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BINKS RiskNotes

Trends in Automobile Liability Damage Awards

Certain recent court awards illustrate the need for a review of liability coverage limits.

1. **Marcoccia v. Gill** - Robert Marcoccia– Severe brain injury

Accident Date: June 18, 2000

Award Date: February 2007

Liability split – 61% on defendant, 39% contributory negligence against Marcoccia

Total award: \$16,915,998 plus prejudgment interest

- \$13,953,064 – Future rehabilitation and care costs
- \$1,265,816 – Future guardianship and legal costs
- \$312,200 – General damages (capped)
- \$1,384,918 – Loss of future Income

Plaintiff's counsel comments: "Few Ontario residents will collide with a vehicle carrying enough insurance to pay such a large award." Defendants only had \$1MIL coverage. Ford Motor Credit (lessor) ended up paying the bulk of the award. Note that this will not happen in future as Ontario has now capped lessors liability.

2. **Gordon v. Grieg** - Derek Gordon – Catastrophic brain injury

Accident Date: Sept. 2003

Award Date: 2007

Total award: \$11,369,525

- \$8,646,900 – Future care costs
- \$310,000 – General Damages (capped)
- \$1,800,000 – Loss of future income

This accident also involved a parallel claim by Ryan Morrison, another passenger in the vehicle. (spinal injury/paraplegia). Total awards to the defendants exceed \$23MIL. The vehicle leasing company was similarly saddled with the bulk of the settlement.

3. **Katherine-Paige MacNeil** – Severe brain injury

Accident Date: Aug. 2, 2002

Award Date: Sept. 2009

Total award: \$18,400,000

- \$15,000,000 – Future care
- \$1,300,000 – Loss of future income

This award is thought to be the largest personal injury award in Canadian history.

Points to consider

- It's possible that courts will not be so generous in cases where insurance coverage limits will be exceeded. At least two of the awards shown above drew upon liability coverage available through the vehicle lessor/owner. Ontario has since capped lessors vicarious liability, and the vast majority of Ontarians only purchase liability coverage limits of \$1MIL or \$2MIL.

This information is for illustrative purposes only. Reference to policy wordings should be made for clarification.

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- Principles of joint and several liability come into play. If a party is found even 1% negligent in a claim, they may be responsible for payment of the entire award if the other negligent parties are incapable of paying their share. Courts will look to the “deep pocket” defendants for restitution.
- The time between the accident and the award stretches to 7 years in some cases. This can mean significant prejudgment interest awards, and poses difficulties in extrapolating what a court might award 7 years into the future.
- These court awards may contemplate 24/7 care for the injured party, and it is interesting to see the quantum of projected future care costs. Judges have shown that they’re not predisposed to place any obligation for care on parents or other family members.

Conclusion

These awards raise the bar on damages, and we expect other judges and juries to follow their lead. With Accident Benefit Reforms (reductions) to be implemented in Ontario effective Sept. 1, 2010, there is an expectation that the quantum of tort claims may actually increase. Fortunately, such severe injuries remain relatively rare, but there is a strong argument that we’re all ultimately responsible for finding the funds to care for disabled individuals.

It is interesting to note that the statutory minimum amount of liability coverage in Ontario remains at \$200,000, with the majority of vehicle owners purchasing limits of either \$1MIL or \$2MIL. Clearly, such limits would be inadequate where catastrophic brain injury is involved. We wonder how courts will deal with the cost of future care if they no longer have access to the “deep pockets” of vehicle leasing companies. We expect an increase in claims against government bodies (related to road conditions, etc.) in that such bodies are indeed deep pockets when they can draw upon funds of taxpayers to balance their books. Municipalities may see some significant premium increases over the next few years.

As to appropriate coverage limits, our philosophy must always be to seek a balance between the need for risk transfer with the associated costs. We can easily foresee catastrophic claims surpassing \$50MIL or \$100MIL in a case where there are multiple injured parties, or (for example) in a case where a vehicle manages to derail a train carrying toxic chemicals. For most individuals and smaller organizations there will always be a top-side “risk of ruin”. Some very large organizations may have adequate limits through towers of Umbrella and/or Excess Liability coverage.

Our recommendation is to buy as much liability coverage as you can reasonably afford, and retain or self-insure losses at the bottom end, leaving as little top-side risk as possible. That is, most insureds can survive the smaller and more frequent financial losses in life, but will be insolvent if there’s a large award where there is insufficient coverage.

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