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INSURE UPDATES

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Discoverability and the Limitation Act: *Rojas* v. *Porto* 2019 ONSC 447

By *Lauren Furukawa*, DWF Toronto, Email: lfurukawa@dolden.com

Mario Delgado of DWF's Toronto office successfully defended a motion seeking to add a Third Party as a Defendant to an action by arguing the claim was barred by Ontario *Limitation Act*. The question before the court was that of discoverability.

The action arises out of the allegedly defective renovation work performed at the Plaintiff's home. The Plaintiff sued the City of Toronto (the "City") alleging negligent inspection of the renovations contrary to the *Ontario Building Code* (the "Code"). The City then commenced a third party claim against the engineer it relied upon for the purposes of the inspection.

The Plaintiff argued that the engineer's negligence was not discoverable until either the City provided its affidavit of documents and/or the engineer made admissions at his discovery, and as such, the limitation period did not begin to run until September or October, 2017, which was within the 2 year limitation period.

Section 5(2) of the Ontario *Limitations Act*, 2002, imposes a reverse onus upon the moving party to explain why the identity of the proposed added party was not discovered on the date the claim first arose. The reverse onus is satisfied by exercise of due diligence and includes an assessment of when the claim ought to have been discovered. The court noted that due diligence, "*is not*

about information arriving at one's doorstep – it is about actively taking steps outside the door".[1]

The court stated that it would not have been difficult to ascertain the identity of the engineer, and that a party cannot simply wait for discovery to secure this information.

The Plaintiff also provided no reasonable explanation as to why it did nothing to identify possible third parties for over two years prior to bringing the motion, even though it was "spoon-fed" all of the relevant information.

Take Away

A Plaintiff cannot sit on its hands once information respecting possible third parties arises. From a defence perspective, non-parties can rely upon *Rojas v. Porto* to oppose their late addition to an action where the Plaintiff had *prima facie* knowledge of their alleged negligence.

The Caps are Coming: An Overview of the New Caps on Minor Injury Claims

By *Setareh Khasha*, DWF Vancouver, Email: skhasha@dolden.com, and *Manjot Parhar*, DWF Vancouver, Email: mparhar@dolden.com

On April 1, 2019, British Columbia's new *Minor Injury Regulation*, B.C. Reg, 234/2018 (the "Regulation") took effect. We summarize the basic principles for the Regulation below.

The Regulation sets a $5,500 cap (the "Cap") on non-pecuniary damages for minor injury cases, which arise from motor vehicle accidents that occur on or after April 1, 2019. The Cap only applies to non-pecuniary damages, and will be updated annually in accordance with the consumer price index..

[1] *Laurent-Hippolyte* v. *Blasse et al*., 2018ONSC940

What is a minor injury?

The Regulation defines minor injury as:

> a physical or mental injury, whether or not chronic, that does not result in *a serious impairment* or permanent serious disfigurement AND is one of the following:
>
> a) an abrasion, a contusion, a laceration, a sprain, or a strain;
>
> b) a pain syndrome;
>
> c) a psychological or psychiatric condition; or
>
> d) a *prescribed injury* or an injury in a prescribed type or class of injury.

Prescribed injuries include whiplash associated disorder, temporomandibular joint disorder, and mild concussions that do not result in incapacity.

What is a serious impairment?

The Regulation defines serious impairment as a physical or mental impairment that

a) is not resolved within 12 months after the date of the accident; and

b) results in a substantial inability for the claimant to perform activities of daily living or essential tasks of regular employment, education, or training despite reasonable efforts to accommodate the claimant and the claimant's reasonable efforts to use the accommodation.

Moreover, the impairment must be caused primarily by the motor vehicle accident, must be ongoing since the motor vehicle accident, and must not be expected to improve substantially.

What about multiple injuries?

Importantly, each injury must be diagnosed separately to determine if it is a minor injury. If there are multiple injuries and one or more non-minor injuries, the total amount of damages for non-pecuniary loss is the sum of damages assessed for all minor

and non-minor injuries. The maximum amount of damages for non-pecuniary loss recoverable for all minor injuries, in total, must not exceed the Cap.

Who decides whether an injury is a minor injury?

A healthcare practitioner decides whether a claimant has a minor injury as defined under the Regulation. If the claimant disagrees with the classification, their only recourse is to make an application the Civil Resolution Tribunal (the "CRT") to determine whether the injury is a minor injury. The claimant bears the burden of proving that the injury is not minor. If the claimant does not agree with the CRT's decision, they may apply to have the decision judicially reviewed by a judge at the Supreme Court of British Columbia.

