THE RECOVERABILITY OF FINANCING COSTS IN PERSONAL INJURY LITIGATION: USING THIRD PARTY FINANCING AS A SHIELD …. AND A SWORD

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By: John Rossos, BridgePoint Financial Services Inc.[1]

Introduction:

In Canada, third party financing for litigation is a new concept that is increasingly being accepted as a means to facilitate access to justice where there is a substantial imbalance, or Funding Gap, in economic resources between the parties. The global credit crisis of 2008 and the recent amendments to the *Insurance Act* (Ontario)[2] reducing coverage for general medical and rehabilitation expenses from $100,000 to $50,000 for standard motor vehicle accident benefits have aggravated this issue. In a series of recent decisions Canadian courts have recognized that the Funding Gap often forces people to borrow money from third party sources to pay for the costs of litigation and have allowed financing costs to be recovered on the principle that access to justice would be compromised if people with legitimate claims were not able to bring them forward because they did not have the money to pay for legal services. The cases cited in this paper primarily address the issue of recovering financing costs where funds are borrowed to pay for disbursements.

[1] The author extends his appreciation to Darcy Merkur at Thomson Rogers and Stephen Pauwels at BridgePoint Financial Services for their thoughtful review and comment.

[2] *Insurance Act,* R.S.O. 1990, c. I. 8, Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996, O. Reg. 289/10.

However, an even more compelling argument can be made that financing costs ought to be recovered where people with significant injuries borrow money to pay for the cost of “reasonable” and “necessary” treatment related services. In these cases an injured person has a duty to mitigate damages, and arguably the financing cost represents the cost of mitigation and should be recovered against an insurer in contract and tort where applicable. The principle of access to justice should equally apply where people need money to pay for treatment.

This paper explores the growing structural demand for third party financing in personal injury litigation; reviews recent Canadian case law dealing with the recoverability of interest or financing costs; and illustrates how third party financing can be strategically used both as a ***“shield”*** to protect against the pressures of an improvident settlement, and a ***“sword”*** to advance a personal injury claimant’s position in litigation.

The Funding Gap:

The Funding Gap is the economic imbalance in resources available to the parties in litigation. For personal injury litigation the Funding Gap is particularly acute. The claimant is invariably an individual who suffers physical and/or psychological harm caused by the actions of another. In the vast majority of cases, the individual is seeking compensation from his or her insurer, the defendant’s insurer, or both. Where people suffer serious injuries they are often unable to work, or work at a reduced capacity and make less money. Insurance benefits for income replacement[3] and/or disability do not

[33] In Ontario this represents 80% of net weekly income up to a maximum of $400.00 per week up to a maximum period of 104 weeks.

adequately compensate for the loss of income. They often have limited financial resources to draw upon to sustain themselves and their families during their rehabilitation period. Litigation is expensive. In the absence of contingency fee arrangements with counsel most people would not be in a position to advance their claims and seek access to justice for the harm they suffer.

Conversely, insurers are well capitalized. They are in the business of aggregating pools of capital and spreading the risk of loss across a large population of people. For an insurer, the payout for an average personal injury claim is insignificant relative to the value of their reserves and access to capital. For an injured person, the same amount of money comprises a significant component of their net worth. Notwithstanding an insurer's obligation to act with a duty of utmost good faith, the Funding Gap creates an unfair advantage in litigation between the parties that undermines the principle of access to justice. It provides an insurer with an opportunity to leverage its economic power to force people to accept less than the fair value of their losses.

Demand for third party financing for personal injury litigation is driven by the structural factors that create the Funding Gap – lack of funding alternatives for personal injury claimants and their counsel. For the purposes of this paper, third party financing is defined as financing provided by a source that is a "third party" to those involved in the litigation. A third party may include banks, credit unions, litigation financing companies, or other parties offering financing on commercial terms in an arm's length relationship to the claimant. This definition excludes counsel, experts retained by counsel, and treatment providers whose services directly or indirectly assist in validating or prosecuting an individual's claim. Financing provided by experts and treatment providers will be addressed separately below.

Tighter credit conditions across Canada, and the significant reduction in coverage for general medical and rehabilitation expenses, particularly in Ontario, have widened the Funding Gap and created significant and growing demand for specialized third party litigation financing for personal injury claims. If it is accepted that third party financing fulfills a valuable social policy goal improving access to justice, then a related question is – who should bear that cost?

