

2011 CarswellOnt 1927  
Financial Services Commission of Ontario (Arbitration Decision)

Carr v. TD General Insurance Co.

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**Phillip Carr, Applicant and TD General Insurance Company, Insurer**

Judith Killoran Member

Heard: November 19, 2010

Judgment: March 10, 2011

Docket: A09-003154

Proceedings: additional reasons to *Carr v. TD General Insurance Co.* (2010), 2010 CarswellOnt 5646 (F.S.C.O. Arb.)

Counsel: Alexander Voudouris, for Mr. Carr

Nestor E. Kostyniuk, for TD General Insurance Company

Subject: Insurance; Civil Practice and Procedure; Corporate and Commercial; Public

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Alternative dispute resolution**

[VI](#) Practice and procedure

[VI.5](#) Costs

[VI.5.b](#) Taxation or assessment

**Insurance**

[X](#) Actions on policies

[X.2](#) Practice and procedure

[X.2.e](#) Costs

[X.2.e.viii](#) Miscellaneous

**Insurance**

[XII](#) Automobile insurance

[XII.5](#) No-fault benefits

[XII.5.c](#) Medical and rehabilitation benefits

[XII.5.c.iii](#) Counselling and training

**Insurance**

[XII](#) Automobile insurance

[XII.5](#) No-fault benefits

[XII.5.e](#) Disability benefits (loss of income payments)

[XII.5.e.ii](#) Entitlement

[XII.5.e.ii.D](#) Substantial inability

**Insurance**

[XII](#) Automobile insurance

XII.5 No-fault benefits

XII.5.g Other benefits

XII.5.g.iii Special award

#### Headnote

**Insurance --- Actions on policies — Practice and procedure — Costs — General principles**

**Alternative dispute resolution --- Practice and procedure — Costs — Taxation or assessment**

#### Table of Authorities

##### Statutes considered:

*Insurance Act*, R.S.O. 1990, c. I.8  
s. 282 — referred to

##### Regulations considered:

*Insurance Act*, R.S.O. 1990, c. I.8  
*Automobile Insurance*, R.R.O. 1990, Reg. 664

Sched. — referred to

*Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, O. Reg. 403/96

Generally — referred to

#### **Judith Killoran Member:**

##### Issues:

1 The Applicant, Phillip Carr, was involved in a motor vehicle accident on January 30, 2008. In a decision dated July 23, 2010, I dealt with his claims for statutory accident benefits under the *Schedule*<sup>1</sup>, while reserving on the issue of expenses. TD conceded that Mr. Carr was entitled to his expenses as he was successful in his claims for income replacement and medical benefits.

2 The issue in this further hearing is:

1. What is the amount of expenses to which Mr. Carr is entitled in respect of the arbitration and expense hearings?

##### Result:

3

1. Mr. Carr is entitled to \$15,435, inclusive of GST, for his lawyers fees, and \$11,234.63, inclusive of HST, for disbursements. TD shall pay to Mr. Carr the sum of \$26,669.63 in respect of his expenses of the arbitration and expense hearings.

##### Evidence and Analysis:

4 Mr. Carr claims his expenses in the amount of \$29,733.86, inclusive of fees, disbursements and GST/HST.

5 The criteria for awarding expenses and the amount of expenses which an arbitrator may order are set out in Section F of the *Dispute Resolution Practice Code* which reflects the Schedule to

6 R.R.O. 1990, Reg. 664, under the *Insurance Act*, as amended to O.Reg. 275/03. The relevant criteria are: degree of success, whether there were written offers to settle, the novelty of the issues, the conduct of the parties and whether any part of the proceeding was improper, vexatious or unnecessary.

7 Mr. Carr was successful in his claims for income replacement benefits and medical benefits. Consequently, the insurer concedes that he is entitled to his reasonable expenses. There were no written offers to settle submitted to me, the issues were not particularly novel but somewhat complex, the conduct of the parties was appropriate and efficient and no part of the proceeding was improper, vexatious or unnecessary.

8 On August 10, 2010, Mr. Carr's counsel forwarded to me and the insurer's counsel his dockets and relevant disbursements. TD's counsel disputed 4.45 hours billed between June 7, 2009 and November 22, 2009 which related to an earlier application. TD's counsel also objected to some dockets of .2 for discussions between the applicant's counsel and his colleague. TD's counsel challenged the claim for additional correspondence of 97 letters received and sent at .2 per letter. He asserted that there must be duplication as numerous letters had already been claimed. He submitted that a total of 23.85 hours be subtracted from the total hours claimed. When he took into consideration what he considered duplicative time claimed, he reduced the time to 75 hours. He estimated that the total expenses for billable hours should be reduced to \$10,000 plus GST.

