

Sizing up *Ksiazek*: A discussion of costs and offers to settle in Ontario MVA cases

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Introduction

The recent costs decision in *Ksiazek v. Newport Leasing Limited*, 2008 CanLII 15771 (ON S.C.), which was delivered on April 15, 2008, arose out of a trial decision of Mr. Justice C. Raymond Harris in 2006 in Hamilton. The main issue is whether a defendant's Offer to Settle should be compared with the gross damages awarded to the plaintiffs, without a reduction for statutory accident benefits that were deductible from the judgment. Mr. Justice Harris concluded that this was the correct approach.

The effect of this decision is that it supports the Ontario Court of Appeal's decision in *Rider v. Dydyk* and takes it one step further, thereby making it impracticable, at least in this case, to have made a proper Offer to Settle that would have attracted favourable costs consequences under rule 49.10.

Background and Facts

The action arises from a motor vehicle accident which occurred on September 25, 1998. One plaintiff claimed damages for injuries and four co-plaintiffs

advanced claims under the *Family Law Act*. Liability was admitted by the defendant and the trial was confined to the issue of damages. The municipal defendant was deemed to be an unprotected defendant and vicariously liable for the negligence of its employee, another named defendant. The plaintiffs were awarded damages in the amount of \$131,100.00 at trial. The injured plaintiff was awarded \$107,100.00 with the remainder going to the four *Family Law Act* claimants.

The parties agreed that the accident benefits deduction was \$45,100.00, reducing the injured plaintiff's recovery to \$69,000.00.

Defendants' position

The defendants submitted that their Offers to Settle should be compared against the Judgment, net of deductions for accident benefits, rather than the gross damages awarded.

The defendants had made two Offers to Settle. The first was made on April 23, 2003 to the plaintiff in the amount of \$75,000.00 plus interest and costs. The second was made on February 10, 2005 to the plain-

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tiff and some of the *Family Law Act* claimants in the amount of \$147,000.00 plus interest and costs.

The defendants stated that both Offers met the requirements of rule 49.10 in that the Judgment (net of deductions) did not exceed the amount of either Offer. As a result, the defendants argued that they were entitled to costs on a partial indemnity basis from the date of the first Offer, or in the alternative, the date of the second Offer.

Plaintiffs' position

The plaintiffs took the position that the defendants are not entitled to deduct the accident benefits for the purposes of determining whether or not an Offer to Settle is as favourable or more favourable than what was awarded at trial. The plaintiffs relied on the principle of vicarious liability in the context of motor vehicle cases which means that the employer's liability arises from the special employer-employee relationship; the *Insurance Act* and its deductions should have no application on the issue of costs.

In addition, the plaintiffs relied on the recent Court of Appeal decision in *Rider v. Dydyk*, [2007] O.J. No. 3837 (C.A.) wherein the Court held that statutory deductions from the plaintiff's assessed damages in a motor vehicle case are not to

be taken into account in determining whether the defendant is presumptively entitled to costs pursuant to Rule 49 (see Noteworthy 2007 Volume 5).

The plaintiffs argued that the defendant's first Offer did not award any damages to the *Family Law Act* claimants and once the statutory deductible is applied to the Offer, it is less favourable than the judgment received by the plaintiffs. The defendant's second Offer was only \$4,612.65 more than the Judgment. In this case, the plaintiffs argued that the judge should "order otherwise" on the basis of the merits of the action and the finding made at trial.

Issues

The main issues of the costs hearing were as follows:

- (1) Whether the damages awarded should be reduced by the statutory deductions for the purposes of Rule 49?
- (2) Whether the first Offer to Settle is more or less favourable than the Judgment?
- (3) Whether the second Offer to Settle is more or less favourable than the Judgment?
- (4) Whether, if either of the Offers is more favourable, is this a case for the court to exercise discretion and "order otherwise" under rule 49.10?

The Law and Analysis

On the first issue, the Court stated that section 267.5(9) of the *Insurance Act* mandates that for costs determinations, the damage award for non-pecuniary loss is not reduced. The Court referred to *Vollick v. Sheard*, [2005] O.J. No. 1601 (C.A.), where the Court of Appeal dismissed an appeal and upheld the trial decision that an employer, while being a protected defendant as owner of the motor vehicle, is not a protected defendant in this capacity as employer pursuant to the *Insurance Act*. Thus, an employer is vicariously liable for the negligence of an employee and does not benefit from the deductions contained in the *Act*. In *Ksiazek*, the municipal defendant, the Regional Municipality of Halton, was unprotected under the *Insurance Act*, so the statutory deductibles were not factors.

The Court relied on *Rider* and its proposition that the deductions from a plaintiff's assessed damages in a motor vehicle case, which are mandated by s. 267.5(7) of the *Insurance Act*, are not to be taken into account in determining whether the defendant is presumptively entitled to costs pursuant to Rule 49. The Offer is to be compared to the gross award of damages, not the award net of the statutory deductible.

