Case Name:

Rigitano Estate v. Western Assurance Co.

Between
Western Assurance Company, Defendant (Appellant, Respondent by way of Cross-Appeal), and Estate of Vincenzo Rigitano, Plaintiff (Respondent, Appellant by way of Cross-Appeal)

[2007] O.J. No. 3857

54 C.C.L.I. (4th) 32

160 A.C.W.S. (2d) 977

2007 CarswellOnt 6412

Court File No. DC-07-397

Ontario Superior Court of Justice
Divisional Court

E.B. Fedak J.

Heard: September 12, 2007.
Judgment: October 10, 2007.

(72 paras.)

Civil procedure -- Costs -- Special orders -- Cross-appeal by the respondent estate from the award of pre-judgment and post-judgment interest pursuant to the Courts of Justice Act, rather than the specific interest rate prescribed by s. 46(2) of the Statutory Accident Benefits Schedule -- Cross-appeal allowed -- Judge erred in awarding pre-judgment and post-judgment interest on the basis of the Courts of Justice Act -- Accordingly, the Estate was entitled to two per cent interest compounded monthly on $3,500 from December 8, 2003.

Insurance law -- Payment of insurance proceeds -- Beneficiaries -- Western Assurance appealed from a final judgment in favour of the insured's Estate in the amount of $3,500 -- Appellant made Settlement Offer in respect of past, present and future accident benefits arising out of a motor vehicle accident -- Insured died before executing Full and Final Release -- Estate Trustee executed the

Release -- Western Assurance intended to settle all claims with insured and it did so with his lawful representative -- Appeal dismissed -- No palpable and overriding error.

Appeal by Western Assurance Company from a final judgment in favour of the plaintiff for the full amount of the claim for $3,500 -- Respondent Estate of Vincenzo Rigitano cross-appealed from the award of pre-judgment and post-judgment interest pursuant to the Courts of Justice Act, rather than the specific interest rate prescribed by s. 46(2) of the Statutory Accident Benefits Schedule -- Western Assurance had offered to settle Rigitano's past, present and future accident benefits arising out of a motor vehicle accident which occurred on November 29, 2002 for $3,500 -- Rigitano passed away shortly before the Offer to Settle was made and therefore the Full and Final Release from Western Assurance was executed by Rigitano's Estate Trustee -- Western Assurance rescinded the Offer to Settle upon learning of Rigitano's death -- At trial, the Estate claimed it had the right to maintain any action for torts or injuries to Rigitano or his property and would be legally entitled to the same rights and remedies as he would, if living, had been entitled to -- Estate claimed that the death of Rigitano, who was an elderly man at the time of the accident, was foreseeable and therefore constituted an obvious contingency -- His death did not constitute a radical change in the nature of the contract which was for past, present and future benefits -- HELD: Appeal dismissed -- Cross-appeal allowed -- Western Assurance intended to settle all claims with Rigitano and it did so with Rigitano's lawful representative -- There was no mistake of fact and, accordingly, the settlement was not void ab initio -- Issue of whether there was a consensus on the terms of the settlement was a question of fact and, therefore, the trial judge's finding in that regard was entitled to deference -- His finding did not constitute palpable or overriding error of law -- With respect to the interest awarded, the judge erred in awarding pre-judgment and post-judgment interest on the basis of the Courts of Justice Act -- Accordingly, the Estate was entitled to two per cent interest compounded monthly on $3,500 from December 8, 2003.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C-43

Statutory Accident Benefits Schedule, O.Reg. 403/96, s. 46(2)

Counsel:

Ms. F. Lee, counsel for the Appellant.

Ms. Karen Marie Power, counsel for the Respondent.

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1 **E.B. FEDAK J.**:-- Western Assurance Company (*Western Assurance*) appeals from the final judgment of Deputy Judge John Krawchenko (*Deputy Judge*) in Hamilton Small Claims Court on April 12, 2007. The judgment found in favour of the Plaintiff for the full amount of the claim of $3,500.00.

