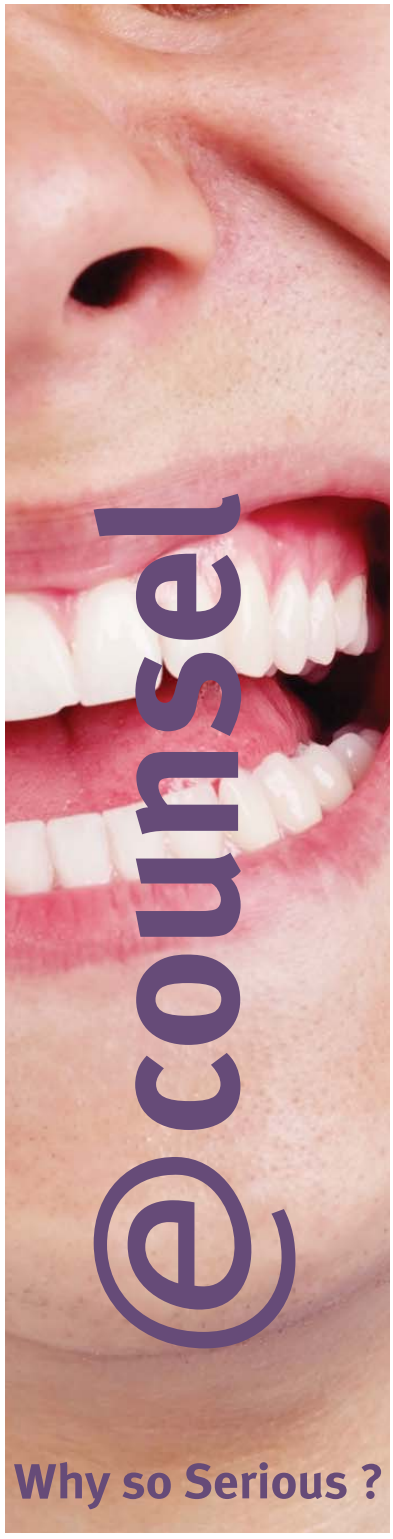
Dutton Brock LLP



A Quarterly Newsletter published by Dutton Brock LLP
Winter 2013, Issue Number 47

" As the purpose of comedy is to correct the vices of men, I see no reason why anyone should be exempt. -Moliere "

Just for Laughs: Judge Reduces Recovery of Trial Disbursements

The issue of reasonableness of costs of disbursements was recently considered in Hamfler v. 1682787 Ontario Inc., where Justice Edwards of the Ontario Superior Court significantly reduced the costs of disbursements awarded to three Plaintiffs that had won a civil action against a nightclub.

In *Hamfler v. 1682787 Ontario Inc.*, (2011) 38 C.P.C. (7th) 398, three Plaintiffs were involved in an altercation with bouncers at a nightclub. One plaintiff, Mr. Hamfler, suffered significant injury. The jury was called upon to assess the usual types of claims in a personal injury claim: general damages, past and future loss of income and future care costs. Mr. Hamfler was entirely successful in establishing liability against the Defendants, and a number of experts were called with respect to damages. Ultimately, the jury awarded Mr. Hamfler $188,000 in damages and the other two Plaintiffs were awarded $3,000 and $2,000 respectively. In total all three Plaintiffs claimed total fees and disbursements in excess of $200,000.

This decision is unique as the main issue considered pertains to assessing the reasonableness of costs of the Plaintiffs' disbursements, rather than legal fees. Justice Edwards highlights this point by stating that our courts have spent far more time in the past reviewing in detail the claims relating to legal fees and very little time in the assessment of the reasonableness of claims for disbursements. He emphasized that the costs of a proceeding are in the discretion of the court and that fundamental to the exercise of the court's discretion is the overriding principle of reasonableness. As such, the amount awarded for disbursements must be fair and reasonable in all of the circumstances.

In assessing the reasonableness of the disbursements, Justice Edwards identified the increasing costs being charged by expert witnesses for reports and for court attendance as a growing concern. As a result, he provided some factors a trial judge can consider in determining the reasonableness of the disbursements claimed with regards to experts. Some of these factors include considering whether the evidence of the expert made a contribution to the case, whether the cost of the expert or experts was disproportionate to the economic value of the issue at risk, and whether the report of the expert was overkill.

