Resolving Costs at Mediation

This paper explores, in the context of a personal injury mediation, the typical issues that arise when parties attempt to resolve the legal fees and disbursements to be paid, if any, as part of the negotiated settlement. Because disbursements are the most often debated item when resolving costs, the article concludes with a handy chart listing a variety of different disbursements that are commonly sought, and how they are treated under the law, in order to help guide the parties through their negotiations, whether it be in the context of a personal injury claim, or otherwise.

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RESOLVING COSTS AT MEDIATION - A PRIMER

This article will explore, in the context of a personal injury claim, the typical issues that arise when the parties attempt to resolve the legal fees and disbursements to be paid, if any, including a closer look at how disbursements are treated. The article concludes with a helpful chart that defines how various disbursements are categorized under the legislation and by the courts, to help guide the parties through their settlement negotiations.

COSTS – THE LAST FRONTIER

Mediation in a personal injury claim requires parties to negotiate and resolve many different issues, and "costs" will more-than-likely be one of them: typically the last one.

The term "costs" generally refers to two components: first, the amount paid towards the lawyer's time (the legal "fee"), and second, the amount paid, or disbursed, to advance the dispute or litigation (the "disbursements"). The party receiving payment or compensation in damages at mediation will generally also receive a sum of money towards their legal costs, and this sum needs to be negotiated, just like everything else.

There is no hard-and-fast rule on how costs are to be resolved at mediation. Indeed, the range can be anything from zero dollars to a 100% recovery on costs. Much depends on the strength of the parties' positions. A claimant with an exceptionally strong case may be able recover close to 100% of their costs, juxtaposed against a claimant with a very weak case who may get very little, if anything, paid towards their costs.

"There is no hard-and-fast rule on how costs are to be resolved at mediation."

Legislation Impacting Costs

Additionally, there could be relevant legislation at play, such as the *Victims' Bill of Rights* S.O. 1995, c.6, where section 4(6) requires costs to be assessed at a higher level when the claimants sustained injury during the defendants' criminal activity, unless the court orders otherwise. This conceivably could be invoked in a motor vehicle personal injury claim where the defendant driver was convicted of a related criminal offence (i.e.: impaired driving, dangerous driving, careless driving, etc).

By way of further example, Rule 76 mandates that **no** costs should be awarded in cases brought outside the simplified rules when damages are assessed for less than the prescribed limit ($100,000.00 prior to January 1, 2020, and $200,000.00 thereafter). Notwithstanding this rule, it typically doesn't come into play during mediation because it is not a venue to determine whether the claim was brought in the wrong forum. Indeed, there is often much time between a mediation and any pending trial, and anything can happen with that passage of time: the claimant's health could improve or alternatively deteriorate; they could be promoted, or alternatively fired from their

job for poor performance; they could become less dependent, or alternatively more dependent on others or medication, etc.

It is noteworthy that even following a trial, when it is crystal-clear that the plaintiff's assessed damages are less than the prescribed monetary limit for simplified proceedings, the court routinely excuses plaintiffs for bringing the case in the regular proceeding on the grounds that there was sufficient evidence, or legal issues, to warrant the plaintiff bringing the claim outside the simplified rules (see for example *Wynter v. Toronto Police Services Board*, 2018 ONSC 5594).

As such, costs are generally paid at the conclusion of mediation, even if the monetary contribution is below the prescribed limit for simplified proceedings. From the defendants' perspective, it is best to resolve costs on this basis, and obtain closure, then to risk a hefty cost sanction following trial should their defence fail, especially when the courts are generally not penalizing plaintiff's for bringing their low monetary claims outside the simplified rules. The judicial attitude may change now that the monetary limit has been recently increased to $200,000.00

"…costs are generally paid at the conclusion of mediation, even if the monetary contribution is below the prescribed limit for simplified proceedings."

RULES OF THUMB

Although nothing is carved in stone, there are several generally accepted practices when settling costs at mediation (assuming a normal even-strength type case), all of which will be explored in more detail in this paper:

"There are several generally accepted practices when settling costs at mediation."

a) Legal fees are paid at a rate of 15% for any damage recovery up to $100,000.00, and then at a rate of 10% for any recovery above $100,000.00;

b) H.S.T. is generally paid in addition to the legal fees and disbursements agreed upon;

c) Disbursements generally are paid in accordance with rules and developed case law governing assessable disbursements.

