COURT FILE NO.: 03-10820
DATE: 20050817

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
MARIE MASCITTI	)	Stephen E. Sloan, counsel on behalf of the Plaintiff
	)	
Plaintiff	)	
- and -	)	
GORE MUTUAL INSURANCE COMPANY	)	Lawrence M. Foy, counsel on behalf of the Defendant
Defendant	)	
	)	HEARD: June 22 & 23, 2005 (at Hamilton)

HARRIS J.

[1] This is an application by the plaintiff for a determination of the date from which s.68 interest in the Defendant's *Benefit Schedule* should run.

FACTS

[2] The Plaintiff, Marie Mascitti, was involved in a motor vehicle accident in February 1994. At the time of the accident she was insured under a motor vehicle insurance policy issued by the defendant, Gore Mutual Insurance Company. She was eligible for either an income replacement benefit or a caregiver benefit. Her son was six years old at the time and she elected to receive the caregiver benefit.

[3] The plaintiff received a caregiver benefit until January 1996. The defendant put forward a full and final lump sum offer that would settle all her future benefits. On January 18, 1996 the plaintiff signed the full and final release that was included in the settlement documents. She had the advice of counsel at the time.

[4] On June 20, 2002 the defendant received notice that the plaintiff viewed the release as defective and the settlement void *ab initio*. Notice of this action to seek declarations of this position as fact was also given.

[5] This action originally contained several issues. The filing of an agreed statement of facts by the parties has settled most issues in this action.

[6] The defendant has conceded that the settlement of January 1996 does not comply with s. 9.1(2) of *Automobile Insurance*

Regulation 664[1] and that the plaintiff is entitled to a caregiver benefit from January 1996 to April 20, 2004. The parties have agreed that the plaintiff is entitled to a loss of earning capacity benefit (LECB) after this date.

[7] Values have been agreed upon and a settlement has been reached. However, the issue of statutory interest remains outstanding. The parties request a date, from which interest under s. 68 of the relevant Statutory Accident Benefits Schedule[2] shall be calculated, if any interest is owing from January 1996 to the present.

DISCUSSION

[8] A useful starting point is the decision of Mr. Justice Laskin in ***Attavar v. Allstate Insurance Company of Canada***.[3] The time when interest under s. 68 of the *Benefits Schedule* would begin to run was an issue on the appeal and the facts bear some similarity to the present case.

[9] In ***Attavar***, a university student had been injured in an automobile accident. The insurer paid the educational benefit that was owing to the insured under s. 15(1) of the *Benefits Schedule*. This benefit expired after 104 weeks and the insurer

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[1] R.R.O. 1990, Reg. 664, s.9.1 as am. by O. Reg. 483/01 s. 1 [*Regulation 664*].
[2] O. Reg, 776/93 [*Benefits Schedule*].
[3] (2003), 63 O.R. (3d) 199 [*Attavar*].

initially proposed that the insured was not entitled to a further loss of earning capacity benefit (LECB). She rejected this proposal and sought an assessment.

[10] The assessor recommended two future prospects for employment. Based on this recommendation the insurer paid the insured an LECB of $132.44 per week, retroactive to the date that her education benefit terminated. The insured did not agree with this recommendation and brought her claim to litigation.

[11] At trial the judge did not agree with the assessor and found that she was in fact entitled to an LECB payment of $291.03 per week. The court ordered interest under s. 68 of the *Benefits Schedule* to be paid on the outstanding difference from the date that the LECB was payable. That is, the date that her education benefit expired.

> *... [I]t is clear that the precedents establish that failing unusual circumstances brought on by the complexity of the action and/or the applicant's own behaviour "it is the insurer not the insured who must bear the consequences of a decision not to pay benefits that are found later to be owing ...*[4]

The Court of Appeal agreed with this treatment of the law for two reasons.[5] First, the Court of Appeal found that an amount payable is overdue if an insurer does not mail the LECB payment at least

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[4] (2000), 20 C.C.L.I. (3d) 290 (Ont. Sup. Ct.).
[5] *Attavar, supra* note 3 at para. 45.

once every second week. The insured was entitled to the full amount, as determined by the trial judge, by the second week after her education benefit ended. Second, the court held that if the drafters of the *Benefit Schedule* had intended insurers to avoid s. 68 interest they would have stated so.