In addition, with respect to administrative disbursements like research charges, courier service, stationary, postage and photocopying, Justice Edwards asserted that a disbursement will be recoverable provided that it is reasonable, not excessive, and has been charged to the client. In justifying this test, he stated that accepting a disbursement which on its face appears to be extravagant and excessive will encourage counsel and experts to charge excessive fees and make litigation even more inaccessible.

cont'd on Page 2

from Page 1

With respect to the case at hand, Justice Edwards concluded that the Plaintiffs' disbursements were grossly excessive. Justice Edwards was particularly critical of the Plaintiff's use of an economist to show future income loss, as he found the economist's evidence to be of very little use to the jury. He also found the Plaintiff's medical experts of little assistance to the court and contended that a court will not simply rubber stamp the expert's invoice. The court will require more than merely a list of the disbursements, such as information from an expert's governing body as to appropriate hourly rates.

Overall, the message of this decision is clear: reasonableness and proportionality dictate the cost of disbursements awarded to a party. Counsel seeking costs for disbursements should be reasonable in their claim and provide information pertaining to each disbursement to assist the court with its assessment. Disbursements that are found to be of little utility, disproportionate, or unreasonable in the circumstances of the case will not be recovered.

Lida Moazzam graduated from the University of Windsor Law School and also worked as a Judicial Law Clerk from January to April 2013 before starting her articles at Dutton Brock LLP.

This Joke Isn't Funny Anymore: Class Action by Problem Gamblers Rebuked by Courts

The Ontario Court of Appeal has recently upheld a motions court decision refusing certification of a class action proceeding by a proposed group of problem gamblers. The Appellant and proposed class representative, Peter Dennis, was a problem gambler who signed a self-exclusion form provided by the Respondent, the Ontario Lottery and Gaming Corporation (OLG). Self-exclusion is a self-help tool to enable patrons to take positive action to address problems they may be experiencing with gaming.

Despite excluding himself from the OLG premises, Mr. Dennis returned to the casino and later claimed damages against the OLG. His claim was based on allegations that the OLG failed to exclude him from its facilities. The action was framed in breach of contract, negligence and occupiers' liability. The Appellant's spouse, Zubin Noble, made a claim pursuant to the *Family Law Act* (FLA).

The self-exclusion form signed by the Appellant states that the OLG "accept[s] no responsibility, in the event that you fail to comply with the ban, which you voluntarily requested" and also contains a release which discharges the OLG from liability in the event that a patron fails to comply with the voluntary ban.

The problem gamblers sought to certify their claim pursuant to the *Class Proceedings Act* (CPA), seeking $2.5 billion in general and special damages and $1 billion in punitive damages. Mr. Dennis sought to represent the proposed class of individuals, who signed self-exclusion forms provided by the OLG (Class "A" Members). Ms. Noble sought to represent family members seeking FLA damages (Class "B" Members).

The motion judge refused certification because the proposed class of litigants was over-inclusive and because the requirements set out in section 5 of the CPA were not met. At its core the claims rested on the proposition that Class "A" members are vulnerable, pathological problem gamblers and this needed to be determined on a case-by-case basis. The Divisional Court upheld the motion judge's decision although one judge dissented.

The Court of Appeal for Ontario upheld the decision of the motion judge and the majority decision of the Divisional Court. According to the Court of Appeal, this was a case in need for individualized inquiries and could not be treated as a systemic wrong. Damages cannot be awarded simply on the basis that Class "A" members had signed a self-exclusion form. Evidence would be required about each problem gambler including, for example, their gaming history, the nature and severity of their addiction, their vulnerability to gambling and the severity of their addiction.

The Court described the proposed class definition of Class "A" members as "fatally over-inclusive". According to the Court, certification also failed on the common issues requirement of section 5(1)(c) of the CPA, reiterating that all proposed common issues required individual inquiry. The Court also found that a class action is not the preferable procedure and a more efficient way to adjudicate the claims of Class "A" members would be to proceed by way of individual actions as "it is inevitable that a class proceeding will break down into individual proceedings in any event."

This decision reminds occupiers like casinos that provide self-exclusion programs of the importance of exercising best efforts to exclude customers who wish to remain off their property.

S. Alexandre Proulx is an Associate in Dutton Brock's tort group. He articled at the firm before being called to the Bar in 2010.

cont'd on Page 3

Did you hear the one about .....

Rebuttal Reports Return: Who's Laughing Now?

