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THE NEW SUMMARY JUDGMENT RULES AND INSURANCE LAW: A NEW WEAPON IN THE ARSENAL OF LITIGATION (tort and accident benefits)

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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 us and we will certainly explore the possibility of writing an article.

As an insurer, there is perhaps nothing more frustrating then getting dragged into years of litigation when there is no legal exposure. For example, in a tort case, a defendant may have no liability for an accident but is stuck waiting for the target parties to resolve their case before one can close their file. In the accident benefits world, the claimant may not have introduced any evidence of proof of an economic loss for attendant care benefits, but we are still left to go to trial to adduce medical evidence regarding the substantive need for this service. The old rules pertaining the summary judgment motions were quite restrictive and made it difficult to successfully bring cases to a resolution. However, the 2014 Supreme Court of Canada decision of *Hryniak v. Mauldin* has relaxed the rules pertaining to summary judgment motions and thereby granted the parties in litigation a new weapon to use in their arsenal. Insurers may find that the use of the new summary judgment procedure gives them the opportunity to take proactive action to bring their cases to a resolution effectively and efficiently.

The Basics Of The New Law

In *Hryniak v. Mauldin* (2014) the Supreme Court of Canada noted that trials "have become increasingly expensive and protracted" and called for a cultural shift in which "summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely, and just adjudication of claims". In a nutshell, the Court has created a new set of rules that make it easier for a party to successfully obtain a summary judgment ruling and thereby avoid going to trial.

Before getting into the details of the new summary judgment rules, one perhaps obvious point must be made. A summary judgment motion is a decision that is being made by a Judge and not a Jury. As such, one loses the opportunity to present the argument in front of a Jury if it is decided to proceed by way of motion. This may turn out to be an important consideration with tactical implications. If one party in a dispute makes the decision to bring a summary judgment motion then this will be decided by a Judge rather then a Jury.

The Supreme Court of Canada lowered the onus as to the level of evidentiary proof needed in order to succeed on a summary judgment motion. Whereas beforehand the evidence required was equivalent to that found at a trial, the new rules only require that the motion judge would be "confident that she can fairly resolve the dispute". The judge is to consider where a trial is required when considering factors such as proportionality, timeliness, and cost. This

allows the Judge to have more power and discretion to make a decision rather then simply referring the matter to trial.

The Supreme Court ruled that "there will be cases where extensive oral evidence can be heard on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of procedure." Essentially, this would allow for a mini-trial to take place on a discreet issue and for oral evidence to heard.

The procedure that has been set-out for the Court to follow is two fold: (1) the motion judge will first determine if there is a genuine issue regarding trial without using the new fact-finding powers set out in the Rules and (2) if there appears to be a genuine issue requiring trial the motion judge should determine if a trial can be avoided by using these new fact finding powers including (a) weighing evidence (b) assessing credibility, (c) drawing inferences, and (d) hearing oral evidence.

In order to prevent a flood of inappropriate summary judgment motions, the Supreme Court has suggested (not ordered) that judges who hear such motions should then become seized of the matter for trial. Accordingly, if a case continues to proceed after the disposition of the motion the same Judge who heard the motion is supposed to also be the trial judge. The Judge would have gained knowledge of the case via the motion and this would perhaps help streamline the trial. By way of this new procedure then the remaining parties will know well in advance of trial who their Judge is. This may allow the parties to study the Judge's past ruling / temperament and tailor their arguments accordingly. However, this is not a mandatory aspect of the ruling. Indeed, in *Huang v. Mai* (2014) after the Judge dismissed a motion for summary judgment he found that there is no reason for him to be remained seized of the matter and declined to do so.

Application To Tort Cases

There are a variety of circumstances in which an insurer can utilize this new tool in tort cases. The most straight forward circumstance is a case involving multiple defendants in a liability case. By way of example, we may consider the typical chain of collision case in which the Plaintiff's vehicle is stopped at a red light, a first defendant vehicle is stopped behind him, and a second defendant vehicle rear-ends the middle vehicle and pushes it into the Plaintiff's vehicle. Based on the Supreme Court of Canada decision, the first defendant can now bring a summary judgment motion and evidence may be called from the parties involved in the accident (and any witnesses). This summary judgment motion probably would not take longer then one day to be heard and could be brought at any time.

The new summary judgment rules may also be applicable in less straight forward liability circumstances such as in unidentified and uninsured motorist cases (the application of the 1% rule). In these circumstances it may be in the tactical advantage of an insurer to proceed without a Jury and have a decision made by a Judge. In cases involving an unidentified or uninsured motorist, the insurance company is a named defendant in the case and perhaps a Juror has a biased view against insurance companies. This way one puts the decision in the hands of a Judge and presumably this potential Juror bias is averted.

The new summary judgment procedure may also be used in certain other discreet tort issues such as: (1) whether a party had consent to operate a vehicle and (2) whether there is any objective evidence (as set-out in the *Insurance Act*) to substantiate a claim for underinsured motorist coverage when dealing with an unidentified motorist claim. In short, the rules have been relaxed to allow a Judge greater leeway to grant summary judgment.

This is not to say that there should be a run on summary judgment motions. This is especially so when dealing with the frequent circumstance in which the Plaintiff missed the limitation period for commencing a claim. In *Huang v. Mai* (2014) the defendant brought a summary judgment motion based on these new principles as the Plaintiff missed the limitation period (by 63 days) to commence her action. The Court considered all of the evidence as to when the plaintiff knew, or ought to have known, about the existence of a motor vehicle negligence cause of action that meets the threshold requirements. After reviewing all the medical evidence and case law the Judge dismissed the motion finding that the limitation period had not been missed. Although the case law makes it very difficult to win on a missed limitation period in a tort case, at the very least the new summary judgment rules do allow the Courts greater discretion to make a decision on this issue.

