,000.00 (gross). Accordingly, Kent was entirely unsuccessful after taking into account the deductible, and Rider would have only netted $5,000.00 (equal to the amount offered by the defendant). Both the plaintiffs and the defendant sought their costs. The Plaintiffs combined delivered a Bill of Costs in the amount of $176,188.40 and the Defendant $119,083.34. The Court of Appeal concluded that the statutory deductions from a plaintiff's assessed damages are not to be considered in determining a party's entitlement to costs. As such, the Judgments ($15,000.00 and $20,000.00) were greater than the offers to settle. What is the practical result? Based on the substance of the case, this looks like a victory for the defendant. Based on this ruling: (1) the insurer may have been found ordered to pay $176,188.40 to the Plaintiffs' lawyer for fees and disbursements (subject to any reductions), (2) nothing to Kent, and (3) only $5,000.00 to Rider. Does this make sense?

The Court of Appeal reasoned as follows:

> "(I)nterpreting s.267.5(9) to require that insurance companies "cushion" their offers to plaintiffs by $15,000.00 in order to rely on Rule 49 is not, as I see it, an "arbitrary benefit" to plaintiffs. Rather, such an interpretation encourages insurance companies to make offers of

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settlement that are based on an assessment of the damages actually suffered by the plaintiff. *Offers of settlement that fairly reflect the plaintiff's actual damages, without deduction, will encourage settlement." (Author's emphasis)*

The Court of Appeal is asserting that offers that accurately reflect the Plaintiff's gross general damages, without taking into account the deductible, will increase the likelihood of settlement. Of course such offers will increase the likelihood of settlement, because a Plaintiff would be getting paid more than he is legally entitled. For the purposes of costs at trial, there is no deductible. An insurer is faced with the prospect of increasing an offer to settle in a Bill 198 world by an additional $30,000.00 (by disregarding the deductible), or potentially being hit with a $90,000.00 cost award at trial; even if the defendant wins. This does not even include the cost of sending the insurer's own counsel to trial.

In the past, an insurer often recognized that the prospect of recouping costs from a losing Plaintiff was more of a bonus then an incentive. The goal was to win the case / beat an offer to settle. Now, a Defendant may be substantially successful, such as in the *Rider* case, but still be made to pay a substantial sum of costs to a losing Plaintiff. Undoubtedly, clever Plaintiffs' counsel will be using this economic-cost benefit analysis rationale for the purposes of settlement strategy into the future. This decision will become even more pronounced in the questionable threshold type cases where it is difficult to justify increasing an offer to settle from a net general damages sum of $10,000.00 to $40,000.00 gross.

The key question will be how the lower courts interpret the decision by the Court of Appeal (assuming that leave to appeal to the Supreme Court of Canada is not granted). One strategy that may be used is to use the Court of Appeal's reasoning in the *Rider* case to achieve an alternative result. While as the Court of Appeal "encourages insurance companies to make offers of settlement that are based on an assessment of the damages actually suffered by the plaintiff", a defendant may phrase an offer to settle to reflect both the actual damages suffered and the net damages being offered to pay. So, a defendant may say that it recognizes that a Plaintiff has suffered an actual general damages assessment of $40,000.00, but offers to pay to the Plaintiff $10,000.00 as consideration for this loss. Offers to settle that attempt to incorporate the wording of the *Rider* decision, but reflect the pragmatic intentions of the legislature (the deductible), may resonate with a sensible Judge.

Alternatively, it may be argued that the *Rider* decision does not explicitly award to a Plaintiff their costs; but rather stands for the proposition that a Defendant may not be entitled to costs. As such, an insurer may argue that no one is entitled to costs in factual scenarios such as *Rider*. Moreover, if the Plaintiff is found entitled to costs, the award should reflect the level of recovery obtained by the Plaintiff. Should the Plaintiffs be found entitled to costs of $176,188.40 when the Judgment was only $5,000.00?

If this sounds like "lawyer-speak" to you (i.e. talking in riddles) it should; because it is. The lay person on the street appreciates that if he is involved in a motor vehicle accident that he has a $1,000.00 deductible on the property damage to his car. There is nothing complicated about that. The deductibles set-out in the *Insurance Act* are clear, the manner in which general damages are assessed is clear, and the purpose behind Rule 49 offers to settle is clear. Unfortunately, clarity and common sense do not permeate the decision and reasoning of the Court of Appeal in *Rider*. Insurers are now going to have to re-address making an offer to settle to a Plaintiff that: (1) reflects how much he is entitled to receive;(2) causes the Plaintiff to be concerned about cost consequences if he does not accept this offer; and (3) does not include the payment of a premium. Rather than encouraging early settlement, the Court of Appeal has complicated such prospects even further.

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