

CITATION: Markovic v. Richards et al., 2015 ONSC 6983
COURT FILE NO.: 11-32207
DATE: 2015-11-12

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Misa Markovic)
) D. Robert Findlay, for the Plaintiff
Plaintiff)
)
– and –)
)
Amoma Richards, Miles & More Autoland)
Inc., Esther Obih, and State Farm Mutual)
Automobile Insurance Company) James Greve, for the Defendants
)
Defendants)
)
)
)

2015 ONSC 6983 (CanLII)

COSTS ENDORSEMENT

MILANETTI, J.

- [1] I resolved all but two discreet issues relating to the costs of this jury matter post-trial orally. The remaining issues for my consideration are:
- I. Is the plaintiff’s premium for after-the-event insurance a compensable disbursement?
 - II. How should the prejudgment interest on general damages be treated as a result of changes to the *Insurance Act* on January the 1st, 2015?

I. After-the-event insurance

- [2] The plaintiff suggests that the premium paid by them for after-the-event insurance (“ATE”) should be compensable as a disbursement from the defendant.
- [3] It is apparent that many plaintiffs and plaintiffs’ law firms are now obtaining ATE insurance to protect them in case of an unfavourable outcome at trial.

- [4] The only law provided to me in support of this disbursement harkens from the UK. I read with interest both *Callery and Gray/Russell and Pal Pak Corrugated Limited*, 2001 EWCA Civ 1117 and *Able UK Limited and Reliance Security Services Limited* (2006) EWHC 90054. It appears from these cases that there was a substantial overhaul of the system for financing the cost of personal injury litigation in the UK. This overhaul was done via legislative reform and dealt with both “success fees” and the “after-the-event insurance”. The legislation apparently allows a claimant to include the cost of the ATE premium in the costs he is entitled to recover from the defendant if his claim succeeds.
- [5] These policy changes appear to have been many years in the making; the cases referred to deal with discreet issues related to interpretation. As such, the cases are clearly distinguishable from the case before me. No such overhaul of the system of financing litigation has been undertaken by the government, Law Society or insurers.
- [6] These cases, thus while interesting, are of no assistance to the decision before me.
- [7] While it is clearly the plaintiff’s prerogative to obtain ATE insurance, I do not accept that such premium should be reimbursed by the defendants as a compensable disbursement. Such disbursements have not, as far as I am aware, ever been entertained in Canada and have certainly not been the subject of legislative reform as was the case in the UK. I can think of no policy reason that such should be compensated as a taxable disbursement. Existence of the policy may well provide comfort to the plaintiff, it is however an expense that is entirely discretionary, does nothing to advance the litigation, and may in fact even act as a disincentive to thoughtful, well-reasoned resolution of claims. I do not think it fair and reasonable that an insurer be expected to cover the disbursement for this payment of premiums. Moreover, as I understand it, ATE insurance is offered by DAS Canada, a full service legal expense insurer that is recognized by the Canadian Bar Association. DAS provides legal expense coverage that can be purchased by individuals who need to pursue legal action, covering disbursements and adversary costs in the event of an unsuccessful case. It appears that the premium is only payable if the case is successful.

II. Can the January 1st, 2015 amendment to the *Insurance Act*, through the addition of section 258.3 (8.1) which changes the rate at which prejudgment interest is calculated be applied retroactively?

- [8] I was provided the conflicting decisions of Justice Toscano Roccamo in *El-Khodr v. Lackie*, 2015 ONSC 4766 and Justice MacKenzie in *Cirillo v. Rizzo*, [2015] O.J. No. 1881 on this issue. Both cases reference the decision of the Court of Appeal in *Somers et al. v. Fournier et al.*, [2002] O.J. No. 2543 (C.A.) but come to different conclusions.
- [9] I respectfully prefer the reasoning of Justice Toscano Roccamo in *El-Khodr* on this issue. It is my view that the decision of the Court of Appeal in *Somers et al. v. Fournier et al.* confirms that prejudgment interest is akin to a head of damage and hence is a matter of substantive law. Given that section 52 (4) of the *Legislation Act*, 2006, S.o. 2006, chapter 21 states that if a legislative amendment is procedural in nature, it applies immediately

and retroactively. If the right is substantive in nature, (as is the case here) the amendment should not be applied retroactively. As a result, Mr. Markovic shall be entitled to prejudgment interest on his general damages at the pre-January 2015 rate of five percent per annum from the date of notice.

MILANETTI, J.

Released: November 12, 2015

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COSTS ENDORSEMENT

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