

Expert costs under scrutiny of courts

Experts who overcharge for their services, beware: No longer will the courts rubber stamp disbursements that were normally recoverable against a losing party.

Yet, the impact of an overcharging expert will be felt by personal injury plaintiffs and their counsel, not by the expert, since the retaining lawyer remains responsible for all disbursements.

While the courts historically have been assertive in assessing legal fees and in making sure that the time spent and the fees charged by counsel were reasonable, they have been passive in their approach to assessable disbursements. Presumably, the courts avoided challenging disbursements since the disbursements claimed were reimbursement for the amounts spent rather than "profit." As well, the courts were reluctant to second-guess a successful lawyer's disbursements.

In *Hamfler v. 1682787 Ontario Inc.*, 2011 ONSC 3331 (S.C.J.), a May 31, 2011 decision that has recently gained popularity with defence counsel, Justice Mark Edwards of the Ontario Superior Court of Justice took issue with the magnitude of disbursements



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incurred by plaintiff's counsel in a personal injury claim where a jury awarded the plaintiff just under \$200,000 for damages and where the disbursements claimed were approximately \$100,000.

While stating that the fundamental question for the court is whether the amount claimed in disbursements is fair and reasonable, Justice Edwards out-

lined some questions that the court may consider in assessing disbursements:

- Did the expert's evidence make a contribution to the case, was it relevant to the issues?
- Was the evidence of marginal value or was it crucial to the trial's outcome?
- Was the cost of the expert or experts disproportionate to the economic value of the issue at risk?
- Was the expert's evidence duplicated by other experts called by the same party?
- Was the report of the expert overkill or did it provide the court with the necessary tools to properly conduct its assessment of a material issue?

The *Hamfler* decision raises major challenges for plaintiff's personal injury counsel.

Counsel has little input into the amount charged by an expert on a file, other than being able to avoid using that expert again in the future. Moreover, in the face of the still fairly new rules in Ontario requiring expert report to be extremely comprehensive, experts have been encouraged by counsel to spend the necessary time to write them and should

not now be criticized for spending too much time.

One challenge for counsel arising from Justice Edwards' decision in *Hamfler* has to do with establishing the reasonableness of the amounts charged by the expert. Specifically, he was of the view that counsel has an obligation to put before the court information to allow it to assess the fairness and reasonableness of a disbursement, such as the amount of time spent by the expert in preparing the report and in attending at trial and the hourly rate.

The primary means for counsel to establish the time spent by an expert is to require and produce detailed invoicing. While many experts do this, some important experts, such as physicians, often don't.

Justice Edwards also makes it clear that the court should not just rubber stamp the expert's hourly rate. Instead, he encourages counsel to provide the court with any available information from an expert's governing body as to appropriate hourly rates, or providing comparable hourly rates of other experts in the same field.

Justice Edwards further men-

tions that it would be useful to know whether the expert had to cancel part or all of his or her appointments in order to attend court, presumably to compare the fee charged to the lost revenue associated with attending in court. Again, establishing these facts can be a challenge for plaintiff's counsel, especially when trying to do so without incurring further disbursements by asking the expert to spend time helping answer these inquiries.

The *Hamfler* decision raises the bar on how to properly establish the reasonableness of assessable disbursements and raises challenges for plaintiff's counsel trying to manage expert costs while at the same time complying with the new onerous rules mandating comprehensive expert reports. Personal injury claimants may end up paying the price for costs that are no longer recoverable from the losing party. ■

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An oddity in *Personal Injury Law*

Stage slippery when wet

After taking a tumble on stage, a male exotic dancer claimed he fell on slippery body paint left behind by a previous act at Vancouver's Naughty But Nice Sex Show five years ago. Randyll Newsham claimed he tore cartilage in his knee and subsequently sued Canwest Trade Shows for negligence, according to vancouver.sun.com.

Much to his "surprise," a judgment released last week found that he had previously signed a contract that waived liability along with his right to sue in the case of injury. Newsham alleged that he wasn't aware of the liability waiver on the back of the contract he signed and no one brought it to his attention, but B.C. Supreme Court Justice Neill Brown simply didn't fall for it. —*Anum Lateef*