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Rule 49 Offers to Settle and the Deductible: The Cost of Winning the War

The Court of Appeal decision of *Ryder v. Dydyk* (2007) (leave to appeal to the Supreme Court of Canada denied) has had an immediate and substantial effect on tort litigation and settlement strategy. The effect of this decision has already permeated its way into settlement discussions regarding the value of questionable claims which may not cross the threshold or exceed the statutory deductible. Insurers are faced with the real prospect of winning at trial over the substance of the claim, but still being forced to pay sometimes greater than $100,000.00 in legal costs to Plaintiff counsel (never mind the defence legal costs), because of the intricacies of this decision.

In *Ryder*, the Court of Appeal found that a proper Rule 49 offer to settle cannot deduct a statutory deductible for a claim for general damages in order to be effective. So, (in a Bill 198 regime) if the defendant offered to settle a case for $20,000.00 before trial, and judgment is rendered at $25,000.00 after trial, then the plaintiff beat the Defendant's offer to settle. The reality that the Plaintiff would receive zero dollars because the judgment gets wiped-out because of the deductible is not relevant to the Court in *Ryder*. The fact that the judgment is greater than the offer to settle is all that matters in terms of costs.

In the *Ryder* case (Bill 59) the defendant offered to settle for $5,000.00 (plus, plus) each for two separate claimants. Judgment was rendered for general damages only for one claimant in the amount of $15,000.00 (net nil) and $20,000.00 (net $5,000.00) for the other. Since the Judgments of $15,000.00 and $20,000.00 were greater than the offers to settle of $5,000.00 each, the Court found that both claimants were entitled to their costs resulting in the defendant paying the Plaintiffs' legal costs in the amount of $176,188.40. This is despite the fact that the Defendant only had to pay $5,000.00 to one claimant and nothing to the other. It is clear that the only winner in this case was the Plaintiffs' lawyer. In an article that I wrote in the Beard Winter Defender in February, 2008 I wrote more extensively about this decision.

Since that time, this case has been considered on a number of occasions with both good and bad results for the insurer. Since this case has such a dramatic effect on costs consequences at trial and settlement negotiations involving smaller claims, it is important to see how it has been dealt with by later courts.

First, the bad news.

In *Abel v. Hamelin* (2007) and *Ksiazek v. Newport Leasing Ltd.* (2008) the Court affirmed and followed the decision of *Ryder*. In *Garisto v. Wang* (2008) the Court of Appeal did not mention the *Ryder* case but did state that it was "common ground" that the deductible is not taken into consideration when assessing the costs at trial. So, we have two lower court decisions and another Court of Appeal decision that follow the reasoning in *Ryder*.

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Your comments are appreciated and if there are any commercial or insurance related 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. Contact: defender@beardwinter.com

Now, the very bad news.

In *Dennie v. Hamilton* (2008), the Court took the *Ryder* case even one step further. In that case, Defendant offered to settle a case for $15,000.00 plus pre-judgment interest, costs, and disbursements. The Plaintiff's offer was for $110,000.00 (plus, plus). At trial the jury awarded the Plaintiff $20,000.00 in general damages (Bill 59 case), nothing for income loss, and $20,000.00 for future housekeeping capacity. Prior to the Jury awarding its Judgment, the Judge ruled on a motion that the Plaintiff did not suffer a threshold injury. Accordingly, the only award afforded to the Plaintiff was the future housekeeping claim of $20,000.00. The Defendant's offer to settle inclusive of interest would have amounted to $19,951.00 which was just dollars shy of the trial result while as the Plaintiff's offer was greater than $90,000.00 off. Clearly the defendant's pre-trial position was much more exact and reasonable than that of the Plaintiff.

However, the Court found that the principles laid down in *Ryder* equally apply to considerations regarding the threshold as they do the deductible. The Judge found that even though he ruled that the Plaintiff did not suffer a threshold injury, (which would disentitle the Plaintiff to any general damages award), that this judicial finding is irrelevant for the purposes of determining costs at trial. The fact that the Jury awarded the Plaintiff a general damages assessment of $20,000.00 and for future housekeeping in the amount of $20,000.00 means that for the purposes of costs, that the Plaintiff effectively received an award of $40,000.00. Since the award of $40,000.00 is substantially greater than the Defendant's offer of $19,951.00, this had the net effect of allowing the Plaintiff to obtain costs at trial; which amounted to $106,255.12. The Plaintiff on the other hand, received just $20,000.00.

There is some good news.

Bucking the trend set-out above is the decision of *Peterson v. Phillips* (2008). In this Bill 198 case the Plaintiff was awarded judgment of just $10,000.00 at trial for general damages and nothing else for any other head of claims. Because of the deductible, the net effect resulted in a judgment of nil. The Defendant had made an offer to settle for $30,000.00 gross, subject to the deductible, resulting in an actual offer to settle of zero dollars net. The Plaintiff argued that the principles laid down in *Ryder* entitle the Plaintiff to his costs of trial.

In a short and succinct ruling, the Judge said as follows:

> "The proper result, in my view is to award costs to neither party. Both Rule 49 and Rule 57, as well as s.131 of the *Courts of Justice Act*, recognize an overriding discretion in the Court on the question of costs. The Court cannot be blinded by the somewhat artificial characterizations of both the offer to settle and the result of trial. In reality, an offer to settle for zero dollars was made and rejected, a trial was held, and the result is a judgment for zero dollars. The fairest disposition, in my view, is that each party bear her own costs." (emphasis added).

The Judge did not allow the law with regards to costs obfuscate the reality of what happened at trial.

Despite the maverick ruling in the decision of *Peterson*, insurers should be wary of the five decisions (including two from the Court of Appeal), that ruled in favour of the Plaintiff. These five decisions may encourage Plaintiff counsel to take-on more questionable claims as it gives claimants a distinct strategic advantage for settlement discussions. Very few insurers will be willing to proceed to trial based on the prospect that even if they shut the Plaintiff out, that they will be forced to pay the Plaintiff's lawyer in excess of $100,000.00 in legal fees (even though the Defendant won). Plaintiff counsel makes substantially more money losing at trial in such cases then through a settlement.

My best advice to insurers is to be cognizant as to what Plaintiff counsel does and does not know. If Plaintiff counsel does not mention the *Ryder* case when discussing settlement of smaller claims, then try and take advantage of your good fortune. If counsel does mention the *Ryder* decision, then be sure to hand him a copy of the *Peterson* case. If counsel mentions all five of the Plaintiff friendly cases, then we have a problem. The emerging law with respect to offers to settle and the costs consequences must be taken into consideration early on in the litigation process and not left for trial. By recognizing the risks set-out in this recent legal development, a sharp adjuster will recognize that the costs involved in winning the war are not worth the expense of the battle.

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