Canadian Courts and the Recoverability of Financing Costs – A New Way Forward?

Canadian courts have recently considered the issue of whether interest or financing costs incurred by personal injury claimants to finance disbursements are recoverable. The first reported case to deal with this issue was *McCreight* v. *Currie.*[4] In *McCreight* the Supreme Court of British Columbia considered whether interest charged by a company for CDs of MRI imaging scans purchased by the plaintiff in preparation for trial where recoverable. Master Young held that they were and reasoned as follows:

> This item is for CDs of the imaging scans plus interest. I have already authorized the expense for Canadian Magnetic Imaging; therefore, the copying of those images seems to be reasonable. The interest charged is a separate issue. The defendant says that he had no choice but to charge that interest. The plaintiff really had no choice but to pay the interest given that she did not have the funds to be retaining experts and paying for their costs up front. I suppose the defendant's choice was that the defendant

[4] 2008 BCSC 1751

> could have offered to pay for the report up front once it was disclosed to him, but no offer was forthcoming. Given that this was the only way to finance the obtaining of a report, I find this to be a reasonable expense and will allow it.

Master Young focused on the "reasonableness" of the expense and the fact the defendant could have paid for the report up front when it was disclosed to them but chose not to. Her reasoning implies that defendants will have an obligation to pay for financing costs when: (i) they are put on notice that a plaintiff will be incurring costs; (ii) the costs are "reasonable" and are relevant to the prosecution of the claim; and (iii) the defendant is in a position to pay for those costs but chooses not to do so.

Master Young's decision in *McCreight* was subsequently upheld in *Milne* v. *Clarke*[5]. In *Milne* the plaintiff sought recovery for interest costs that he incurred for M.R.I scans. Master Tokarek rejected the plaintiff's claim for the recovery of interest. His decision was appealed to the Supreme Court of British Columbia where Mr. Justice Burnyeat reversed Master Tokarek's finding and allowed the recovery of interest by finding:

> The law in British Columbia is that interest charged by a provider of services where the disbursement has been paid by counsel for a party is recoverable as is the disbursement. The interest charge flows from the necessity of the litigation. If the disbursement itself can be assessed as an appropriate disbursement, so also can the interest owing as a result of the failure or inability of a party to pay for the service provided.

In *Bourgoin* v. *Ouellette*[6] the plaintiff obtained financing from a third party litigation funder at an effective interest rate of 32.9% per annum. The funds were used to pay for the cost of disbursements. Justice Cyr considered the

[5] 2010 BCSC 317
[6] [2009] N.B.R. (2d) TBEd. FE.013

very high cost of interest relative to rates charged by banks and the interest rate allowed on judgments under the Rules of Court for New Brunswick (7.0% per annum) and ultimately allowed the plaintiff to recover the full cost of interest pursuant to s.2 (14) under the Rules of Court of New Brunswick as being "necessary and reasonable".

The judge placed considerable emphasis on the need to redress the financing imbalance between the parties in order to facilitate access to justice. He found,

> In the instant case, the plaintiff is a young man who was a first-year forestry student at the Université de Moncton, Edmundston campus, when the accident interrupted his studies. Neither he nor his family could afford to fund such an action. Very considerable legal expenses, like an actuarial report at the cost of $17,495.31, had to be made to bring his case to court.
>
> The only option which seemed open to him in order to have access to justice, claim his rights and obtain such a considerable settlement was to get a loan from a financial institution able to support his allowable disbursements for the duration of the action.

It is noteworthy that in reaching this decision the judge differentiated between circumstances where the terms of the retainer agreement make counsel responsible for financing the cost of disbursements versus those situations where the client is responsible for these costs. He noted that in New Brunswick, counsel would be subject to the *Rules of Court* limiting the interest rate to 7.00% per annum as the maximum interest rate that could be charged to a *client*. However, in the present case the plaintiff was responsible for paying for disbursements and obtained a loan to finance his obligation. Accordingly, he was not restricted from recovering the full cost of financing from the *defendant*.