A. Legal Fees are Paid at a Rate of 15% for any Damage Recovery up to $100,000.00, and Then at a Rate of 10% for any Recovery above $100,000.00.

In personal injury claims, legal fees are generally paid at a rate of 15% for any damage recovery up to $100,000.00, and then at a rate of 10% for any recovery above $100,000.00. Sometimes a blended rate, somewhere between 12% and 13%, is used throughout, regardless of the quantum of recovery. And again, the flexibility is endless: there are times when costs are resolved for 15% throughout, or at an even higher rate if the conduct of the paying party is egregious, or at times less than 10% throughout if the claimant's case is very weak.

Parties can also agree on fees by looking at the actual time spent by the lawyer representing the party receiving compensation. This is often quite laborious, and hence the genesis of the 15% / 10% rule of thumb, which on occasion may end up being more than actual time spent, but on other occasions could be much less than the actual time spent on the file: but in the end, balancing out.

To illustrate using the blended rate of 15% / 10%, legal fees would typically resolve for $25,000.00 on a $200,000.00 damage recovery case (i.e.: $15,000.00 for the first $100,000.00 (the 15%), and then $10,000.00 for the remaining $100,000.00 (the 10%)).

Often this seems arbitrary, but it is not. The logic behind this that if the case were to go to trial, the "losing" party would generally be ordered to make a financial contribution towards the legal fees incurred by the winning party: typically something close to about 50% of the amount of legal fees the winning party had to pay to their own lawyer (i.e.: partial-indemnity scale). Plaintiffs in personal injury lawsuits generally enter into contingency fee retainer agreements whereby they agree in advance to pay nothing up-front for the lawyer's time, but when the case resolves, a percentage of their recovery will be turned over to the lawyer as the lawyer's legal "fee;" this percentage is typically in the vicinity of 30% of their recovery, hence the birth of 15% paid on settlement (half of 30%).

It is noteworthy that the recent amendment to Rule 76 (in force commencing January 1, 2020) actually imposes a cap on fees to $50,000.00 (the "**Cap**") for cases going through the simplified proceeding. Keeping in mind that the maximum award is $200,000.00 under the simplified rules, the Cap is a clear endorsement that legal fees to be paid by the losing party can readily be 25% of the damages awarded (if not more). But regardless, the Cap will not come into play during mediation if the 15% rule of thumb is used. Indeed, a settlement of $200,000.00 in damages would generally resolve with legal fees set at either $30,000.00 (if 15% is applied throughout), or $25,000.00 (if the 15% / 10% split is used, as calculated in the prior example above): in either case, the fee will be below the $50,000.00 Cap.

Things are a little different in those situations where there is no contingency fee retainer, and the client pays the lawyer upfront and/or at intervals based on a formula, most commonly tied to the

number of hours worked on the file by the retained lawyer and their clerical staff. Here the parties generally have to supply some supporting documentation for the legal time they are seeking to recover – typically the dockets supplied by the lawyer, and sometimes supplemented with copies of the invoices delivered to the client for legal services rendered (redacted if necessary). In these cases, the Cap could come into play.

The only other option, absent an agreement on costs at mediation, is to defer the resolution of costs to a later date, often subject to an agreement to have the costs formally resolved through an *assessment of cost* hearing before an appointed assessment officer. This is generally not what the parties want, because it simply invites more legal time to be invested, and it prolongs the dispute that the parties are trying to end: hence the parties are often highly motivated to try and resolve costs during the mediation. This said, however, if what has to be paid to resolve costs remains the last unresolved issue, it is often better for the parties to agree on everything else, and minimize and restrict the last remaining dispute to costs before an assessment officer.

One final note, and specifically in the context of a motor vehicle personal injury claim, disputes sometime arise as to whether the "15%" is to be applied to damages assessed before or after the statutory deductible is taken into account. This is a significant issue, especially with the deductible being nearly $40,000.00, and indexing upwards annually. Indeed, 15% on $40,000.00 is a $6,000.00 issue. Based on the prevailing legislation and case law, the legal fees should be calculated on the damages **net** of the statutory deductible. This is based on section 267.5(7) of the Ontario Insurance Act, and as explained in *Mandel v. Fakhim*, 2016 ONSC 6538, "*the plaintiff's recovery for the purpose of assessing costs is the final number after application of the statutory deductible under s. 267.5 (7)*."

