LITIGATION FINANCE: ACCESS TO JUSTICE AT WHAT COST?

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The financing of litigation by entities or individuals who are not parties to the action is a controversial topic. The common law has a history of looking upon this subject with derision, yet the exigencies of modern litigation have led some commentators and adjudicators to question the rationale for this perspective—and suggest that we look anew at the question of what may be the appropriate balancing of interests that underlies this discussion. This article reviews recent common law restrictions relating to this topic, identifies Canadian case law on it and discusses whether it may find traction with the B.C. courts. It concludes by considering problems that may arise as a result and how they may be mitigated.

THE QUESTION OF MAINTENANCE AND CHAMPERTY

The torts of maintenance and champerty have their origins in 13th-century England, but a judicial concern regarding intervention and support of litigation by non-parties is a concept recognized in ancient Greek and Roman law.[1] Its role in ensuring that the litigation process was not used for an improper purpose was reiterated in modern times by Lord Denning (then Master of the Rolls) in his decision in *Re Trepca Mines (No. 2)*.[2] In the years that have followed, many writers have questioned its role given, for example, the unquestioned and long-standing role of insurers as funders of both the defences of their insured and as the shadow marionette players in subrogation actions, the use of contingency fee retainers by counsel and the formation of legal aid societies.[3]

In Canada, the tort has been applied on an increasingly infrequent basis. As with the United Kingdom, it was at one time both a crime and a tort but now is basically a rule of public policy. Generally the torts have been defined narrowly with an emphasis on the role of improper intent on the part of the tortfeasor, on the one hand, and the need to ensure that the courts are not used for improper purposes, on the other.[4]

A relatively recent B.C. example is *Wiegand v. Huberman*.[5] A litigation creditor had advanced $32,500 to two minority shareholders (the debtors) who had brought an action for oppression against the majority shareholders. The debtors had agreed to pay the creditor $32,000 plus 10 per cent of the proceeds of litigation. The debtors did not proceed with the litigation, nor did

they refund the amount advanced, prompting the creditor to commence his action. The debtors admitted that per their agreement the creditor was due $32,500 at the end of the litigation, but defended on the basis that the agreement constituted maintenance and champerty. The court rejected that defence and noted that the plaintiff did not "stir up litigation"—instead, at the request of the defendants, he had enabled them to potentially proceed with an action they could not otherwise continue.[6] The court noted that contingency fee retainers were commonplace[7] and that logically, if the latter agreements were lawful and enforceable, so too must be the former.

RECENT CANADIAN CASE LAW ON LITIGATION FINANCE AS A DISBURSEMENT

In *Wiegand*, Berger J. awarded the creditor $32,500 plus 9 per cent interest from the dates on which each advance was made. The topic of recovery of such financing costs from a tort defendant has risen to prominence as a result of three recent Canadian decisions that have considered the role litigation finance may play as a legitimate disbursement in a given case.

The first is *Bourgoin v. Ouellette*.[8] This was a motor vehicle injury case. The parties settled claims for damages, legal costs and more than half of the disbursements claimed. One of the disbursements at issue in the hearing was $4,231.65 in interest charged on a loan provided by Seahold Investments Inc. The loan had a monthly compound interest rate of 2.4 per cent (approximately 32.9 per cent per annum—4½ times the annual post-judgment rate of 7 per cent allowed under the New Brunswick *Rules of Court*.)[9] Seahold advertised that they provided credit to victims of tort in order to allow them to finance car payments and housing, in addition to legal costs or disbursements while they waited for their cases to settle or be adjudicated upon. Mr. Justice Cyr noted that the plaintiff's family was unable to afford the disbursements incurred in order to litigate and that the plaintiff was unable to access financing from his bank, as he was unemployed.[10] The court stated that the plaintiff may well have been denied access to justice if he had not chosen to obtain credit from this entity to fund his experts for the litigation. Given the risk that the creditor had undertaken, it was an expense that could be legitimately claimed from a tortfeasor by the victim of the tort.[11] Put another way, the tortfeasor had to take his victim as he found him, and the unwillingness of orthodox financiers to support the litigation undertaking meant that high interest rates were part of the plethora of losses the tortfeasor was required to compensate.

Subsequently, this reasoning was accepted in the Ontario case of *Herbert v. City of Brantford*.[12] At the costs hearing following a trial on liability, only the categories of disbursements disputed by the defendants included interest

charged for a loan for expert's fees. The court quoted *Bourgoin v. Ouellette* and noted that while both of these cases involved contingency agreements, the funding of the disbursement in and of itself could be "back breaking".[13] The court therefore determined that while the tariffs and rules did not specifically provide for interest on disbursements, it should be awarded as to do otherwise may deny the plaintiff legitimate access to justice.[14] The appropriate interest rate was left to counsel to determine, and it appears that an agreement was found. Therefore, the issue of whether interest rates in excess of 30 per cent per annum may be approved outside New Brunswick remains open.