Bourgoin was recently followed in Ontario in *Herbert v. City of Brantford*[7]. In *Herbert,* the issue was whether interest charged by an expert on its account was recoverable against the defendant. In considering this issue Mr. Justice Whitten used the following quote from Chief Justice McLaughlin in an address to the Faculty of Law of the Université de Moncton on October 23, 2007:

> The history of the Bar Association and of the judiciary in Canada is that of the struggle to provide Canadians with an efficient and affordable justice system. However, the cost of legal services today is unfortunately a factor which limits access to justice for many Canadians. For the wealthy, and for large companies, access to justice is not a problem. The same applies to the very poor; despite the shortcomings which exist in some regions, they have access to legal aid, at least in cases of serious criminal charges which could lead to jail time. Rather it is the most numerous group, that of middle-class Canadians, which is most affected. This is because these people have a certain income. They have a few assets, maybe a small house, and this disqualifies them for legal aid. The choices they have are none too encouraging; they can exhaust the family assets in a trial, represent themselves, or simply give up. The cost of justice, which could represent taking out a second mortgage on the house or using money saved for retirement or for the children's education should not be so high.

The judge noted that this quote was also cited in Justice Cyr's decision in *Bourgoin*. Justice Whitten ultimately found that interest charged on expert accounts was recoverable.

> It is permissible pursuant to Section 33(1) of the *Solicitor's Act* R.S.O. 1990 CS. 15, for interest to be charged on a solicitor's account. Is it not comparable that interest be charged on expert accounts? The understanding that interest will be charged on unpaid expert amounts is in a way, an additional means of financing the litigation. Without that financing, there would be difficulty in citizens accessing justice as the Chief Justice observed. Litigants may very well not be able to afford otherwise pertinent expert opinions and testimony.

[7] 2010 ONSC C04-12047

There are two important collateral issues in *Herbert* that merit further comment. First, the judge did not allow the claimant to fully recover the interest charged by the expert, and asked that counsel attempt to agree on terms, and should that fail, seek direction from the court. This was not the case in *Bourgoin* where Justice Cyr recognized that the interest rate was extremely high but deferred to the terms of the contract entered into between the parties to allow full recovery for the cost. Similarly in both *McCreight* and *Milne,* the judge did not limit the plaintiff's recovery of interest. However the interest rate incorporated into the financing cost was not disclosed in either case; accordingly it is difficult to determine whether the court was influenced by the reasonableness of the interest rate or the principle that the defendant should bear the full cost of financing.

There appears to be a logical inconsistency in the judge's reasoning in *Herbert*. Although he recognized that many individuals may need to secure financing to protect and enforce their legal rights, he ignored the contractual provisions that allowed them to obtain funding in the first place by restricting the recovery of these costs. This implies that people in more difficult financial circumstances who are forced to bear higher financing costs suffer the most. A basic premise of tort law is the tortfeasor takes his or her plaintiff as they are, and must compensate accordingly. This finding prejudices the people in greatest need.

A second issue is whether experts ought to be allowed to finance a client's litigation in the first place. This issue is highlighted by the factual differences between *Herbert, McCreight,* and *Milne* on the one hand and *Bourgoin* on the other. In *Bourgoin*, the plaintiff sought third party financing to pay for the cost of disbursements, which included expert reports. In *Herbert, McCreight,* and *Milne,* the expert financed the cost of his or her services directly. The evidentiary value of any expert is based on a number of factors including his or her *objectivity* and *independence.* If compensation for expert services is influenced by the final outcome of litigation does this not create a potential conflict of interest?

In *Bourgoin* no conflict existed because third party funding was utilized to pay for the cost of expert services. The expert received payment and had no residual financial interest in the outcome of the litigation. It can be argued that this is not the case with *Herbert*, and perhaps to a lesser extent in *McCreight* and *Milne* (given the nature of MRI imaging services) where compensation for the expert's services can be viewed as largely being dependent on the successful outcome of the plaintiff's claim. In these cases the courts were focused on the "access to justice" issue. Going forward, it will be interesting to see whether insurers will begin attacking the credibility of experts who finance a plaintiff's case and how courts will weigh this potential conflict against access to justice considerations.

McCreight, Milne, *Bourgoin, and Herbert* are important decisions for allowing the recovery of interest or financing costs by recognizing that access to justice requires people in many cases to incur financing costs at higher than conventional market rates to pay for the substantial costs of litigation. In each case the judges recognized that the plaintiffs were required to seek alternative forms of credit from a third party litigation financing provider or experts willing to extend credit and accepted that in the absence of these funding arrangements the plaintiffs would not have been in a position to carry forward the litigation and obtain fair compensation for their losses.