"Based on the prevailing legislation and case law, the legal fees should be calculated on the damages NET of the statutory deductible."

B. H.S.T. is Generally Paid in Addition to the Legal Fees and Disbursements Agreed Upon

The additional payment of the Harmonized Sales Tax ("H.S.T.") is rarely controversial, and indeed, it is effectively mandated by the rules and item 35 of Tariff A, R.R.O. 1990, Reg 194 (herein the "**Tariff**"). But occasionally there are points of contention, such as:

a) **Is H.S.T. being counted twice?** Sometimes a list of disbursements needs to be vetted to ensure that the amounts presented are net of H.S.T., or inclusive of H.S.T. If it is the later, then no additional H.S.T should be paid (this was a critique, for example, in *Andreevskaia v. Satanovski* et al., 2017 ONSC 6289);

b) **Has the paying party paid for some of the disbursements already?** It is commonplace for claimant's counsel to send requests for reimbursement when

disbursements are incurred throughout the litigation, and occasionally the list of disbursements includes items already paid for by the other side. Hence, not only should these amounts not be paid (again), there should be no H.S.T. paid on those items either, having already been paid historically;

c) **Is backup paperwork required?** Some counsel attend mediation with back-up documentation as a matter of course: others not. Parties often accept that a lawyer is ethically bound to present honest paperwork governing the disbursements incurred on behalf of a client, however, this doesn't mean that a request for back up supporting documentation shouldn't be made if it is needed: for example, where an outlay seems bizarre (perhaps an extremely high amount), or where there is a lot of repetition (perhaps a singular item is being counted twice or more times), or where it seems out-of-place (perhaps a cost associated with a facility the party never attended, suggesting that it may have been inadvertently posted to the wrong file).

C. Disbursements are generally paid (Recovered) in accordance with rules and developed case law governing assessable disbursements

The amount of recovery a party will receive for the disbursements incurred to advance the lawsuit is undoubtedly the area of most contention when resolving costs during settlement dialogue.

A party who successfully advances a lawsuit generally feels entitled to have all of their out-of-pocket money, expended to advance their case, paid for by the losing party: after all, why should a successful party be out-of-pocket money, especially when they were "successful?" But our system doesn't work that way: a successful party typically recovers less than what they expended in disbursements to advance their case. Although this is not ideal, it may be surprising to learn that in other jurisdictions, like south of the border, it is commonplace for "*winners*" to recover nothing for their litigation expenses (i.e.: the parties bear their own costs, win, lose, or draw). Although our system may not be ideal, it appears to be more equitable than some of the alternatives.

"… the disbursements incurred to advance the lawsuit is undoubtedly the area of most contention when resolving costs during settlement dialogue."

The penultimate question becomes: if we are not in a "*no-recovery*" state, and we are not in a "*full recovery*" state, where are we? The answer, as could be expected, is "*somewhere in the middle*."

There is often another undertone as well: for claimant's with very strong cases, it is often better for the defence to simply agree to pay most, if not all, of the claimed disbursements, without too much debate or fanfare, on the pretence that it is better to incentivize the plaintiff to settle by do so, and not jeopardizing the settlement, after which the disbursements will only increase exponentially as the claimant continues to move their "*strong*" case closer to trial.

To be recoverable, the person seeking to recover the disbursement must demonstrate, on a balance of probabilities, that a) the disbursement falls within a given tariff, b) the disbursement was necessary and reasonable, and c) the expense was actually incurred.

The party seeking costs during mediation will rarely be in a position to convince the other party to pay a disbursement that would otherwise be declined by the court under the rules and the Tariff. As such, the party seeking to recover their expenses during mediation can theoretically only seek to recover those things identified in the rules and the Tariff as an assessable disbursement.

> "As such, for disbursements that fall outside any specific tariff item, the parties are left to debate whether such disbursement was 'reasonably necessary,' and if so, whether the amount was 'reasonable.'"