Application To Accident Benefits Cases

To be clear, the Supreme Court of Canada ruling only addresses claims that are in litigation. It does not have a direct bearing on matters that are in Arbitration; but it remains to be seen whether the principles that have been articulated in this case will have an impact in that forum as well. In particular, it is possible that the manner in which preliminary issue

hearings are conducted may be influenced by this ruling.

Similar to tort claims, the use of summary judgments is best used for distinct / narrow issues as opposed to whether a claimant has suffered a medical disability. One of the more common areas to address is a missed limitation period. Where as a limitation period in a tort case is subject to the discoverability principle, this does not apply in accident benefits cases. By way of example, a claimant has two years to commence an action following a clear an unequivocal denial of a benefit. If the denial is found to be clear and unequivocal the claimant does not have the discoverability principal to fall back on.

In *Compton v. State Farm* (2014) the Plaintiff commenced a claim for income replacement benefits beyond the two year mark in which there was a denial of the benefit. After applying the principles of summary judgment as articulated by the Supreme Court, the Divisional Court in this case found that the limitation period had been missed and that there was no genuine issue for trial. This was distinct legal issue and the Court dismissed the claim.

Similarly, in *Roger v. The Personal Insurance Company* (2014) the Court was also asked to address whether the Plaintiff had missed the limitation period for commencing a claim for benefits. Interestingly, the summary judgment motion was brought by the Plaintiff against the insurer for a decision that the limitation period had not been missed. After applying the new summary judgment principles the Court found that the insurer had not followed certain procedural requirements as set-out in the *Schedule* and therefore could not rely on a missed limitation period defence.

Willoughy v. Dominion of Canada (2014) is an example of a case in which the Court found that a trial was favourable to a summary judgment motion. In that case the insurer sought to dismiss the claim for non-earner benefits on the basis that there was no substantive evidence to support he suffered from such a disability. After applying the principles set out in *Hryniak* for the test for summary judgment, the Judge found that the test for non-earner benefits includes an analysis of the claimant's activities in a "qualitative perspective" as a whole including an analysis of her ability to engage in her normal life. The Judge was not of the view that the use of the "mini-trial" process permitting oral testimony on the motion would "lead to a fair and just result and will serve the goals of timeliness, affordability, and proportionality in light of the litigation as a whole". The Judge was of the view that a trial was necessary. Indeed, it appears to me that a "mini-trial" in this case would be no different then a full blown trial.

Some other areas in which summary judgment may be utilized in accident benefits cases may include: (1) whether a claimant has suffered a economic loss that would entitle her to attendant care benefits and (2) whether a claimant qualifies for income replacement benefits based on working 26 of the past 52 weeks and /or the last 4 weeks. Both of these scenarios would involve a limited amount of witnesses and evidence just pertaining to discreet issues.

Conclusion

The principles set out in the Supreme Court of Canada case of *Hryniak v. Mauldin* (2014) has opened the door for the parties in insurance litigation to address matters without waiting years for a trial. Judges are being given more power to utilize their discretion and make decisions. The fact that oral evidence may be heard allows the parties to conduct a mini-trial and a Judge to assess a party's credibility. With that being said, not every issue in dispute should properly be subject to a summary judgment motion. The more discreet the issue the better. For instance liability in a tort case and a missed limitation period in an accident benefits case deal with specific issues that can be narrowly compartmentalized. The more the focus is on a claimant's actual medical disability (thereby requiring the evidence of doctors and the claimant) the less likely that the summary judgment motion would be successful (i.e. *Willoughy v. Dominion of Canada*).

In tort cases, much of the focus may very well be as between co-defendant insurers and in accident benefits cases it would be against the claimant. Although it will take some time to determine the impact of this Supreme Court of Canada decision on insurance law in Ontario, it certainly appears to be a potentially useful tool to employ in the right case. Astute adjusters and their counsel will likely resolve issues quicker and more efficiently by employing this new weapon in our arsenal of litigation.

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The Beard Winter Defender
Past Issues

What is an Economic Loss? The Appeal Courts Have Spoken

Slowly but surely the changes to the Statutory Accident Benefits Schedule are being interpreted by the Courts and Arbitrators. The Court of Appeal decision of *Henry v. Gore* (2013) and The Director's Delegate decision of *Simser v. Aviva* (2014) provide us with some guidance as to what an Economic Loss means.

The Law of Damages In Motor Vehicle Accident Cases (Tort): 101

The law with respect to the burden of proof in motor vehicle accident cases is often overlooked until it is too late. We need to know what we need to prove when assessing cases, advancing a position at a mediation, and well before we step inside a courtroom.

Need To Know: Four Recent And Key Accident Benefits Decisions

Knowledge of the law is important for both adjusting claims and negotiating settlements. This is all the more pronounced in the realm of accident benefits where the new changes to the Schedule have resulted in a host of unanswered questions.

Facebook and Insurance Litigation

The advent of the popular social phenomenon Facebook and other social media sites has given the insurer a new tool to take a peek into the private life of a claimant.

Non-Earner Benefits: What You Need To Know

Claims for non-earner benefit are often very difficult to assess. Since these claims are being advanced by people who are not working or taking care of children.

The Value Of A Death Of A Loved One: Loss Of Care, Guidance And Companionship *Family Law Act* Claims

As representatives for the insurance company, it is our job to assess the appropriate monetary ranges in place for the death of a loved one.

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