[12] The court also outlined the policy behind s. 68 interest payments. The provision is designed to compensate insured persons for the time value of money. It also operates to encourage insurers to pay accident benefits promptly.[6] The prompt payment of benefits is one of the fundamental goals of the statutory system.[7] Interest flows from the late payment of benefits and there is no need to show any misconduct on the part of the insurer.[8]

[13] The facts and statutory provisions involved in this case must be considered with this framework in mind. The defendant has admitted that the settlement made in January 1996 did not satisfy the terms of section 9.1(2) of *Regulation 664*. This gives the plaintiff a right to rescind the contract under s. 9.1(4). It reads:

> *If the insurer did not comply with subsection (2), the insured person may rescind the*

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[6] *Ibid.* at para. 49.
[7] *Ibid.* at para. 49. See also *Sebastian v. Canadian Surety Co.*, [1998] O.F.S.C.I.D. No. 130 (Ont. Insurance Comm.)
[8] *Cole v. Allstate Insurance Co. of Canada*, [2003] O.F.S.C.D. No. 84 (Appeal) [*Cole*].

> *settlement after the period mentioned in subsection (3) by delivering a written notice to the insurer.*

[14] The drafters have specifically chosen the term *"rescind"*. Rescission is a very specific contractual remedy.

[15] Though there has been confusion regarding the intended meaning of the word rescission when used in a contract between parties, the legal remedy of rescission has remained constant. It places the parties back in the position they were in before the contract was made.[9]

[16] The Supreme Court of Canada has recently restated the meaning of rescission. In ***Guarantee Co. of North America v. Gordon Capital Corp.***[10] the court draws a distinction between repudiation and rescission. If a party repudiates a contract they may seek to maintain past and/or future contractual obligations. However, rescission

> *...terminates the contract, puts the parties in status quo ante and restores things, as between them, to the position in which they stood before the contract was entered into.*[11]

A party cannot rely on a rescinded contract to claim any damages flowing from breach.[12] Rescission voids the contract from the

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[9] S.M. Waddams, *Law of Contract* (Toronto: Canada Law Book, 1999) at 460 [*Waddams*].
[10] [1999] 3 S.C.R. 423 at 39.
[11] Ibid. citing Lord Atkinson in *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773 (U.K. H.L.) at p. 781:
[12] See *Waddams*, supra note 9 at 461.

beginning and no past or future obligations exist under the contract.

[17] The above concepts are succinctly captured by the definition of *"rescission"* provided by ***Blacks Law Dictionary***:

> *...To declare a contract void in it's inception and to put an end to it as though it never were ... A "rescission" amounts to the unmaking of a contract, or an undoing of it from the beginning, and not merely a termination...*[13]

[18] Insurance law is geared towards the protection of the consumer.[14] The right of rescission that has been granted by the legislature in s. 9.1(4) has an essential purpose: To protect the consumer from improvident insurance settlements. It does this by guaranteeing to insured persons that even if they sign an improper settlement, they can put that agreement aside and assert their rights anew.

[19] In this case the letter sent to the defendant on June 20, 2002 on behalf of the plaintiff is clear notice of rescission. The letter makes specific reference to the plaintiff's position that the full and final release signed in January 1996 was defective, making the settlement void *ab initio*.

[20] The defendant has pointed out that repayment to the insurer of the money paid under the settlement was waived on February

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[13] *Black's Law Dictionary*, 6th ed., *s.v.* "rescission".
[14] *Smith v. Co-operators General Insurance Co.*, [2002] 2 S.C.R. 129 at para 16.

11, 2003. It is this date that the defendant admits as the date of full and proper rescission. I accept February 11, 2003 as the date of rescission.

[21] The defendant also submits that until this date, the settlement agreement was not void, but voidable. Several cases, including ***Gelle (Litigation Guardian of) v Kacaba & Associates***[15], ***Navage v Pilot Insurance***[16], and ***Catania v Scottish & York Insurance Co.***[17] are put forward to support this submission. The defendant relies on the subtle, yet important, meaning of the word *"voidable"*. That is, the contract is made void on the date of such a declaration, but is not void *ab initio*. Only Mesbur J. used *"Voidable"* in ***Gelle***. Both ***Navage*** and ***Catania*** refer to the right of rescission existent in s. 9.1(5) of the *Benefits Schedule* and the fact that the right to litigate is void under s. 279(2) of the ***Insurance Act***. As already stated above, the legislature has chosen the term *"rescission"*. A rescinded settlement agreement is void *ab initio*.

[22] The parties will be restored to their original positions and treated as if the settlement agreement never existed. As such, the plaintiff's caregiver benefit should not have been interrupted in January of 1996 and are overdue from that time.

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[15] (2002),43 C.C.L.I. (3d) 206 (Ont. Sup. Ct) [Gelle]
[16] (2004), 10 C.C.L.I. (4th) 117 (Ont. Sup. Ct.) [Navage]

The interest owing under s. 68 of the *Benefit Schedule* will begin to run from the date that the plaintiff's caregiver benefit payments were first missed. This appears to be January 14th, 1996.