This said, item 35 of the Tariff is the proverbial "*catch-basin*," because it grants the court a great deal of discretion. Indeed, it empowers the court to award a "*reasonable*" amount toward any disbursement they consider to be "*reasonably necessary for the conduct of the proceeding*." This discretion is mimicked in section 131 of the *Courts of Justice Act*, which the courts have said needs to be "*exercised in an objectively fair and reasonable fashion with an eye to the particular circumstances of the case*."

As such, when a claimed disbursement falls outside any specific Tariff item, the parties are left to debate whether such disbursement was "*reasonably necessary*," and if so, whether the amount was "*reasonable*."

Although this may sound daunting, things largely run smoothly during mediation, because the lawyers generally have a good grasp of what is, and isn't, an assessable disbursement, leading to a "*list of disbursements*" that contains items that are oft-accepted as assessable disbursements.

For example, expenses to obtain medical records, or to secure medical opinions, are rarely going to be challenged because in the context of a personal injury claim, these documents often go to the root of the case, and hence are by default reasonable and necessary to obtain, and the party is often at the mercy of the third-party medical community in terms of what is being charged to get those records and reports, thereby making what they paid reasonable. This said, occasionally a charge may fall far outside the norm, and an explanation may be warranted.

As a general rule, overhead costs, as opposed to expenses incurred in an individual file, are not assessable. Disbursements are not reduced because of partial indemnity obligations: put another way, disbursements are recovered on what was actually spent, and only reduced on the basis of reasonableness: *3664902 Canada Inc. v. Hudson's Bay Co*. (2003), 169 O.A.C. 283 (CA.).

At the end of this paper is a chart outlining, in alphabetical order, some of the typical "expenses" that have been considered by the courts. As noted previously, some items are specifically identified in the Tariff as a codified assessable disbursement, but many disbursements fall into the general Tariff item 35 category whereby the courts are given great latitude to decide whether the item was reasonably necessary for the advancement of the case, and whether the amount was reasonable.

One of the more contentious "cost" issues arises in the context of disbursements that have dual or multiple purposes: most notably what to do with an expert report that was commissioned to advance the injured party's disability claim, their benefits claim, and/or their tort claim? In these circumstances, it is commonplace for the defendant at mediation to object and resist paying for the entire cost of the report, citing that this expense is recoverable elsewhere, or alternatively, "reasonableness" requires the cost to be divided, presumably in some proportion relative to the number of venues the report served.

"…what to do with an expert report that was commissioned to advance the injured party's disability claim, their benefits claim, and/or their tort claim?"

The most helpful decision on the point is *Carr v. Modi*, 2016 ONSC 7255 (Div. Crt.) which essentially held that if the defendant derives a benefit from the report, the defendant must pay for it, unless the cost of that report was otherwise recovered by the plaintiff previously, or elsewhere. In a real-world example, if the plaintiff commissioned a medical report for the purpose of having their income benefits re-instated, the tort defendant benefitted (by way of set-off-or potential set-off), and hence the report should be paid for by the tort defendant if the plaintiff was *unable* to recover that cost in the alternate proceeding.

There was some initial debate, in the context of Statutory Accident Benefits ("**SABS**"), over whether the cost of the expert report used in the SABS proceeding was a "disbursement" at all: the thought being that the cost should simply be applied as a reduction on the tort defendant's collateral benefit credit (see *Lourdes Prabaharan (Boniface) v. RBC General Insurance Company*, 2018 ONSC 4885, in effect departing from *Carr v. Modi,* which treated the matter as a disbursement). But this controversy seems to have ended with the Ontario Court of Appeal's decision in *Cadieux v. Cloutier*, 2018 ONCA 903, ruling that the correct approach is to allow the defendant to deduct collateral accident benefits received by the plaintiff on a *gross* basis, and then to award the plaintiff some costs incurred to procure those benefits. As stated by the appellate court:

> "The court has jurisdiction, under s. 131(1) of the *Courts of Justice Act*, to award "costs of and incidental to a proceeding". Legal fees and disbursements in pursuing SABs can reasonably be considered incidental to the proceeding where the SABs have reduced the damages payable by the tortfeasor."