Utilizing Third Party Financing as a Shield…. And Sword:

Thus far, the discussion has focused on the recovery of financing costs incurred to pay for disbursements. By extension, should financing costs incurred to pay for the cost of treatment and other rehabilitative services such as surgical procedures, medication, medical devices and other sundry items ("treatment related costs") also be recovered against the defendant? Is there any rational distinction between recovering financing costs for disbursements versus treatment related expenditures? Do different considerations apply where a person borrows money to finance treatment related costs to mitigate his or her damages, as opposed to "reasonable" and "necessary" expenses that are ***not*** incurred to mitigate damages? The recoverability of financing costs for personal loans where funds are not used for litigation remains open for debate and will not be addressed in this paper.

An argument can be made that there are even more compelling reasons to recover financing costs incurred for treatment related expenses over disbursements. In the majority of cases, personal injury lawyers offer their services on a contingency fee basis and accept the investment in disbursements as the cost of "doing business". Treatment expenses are different. Plaintiffs have a duty to mitigate damages in both contract and tort. If treatment related costs are both reasonable and necessary and will accelerate the plaintiff's return to his or her pre-accident status and reduce pain and suffering then arguably they have a ***duty*** to incur such costs. If they need to finance the "cost of mitigation" then should these costs not be recoverable against the insurer in both contract and tort? If a plaintiff fails to do so then a defendant could argue that the value of the plaintiff's claim should be reduced by his or her failure to mitigate. Further, insurers may draw an adverse inference on the severity of a person's injuries by arguing that they must be minor or insignificant since the claimant did not seek or obtain treatment for them; even though the failure to do so was driven by the inability to pay rather than need.

To borrow from Lord Denning's analogy of the "shield" and "sword" in *Combe* v. *Combe*[8] as he applied it to the concept of promissory estoppel; third party financing for treatment can be used effectively both as a defensive mechanism or "***shield"*** to protect the value of an injured person's legal claim; or offensively as a ***"sword"*** to increase an insurer's exposure for damages depending on whether, and to what extent, financing costs may be recovered for litigation loans. Where financing costs are not recovered, third party financing for treatment can be used effectively as a shield to protect the value of a person's claim by ensuring: (i) that they can continue to receive necessary treatment to hasten their rehabilitation and fulfill their obligation to mitigate damages, and (ii) the utilization of these services rebuts the inference that their injuries are not serious.

However, the value of third party financing takes on a greater dimension where interest or financing costs are recoverable against an insurer. This would allow counsel to strategically use financing as a ***"sword",*** or an offensive tactic, to increase an insurer's loss exposure. The greatest source of leverage that an insurer has over a personal injury claimant is time. Where an individual experiences pain and suffering; is unable to work; is running out of financial resources; faces stress at home and at work; and is desperately trying to get back to a normal life; his or her most critical objective is to expedite the resolution of the claim in the shortest period of time possible to alleviate these pressures.

[8] [1951] 2KB 215

Conversely, the insurers' greatest strategic advantage lies in leveraging the imbalance in resources between the parties, or the Funding Gap, to delay the litigation process and force people to accept lower levels of compensation through attrition. Third party financing becomes particularly effective where the cost of financing is recoverable against the defendant, since it allows counsel to turn the insurer's tactical advantage against it. Time is no longer an ally; it now bears a cost as interest accrues. This is particularly so where a plaintiff is in a difficult financial situation and is forced to seek financing at a significant premium to conventional market rates.

In *Hill* v. *Cogeco Insurance Co./HB Group/Direct Protect*[9], a dispute arbitrated at the Financial Services Commission of Ontario in May 2006, the arbitrator found that interest was recoverable against an insurer who improperly denied a plaintiff's claim for benefits. The plaintiff suffered serious injuries which greatly affected her mobility, and applied under s.15(5)(i) of the SABS[10] for home modification benefits to accommodate her disability. In this case the most reasonable accommodation was considered to be the purchase of a new home. The insurer refused to pay for the benefit by arguing that the claimant was "ambulating independently throughout her home" and advised that if she wished to contest its decision she ought to pursue the dispute resolution process set out by statute. When she bought the new home and sought to recover her entitlement through mediation, the insurer changed tack and took the position that mediation was not possible since she did not complete a treatment plan in the first instance.