What is more is that the CRT will adjudicate all motor vehicle claims that fall below $50,000 in total. In short, the CRT will have jurisdiction to decide whether an injury is minor, whether a claimant is entitled to receive accident benefits, who is the at-fault driver in a motor vehicle accident, and quantum for all heads of damages falling below $50,000.

Criticisms

One of the more obvious criticisms about the Cap is that the definitions in the Regulation are complex and difficult to apply in isolation when injury symptoms are often interwoven. Moreover, "minor injury" is a not a medical term. Rather, it is a legal definition that healthcare practitioners will be asked to apply when diagnosing injuries. It is unclear how healthcare practitioners will tackle this task placed upon them.

Critics also question whether the CRT can handle motor vehicle claims. The CRT is an online tribunal that was created to resolve strata disputes and small claims disputes under $5,000.

Take Away

The norms of litigation stemming from motor vehicle injury claims have changed in significant ways. These changes are broad and will impact all stakeholders. With that said, it remains to be seen how the Regulation will be interpreted, applied, and perhaps challenged by legal players in the coming years.

Battle of the Experts No More?

By *Setareh Khasha*, DWF Vancouver, Email: skhasha@dolden.com, and *Manjot Parhar*, DWF Vancouver, Email: mparhar@dolden.com

On February 11, 2019, the British Columbia government announced the addition of Rule 11-8 to the *Supreme Court Civil Rules*, BC Reg 168/2009 (the "*Rules*").[1] Each party will be allowed one expert witness in a fast track action and up to three expert witnesses for all other actions (the "Expert Cap"). In addition, each party will be allowed to tender only one report from each expert witness. The Expert Cap applies to experts who opine on damages only, and not to experts who opine on liability (e.g. engineers).

When will the Expert Cap Apply?

At present, the Expert Cap applies to all personal injury actions that arise out of the use or operation of a motor vehicle except for vehicle actions wherein any reports of an expert were served in accordance to Supreme Court Civil Rules before February 11, 2019, or to any motor vehicle action that has a scheduled trial date on or before December 31, 2019.

Importantly, the Expert Cap will apply to all personal injury cases as of February 1, 2020, thus affecting commercial host liability claims, occupier's liability claims, and sports and recreational liability claims among others.

Can you challenge the Expert Cap?

Rule 11-8(4) states that, if all the parties to a motor vehicle action consent, the parties may tender one or more additional reports from one of their three experts, or obtain the expert opinion evidence of one or more additional joint experts in excess of the Expert Cap.

If the parties do not consent, a party can bring a court application. On application, the court may make one of the following orders

[1] Limiting use of experts to reduce costs, delays in motor vehicle disputes, *BC Government News*, online: https://news.gov.bc.ca/releases/2019AG0009-000208.

if it is satisfied that it would further the objective of the *Supreme Court Civil Rules*:

a. allow for the expert opinion evidence of one or more additional experts in excess of the Expert Cap by

   i. ordering the parties to appoint a joint expert;

   ii. appointing the court's own expert; or

   iii. allowing a party to tender as evidence one or more additional reports from an expert.

In other words, if a party wishes to have additional experts in excess of the Expert Cap, they are restricted to making a court application for a joint expert, or a court-appointed expert. A party cannot apply to have an expert of their own choosing in excess of the Expert Cap.

Comparison with Ontario

The Ontario *Evidence Act* limits the number of expert witnesses to three in all actions. However, the parties may apply to the court for additional experts of their own choosing. On an application for additional experts, the court will consider factors including but not limited to the number of expert subjects in issue, the number of experts each side proposes to have opine on each subject, how many experts are customarily called in cases with similar issues, and how much duplication there is in the proposed opinions of different experts.[1] Generally speaking, the bar is low and the case law in Ontario easily allows for more than three experts in complex cases.

Take Away

This change is aimed at regulating the disproportionate use of experts and expert reports at trial and at reducing the costs related to same. However, the applicability of Rule 11-8 remains unclear. Parties involved in motor vehicle actions who already have more reports than the Expert Cap allows, and do not fall into the outlined exceptions, should consider whether to seek leave to rely on those experts and reports at trial.

[1] *Tomec v Mangat*, [2015] OJ No 2245

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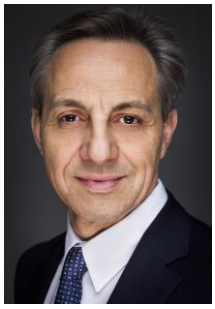

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