However, keep in mind that the plaintiff must show that the tort defendant derived a benefit from the expense incurred in the SABS claim: it is not considered a given (*Walla Amouri v. Catherine and Edwin Hansen et al*, 2021 ONSC 4473 (Master)). In addition, the plaintiff can be denied the recovery if they don't provide a detailed breakdown of the time and expenses that were incurred in the SABS claim to permit the court to assess the reasonableness (*Lloyd v. Bush*, 2020 ONSC 2892).

"The challenge at mediation is that process often occurs at a time when multiple proceedings are still open and active, so it is uncertain where (and if) the plaintiff will recover the cost of a multi-purposed expert report."

The challenge at mediation is that the process often occurs at a time when multiple proceedings are still open and active, so it is uncertain where (and if) the plaintiff will recover the cost of a multi-purposed expert report. It would also be intuitively unfair to "*penalize*" a defendant at mediation by foisting the entire cost of the medical report on them simply because they happen to be the first (and perhaps only) defending party that made an effort to try and resolve the case early through mediation.

But from the plaintiff's viewpoint, the future unknown is unsettling. At the time of mediation, the plaintiff doesn't know how much, if anything, another defendant is going to pay toward a medical report. The plaintiff's contention would be that it bears no relevance if a commissioned expert medical report also happens to serve another purpose: the only relevancy is that the report served a purpose in the proceeding involving the defendant, and should be paid because it is a cost incurred regardless of whether there were other proceedings or not.

If the case at mediation is the "*last*" proceeding to resolve, there is less to debate: the plaintiff should know how much they recovered toward the cost of the medical reports in the "*other*" proceeding(s), and there are really no grounds for the "*last*" defendant to resist paying the "*balance,*" provided the plaintiff can properly account and establish that the unpaid balance is accurate (i.e.: based on *Carr v. Modi*, *supra*), and the defendant derived a benefit.

On a final note, the legislation governing the SABS infuses a cap on what the insurer can pay towards an expert report commissioned by the plaintiff ($2,000.00 per medical discipline), so in many instances there will be a shortfall that the tort defendant will have to absorb, irrespective of any split based on the number of forums where the report was used.

The chart that follows summarizes how some common "disbursements" have been treated by the courts, keeping in mind always that these are just general results, because there is no shortage of situational cases where a court, depending on the circumstance, may step out of the norm and award a party a disbursement that is not generally granted, or conversely deny a disbursement that is generally granted, or alternatively temper a recovery, under the doctrine of "reasonableness:"

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DISBURSEMENT CHECKLIST

Adverse Cost Insurance	**Still hotly debated**, but the trend is shifting to this being a recoverable disbursement. The first case to address this issue was *Markovic v. Richards* et al., 2015 ONSC 6983, concluding that it was not a recoverable expense. A number of cases followed suit until *Armstrong v. Lakeridge Resort Ltd*., 2017 ONSC 6565, which ruled that it was a recoverable expense. Still, with the disconnect between the cases, this cost remained an expense that was oft-rejected at mediation. The tide may be shifting, however, as more recent cases appear to adopt *Armstrong* and the conclusion that the adverse cost insurance should be a recoverable expense. In *Stewart v. Wood et al*., 2019 ONSC 3931, Justice Tausendfreund concluded that adverse costs insurance was an "*access to justice issue*" and that it was a compensable disbursement to be included in the cost obligation payable to the plaintiff (para 24).
Attendance Money	**Yes**, if actually paid to a witness – Tariff item 21
Binding Charges	**Not generally recoverable** because it is considered overhead (*3664902 Canada Inc. v. Hudson's Bay Co.* (2002), 22 C.P.C. (5th) 102 (Ont. S.C.J), affirmed 169 OAC 283 (C.A.)
Car Rental	See **Travel Charges** below
Certified Copies (Cost to Obtain)	**Yes** – Tariff Item 33
Collateral Benefit Recovery Costs (ie: SABS)	**Yes.** If the collateral benefit is deducted on a gross basis, then the reasonable costs incurred to secure that benefit can become an assessable disbursement (*Cadieux v. Cloutier*, 2018 ONCA 903). If there is no benefit to the defendant, then it is not an assessable disbursement (*Walla Amouri v. Catherine and Edwin Hansen et al*, 2021 ONSC 4473 (Master)). Can also be denied if the plaintiff fails to provide adequate breakdown of costs incurred in recovering the collateral benefit (*Lloyd v. Bush*, 2020 ONSC 2892).
Consultant Fees	**Can be** – It was deemed a proper disbursement in this case (approximately $1,000.00), where case involved a "rather complicated financial picture:" *Pohl v. Palisca*, 2019 ONSC 2568
Courier Charges	**Yes**, **provided not excessive** and was actually charged to the client; *Moon v. Sher* (2004), 246 D.LR. (4th) 440 (Ont. CA) – (i.e.: may be unreasonable if postage was a viable alternative)
Demonstrative Evidence	**Yes** – Tariff Item 25 – Specifically, a "*reasonable*" amount for "*the preparation of a plan, model, videotape, film or photography reasonably necessary for the conduct of a proceeding*." **No – if not probative** (i.e.: video modeling of different accident conditions) - *Jeremy Josey v. Joshua Trebych. et al*, 2017 ONSC 6420
Electronic Document Review (for relevancy)	**Can be** – It was deemed a proper disbursement in this case (almost $45,000), where Master ordered documents to be scanned electronically for relevance: *Enbridge Gas. v. Michael Marinaccio et al*, 2011 ONSC 4962