[9] 2006 FSCO A04-001991

[10] The Statutory Accident Benefits Schedule – Accidents on or after November 1, Ontario Regulation 403/96, as amended

The arbitrator, John Wilson, found that the claimant was entitled to damages in the amount of $60,291.10 and further ordered the insurer to pay interest at the rate of 2 per cent per month, commencing from the date the insurer *denied* the benefit. Wilson justified his decision by reviewing the insurer's duty to the insured,

> In making its determination an insurer is under an obligation to weigh the merits of the claim fairly, and not prefer its interests over those of an insured. It should make its decision on the whole of the information reasonably available to it at the time of the determination. Changing the reasons for refusal in such a situation should not happen in the absence of new and important information that was not available when the original determination was made. I see no evidence that the need for a treatment plan was unknown to the Insurer at the time it made its determination of entitlement.
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> When Mrs. Hill filed for the rehabilitation benefit, her injury and resulting disability was not unknown to the insurer. Virtually all the necessary information relevant to the claim was produced and received in the context of the claim for moving expenses. The Insurer knew the date of closing for the house transaction. It knew the reasons Mrs. Hill wished to move, and it had the opinions of its own assessors and Mrs. Hill's treating physicians, as well as occupational therapy reports, when it made its determination. It also knew the procedural pre-conditions for entitlement to a rehabilitation benefit and, by its actions, essentially waived those pre-conditions to her claim.

Although the expenditures in *Hill* related to the denial of a benefit, the theory supporting the recovery of the benefit plus interest in this case is consistent with the principles followed in *McCreight* by finding that: (i) the insurer was aware of the benefit being applied for; (ii) supporting evidence of the reasonable and necessary nature of the benefit was produced; and (iii) the insurer was in a position to pay the benefit but chose not to. For these reasons the arbitrator ruled that interest began to accrue from *the date of denial*.

A recent Ontario case also offers significant promise for imposing contractual liability on insurers to pay interest costs to an insured where they fail to pay benefits in a timely manner. In *Sorokin* v. *The Wawanesa Mutual Insurance Company*[11] the court found that where an insurer is obligated to pay a benefit and fails to do so it shall be responsible for paying interest on a compounded basis at the rate set out in the Statutory Accident Benefits Schedule of the *Insurance Act*[12]. In reaching his decision Mr. Justice Boswell found:

> The parties agree that, as of May 4, 2004, the Plaintiff was due $40,942.02 in interest which had accrued on other overdue benefit payments. In my view, the accumulation of that interest is a benefit that accrued to the Plaintiff. The non-payment of the interest until December 13, 2005, allowed the Defendant to hold a significant sum of money owing to the Plaintiff for 19 months. The Defendant had use of the Plaintiff's funds and should compensate the Plaintiff for the time value of that money.
>
> To find otherwise would be to allow the insurer to delay payments to insureds without consequence, a result that is not in keeping with the design of the interest provisions of the SABS, as described by Mr. Justice Larkin in *Attavar.* To interpret s.46 (2) of the SABS as precluding the accrual of interest on overdue interest would effect a result that is, in my view, commercially unreasonable.

Notwithstanding that the court in *Sorokin* was focused on a specific incident where the insurer was ordered to pay interest for delaying payment of an arbitral award for accident benefits, the decision potentially has broader implications. The court specifically determined that interest is *compensatory* in nature and not punitive pursuant to the terms of the *Insurance Act*. In other words, it is designed to compensate the insured for the time value of money for the period it has not received payment where funds are retained by the insurer.

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[11] 2008 CanLII 26265 (ON S.C.)

[12] *Insurance Act,* R.S.O. 1990. c. I. 8, Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996, O. Reg. 403/96

Sorokin was an interpretation of the *Insurance Act* (Ontario) which makes the finding relevant in other Canadian jurisdictions with similar legislative provisions. Strategically, both this decision and *Hill* imply that where a claimant has both an accident benefit and tort claim; obtains third party financing for treatment related expenses; and it is further determined that the benefits have been improperly denied or terminated, counsel may seek recovery from the accident benefit insurer for the cost of interest up to the limits set out by statute (where applicable), and claim the balance from the tort insurer. These decisions present an attractive opportunity for counsel to use third party financing as a "sword" forcing insurers to pay interest or financing costs where they improperly deny or terminate treatment related benefits. It enables counsel to use the insurers' most effective strategic advantage – "time" - against them. Now time, as measured by accrued interest, has a real and tangible cost.

