

# **When is a Disbursement for an Expert Report Reasonable?**

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## **THE GOLDILOCKS CONUNDRUM – WHEN IS A DISBURSEMENT FOR AN EXPERT REPORT REASONABLE?**

### **INTRODUCTION**

The genesis of this paper is found in the Alberta Court of Queen's Bench decision *Meehan v. Holt*. However, it is not the Trial decision, reported at 2010 ABQB 287, but rather Justice Sullivan's decision on disbursements reported at 2011 ABQB 110 that is the focus. This paper was conceived alternatively to be about the strategic and judicious selection of experts, or the appropriate test for the recovery of disbursements incurred to retain experts in litigation, in light of this decision. Ultimately, the one necessarily impacts on the other. Thus, this paper will canvas the strategic selection of experts in light of the desire by counsel to recover the disbursement paid to their experts.

### **WHEN IS AN EXPERT REQUIRED**

The Supreme Court of Canada has answered this question from an evidentiary perspective in *R. v. Mohan*, [1994] 2 S.C.R. 9, where Sopinka J. stated at 23:

What is required is that the opinion be necessary in the sense that it provide information 'which is likely to be outside the experience and knowledge of a jury'...The evidence must be necessary to enable the trier of fact to appreciate the matters and issue due to their technical nature.

In the conduct of personal injury disputes counsel cannot typically prove their cases without calling experts. In order to establish causation i.e. that an accident caused a particular injury, expert opinion is required. Even a diagnosis by a family physician of a simple whiplash injury is an expression of an expert opinion. As such, lawyers are put in a position of necessarily having to retain an expert. In most cases the cost of these experts is funded by a plaintiff's counsel. So too must the defendant's insurer pay to have its expert provide an opinion. If a party is intending to prove a necessary portion of their case that relies on an opinion, an expert is required to give that opinion.

There has been much judicial commentary recently regarding concerns over escalating expert costs. Additionally, other cases have referred to the use experts getting out of control. Even in private situations, such as judicial dispute resolutions, judges have expressed their concerns over the ongoing use of experts. In one particular situation, a Justice was faced with two reports written by two very qualified Occupational Medicine Physicians. Both

physicians were in fact retained through the same medical booking agency. Interestingly, the defendant's expert diagnosed the plaintiff as having suffered a Grade II Whiplash Associated Disorder injury that had essentially resolved at the time of his examination. He was of the opinion that she was a "Minor Injury" for the purposes of the *Minor Injury Regulation*. Not surprisingly to personal injury practitioners, but of some surprise to the Justice, the Plaintiff's expert physician had diagnosed the Plaintiff as suffering from ongoing chronic pain that was unlikely to improve. He assessed a 6% whole person impairment to the Plaintiff and concluded that she was not a "Minor Injury" within the meaning of the *Minor Injury Regulation*. The respective examinations were conducted four months apart from each other.

Faced with these conflicting reports based on examination of the Plaintiff conducted four months apart, the Justice was at a loss of what to do with them. Instead, she used the opportunity to pass generalized comments regarding the Courts ongoing frustration with experts and their perceived limited utility in such cases.

The problem is lawyers are required to call expert evidence, or risk losing the case. See *Sidorksy v. Lowry*, 2009 ABQB 68, paragraph 153. As such, how does counsel prove/defend a case by calling the right experts and still get paid the disbursements incurred in retaining those experts? The language used by Justice Sullivan in *Meehan v. Holt* should be a warning to any lawyer retaining an expert.

## **MEEHAN v. HOLT – THE CASE STUDY**

### **The Trial Award**

In order to understand Justice Sullivan's costs decision in *Meehan v. Holt*, it is necessary to understand the damages portion of the case. In 1998, the Plaintiff, Debra Hogan, was injured in a relatively minor motor vehicle accident. She was a passenger in a Ford Taurus that was struck by another vehicle which ran a stop sign. There was only \$1500 damage to Dr. Hogan's vehicle. However, she went on to develop significant symptoms that persisted from the date of the accident. Among her injuries, the most notable were bilaterally displaced discs in her temporomandibular joint, chronic neck pain, shoulder pain, arm weakness with numbness in her hands, and headaches. She also had low back pain that was acute for a number of years, but settled to a lower grade some time later.