The FSCO decision of R. J. and Dominion (A12-001233), released on September 17, 2013, raises some concerns for insurers as there is now confirmation from at least one arbitrator that rebuttal reports are alive and well in the post September 1, 2010 accident benefits regime. In that case, the claimant submitted an Application for Catastrophic Impairment (OCF 19) and claimed that she sustained a catastrophic impairment as a result of a motor vehicle accident on July 23, 2007. She underwent Insurer's Examinations which concluded she did not sustain a catastrophic impairment on a physical or mental behavioral basis. The claimant then requested funding to obtain her own reports to rebut the insurer's findings.

Arbitrator Wilson considered this request in an interim benefits motion and followed his previous approach in *Nguyen and State Farm*, FSCO A05-000305, December 22, 2005, in considering an interim order including criteria such as the balance of the evidence, potential success, urgency, need, and the failure to respect the provisions of the Schedule. In R.J., the claimant had sustained injuries from a motor vehicle accident, did not return to work and alleged physical and psychological injuries. The claimant's evidence included documentation of substance abuse, suicide attempts, involvement of the Children's Aid Society (CAS), the police, and that she required constant supervision from her family members. The insurer paid income replacement benefits, attendant care and housekeeping and then terminated benefits based on insurer's examinations at the two-year mark.

Arbitrator Wilson reviewed the insurer's catastrophic assessment reports and preferred the evidence from the claimant's own treating psychiatrist, concluding that the insurer's assessor "essentially missed the boat on a woman who had severely disabling depressive symptoms to the degree that she became a suicide risk. She could not on any reasonable examination of her treatment records be said to be in remission, either with regard to her substance abuse or her depression".

Arbitrator Wilson found that, "having a rebuttal report available can assist an insurer in making a fair determination and, to an arbitrator hearing this matter, should streamline the process by drawing together and placing in a medical context the alleged shortcomings of the insurer's medical legal reports". He further stated that funding of a rebuttal report "would not only be reasonable but would facilitate the claims process." In coming to this conclusion, Arbitrator Wilson reviewed the changes to the *Schedule* post September 1, 2010, which specifically excluded the funding of rebuttal reports and concluded that at the time of her accident in 2007, the prior Schedule applied and the amendment to the Schedule in September 2010 did not retroactively amend her contract of insurance under which her accident benefits claim was made.

This raises some concern as the law on statutory interpretation indicates that procedural changes to a statute are not to be given retroactive effect and only substantive rights are preserved in statutory changes. On this issue, Arbitrator Wilson held that:

[G]iven the Director's Delegate analysis of the transition provisions in State Farm and Federico, FSCO P12-00022, March 25, 2013, and the absence of a clear direction from the legislature that the contractual provisions with regard to indemnity for the costs of rebuttal reports in existing contracts are taken away, I find that an arbitrator is more likely than not to accept Ms. J's argument that the contractual right to indemnity subsisted in cases like hers where a claim crystallized prior to the SABS reforms of 2010

He therefore concluded that the right to be compensated for a rebuttal report is a substantive contractual right. In considering the

appropriate cost of funding for the rebuttal reports, Arbitrator Wilson considered the principles set out in section 282(11) of the *Insurance Act* and section 12 of Regulation 664 with respect to the award of expenses in the Schedule. He concluded that a detailed rebuttal report can, and in this case should, reflect the complexity and the importance of its subject matter and that a complex rebuttal report is not only reasonable but justified. Arbitrator Wilson stated "to so order would at least level up the playing field adequately enough to permit Ms. J to provide the insurer with a cogent rebuttal of the catastrophic reports and to allow the insurer to make a determination as to catastrophic impairment based on more complete evidence.

Given the findings in this case, it appears that funding for a rebuttal report in the post September 1, 2010 accident benefits regime may be awarded in situations where the criteria for an interim benefit can be satisfied by the claimant. In this case, it remains to be seen whether Ms. J will ultimately be successful at a full arbitration hearing.

Shirline Apiou is a senior associate at Dutton Brock. Her practice focuses on all matters involving statutory accident benefits and disputes between insurers in priority and loss transfer claims

cont'd on Page 4

from Page 3

Knock, Knock: Who's There? Uninsured Motorist Coverage

The case of Bruinsma v. Cresswell, 2013 ON 111, concerns a Plaintiff, Shane Bruinsma, who was involved in a motor vehicle accident with the Defendant, Kyle Cresswell. Importantly, Bruinsma was operating a vehicle owned and insured by his girlfriend while his driver's license was suspended. Cresswell, on the other hand, was operating an uninsured vehicle.