Many personal injury law firms across Canada are utilizing treatment financing programmes designed by BridgePoint Financial Services, a Canadian litigation finance company, to force the issue by putting insurers on notice that financing costs will be incurred for reasonable and necessary treatment related expenses, and recovery of those costs will be pursued if the insurer fails to honour its obligation to pay. The following provides a template for how this programme works and potentially serves as a useful test for seeking the recovery of financing costs from an insurer for treatment related expenditures:

1. An assessment by a qualified expert is prepared justifying the claimant's need for a treatment related good or service;

2. A plan or budget is prepared to establish the cost of the good or service;

3. A term sheet setting out the key financing terms for a pre-approved loan to pay for the treatment related good or service is prepared and presented to the insurer where financing costs are calculated over different time intervals; and

4. The structure of the loan arrangement directly ties the proceeds of the financing to the cost of the treatment related good or service to ensure funds are not commingled with other personal expenditures thus providing clear evidence that financing costs are being used exclusively to pay for treatment.

Under this approach, the insurer is provided with an opportunity to resolve the issue by paying for the treatment expense. If it fails to do so, counsel is providing notice that its client is prepared to mitigate its damages and will be seeking recovery of the financing cost from the insurer. More importantly, this programme allows counsel to manage the process by controlling when to apply for benefits. Although there are no court decisions addressing the issue of whether interest is recoverable under these arrangements, anecdotally counsel have consistently claimed that the greater exposure created by the threat of recovering interest costs has generally provided more favourable outcomes in negotiated settlements.

The justification for recovering financing costs using a specialized treatment financing programme is supported by *Hill*, *Sorokin,* and the case law allowing recovery of financing costs for disbursements since, (i) the insurer is being put on notice that the plaintiff is to incur treatment related costs that are financed by a third party; (ii) evidence is adduced that the costs are reasonable and necessary and, where applicable, will allow the claimant to mitigate damages; and (iii) the insurer is in a position to pay for these costs but chooses not to. It is also noteworthy that *Hill* supports the recovery of financing costs where the expenditure was not incurred to mitigate damages; the benefit was for home modification.

In summary, the strategy for using third party financing to pay for treatment related costs offers tremendous benefits by imposing a real and tangible cost on insurers where they behave unreasonably and delay, terminate, or otherwise deny the payment of benefits to a person who has a legitimate claim. It will be interesting to see how Canadian courts deal with this issue over time.

Similar to the discussion concerning experts in the preceding section, it is useful to revisit the issue of whether treatment providers ought to finance the cost of their services directly. The court decisions in *McCreight, Milne,* and *Herbert* support the recovery of interest charges where financing has been extended by experts. However, one could argue that treatment providers, like experts, place themselves in a conflict of interest if they finance the cost of treatment. There may be some concern that the optimal treatment plan may not be recommended if the treatment provider fears that he or she may not recover their full fees if the plaintiff's litigation is unsuccessful. This is an issue that will become increasingly relevant for health care professionals, their governing bodies, and others who provide treatment related services to injured people, particularly since the reduction in accident benefits and more limited access to credit will increasingly place them in a situation where they are asked to finance the cost of these services pending the final resolution of the litigation.

Conclusion:

Third party financing for personal injury litigation has become a legitimate instrument for facilitating access to justice by redressing the Funding Gap between people with limited financial resources on the one hand, and well-funded defendants, namely insurance companies on the other. Recent Canadian court decisions have recognized that the often substantial interest expense incurred by claimants to pay for the cost of litigation ought to be recovered from the defendant. Although the court decisions cited in this paper principally deal with recovering interest on loans used to finance the cost of disbursements, *Sorokin* and *Hill* support the recovery of financing costs for treatment related goods or services.

In fact, one could argue that a claimant's duty to mitigate in both contract and tort, strengthens the argument for making the cost of mitigation (i.e. the cost of financing to achieve mitigation) recoverable. This introduces the idea that third party financing for treatment related expenditures strategically provides counsel with both a "shield" to defensively protect the value of the claim, and alternatively, a "sword" to maximize an insurer's exposure to damages for delaying the payment of fair compensation, depending on whether, or to what extent, interest or financing charges are recoverable. It blunts the most effective strategy in an insurer's arsenal – leveraging time to pressure people to accept less through attrition. Are we witnessing a new paradigm where the saying "time is money" takes on a whole new dimension for Canadian insurers? Only time will tell.