2 The Respondent Estate of Vincenzo Rigitano (*the Estate*) by way of cross-appeal, appeals Deputy Judge Krawchenko's award of pre-judgment and post-judgment interest pursuant to the *Courts*

of Justice Act, R.S.O. 1990, c. C-43, rather than the specific interest rate prescribed by s. 46(2) of the *Statutory Accident Benefits Schedule*, O.Reg. 403/96 (*SABS*).

Background Facts

3 The Estate issued a Plaintiff's claim against Western Assurance on or about November 23, 2004 for the sum of $3,500.00 plus interest and costs.

4 Western Assurance filed a Statement of Defence on February 11, 2005.

5 Western Assurance had offered to settle Mr. Rigitano's past, present and future accident benefits arising out of a motor vehicle accident which occurred on November 29, 2002 for $3,500.00 (*Offer to Settle*).

6 Mr. Rigitano passed away shortly before the Offer to Settle was made and thus the Full and Final Release (*Release*) from Western Assurance was executed by Mr. Rigitano's Estate Trustee.

7 Western Assurance rescinded the Offer to Settle upon learning of Mr. Rigitano's death.

8 Trial in this matter proceeded by way of an Agreed Statement of Facts on April 12, 2007. No witnesses were called.

9 At trial, the Estate claimed it had the right to maintain any action for torts or injuries to Mr. Rigitano or his property and would be legally entitled to the same rights and remedies as he would, if living, have been entitled to. There are no provisions in the *Insurance Act*, R.S.O. 1990, c. I-8 - or the *SABS* that prevent an Estate from accepting an insurer's Offer to Settle. Similarly, there was no condition in the Offer to Settle or the Release, both drafted by Western Assurance, that the insured must be living at the time the offer was made in order for the Offer to Settle to be valid. The Estate claimed that Mr. Rigitano's personal presence was not essential to the performance of the agreement as the core of the agreement was the exchange of a release for certain payments by Western Assurance. The Estate claimed that the death of Mr. Rigitano, who was an elderly man at the time of the accident, was foreseeable and therefore, constituted an obvious contingency. His death did not constitute a radical change in the nature of the contract which was for past, present and future benefits.

10 The Estate admits the following allegations advanced by Western Assurance:

(1) That Mr. Rigitano was covered under a Western Assurance motor vehicle liability policy at all material times and that Mr. Rigitano was involved in a motor vehicle accident on November 29, 2002;

(2) As a result of the personal injuries suffered from the motor vehicle accident, the Insured periodically made claims to Western Assurance, and received from Western Assurance, statutory accident benefits including medical benefits;

(3) Western Assurance approved a treatment plan for the Insured prepared by Dr. Jacques J. Gouws on August 28, 2003, where it agreed to pay up to $2,160.00 for any associated expenses that were in excess of extended health care coverage already available to the Insured;

(4) The Insured did not commence the treatment plan and did not incur any associated expenses. Western Assurance never received a claim from the Insured or an invoice from Dr. Gouws with respect to the approved treatment plan;

(5) The Insured passed away on November 11, 2003. Western Assurance was notified on December 5, 2003 that the Insured was "recently deceased", and immediately requested confirmation of the date of death. These details were not provided to Western Assurance until September 7, 2005;

(6) Western Assurance tendered the Offer to Settle to the Insured on November 28, 2003, being the eve of the first date that a settlement offer for accident benefits can be effective pursuant to the *Insurance Act*, R.S.O. 1990, c. I-8. and its regulation *Automobile Insurance*, R.S.O. 1990, Reg. 664.

(7) The Offer to Settle offered $3,500.00 in exchange for a full and final release from liability for statutory accident benefits claims, and specifically noted that the full amount of the offer was based on consideration of all past and future medical benefits. The Offer to Settle also advised: "... if you sign this notice and a release you are finally and permanently settling your claim for the benefits specified. You are forever giving up the right to claim such benefits in the future, even if your medical problems get worse."

(8) The Offer to Settle was executed by the Respondent Estate on December 5, 2003 and returned to Western Assurance. This was also the first notice received by Western Assurance that the Insured was "recently deceased".