Bruinsma brought an action against the owner of the Cresswell vehicle, Cresswell himself, and Bruinsma's own insurance company, CAA, pursuant to an uninsured motorist claim under section 265(1) of the *Insurance Act*. In its Statement of Defence, CAA asserted that the Plaintiff was not entitled to coverage because he breached the policy by driving without a valid license. During the course of the litigation, the Minister of Finance became involved on Cresswell's behalf and brought a crossclaim against CAA. The Minister asserted that the Plaintiff is entitled to coverage because the Statutory Conditions do not apply to uninsured automobile coverage.

CAA then brought a motion for summary judgment seeking dismissal of the Plaintiff's claim for uninsured automobile coverage and also dismissal of the crossclaim brought by the Minister in the name of Cresswell on the basis that it was time-barred by the *Limitations Act.*

The motion judge concluded that the Plaintiff was entitled to coverage under the CAA policy and that the *Limitations Act* does not apply to crossclaims brought by the Minister on behalf of a defendant pursuant to section 8(2) of the *Motor Vehicle Accident Claims Act.*

CAA appealed that Order. On appeal, the Court agreed with the motions judge that a Plaintiff's breach of the policy does not disentitle him from uninsured coverage. The Court also held that motions judge erred in concluding that the *Limitations Act* does not apply to the Minister's crossclaim, however, did not give effect to CAA's argument.

CAA argued that pursuant to section 234(1) of the *Insurance Act,* the Statutory Conditions are deemed to be part of the insurance contract. In this case, the Plaintiff was not authorized by law to operate the vehicle because his driver's license was suspended. Section 5.5 of the Policy provides that:

No person has a right to sue us for compensation under this Section for injury or damage caused by an accident involving an uninsured or unidentified automobile, unless the conditions in this Section of your policy (Uninsured Automobile Coverage) have been met.

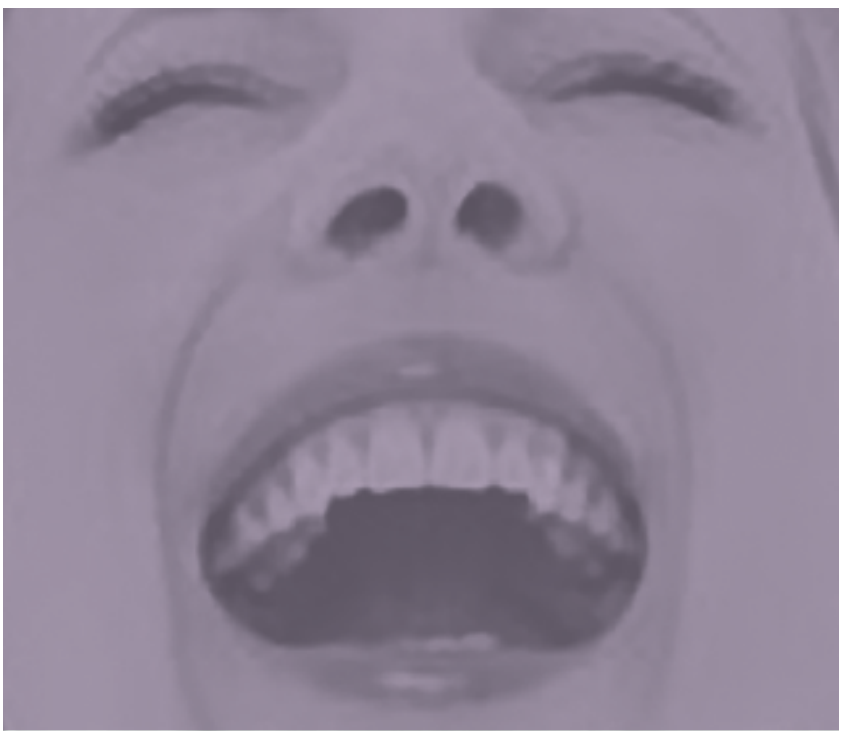
The Court however referenced section 10 of the Schedule to Ontario Regulation 676 which provides:

In so far as applicable, the general provisions, definitions, exclusions and statutory conditions as contained in a motor vehicle liability policy also apply to payments under the contract under subsection 265(1) of the Act.

