2019 Legal Highlights

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T'is the season for many things.

Yes, of course, it's the season of festive gatherings, gift-giving and all the feelings espoused in the holiday music playing overhead (or, if you subscribe to a more cynical perspective, the season of crowds, overindulgence and all of the hassles inherent of winter). No judgement either way.

If you're anything like me, though, it's the season of wondering where 2019 went. No doubt my saying that the year flew by raises the ire of cliché-haters everywhere but, really, was it not just yesterday that we were bracing for a polar vortex and discussing whether the danger of chair-tossing from a high-rise balcony was not simply a matter of common sense? As it turns out, no – both were events of over 10 months ago now.

From a legal perspective, it can be easy to lose track of the number of developments over the course of any given year. It's likely understandable – case law, unlike, say, Raptors' championships or elections, is churned out on effectively a daily basis from not one, but multiple levels of court.

So, for the sake of appreciating some of those developments over the blur of the past 11 months, here are some of the highlights of 2019 (from my perspective):

Limitation Periods

Two decisions appear to call into question reliance on what would have been thought to be statutorily-mandated limitation periods.

First, a majority of the Supreme Court in *Pioneer Corp. v. Godfrey*[1] held that the discoverability rule, while not a rule of universal application to limitation periods, is a rule of construction to aid in interpreting statutory limitation periods.

The resulting take-away is two-fold: absent clear legislative language to the contrary, discoverability applies where a statutory limitation period runs from the accrual of a cause of action or the plaintiff's knowledge of injury, even if the statutory wording does not explicitly speak to such events; discoverability does not apply where a statutory limitation period runs from a fixed event, unrelated to the accrual of a cause of action or the plaintiff's knowledge of injury.

While *Pioneer Corp.* dealt with a limitation period under the *Competition Act*, the decision's application in *Tomec v. Economical Mutual Insurance Company*[2], may be more relatable.

Although the statutory wording at issue in *Tomec* (under the *Statutory Accident Benefits Schedule*) appeared to provide for a hard limitation period being two years after an insurer's "refusal to pay the benefit claimed", the Court of Appeal held that such a refusal is inextricably tied to the claimant's cause of action, such that discoverability applies to the limitation period outlined in the *SABS*.

In the result, the Court of Appeal permitted the claimant's appeal of a denial of benefits some five years after the denial – a seemingly concerning outcome for insurers.

Surveillance

While the potential to use surveillance for impeachment purposes appeared to be somewhat tempered after *Iannarella v. Corbett*[3], the Court of Appeal helpfully clarified its use as substantive evidence at trial and the criteria for admissibility for that purpose (distinct from its use for impeachment).

The Court articulated that the relevance of surveillance as substantive evidence is not diluted simply because the plaintiff contends that the surveillance is consistent with his or her stated abilities, as the surveillance can still dictate the findings of a trier of fact as to the nature and degree of an alleged impairment.

The Court further held that the admissibility of surveillance is not an all or nothing exercise, with each piece of video evidence to be considered in a "discrete and granular assessment".

Moreover, and contrary to arguments advanced by plaintiffs (and sometimes accepted), the Court effectively held that gaps in surveillance footage do not take away from its accurate depiction of a witness' activities.

Prejudgment Interest

Two years after the Court of Appeal's thorough consideration of the prejudgment interest rate for both non-pecuniary and pecuniary damages in auto cases in *Cobb v. Long Estate*[4] in light of changes to the *Insurance Act*, the Court considered the issue in the non-auto context in *MacLeod v. Marshall*[5].

Despite rule 53.10 of the *Rules of Civil Procedure* stating that the prejudgment interest rate on non-pecuniary damages in personal injury actions is 5% per year, the Court held that using 5% as the default prejudgment interest rate is not correct in law.

The Court indicated that the market interest rates need to be considered when judges exercise their discretion under section 130 of the *Courts of Justice Act* with respect to interest to be awarded. In the face of much lower market interest rates over the past two decades than 5%, this is a positive development for insurers.

Summary Judgment

It may be more fitting to speak of the watering down of summary judgment. Approaching six years since the Supreme Court's decision in *Hryniak v. Mauldin*[6], it seems that the Court's encouraged "culture shift" with respect to the efficient disposition of claims may not necessarily be taking root.

In *Farooqi v. Lorenzo*[7], a summary judgment motion sought by a defendant in a multi-party motor vehicle accident action, where said defendant's liability was arguably a discrete and extricable issue, was not even permitted to be scheduled, on the basis of it being a partial summary judgment motion creating the risk of duplicative proceedings or inconsistent findings of fact.

In *Hubert v. Ladha*[8], also a summary judgment motion brought by the defendants in a motor vehicle accident action, the motion judge suggested that the "culture shift" articulated in *Hryniak,* necessary to facilitate timely and affordable access to justice, was not an issue arising from motor vehicle litigation.

In support of this suggestion, the motion judge alluded to the availability of compulsory auto insurance, as well as fee arrangements and adverse costs insurance available to plaintiffs.

The position seems hardly in keeping with the principles outlined in *Hryniak* which spoke to a systemic access to justice issue, and, moreover, fails to consider the potential

implications of rampant motor vehicle accident litigation (such as on insurance premiums, and the like).

While it's not that summary judgment is an unheard of remedy at this point, decisions such as *Farooqi* and *Hubert* certainly suggest that the concerns and guidance of the Supreme Court in *Hryniak* may, unfortunately, be being misunderstood.

As the number of such decisions grows, and as the potential certainty of summary judgment motions becomes more of a toss-up, it seems the courts may be on course to reverting to a pre-*Hryniak* state altogether.

Summing Up

Could I go on? Probably, but we may be here all day.

The fact is that the Ontario Superior Court of Justice alone will have released over 3700 decision by year's end. Distilling those and the hundreds of appellate decisions released to a handful seems to be an exercise in futility. It's one, however, that for me, at least, serves as a reminder that the year really did not pass by as fleetingly as it seems.

Merry Christmas/Happy Holidays and a Happy New Year to all!

[1] 2019 SCC 42.
[2] 2019 ONCA 882.
[3] 2015 ONCA 110.
[4] 2017 ONCA 717.
[5] 2019 ONCA 842.
[6] 2014 SCC 7.
[7] 2019 ONSC 2547.
[8] 2019 ONSC 5542.