DISBURSEMENT CHECKLIST

Examiner's Fees (i.e.: Fee to Special or Official Examiner)	**Yes** – Tariff Item 24 - *Rankin Construction Inc. v. Her Majesty The Queen In Right Of Ontario*, 2013 ONSC 1625
Experts – Cost of their Report	**Generally recoverable, subject to reasonableness**. The most significant contention usually arises in the following circumstances: a. The report has multiple uses. In the context of motor vehicle personal injury lawsuits, there is often an assertion that expert reports were used in the context of a claim for benefits (i.e.: Statutory Accident Benefits, or Disability Benefits), and hence should not be reimbursed by the tort defendant. This issue is addressed in more detail in the paper. b. There are several reports on the same issue. The courts generally do not approve, and will limit the recovery if there are multiple reports covering essentially the same expert topics: *Kemp v. Powell* (1988), 12 A.C.W.S. (3d) 198 (Ont. Assessment Officer), *Jeremy Josey v. Joshua Trebych*. et al, 2017 ONSC 6420 (S.C.J.); c. The amount charged must still be reasonable. A party can pay for the Cadillac of service – the opponent doesn't have to pay for it. This said, note that in this case, an orthopaedic expert "*…charged $11,300 for the written report which is somewhat on the high side but not unreasonably so*." *Loye v. Bowers,* 2020 ONSC 782 (it may be noteworthy, however, that the judge had the ability to see this witness on the stand, and conclude that "*…his evidence was clear and persuasive and … it was important in assisting the jury to render its verdict*.")
Experts – Fee charged to review videos, etc.	**Yes, if reasonably necessary** - *Jeremy Josey v. Joshua Trebych. et al*, 2017 ONSC 6420
Facsimile	**Generally allowed**, but typically just pennies per fax. Often considered overhead.
Filing Fees	**Yes** – Tariff item 22, Rule 58.05(1)(b) and 58.05(3)
Film/Photography	**Yes** - *Firth v. O'Brien*, 2013 CanLII 7009 (ON SC), *Davies v. Clarington* (Municipality), 2007 CanLII 49484 (ON SC)
Focus Groups	**No** - *Molinaro v Bamford*, 2011 ONSC 7240
Forensic Document Investigation	**Can be** - It was deemed a proper disbursement in this case (approx. $150,000.00) because of extensive financial documents produced: *Enbridge Gas. v. Michael Marinaccio et al*, 2011 ONSC 4962. See also *Fairview Donut Inc. v. The TDL Group Corp*., 2014 ONSC 776 where it was approved as an assessable cost in motion that was "*documentary-intense*," and much of the time spent and disbursements incurred were "*the result of the* (losing party's) *demands for full production*."
Hotels	See **Travel Charges** below
Interpreter	**Yes, but limited** to only those instances where the interpreter was needed for attendances at court, or at discovery.
Interest on Disbursements	**Added (May 2022): No.** A global interest charge applied by the law firm to carry the expenses of the litigation is not recoverable: *Lloyd v. Bush*, 2020 ONSC 2892.