Further, section 234(3) of the Act states:

Except as otherwise provided in the contract the statutory conditions referred to in subsection (1) do not apply to the insurance required by section 265 or 268.

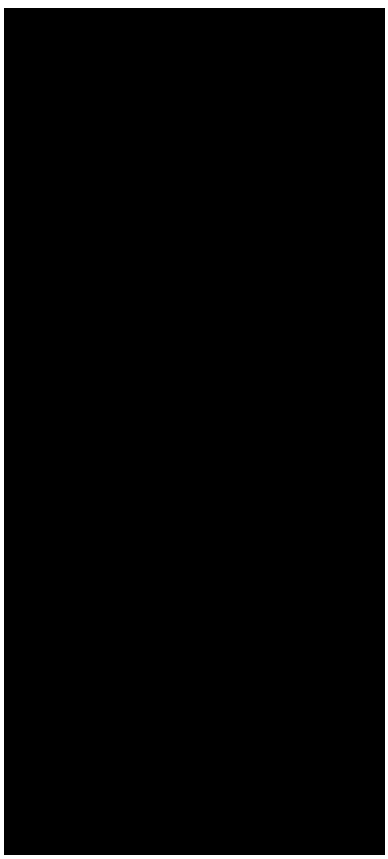
The Court reconciled the two provisions in making its decision by



cont'd on Page 5

from Page 4

focusing on the operational phrases, "in so far as applicable" and "except as otherwise provided in the contract". Section 234(3) was enacted after section 10 of the Schedule and the legislature did not amend section 10 thereafter. To the Court the words "except as otherwise provided in the contract" signify that the Statutory Conditions are not "applicable" to uninsured automobile coverage unless the contract itself explicitly otherwise provides. The Court was of the opinion that the Policy does not otherwise provide that the Statutory Conditions are to apply to uninsured automobile coverage.



On the second issue, namely whether the *Limitations Act* applied to the Minister's crossclaim, the Court simply relied on section 19(1) of that Act which provides that the limitation period set out in any other Act is of no effect unless the provision establishing it is listed in the Schedule to the *Limitations Act*. The Schedule does not set out any provision providing a different limitation period to the Minister in these circumstances.

Notwithstanding the conclusion that the *Limitations Act* does apply to the Minister's crossclaim, the Court stayed CAA's summary judgment motion to the extent founded on the limitation argument using the powers conferred under section 106 of the *Courts of Justice Act*. This section permits a court to stay any proceeding "on such terms as are considered just."

As such it is now established that the coverage afforded by section 265(1) of the *Insurance Act* applies even in circumstances where a Plaintiff has violated a Statutory Condition… unless the insurance policy explicitly provides otherwise.

Andrew Punzo is an Associate at Dutton Brock LLP whose practices includes a wide variety of tort litigation.

Are you kidding me?

Last issue's trivia contest was the hardest one (so far). The winner was Ken Jones of Gore Mutual who knew that Martin Van Buren was the President of the United States in 1837. Ken's name was pulled from a hat with the other 5 entrants who had the correct answer: Jill Van Vugt of Aviva, Jessica Larrea of the Dominion, Jennifer Bethune of Gore Mutual, Max Weissengruber of Acris Partners Consulting, and Jonathan Barker of Aviva.

WEB-CONTEST

In honour of our Are You Kidding Me? theme, this "Loser" actor played Eddie Blake (aka the Comedian) in a Warner Brothers' action movie. He was also played the role of Denny Duquette in a long-standing medical drama television series. That television series' most watched episode of all time had over 38 million viewers. The two part program was named after a song by R.E.M. The closing song to this two part program was a cover tune collaboration by Michael Stipe and another singer who is married to an actress who at one time was engaged to an actor who recently starred in World War Z. This other singer (the one who collaborated with Michael Stipe) also had a cameo in a British zombie movie released in 2004. Who is this other singer and what musical band does he front?

Email your answer to dlauder@duttonrock.com. A draw will be held to award a prize.

Editors' note

E-Counsel reports on legal issues and litigation related to our institutional, insured and self-insured retail clients. Dutton Brock LLP practices exclusively in the field of civil litigation. Any comments or suggestions on articles or E-Counsel generally can be directed to David Lauder, Gillian Eckler or Elie Goldberg. You can find all our contact information and more at www.duttonbrock.com.

Dutton Brock LLP
438 University Avenue, Suite 1700
Toronto, Canada M5G 2L9
www.duttonbrock.com