BEARDWINTER LLP
Defender
Vol.6 | Issue 2
April, 2012

Combating Disbursements

One of the most frustrating aspects of settling cases from a defence standpoint is dealing with the rising costs of a claimant's disbursements. It seems that there is a preponderance of excessive medical reports, economic loss reports, future care cost reports, life planning reports, and other such assessments generated on even the most straightforward claims. While undoubtedly there is a need for certain key medical assessments, it seems that the principle of "more is better" has become commonplace in personal injury litigation. The decision of *Hamfler v. Mink* (2011) ought to serve as a wake-up call to remind litigants that a disbursement will be recoverable only if it is reasonable and justified. In this case, the claimant submitted a list of disbursements totalling approximately $93,000.00 and the court reduced that sum by nearly half – to $51,000.00. Here is why.

The Principle Of Reasonableness

The court reasoned that fundamental to the exercise of the court's discretion is the overriding principle of reasonableness. The court recognized that the quantum of disbursements can form a significant component of the overall claim and often will be a significant impediment to getting a case resolved. The Judge wrote as follows:

> "By simply accepting a disbursement which on its face appears to be extravagant and excessive, will simply encourage experts to charge excessive fees. Litigation in the 21st century is at risk of becoming priced well beyond the reach of almost anyone seeking, or needing access to our courts. In far too many cases, the total claim for costs and disbursements exceeds the recovery at trial. Reasonableness and proportionality dictate that the court take a long hard look at the claim for costs and disbursements in its overall determination as to the reasonableness and fairness of the amount claimed."...
>
> ..."An expert can simply not charge what he or she considers appropriate and then expect through counsel that such fee will be deemed acceptable by the court".

A framework was suggested for assessing the appropriateness of the disbursement:

1. Did the evidence of the expert make a contribution to the case, and was it relevant to the issues?
2. Was the evidence of marginal value or was it crucial to the ultimate outcome at trial?
3. Was the cost of the expert or experts disproportionate to the economic value of the issues at risk?
4. Was the evidence of the expert 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?

Cary Schneider is a partner at Beard Winter LLP specializing in insurance and civil litigation matters including the growing area of cyber and privacy law. He is a member of the International Association of Privacy Professionals (IAPP), is in the process of being certified as a Certified Information Privacy Professional/Canada (CIPP/C), and studies cyber security at Harvard University. Cary advises insurers on breach and coverage situations, as well as assists businesses in preparing pre-breach data plans and post breach responses.

Your comments are appreciated and if there are any commercial or insurance related topics that you would be interested in reading about, please feel free to email us and we will certainly explore the possibility of writing an article. Contact: defender@beardwinter.com

The Reasonable Cost Of The Experts

In the *Hamfler* case, the claimant called a clinical psychologist and a vocational psychologist as witnesses at trial. The clinical psychologist prepared a report at a cost of $12,850.00 and charged an attendance fee of $16,775.00. The vocational psychologist, on the other hand, prepared a report at a cost of $3,350.00 and an attendance fee of $4,020.53. There was no explanation proffered by claimant's counsel as to why these two comparable experts charged substantially different rates. The Court thereby reduced the clinical psychologist's combined account from $29,625.00 to $8,500.00.

This serves as an example as to how to challenge the reasonable costs of disbursements. If the cost of an expert report is excessive as compared to that of a comparable expert, (even that of the defendant expert), then this serves as a basis to argue for a reduced rate. One perhaps could even argue that amount charged is excessive to that of the "going rate" experts in that field.

Duplication And Inadmissibility

In *Hamfler*, the claimant had obtained a report from an eminently qualified psychiatrist, and sought to call him as a witness at trial. The Court disallowed this doctor's evidence on the basis that it consisted as an overlap with that of the two psychologists. Since this doctor's report was inadmissible, and he was not called as a witness at trial, his report which cost $4,500.00 and his attendance fee of $3,000.00 was not considered to be a reasonable disbursement. The defendant was not obligated to pay anything for this expert.

Accordingly, if a claimant obtains reports from two orthopaedic surgeons, there is a live question as to whether a defendant needs to pay for both of these reports. If only one such expert will be able to give evidence at trial, there may not be an obligation on the defence to pay for reports of two such experts.

Marginal Value And Contribution To The Case

At verdict in the *Hamfler* case, the Jury awarded the plaintiff just $15,000.00 in past income loss and $30,000.00 in future income loss. The claimant's income tax returns did not reveal a substantial change in his income, nevertheless, the claimant called an expert economist who assessed the income loss as having a value of between $183,000.00 - $893,000.00. At the same time the expert failed to explain to the Jury the basic premise of present value. The Court pointed out that it was clear that the Jury disregarded the evidence of this expert. The expert's total fee of $5,460.00 was reduced by the Judge to $2,500.00 (less then half) on account of the limited assistance that he gave to the Court and the Jury.

The Court is thereby putting litigants and experts on notice that if the report does not add much to the overall outcome of the case and / or that there are substantive inherent flaws in the report, that the full cost need not be paid. The quality of the product still counts.

Obligation To Justify The Account

The claimant called a physiatrist and a life planner as witnesses at trial who worked under the auspices of an assessment centre. The assessment centre provided few particulars as to the account that it rendered, which ultimately totalled $22,518.00. From that sum it was carved out that $1,274.00 was for the cost of the physiatrist's report, $4,020.53 for the court attendance by the physiatrist, and $1,275.00 for the court attendance of the life planner. This left an unaccounted shortfall of $15,568.00. Since this sum could not be justified, the Court thereby reduced the value of that shortfall disbursement to $10,000.00.

In general, the Judge found that he had been provided with no assistance as to how the various medical doctors arrived at the amounts they charged for preparation of their reports and attendance at trial. He reasoned that the court should be provided (if it is available) information from an expert's governing body as to the appropriate hourly rates. Information should be presented as to how much time was used for the preparation of reports and trial preparation.

Again, this is a valuable precedent to use to force claimant's counsel to justify an excessive or unexplained account. Doctors and assessment facilities ought not to be given free reign to charge exorbitant fees and expect the defence / court to provide a "rubber stamp".

Conclusion And Application

The lessons learned in the *Hamfler* decision can be used in everyday negotiation with claimant counsel. There is no need for a future care cost report to be generated in every file, there is no automatic obligation for the defence to pay for duplication of expert reports, and it is well within a defendant's right to refuse to pay for excessive and poorly drafted assessments. In certain cases a defendant may decide the pay for the claim, but bring a motion to argue about the reasonableness of the disbursements. Although this would be costly on a particular file, it would certainly send a message to the industry that the cost of disbursements has spiralled out of control.

At the end of the day this is legitimate negotiation tool that may

be utilized. Often claimant's counsel have arranged a deal in which they will pay their experts at the conclusion of the lawsuit out of the settlement proceeds. If the defence successfully points out that the cost of the disbursements are not entirely proper, then claimant counsel can deal with their experts accordingly. While as claimant counsel has retained the expert to assist in the lawsuit, their priority obligation is that to their client. If claimant counsel has already spent the money out of their pocket, then they will think twice next time.

When one is combating a questionable disbursement account, it may be worthwhile to send a copy of the *Hamfler* decision to claimant counsel. I certainly will.

Contact us at: defender@beardwinter.com

Subscribe To The Beard Winter Defender
CLICK HERE
(to receive The Defender by email)