Turning to the second issue, the Court held that the first

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Offer was clearly less favourable than the Judgment. With respect to the third issue, the Court held that the second Offer was more favourable when looking at total amounts, however, the difference is minimal. Further, the second Offer, with respect to the *Family Law Act* claimants, is less favourable.

Justice Harris relied on the decision of *Lumsden v. Delpeche*, [2003] O.J. No. 2248 (S.C.J.) which dealt with the issue of determining whether a non-severable Offer to Settle was more favourable than the judgment. In *Lumsden*, Madam Justice Sachs concluded that the non-severable nature of the Offer precluded it from attracting the cost consequences of rule 49.10(2). She held that non-severable Offers, where one plaintiff cannot settle the action unless all the others agree, encourage plaintiffs to play off their claims against each other. Therefore, since there was no relevant Offer to Settle, the plaintiffs were entitled to their partial indemnity costs throughout. In *Ksiazek*, the Court found that the second Offer to Settle was non-severable and since the *Family Law Act* claimants were more successful at trial and based on *Lumsden*, the Offer does not attract the cost consequences of rule 49.10(2).

Turning to the final issue, Justice Harris held that alternatively he would exercise his dis-

cretion and "order otherwise" pursuant to rule 49.10(2). Generally, courts will be persuaded to do so when it is in the interests of justice or in situations where if it did not do so, it would be manifestly unjust to the plaintiff. While the ability to pay could not in and of itself be a determinative factor, this factor was definitely an influential one in terms of making such an order. In *Ksiazek*, the court listed twelve factors it considered when exercising its discretion:

- (1) The *Family Law Act* claimants obtained a more favourable result than the defendants' offer.
- (2) The plaintiffs were successful on their motion at the outset of trial to have the defendant Regional Municipality of Halton declared an unprotected defendant. Costs of that motion were reserved to the trial.
- (3) The difference between the Offer and Judgment is not large.
- (4) The difficult nature of the case.
- (5) The great expense to which the plaintiffs had been put in their efforts to get to trial.
- (6) The financial loss suffered by the plaintiffs as a result of the accident.
- (7) The plaintiffs were successful in obtaining considerable

damages.

(8) The plaintiff, Margaret Ksiazek, has suffered very serious damage.

(9) The plaintiffs are of limited means in contrast to the insured defendant. A costs award against them would be devastating.

(10) The plaintiffs have incurred onerous costs in amassing the evidence required to prove the case.

(11) Although the Offer of the defendant was backdated to February 10, 2005 on consent, it was not made until August 11, 2005, after the motion determining that the employer was not a protected defendant was heard. At this point in time, the trial had already begun. Therefore, the main reason behind rule 49.10, the avoidance of costly litigation is not defeated by "ordering otherwise".

(12) The difference between the Offers is \$4,612.00 or 2.7 percent of the Judgment.

Decision

Ultimately, the plaintiffs were awarded their costs on a partial indemnity scale in the amount of \$277,995.00 pursuant to their Amended Bill of Costs.

Riding *Ksiazek's* wake

This costs decision is problematic for defendants who wish to

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make Offers to Settle. The *Rider* decision was based on a specific provision in the *Insurance Act*, that provides: "the determination of a party's entitlement to costs shall be made without regard to the effect of [the statutory deductible] on the amount of damages, if any, awarded for non-pecuniary loss." The *Insurance Act* does not have a similar provision which speaks to what should be done, if

anything, with collateral benefits.

In *Ksiazek*, the net amount of the Judgment was less favourable than both Offers to Settle made by the defendants. One must question whether it makes sense when doing the rule 49 comparison to compare an offer to the gross judgment when the plaintiffs are really only going to receive the net amount of the judgment.

The ultimate effect of *Ksiazek* is that it will make it most challenging for defendants in motor vehicle cases to serve meaningful Offers to Settle. We will stay tuned to see what the Court of Appeal does with *Ksiazek*; until we receive further clarification from the court, defendants will find themselves in an extremely difficult position when considering how to draft offers to settle.

FIRM NEWS

The partners take great pride in announcing the opening of the new Hughes Amys premises in Hamilton. We are now located at 25 Main Street East, Suite 2100. The premises are much larger, to accommodate our expanding practice in Hamilton and the Niagara region. Drop by if you are in the area!!

We are also very pleased to announce that Greg Bailey will be joining our Hamilton office as of June 1. Greg was called to the bar in 2002 and has several years experience in the insurance industry, most recently with Kingsway Insurance.

Jack Fitch has re-located his practice to our Hamilton office. While we will no doubt still be seeing a lot of Jack in Toronto, he will now be based in Hamilton, where he will continue to service clients both inside and outside the province.

Wendell Wigle participated in a panel discussion on May 22, 2008 at the Advocates Society program entitled: A Guide to Securities Regulatory Proceedings: What Civil Lawyers Need to Know.

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