(9) On December 8, 2003, Western Assurance advised the Respondent Estate's solicitor that the Offer to Settle was rescinded, as the file had been settled based on future psychological treatment and physical treatment. Western Assurance also requested that a copy of the death certificate and any outstanding medical expenses related to the Insured's motor vehicle accident be submitted within 15 days.

(10) To date, no such claims for expenses have been submitted to Western Assurance.

11 The Estate admits that Western Assurance was unaware of Mr. Rigitano's death at the time it made the Offer to Settle. The Estate further admits that logically, Western Assurance would not make an offer to Mr. Rigitano had they known of his death. However, it is the Estate's position that negotiations may have occurred between Western Assurance and the Estate Trustee as the Estate would be at liberty to commence any action Mr. Rigitano could have commenced had he still been alive.

12 The Estate submits Western Assurance has reached beyond what was set out in Paragraph 15 of the Agreed Statement of Facts, being the document upon which the Estate relies. The Estate admits that at the time that Western Assurance made the Offer to Settle, Mr. Rigitano had no outstanding out-of-pocket expense claims for past, present or future medical treatments. However, the Estate submits that out-of-pocket expense claims differ in nature from general entitlement to receive accident benefits.

13 The Estate states that the first time Mr. Camporese, solicitor for Mr. Rigitano, became aware of his client's passing was when he attempted to contact Mr. Rigitano to present Western Assurance's Offer to Settle.

14 The Release forwarded to Mr. Rigitano by Western Assurance was duly executed by his widow, Mrs. Dorothy Rigitano, who was at all material times the valid Trustee of the Respondent Estate.

The Issues

15 The following issues arise on this appeal and cross-appeal:

(A) What is the standard of review?
(B) Was the Offer to Settle valid and enforceable?

(i) Do the grounds of mistake apply?
(ii) Was there consensus on the terms of settlement?
(iii) Does the statutory one-year bar on settlement of accident benefits apply?
(iv) Are past and present claims and entitlements relevant?
(v) Is the offer unconditional?

(C) If the Offer to Settle was not valid can it still be accepted so as to form a binding agreement?
(D) What interest rate is applicable to the matter before the Deputy Judge?

(A) What is the Standard of Review?

16 Section 31 of the *Courts of Justice Act* provides:

> An appeal lies to the Divisional Court from a final order of the Small Claims Court in an action,
>
> (a) for the payment of money in excess of $500.00, excluding costs or,
> (b) for the recovery of possession of personal property exceeding $500.00 in value.

17 On findings of fact or mixed fact and law, the trial judge is entitled to appropriate deference on appeal. However, where the issue on appeal is a question of law, or where the trial judge's findings of fact are not supported by the evidence, the required standard is correctness and deference is not appropriate. (See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235; *Bird v. Ireland*, [2005] O.J. No. 5125 (S.C.J. (Div. Ct.).)

18 The role of the appellate court is not to retry the case nor substitute its view for the view of the trial judge. (See *Meyknecht Lischer Contractors Ltd. v. Stanford,* [2006] O.J. No. 4360 (S.C.J. (Div. Ct.).)

19 A trial judge's findings of fact are entitled to deference on appeal. An appellate court may only interfere if the trial judge's findings is tainted by a "palpable and overriding error." (See *Donovan v. Barclay,* [2001] O.J. No. 3858 at para. 6 (C.A.).)

(B) Was the Offer to Settle Valid and Enforceable?

(i) Grounds of Mistake

20 There are three types of mistakes: common, mutual and unilateral. In common mistake, both parties make the same mistake. Each knows the intention of the other and accepts it, but is mistaken about an underlying and fundamental fact. In mutual mistake, the parties misunderstand each other and are at cross-purposes. In unilateral mistake, only one of the parties is mistaken. (See *John Swan et al., Contracts: Cases, Notes & Materials,* 6th ed., Markham: Butterworths, 2002, at 723.)

21 In the case of common mistake, the agreement exists unless the mistake is "fundamental" and the agreement is "robbed" of all efficacy by reason of the mistake. (See *John Swan, supra*, at 723.)

22 In the case of a mutual mistake, the court applies an objective test, "Would a reasonable person in the circumstances decide that an agreement had been reached between the two parties?" (See *Lem v. Lem* [1987] O.J. No. 2319 at para. 20 (Surr.Ct.).)

