THE OATLEY-MCLEISH GUIDE TO MOTOR VEHICLE LITIGATION 2016

YEAR IN REVIEW: THE TOP FIVE TORT CASES

James Davidson

WILL | DAVIDSON LLP

March 31, 2016
The Law Society of Upper Canada

INTRODUCTION

The following paper briefly discusses the top five tort cases of the past year. It is to be read in conjunction with the Law Society of Upper Canada's presentation of the same name which forms part of the Oatley-McLeash Guide to Motor Vehicle Litigation 2016.

There is obviously a certain amount of discretion that goes into deciding which cases are among the top five tort cases of any given year. The guiding factor was the author's opinion as to which cases changed or altered the existing body of case law on a particular issue and therefore would be of interest to lawyers who practice motor vehicle tort law in Ontario.

IANNARELLA V. CORBETT 2015 ONCA 110

- **Onus of Proof for rear end collisions in emergency situations**
- **Final word on disclosure requirements for surveillance evidence**

Facts

This case involved a rear-end collision that occurred during a snow storm. The defendant was driving a truck and entered into "whiteout" conditions causing a loss of visibility. The defendant attempted to brake but was unable to avoid rear-ending the plaintiff. The jury deciding this case found that the defendant was not negligent in the operation of his motor vehicle given the circumstances of a sudden emergency situation. The action was dismissed. The plaintiff appealed on a number of grounds including the following:

- that the trial Judge failed to properly instruct the jury on the onus of proof in a rear-end collision situation; and
- that the trial judge had improperly permitted surveillance evidence that had not been properly disclosed before trial.

The Court's Decision – Onus of Proof

The Court of Appeal agreed that the trial Judge had erred in his charge to the jury with respect to the onus or proof issue. The Court of Appeal described the onus of proof in rear end collisions as follows:

> **"…once the plaintiff has proven that a rear-end collision occurred, the evidentiary burden shifts from the plaintiff to the defendant, who must then show that he or she was not negligent. This analysis would apply even where an emergency situation is alleged, as in this case".**

This is an important conclusion as it not only clearly defines the shifting onus of proof in rear end collisions but it also deals with emergency situations caused by weather and even "inevitable accident" defences. In the weather context, it is unlikely that a defendant will succeed in proving that he or she was not negligent as emergency situations are foreseeable during inclement weather requiring motorists to adjust their manner of driving accordingly. In the inevitable accident context, the onus will remain on the defendant to prove that he or she was not negligent under the circumstances of the particular case.

The Court's Decision – Surveillance

In this decision, the Court of Appeal removes any lingering doubt about whether a defendant can withhold surveillance evidence intended for use at trial. The Court clearly states that a defendant must provide a supplemental affidavit of documents once it comes into possession of surveillance evidence after the original affidavit of documents was served. This is mandatory even if a plaintiff does not request this information at examinations for discovery.

This case effectively closes a potential loop hole found in Rule 30.07 (a) which reads as follows:

30.07 Where a party, after serving an affidavit of documents,

> **(a) comes into possession or control of or obtains power over a document that relates to a matter in issue in the action and that is not privileged; or**
>
> **(b) discovers that the affidavit is inaccurate or incomplete,**
>
> **the party shall forthwith serve a supplementary affidavit specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents.**
>
> [emphasis added].

The Court of Appeal concluded that use of the word “or” between subsection (a) and (b) was disjunctive and therefore when read as a whole, this Rule required service of a supplemental affidavit of documents even if privilege over the surveillance was being claimed.

***ZEIBENHAUS v. BAHLIEDA* 2015 ONCA 471**

- **Defence assessments by non "health practitioners"**

Facts

The plaintiff was seriously injured in a skiing accident. Counsel for the plaintiff delivered a psycho-vocational assessment report. The defendant requested that the plaintiff undergo a vocational assessment by an expert of its own choice in order to respond to the plaintiff's report. The plaintiff took the position that a defendant had no right to request an examination by an individual who was not a "health practitioner". That term was defined in the *Courts of Justice Act* as follows:

105. (1) In this section,

> **"health practitioner" means a person licensed to practise medicine or dentistry in Ontario or any other jurisdiction, a member of the College of Psychologists of Ontario or a person certified or registered as a psychologist by another jurisdiction. R.S.O. 1990, c. C.43, s. 105 (1); 1998, c. 18, Sched. G, s. 48.**

The Courts Decision

While it was accepted that a vocational assessor was not a "health practitioner" as defined, the Court of Appeal agreed with the motion judge and the Divisional Court that it had inherent jurisdiction to order an examination by someone who was not a "health practitioner". It concluded that *Section 105* does not "occupy the field". It stated further

that health sciences have evolved to include a wide range of assessments by experts who are not “health practitioners”. Precluding their use in the litigation context would be contrary to good public policy. In so concluding, the Court of Appeal provided much needed clarification on an issue that had given rise to considerable debate over the the years.

***SALEH V. NEBEL* 2015 ONSC 3680**

- **Should a successful threshold motion be taken into account when ordering costs**

Facts

This was claim for personal injuries arising out of a motor vehicle accident. At the end of the trial, the jury awarded general damages of $30,000 and no damages for past or future loss of income claim. The trial judge also granted the defendants threshold motion.