The Alberta Court of Queen's Bench adopted a more guarded approach to this subject in *Schmolzar v. Higenbottan*.[15] While Romaine J. did not rule that there was in principle an issue with the provision of litigation financing for expert fees, she determined that in the circumstances of that case it was not justified. The court considered *Bourgoin v. Ouellette* but concluded that there was not a "strong access to justice issue" that would justify an "exceptional award of interest on disbursements".[16]

Schmolzar was not referred to in *Herbert*; however, the reasoning is not at odds, the question being essentially one of discretion by a given judge as to whether this interest is justified for the given plaintiff.

THE BRITISH COLUMBIA EXPERIENCE

To date in B.C. there has been only one case that has addressed the issue of whether litigation financing can be claimed as a disbursement—and the answer was no.

In *Sovani v. Jin*,[17] Registrar Blok considered whether interest should be awarded as a disbursement for a plaintiff who had borrowed funds from counsel in order to finance other disbursements, his counsel passing on the interest charged by his financial institution. In ruling that such interest would not be allowed, the registrar appeared to approach the issue from the viewpoint of whether or not the tortfeasor was the cause of the underlying impecuniosity, and whether interest of this sort was truly a "disbursement" under then Rule 57.

More recently, however, Mr. Justice Burnyeat overruled *Sovani v. Jin* in his ruling in *Milne v. Clarke*.[18] This appeal from a registrar's disallowance of the disbursement did not concern financing charges per se, but interest on outstanding invoices sought by a provider of MRI scanning services. In this case, the plaintiff attested that he would not have been able to pay for the scans without this loan agreement. The court applied Registrar Young's decision in *McCreight v. Currie*,[19] which also concerned interest charged on imaging scans,[20] and the case law upon which the *Sovani* decision was based. Mr. Justice Burnyeat concluded:

> 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.[21]

Thus, while the only B.C. decision that considered financing by a creditor who is not a provider of disbursement-related services rejected awarding the interest charged as a disbursement, the reasoning used in it relating to whether the necessity was linked to the tortious wrongdoer has been overruled.

LITIGATION FINANCE: WHO SHOULD PAY?

Although litigation finance can take many forms, it is a relatively recent and undeveloped phenomenon in Canada compared to the situation in the United Kingdom. Part 2 of this article will explore a brief history of the development of litigation finance in that jurisdiction and consider what lessons may be drawn when considering some of the philosophical issues underlying the vexing question of when such charges are recoverable, and from whom.

ENDNOTES

1. RL Cohen & RM Schwartz, "Champerty and Claims Trading" (2003) 1 Am Bankr Inst L Rev 197. Also see the historical commentary on this topic found in *Osprey Inc v Cabana Limited Partnership*, 532 SE 2d 269 (SC 2000) and Max Radin, "Maintenance by Champerty" (1935) 24 Cal L Rev 48 at 67.
2. [1963] 1 Ch 199 (CA).
3. Jason Lyon, "Revolution in Progress: Third-Party Funding of American Litigation" (2010) 58 UCLA L Rev 571 at 582; P Puri, "Financing of Litigation by Third Party Investors: A Share of Justice?" (1998) 36 Osgoode Hall LJ 515 at paras 10–16.
4. P Puri, *ibid* at para 22.
5. (1979), 18 BCLR 102, 108 DLR (3rd) 450 (SC) [*Wiegand*].
6. *Ibid* at 104.
7. In British Columbia since an amendment to the *Legal Profession Act* in 1969.
8. 2009 CanLII 27242, 343 NBR (2d) 58 (QB) [*Bourgoin*].
9. *Ibid* at para 48.
10. *Ibid* at paras 62 and 50.
11. *Ibid* at paras 63–64.
12. 2010 ONSC 6528 [*Herbert*].
13. *Ibid* at para 22.
14. *Ibid* at paras 20–24.
15. 2009 ABQB 616 [*Schmolzar*].
16. *Ibid* at para 1.
17. B9814765 (Vancouver Registry), 25 April 2006.
18. 2010 BCSC 317 [*Milne*].
19. 2008 BCSC 1751.
20. Another case that considered contingent payment schemes for MRIs was *Farrokhmanesh v Sahib*, 2010 BCSC 1797, but in that case the MRI itself was disallowed as a disbursement, so the court declined to comment as to whether that could constitute champerty. However, in light of the ruling in *Wiegand*, it is difficult to imagine how it could be.
21. *Milne*, supra note 18 at para 9.