NOTE: These are just general results, and because of the far-reaching discretion afforded to the court, it still remains commonplace to find cases awarding disbursements that are generally declined, and conversely cases declining disbursements that are generally granted.

Interest on Expert Accounts	**Yes -** *Clara Herbert v. City of Brantford*, 2010 ONSC 6528; *Herbert v. Brantford* (City), 2012 ONCA 98.
Interest on Litigation Loans	**No, but this area of the law may be evolving still** The following cases said not a recoverable disbursement: *Warsh v. Warsh*, 2013 ONSC 1886; *Giuliani v. Halton (Regional Municipality),* 2011 ONSC 5119; *Poile v. Collins*, 2015 ONSC 916; *Davies v. The Corporation of the Municipality of Clarington*, 2019 ONSC 2292. The appellate court in New Brunswick said yes in this case*: LeBlanc v. Doucet,* 2012 NBCA 88. Also approved in *Bourgoin v. Ouellette* (2009), 843 N.B.R. (2d) 58 (Q.B.) **Update (May 2022)**: Seems the trend is still moving against interest on litigation loans being recoverable. See for example *Lloyd v. Bush*, 2020 ONSC 2892, in a case not specifically dealing with a litigation loan, but where nonetheless the court held that any interest to carry the litigation costs, whether actual or notional, paid or unpaid, is not recoverable: this arguably could apply to litigation loan interest. Note as well, attempts have been made to have loan interest included in damages. Although the argument is generally not well received (i.e.: see *Mann v Jefferson*, 2019 ONSC 422) the cases seem guided by principals of foreseeability, etc. As such, if the plaintiff could establish that the defendant would know, when they committed the breach or negligent act that the plaintiff would have to borrow money to finance their litigation, such interest may very well claimable as damages. If it is a class action lawsuit, loan interest will be denied unless the loan agreement was submitted for approval by the court. (*E.M. Morgan J. in J.B. & M. Walker Ltd. v. TDL Group*, 2019 ONSC 999, *Davies v. The Corporation of the Municipality of Clarington*, 2019 ONSC 2292).
Investigation (i.e.: private investigator)	**Yes** – to find and interview necessary witnesses: *Jeremy Josey v. Joshua Trebych. et al*, 2017 ONSC 6420;
Law Society Litigation Levy	**Mixed** – Some say no, such as *393 Queen St. v. Cserpes,* 2010 ONSC 2335 (S.C.J) and *Digiorgio v. Matchett* (2002), 21 C.P.C. (5th) 321 (Ont. S.C.J.), but there are some cases that say yes, such as: *Dominion Construction v. Keewatin-Patricia District School Bd,* 2004 CanLII 22948 (S.C.J.) and *Municipality of Dysart v Haliburton Forest & Wild Life Reserve Limited*, 2016 ONSC 2238 (S.C.J.)
Long Distance Charges	**Yes** *Davies v. Clarington* (Municipality), 2007 CanLII 49484
Meals	See **Travel Charges** below
Mediation Cost	**Yes, if mediation was mandatory** – Tariff Item 23.1 and 23.2 **No if mediation was voluntary** - *Saltsov v. Rolnick* (2010), 89 C.C.E.L. (3d) 71 (Ont. Div. Crt), *3664902 Canada Inc. v. Hudson's Bay Co.* (2002), 22 C.P.C. (5th) 102 (Ont. S.C.J), affirmed 169 OAC 283 (C.A.) **Note:** if mediation is held under section 258.6(1) of the *Insurance Act,* (i.e.: an MVA BI mediation) it is paid by the defendants' insurer.
Mileage	See **Travel Charges** below

NOTE: These are just general results, and because of the far-reaching discretion afforded to the court, it still remains commonplace to find cases awarding disbursements that are generally declined, and conversely cases declining disbursements that are generally granted.