23 In the case of unilateral mistake, the party making the mistake is allowed to show the effect of that mistake on his own mind as opposed to the mind of a reasonable man. (See *Lem v. Lem, supra*, at para. 20.)

24 The Estate submits that the purpose of the Offer to Settle was not to release Western Assurance from all medical benefit claims, but rather, as set out in the Release forwarded to Mr. Rigitano by Western Assurance, the Offer to Settle released Western Assurance from liability for all past, present and future benefits with respect to any and all accident benefits that could have been claimed by Mr. Rigitano.

25 It is the appellant's position that Deputy Judge Krawchenko erred in law by failing to give effect to or recognize that the death of Mr. Rigitano was a fundamental, material fact which went to the root of the subject matter of the agreement. The purpose of the Offer to Settle was to release Western Assurance from all of Rigitano's medical benefit claims, in consideration for a lump sum payment. Given that there were no past or present claims in issue, Western Assurance reasonably anticipated that Mr. Rigitano would have made future claims during the remainder of his life expectancy and based their proposal settlement upon a calculation of this risk.

26 Deputy Judge Krawchenko in his reasons for judgment noted that the Release which was drafted by Western Assurance sought to exchange $3,500.00 for a release for all past payments "made to date" and "in full satisfaction for any claims for statutory accident benefits" including "past, present and future claims."

27 Deputy Judge Krawchenko acknowledges that Western Assurance argued that the Offer to Settle was made on the basis of mistaken fact, but rejects this argument. He found that Western Assurance intended to settle all claims with Mr. Rigitano and that it did so with Mr. Rigitano's lawful representative.

28 Having found that there was no mistake of fact, the settlement is not void *ab initio*. If Deputy Judge Krawchenko erred in not finding a common mistake, the Estate's position is that a common mistake would not operate to invalidate the Offer to Settle because the common mistake was not fundamental in nature, and therefore, did not rob the agreement of all efficacy. The core of the Offer to Settle was the exchange of the said Release for certain payments by Western Assurance and thus, Mr. Rigitano's personal presence was not essential to the performance of same.

(ii) Was there consensus on the terms of the Settlement?

29 It is Western Assurance's position that Deputy Judge Krawchenko erred in law by disregarding the evidence, and failing to give reasons for doing so, which showed that the death of Mr. Rigitano made it impossible for any consensus to be reached on terms of settlement or any instructions to be obtained from Mr. Rigitano or his estate to accept the terms of settlement. Further, because negotiations for settlement did not begin until after Mr. Rigitano had died, terms of settlement did not exist within Mr. Rigitano's lifetime.

30 The issue of whether there was consensus on the terms of the settlement is a question of fact and thus, the trial judge's finding of fact in this regard is entitled to deference.

31 Furthermore, on a question of fact, the appellate court should only interfere with the trial judge's finding if it constitutes a "palpable and over-riding error." (See *Donovan v. Barclay, supra,* [2001] O.J. No. 3858 at para. 6.)

32 In the matter of this appeal, Deputy Judge Krawchenko gave adequate reasons for finding the Offer to Settle to be valid. Even though the Deputy Judge did not expressly refer to the issue of consensus, he wrote: "The Defendant intended to settle all claims, past, present and future, and did so with the lawful representative for their insured namely, his Estate Trustee."

33 Thus, Deputy Judge Krawchenko's finding did not constitute a palpable or over-riding error of law.

(iii) Does the statutory one-year bar on settlement of accident benefits apply?

34 Western Assurance argues that Deputy Judge Krawchenko erred by disregarding, and failing to give reasons for so doing, the application of s. 9.1(10) of the *Automobile Insurance*, regulation as enabled by the *Insurance Act* to the evidence and arguments presented. Western Assurance maintains that any settlement offer entered into between Western Assurance and Mr. Rigitano during his lifetime would have been void.

35 Section 9.1(10) reads as follows:

> A restriction on an insured person's right to mediate, litigate, arbitrate, appeal or apply to vary an order under sections 280 to 284 of the Act is not void under subsection 279(2) of the Act if,
>
> (a) the restriction is contained in a settlement;
> (b) the settlement is entered into on or after the first anniversary of the day of the accident that gave rise to the claim; and
> (c) the insurer complied with subsections (2) and (3).