The end result was that no damages whatsoever were awarded to the plaintiff. Both plaintiff and defendant sought their costs. The plaintiff argued that they won a Judgment of $30,000 despite the fact that they had received nothing once the deductible was applied. The plaintiff also argued that, like the deductible under s. 267.5(9) of the *Insurance Act*, the threshold should not be taken into account in the assessment of costs of the lawsuit.

The Court’s Decision

The Court disagreed with the plaintiff's argument noting that the *Insurance Act* at the time specifically addressed the issue of whether or not the deductible should be taken into account when assessing costs. In this regard, section 267.5(9) reads as follows:

> **(9) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the determination of a party's entitlement to costs shall be made without regard to the effect of paragraph 3 of subsection (7) on the amount of damages, if any, awarded for non-pecuniary loss. 1996, c. 21, s. 29; 2015, c. 20, Sched. 17, s. 3 (4).**

However, the court noted that there was no similar provision for the threshold issue. The court also held that the deductible and threshold are different in a way that is relevant to costs:

> **The plaintiff should not be bringing a case that is not serious enough to meet the threshold. Plaintiffs' counsel know that no matter what a jury may find, if they do not meet the threshold the case will be dismissed. It is a hurdle that must be overcome in every case in order for the plaintiff to be entitled to sue in Ontario.**
>
> **The deductible, by contrast, assumes that the plaintiff's claim meets the threshold and that the plaintiff is successful in his or her lawsuit. All successful plaintiffs' non pecuniary damages awards will be reduced by**

the deductible amount. However, as the threshold is met, the claim is serious by definition and deserves to be brought.

The Judge also noted that the assessment of general damages can be unpredictable because it is decided by juries. On the other hand, the threshold is decided by judges who must determine the issue by reference to a very detailed set of criteria as set out in the applicable regulations.

The Trial Judge indicated that he would have awarded costs to the defendant based on the successful threshold outcome. This decision differs from the court`s decision in *Dennie v. Hamilton* (2008) 89 O.R. (3d) 542 (S.C.J.) which came to the opposite conclusion and paves the way for an appellant review of this important issue.

***VICKERS v. PALACIOUS* 2015 ONSC 7647**

- **Is the "deductible" substantive or procedural in nature and does the new increased deductible have retroactive application**

<u>Facts</u>

This case dealt with the issue of whether or not the indexed quantum for the statutory deductible introduced on August 1, 2015 ($36,540) was a matter of substantive or procedural law and whether or not it should be applied retroactively.

An earlier decision in *Cobb v Long Estate*, 2015 O.N.S.C. 6799 held that the indexed deductible did not apply to pre-August 1, 2015 accidents.

The Court's Decision

In this case, Mr. Justice James specifically rejected the earlier decision of Justice Belch in *Cobb v. Long Estate*. Justice James felt that the legislative intent was clear and that the amendments were meant to apply to all pending actions. The court held that the deductible is a matter of procedural law and therefore has retroactive application. Accordingly, if correct, this analysis would apply to the January 1, 2106 amendments as well. It is likely that this issue will also require appellate review in order to deal with the conflicting lower court decisions.

***WESTERHOF v. GEE ESTATE* 2015 ONCA 206**

- **To which Experts does Rule 53.03 apply?**

Facts

This was a claim for personal injuries arising out of a motor vehicle accident. The parties sought to adduce evidence at trial from a number of different doctors including treating doctors, AB doctors and medical legal experts. The trial judge refused to allow evidence from certain doctors based on their failure to provide reports or comply with the requirements of Rule 53.03. This decision was up held by the Divisional Court. The matter was appealed to the Court of Appeal.

The Court's Decision

The Court of Appeal overturned the lower court decisions and held that certain experts may give opinion evidence even if they have not provided reports or complied with the requirements of Rule 53.03. In coming to its conclusion on the applicability of Rule 53.03, the Court of Appeal categorized experts into three groups for the purposes of giving opinion evidence at trial as follows:

1. Participant Experts – these are experts who develop opinions based on their observations of or involvement in the underlying facts such as treating doctors;

2. Non-Party Experts – these are experts who have developed opinions based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation such as AB doctors;

3. Litigation Experts – these are traditional medical legal experts who are engaged by or on behalf of a party to provide evidence in relation to a proceeding.

The Court of Appeal held that Participant Experts and Non-Party Experts who have not been engaged by a party to the lawsuit may still give opinion evidence for the truth of its contents without complying with Rule 53.03 provided that:

- the opinion to be given is based on the witness's observation of or participation in the events at issue; and

- the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge or training and experience while observing or participating in such events.

The Court of Appeal further stated that Participant Experts and Non-Party experts are not engaged by a party to form their opinions and they do not form their opinions for the purposes of the litigation before the court so Rule 53.03 has no direct application. It was also noted that a party does not “engage” an expert merely by calling that expert as a witness at trial.

The Court of Appeal concluded that rule 53.03 applies only to Litigation Experts engaged by the parties. This decision along with the decision in *Moore v. Getahun* 2015 ONCA 55, finally clarifies the rules with respect to experts in personal injury actions and the application of Rule 53.03 in that regard.