9 I prefer to adopt the approach to expenses which does not require a line-by-line analysis. Considering the case before me in terms of complexity and the amount of time required for a 4-day hearing, I find that a 3:1 ratio for billable hours is most appropriate. That is, Mr. Carr is entitled to expenses for lawyer's fees in the amount of 96 hours for the arbitration plus 2 hours for the expense hearing or 98 hours, which is a reduction from the 107.1 hours claimed.

10 Mr. Voudouris is a senior counsel with considerable expertise in accident benefits legislation. He conducted the case before me with skill and efficiency. The maximum hourly rate which I can award is \$150, to which Mr. Voudouris is more than entitled. Therefore, the total amount for lawyer's fees is \$14,700 (98 × \$150) plus \$735 GST (as agreed by the parties) equals \$15,435.

11 TD's counsel challenged some of the disbursements claimed and argued that many of the reports were designed to be used later in the tort proceeding. This was disputed by Mr. Carr's counsel. I find that almost all of the disbursements claimed by Mr. Carr's counsel were reasonable.

#### ***GST/HST Issue***

12 The Applicant takes the position that it does not matter what a service provider has billed, whether GST, HST or neither. The important issue is what Mr. Carr's solicitors are required to bill Mr. Carr for GST/HST. The parties have agreed that GST applies to fees so the dispute centres on what GST and/or HST is applicable to the disbursements.

13 According to the GST/HST Policy Statement of the Canada Customs and Revenue Agency, a disbursement incurred as an agent does not attract GST/HST, while a disbursement not incurred as an agent will attract GST and/or HST.

14 The Policy Statement states that fees paid for expert reports are not incurred as an agent and accordingly GST and/or HST is applicable. Also, the Law Society has instructed its members in a Notice to the Profession to bill their clients GST or HST, regardless of whether such a tax was billed to the lawyer by the service provider.

15 The Applicant relies on the decision in *Simpson and Allstate Insurance Company of Canada*<sup>2</sup> where the arbitrator found according to the Canada Customs and Revenue Agency's policy that fees for expert reports are categorized as disbursements "not incurred as agent" and hence subject to GST when billed to the client. The Applicant submits that

both the CCRA policy and the Law Society's Notice to the Profession also applies to the HST and has not been amended or revoked.

16 Mr. Carr has not been billed by his solicitors. Accordingly, Mr. Carr will be billed with HST for all disbursements as his law firm's account will be prepared after July 1, 2010. Therefore, his counsel submits that Mr. Carr should be awarded HST for all his disbursements.

17 Although TD's counsel submitted that his bookkeeper spoke to an agent at the GST/HST office who claimed that the non-client (insurer in this case) is not required to pay GST/HST to the lawyer seeking reimbursement for accounts where the service provider has not charged GST/HST. However, this information was not supported by a sworn affidavit nor was there any evidence of the Rulings Officer's name, ID, or a memo to support this information. Consequently, I can give no weight to this submission.

18 I find the Applicant's submissions persuasive and consequently, I find in favour of the Applicant that all disbursements in dispute are subject to HST.

19 Based on the information I have been provided, the Applicant is entitled to the following disbursements:

Arbitration Fee	\$100.00
(HST Exempt — disbursement incurred as agent)	
OHIP Summary	40.00
(HST Exempt — disbursement incurred as agent)	
Courier (\$62.56 plus HST \$8.13)	70.69
Fax (\$83.00 plus HST \$10.79)	93.79
Photocopies (\$759.47 plus HST \$98.73)	858.20
Balaban Report (\$1,200 plus HST \$156)	1,356.00
Balaban Report II (\$1,200 plus HST \$156)	1,356.00
Kirwin Report (\$1,500 plus HST \$195.00)	1,695.00
Kirwin Report II (\$1,500 plus HST \$195.00)	1,695.00
Antflick Report (\$1500 plus HST \$195.00)	1,695.00
Miller Report (\$1500 plus HST \$195)	1,695.00
Hospital Records (\$140 plus HST \$18.20)	158.20
Dr. Small's Records (\$34.15 plus HST \$4.44)	38.59
Dr. Chin's Records (\$200 plus HST \$26.00)	226.00
Dr. Ramlochan (\$50.48 plus \$6.56)	57.04
Process Server (\$88.60 plus \$11.52)	100.12
Total Disbursements	\$11,234.63

20 Together with legal fees of \$15,435, inclusive of GST, Mr. Carr is entitled to payment by TD of \$11,234.63 in disbursements, inclusive of HST. TD shall pay Mr. Carr the sum of \$26,669.63 in expenses relating to the arbitration and expense hearings.

**Judith Killoran Member:**

21 Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mr. Carr is entitled to \$15,435, inclusive of GST, for his lawyers fees, and \$11,234.63, inclusive of HST, for disbursements. TD shall pay to Mr. Carr the sum of \$26,669.63 in respect of his expenses of the arbitration and expense hearings.

Footnotes

1 *The Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

2 (FSCO A01-000215, April 4, 2003)

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