36 The statute explicitly stipulates that any settlement entered into before the first anniversary of the day of the accident that gave rise to the claim is void.

37 The date of Mr. Rigitano's accident was November 29, 2002. Although Mr. Rigitano died on November 11, 2003, the necessary documentation was completed when the Estate Trustee as the lawful representative of Mr. Rigitano executed the Release which was provided by Western Assurance. The Full and Final Release was signed by the Estate Trustee on December 5, 2003.

38 Deputy Judge Krawchenko correctly observed: "The Defendants Offer to Settle was made at the statutorily prescribed time."

39 This court finds that the case of *Cordova v. Allstate Insurance Company of Canada* (1998), 41 O.R. (3d) 795 (Gen.Div.), is distinguishable from the case in this appeal. In *Cordova*, the plaintiff and insurer participated in a mediation where a resolution was reached; however, the mandatory disclosure statement the insurer provided did not meet the statutory requirements. Since the disclosure statement constituted the second part of a two-stage process, the court held that the settlement was not binding and thus the plaintiff was not barred from initiating a civil suit.

40 The release prepared by Western Assurance and signed by the lawful representative of Mr. Rigitano restricted the Estate's ability to mediate, litigate, arbitrate or otherwise pursue the accident benefits to which Mr. Rigitano was entitled.

(iv) Are past and present claims and entitlement relevant?

41 It is Western Assurance's position that although the Deputy Judge correctly recognized that future claims or entitlements for medical benefits would have no application due to Mr. Rigitano's death, the judgment was primarily based on his finding that Western Assurance also intended to settle past and present claims and entitlements. It is Western Assurance's further position that the Deputy Judge erred in law by giving weight to Western Assurance's obligation to the deceased for outstanding past and present claims for medical benefits, when such entitlements were not proven by the evidence and did not exist.

42 This court agrees with the Estate's position that there is a difference between outstanding claims for out-of-pocket expenses and outstanding entitlement to benefits for which there is a corresponding outstanding risk to the insurance company.

43 Western Assurance had determined that Mr. Rigitano had some entitlement to benefits and that there was some outstanding risk of payment. This is the only reasonable explanation for Western Assurance offering funds to settle this case in exchange for a Full and Final Release.

44 Since the trial before Deputy Judge Krawchenko was to determine the validity of the Offer to Settle specifics of past and present entitlements were not relevant. Therefore, his finding that past and present claims were not relevant does not constitute a palpable or over-riding error.

(v) Is the Offer unconditional?

45 Deputy Judge Krawchenko found that: "[a]s the Offer was unconditional and dealt with past and present entitlements as well as future (which would have no application due to the Plaintiff's death) it was open for acceptance by the Plaintiff's Estate."

46 Western Assurance takes the position that the Deputy Judge erred in law by finding that the Offer to Settle was unconditional and that he relied in part on such finding in his judgment. Although the Offer to Settle did not include an explicit condition that Mr. Rigitano must be alive at the time the Offer was tendered, Western Assurance maintains that this condition was not necessary as it was fundamental to the subject matter of the contract and was an implied term of the Offer.

47 Western Assurance relies on a passage written by John D. McCamas, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 105:

> Indeed, as McLachlin J. noted in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299: "the court, where appropriate, may as a matter

> of policy imply a term in a particular type of contract, even where it is clear that the parties did not intend it." Thus, terms implied by a law are said to constitute "legal incidents" of particular kinds of contractual relationships. Although the test for implying a term as a matter of law is said to be one of "necessity", the term "necessity" is being used, in this context, in a somewhat different sense from its use in the context of terms implied by fact. A distinction is drawn between "the search for an implied term necessary to give business efficacy and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship."

48 Western Assurance submits that the condition that the insured party must be alive at the time of the Offer is inferred and integrated into forms provided by the regulatory body governing the insurance industry in the Province of Ontario.