[23] This outcome flows from the essential meaning of the word "*rescission*", but it also follows the logic of the Ontario Court of Appeal in ***Attavar.*** The amount of interest found owing flowed from the date that the benefits should have originally been paid, not the date of the court's decision.

[24] The defendant has argued that this outcome unfairly allows a plaintiff to sit on a claim for an indefinite number of years to take advantage of a high interest award and has asked the court to exercise its discretion to reduce the interest award. The defendant argues that the plaintiff should not be rewarded for sitting on her claim for six and one-half years.

[25] The leading case of **Attavar** defeats this argument. The general statement of the application of s. 9.1 interest provisions is that "*it is the insurer not the insured who must bear the consequences of a decision not to pay benefits that are found later to be owing.*"[18] This general rule is avoided when unusual circumstances exist which have been brought on by

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[17] (2001), 53 O.R. (3d) 383 (C.A.) [Catania].
[18] (2000), 20 C.C.L.I (3d) 290 (Ont. Sup. Ct.)

complexity of the action or behaviour of the insured.[19] The party that asserts the existence of unusual circumstances that act to limit the general proposition of law found in ***Attavar*** must prove those circumstances on a balance of probabilities.

[26] The parties have provided decisions of the Financial Services Tribunal that illustrate circumstances where the actions of the insured have created unusual circumstances. In ***Allstate Insurance Co. v. Cole***[20] the insured did not challenge Allstate's decision to terminate his benefits for almost four years. The insured even returned to work. The insurance provider had good reason to believe the policy termination had been accepted and the four-year delay was found to be entirely attributable to the insured.

[27] Similarly, in ***Stewart v. Liberty Mutual Insurance Co.***[21] the court held that after the insured had retained counsel on the matter, he was responsible for pursing his claim in a timely fashion. Failure to do so created a period of delay to which s. 68 interest did not attach. Another decision supports the proposition that the delay cannot be attributable to the

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[19] Ibid.
[20] *Supra* note 8.
[21] [2004] O.F.S.C.D. No. 176.

insurer. If the insurer causes the delay, there can be no relief from s.68 interest.[22]

[28] In the present case the plaintiff held a genuine belief that the settlement agreement was binding. The settlement agreement is defective because the insurer ignored its statutory duties of disclosure under s. 9.1(2).[23] If not for this inaction on the part of the insurer, no delay would exist in this case. The delay is not attributable to the insured.

[29] There is nothing unusual about the plaintiff accepting what was believed to be a good and proper settlement agreement. Trusting the limited representations made by the defendant when the settlement was reached and sitting on that settlement for any number of years, without knowledge of the settlement's defects and her right to rescind it, is also not unusual.

[30] After a number of years the plaintiff questioned the settlement and sought legal advice. After realizing that the agreement was not a proper one and that she had bargained away her rights unfairly, the plaintiff filed this action and challenged the agreement. On the evidence I have reviewed, no unusual circumstances exist that will affect the plaintiff's right to interest.

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[22] *J.C. v. Progressive Causality Insurance Co. of Canada*, [2005] O.F.S.C.D. No. 14 (Appeal).
[23] *Regulation 664, supra* note 1.

[31] The defendant has argued against the policy of the interest in s. 68 when applied to a rescinded settlement agreement. The defendant submitted that an insured person could sit on a bad settlement agreement and be rewarded with a very lucrative interest award. I do not accept this policy argument for two reasons.

[32] First, the fact that the behaviour of the insured can affect the right to s.68 interest prevents an insured from sitting on a claim indefinitely in the order to receive a higher interest payment. For instance, if the insurer became aware of an improper settlement that was made in the past and alerted the insured, any further delay by the insured would be unreasonable, fully attributable to the insured and unusual. Interest would be denied during such a period of delay. The insurance provider may act to prevent the abuse it fears.

[33] Second, as stated in ***Attavar***, the purpose of the provision is twofold: to compensate insured persons for the time value of money and to encourage insurers to pay accident benefits promptly.

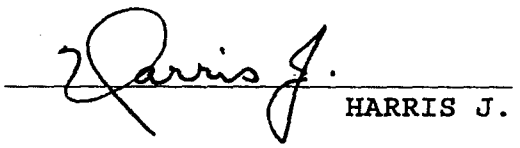
[34] I would add that the settlement provisions are designed to allow insured persons full access to the information regarding their claim. An interest award under s. 68 that runs from the date of the settlement, according to the law of rescission that

makes a bad agreement void *ab initio*, accomplishes all of these purposes.

CONCLUSION

[35] For the foregoing reasons the plaintiff's claim for interest pursuant to Section 68 of *Statutory Accident Benefits Schedule* is allowed and payable to the plaintiff from January 18, 1996.

[36] Absent an agreement between counsel on costs they may provide me with a one-page by letter by August 31, 2005.



HARRIS J.

Released: August 17, 2005