49 Western Assurance further submits that it is just to imply such a condition in the Offer to Settle, given that without such a condition, the contract would be absurd.

50 The Estate counters the arguments raised by Western Assurance with its own submissions:

(a) that the issue of whether this Offer was unconditional is a matter of fact; and thus the trial judge's finding that the Offer was unconditional is entitled to deference;
(b) that the Offer made by Western Assurance was left open without condition and would remain open until, as per law, a Counter-Offer was made. No Counter-Offer was made and thus the Offer remained open for acceptance when Mr. Rigitano's Estate Trustee signed the Full and Final Release;
(c) that at trial, the Estate drew the judge's attention to the fact that there were no provisions in the *Insurance Act*, the *SABS* or the *Regulations* thereto requiring an insured to be alive at the time an insurer makes an Offer to Settle;
(d) that there are no provisions in the *Insurance Act*, the *SABS* or the *Regulations* thereto preventing the Estate of Mr. Rigitano from accepting the Offer to Settle on his behalf;
(e) that at trial, the Estate drew the trial judge's attention to the fact that there was no condition in the Offer to Settle or the Release, both drafted by Western Assurance, that Mr. Rigitano had to be alive at the time the Offer was tendered, or that there was a condition that he must be alive to accept the Offer;
(f) similarly that there was no condition in the Offer to Settle or the Release, both drafted by Western Assurance that the Offer could not be accepted by Mr. Rigitano's Estate;
(g) that Western Assurance could have included a condition that Mr. Rigitano must be living at the time the Offer was made and that he must be alive to personally accept the Offer or that the Estate could not accept on his behalf.

51 With respect to whether there was an implied condition, the Estate submits that it would be unjust to imply terms that would materially alter the parties allocation of the risk of life expectancy.

52 Therefore, it is the Estate's position that implication of such a condition should not be grounded in the fact that future benefits are contemplated in the Offer to Settle. The fact that the Offer refers to the future, or indeed even implies some future obligation on the part of the offeree, does not constitute an implied condition that the offeree must be alive. For this argument the Estate relies on the decision of Mr. Justice Cullity in *McMaster Estate v. Imark Corp.*, [2000] O.J. No. 1003 (S.C.J.).

53 Based on the decision in *Rickards Estate v. Diebold Election Systems Inc.*, [2004] B.C.J. No. 2232, (S.C.J.) at para. 70, it is the Estate's further position that Mr. Rigitano's personal presence was not essential to the performance of the agreement, as the core of the agreement was the exchange of a Release for certain payments by Western Assurance.

54 With respect to the argument that without the inference suggested by Western Assurance, the contract would be absurd, the Estate submits that while it is common sense that Western Assurance would have no longer negotiated with Mr. Rigitano himself, had they learned of his prior death, there is no evidence to support a claim that they would not have been negotiating with Mr. Rigitano's Estate with respect to any past benefits due and owing to Mr. Rigitano.

55 Where the issue of whether the Offer was unconditional is a mixed question of fact and law, this count would have to find that Deputy Judge Krawchenko's finding constituted a palpable and over-riding error. This court cannot so find.

(C) If the Offer to Settle was not valid, can it still be accepted so as to form a binding agreement?

56 Western Assurance submits that even though an Offer might survive the death of the offeree and be accepted by the offeree's Estate to form a binding agreement, the Deputy Judge erred in law by giving weight to these legal principles in his judgment. Western Assurance continues in its argument that if the Offer to Settle is void *ab initio*, then any resulting agreement is unenforceable. They rely on *Bird v. Ireland, supra,* at para. 18, where it was found by the Divisional Court that where an Offer is not presented, the Plaintiff's claim must fail.

57 In *McMaster Estate v. Imark Corp., supra,* at paragraph 8, the Ontario Court of Appeal upheld an employment termination settlement agreement where the employee died prior to the completion of the contract. Western Assurance argues that the facts in the matter on appeal are distinguishable given that the employee's death occurred after the Offer was tendered. Furthermore, the Ontario Court of Appeal found that although certain conditions of the Offer could not be satisfied due to the employee's death, these conditions were not material to the contract and the employer would have paid the lump sum amount in any case. Western Assurance therefore maintains that the principles espoused by the Ontario Court of Appeal support the argument that conditions or mistakes that are material to the core of a contract are sufficient grounds to invalidate the contract.

58 Western Assurance further submits that the Deputy Judge erred in law by giving weight to the wording of Western Assurance's decision of the Offer to Settle on December 8, 2003. Any inconsistencies in the wording of the Offer, the Release and the Rescission have no possible relevance or application to the issues at hand. If the Offer to Settle was void, then the agreement would likewise remain unenforceable despite any wording used to provide Notice of Rescission.

59 Deputy Judge Krawchenko rejected Western Assurance's argument that the Offer was made on the basis of mistaken fact and accordingly that the settlement would be void *ab initio*. He found

as a matter of fact that Western Assurance intended to settle all claims, past, present and future and did so with the lawful representative for Mr. Rigitano.

60 Accordingly, Deputy Judge Krawchenko's findings are entitled to deference on appeal. This court cannot find a palpable and over-riding error to interfere with the trial judge's finding.

(D) What interest rate is applicable to the matter before the Deputy Judge?

61 Deputy Judge Krawchenko awarded the Estate pre-judgment and post-judgment interest in his judgment in accordance with the *Courts of Justice Act*.

62 The issue in the cross-appeal by the Estate is whether the Deputy Judge erred in awarding pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act* rather than the specific interest rate prescribed by the legislation pursuant to which Western Assurance made the Offer, namely, *SABS*, 2% compounded monthly.

63 Section 46(2) of the *SABS* provides:

> If payment of a benefit under this Regulation is overdue, the insurer shall pay interest on the overdue amount for each day the amount is overdue from the date the amount became overdue at the rate of 2 per cent per month compounded monthly.

64 Under s. 128(4) of the *Courts of Justice Act*, a person is not entitled to pre-judgment interest under s. 128(1) if interest is payable by a right other than under this section.

65 Likewise, under s. 129(5) post-judgment interest shall not be awarded under this section where interest is payable by a right other than under this section.

66 In *Mascitti v. Gore Mutual Insurance Company*, [2005] O.J. No. 3668 at para. 12 (S.C.J.), Justice Harris adopted the reasoning of Justice Laskin of the Ontario Court of Appeal in *Attavar v. Allstate Insurance Company of Canada* [2003] O.J. No. 213 (C.A.). At paragraph 12, Justice Harris noted the policy behind s. 68 (now s. 46) interest payments. The provision is designed to compensate insured persons for the given value of money. It also operates to encourage insurers to pay accident benefits promptly. The prompt payment of benefits is one of the fundamental goals of the statutory system. Interest flows from the late payment of benefits and there is no need to show any misconduct on the part of the insurer.

67 In *Mercier v. Royal and Sun Alliance Insurance Company of Canada,* [2004] O.J. No. 3264 at para. 35 (C.A.), the Ontario Court of Appeal found that even if an insurer was empowered to stop paying benefits pursuant to the *SABS*, if it is later determined by a judge that the insured was indeed entitled to the benefits, the insurer is liable to pay the benefits owed plus interest under the *SABS* from the date the benefits were first terminated.

68 Accordingly, the benefit has been owing in the case at bar since December 8, 2003, being the date Western Assurance rescinded the accepted Offer of Settlement.

69 In view of the noted exceptions set out in the *Courts of Justice Act, supra,* and the provisions in s. 46(2) of the *SABS*, this court finds that Deputy Judge Krawchenko erred in awarding pre-judgment and post-judgment interest on the basis of the *Courts of Justice Act*.

70 Accordingly, the Estate is entitled to 2% interest compounded monthly on $3,500.00 from December 8, 2003.

71 There will therefore be an order:

(a) Dismissing the appeal by Western Assurance;
(b) Setting aside paragraph 3 of Deputy Judge Krawchenko's endorsement re: costs and awarding pre-judgment and post-judgment interest at an interest rate of 2% compounded monthly from December 8, 2003.

72 If the parties cannot settle the issue of costs of this appeal and cross-appeal, they are to make short written submissions within 20 days from the date hereof.

E.B. FEDAK J.

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