Legal Fees to Outside Counsel	**Can be, in complex cases**. Typically not applicable when dealing with large firms. Has more application when a party is represented by a sole practitioner, where the court is more apt to sanctioned the delegation of some work to an outside lawyer, and treat that account as a disbursement (see for example, *Mullen v. Lockhart Motor Sales (Collingwood) Ltd*. (1998), 31 CPC (4th) 287 (Ont. GD)). This said, it is usually reduced to the partial indemnity recovery, as this would be the rate recovered if it was done internally: *Wellington Plumbing & Heating Ltd. v. Villa Nicolini Incorporated,* 2012 ONSC 6616 (S.C.J).
Parking	See **Travel Charges** below
Photocopying	**Generally, yes**. There was a line of thought that photocopying was simply overhead and not recoverable, but this view has generally fallen out of disfavour, such that generally photocopying expenses are recoverable (subject always to reasonableness). The approved rate per page seems to hover around between 10 cents and 25 cents per page. *Davies v. Clarington* (Municipality), 2007 CanLII 49484 approved 25 cents per page. *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc*., 2018 ONSC 6895 approved 25 cents per page if done in-house, and around 15 cents per page if outsourced. *Hampton Securities Limited v. Christina Nicole Dean*, 2018 ONSC 1585 held that the appropriate range was between 10 and 15 cents for in-house printing.
Postage	**No** – considered office overhead: *Mercer v. Abbott*, 2008 CanLII 22135 (Ont. S.C.J.),
Service or Attempted Service Costs	**Yes** – Tariff item 23
Scanning	**Mixed Treatment.** Some judges consider it an assessable disbursement, and further, there is no need to itemize who received the scans, etc. (See for example: *York Trafalgar Corp. v. Philips Engineering Ltd*., 2014 ONSC 874, where the court said "I have rarely, if ever, seen photocopies, faxes, and scans itemized in the way that (losing counsel) seems to want to see them – i.e. an indication of the person to whom the copies were given or to whom the faxes or scans were sent. There is nothing to suggest to me that (winning counsel's) disbursement account should not be accepted at face value, much as all counsel's tallying of copies and scans in their disbursement accounts are typically treated in the cost fixing exercise." Seems that 15 cents per page is considered acceptable (*Vink v. Valenzuela,* 2015 BCSC 232 (BCSC Master). Other judges reject the disbursement in its entirety, considering it "overhead": *Chin-Sang v. Bridson*, 2009 CanLII 16295 (ON SC)
Stationary Supplies	**No.** Overhead. *Sam's Auto Wrecking Co. v. Lombard General Insurance* (2012), 4 CCLI (5th) 322 (Ont. S.C.J.)
Taxi Charges	See **Travel Charges** below
Transcript	**Yes** – Tariff Item 24, Rule 58.05(1)(b) - *Rankin Construction Inc. v. Her Majesty The Queen In Right Of Ontario*, 2013 ONSC 1625

Translation	**Yes**, if document had to be translated into either English or French – Tariff Item 29.1
Transportation (i.e.: for Plaintiff to get to medical assessment)	**Yes** - *Jeremy Josey v. Joshua Trebych. et al*, 2017 ONSC 6420
Travel charges (by lawyer – hotels, taxis, mileage charges, meals parking, car rental costs, and fuel)	**Mixed.** Easy to find cases that award all of this without too much fanfare (i.e.: *Thornhill v. Highland Fuels*, 2014 ONSC 3877), and other cases that deny it without too much fanfare (i.e.: *Rankin Construction Inc. v. Her Majesty The Queen In Right Of Ontario*, 2013 ONSC 1625. Occasionally there is some cogent thought put toward travel type disbursement, such as: **Car Rental -** are not generally awarded by the courts in Ontario (see for example: *Heather Jack, et al. v. Gowling, et al*., 2011 ONSC 2474; *Rankin Construction Inc. v. Her Majesty The Queen In Right Of Ontario,* 2013 ONSC 1625 **Hotels** – Mixed treatment: Awarded in this case, but with significant reduction given the following caveat: "*…it is incumbent on counsel to search out and find the most reasonably priced appropriate hotel in the region of a courthouse if it is expected that their client would be asking the adverse party to pay their expenses." Loye v. Bowers,* 2020 ONSC 782; Outright denied in this case, with the judge reasoning that "*the travel expenses of one party are not something that the other party has any control over. For example, one side may decide to drive back and forth while the other side may decide to stay in a hotel. Those decisions should be the responsibility of the party that makes them, and the other side should not be required to indemnify the party that decides to stay in a hotel*." *Watt v. TD Insurance*, 2020 ONSC 953 **Meals** – Mixed. Categorically denied in one case because "*…meals are consumed whether one is in town or elsewhere. The contents of a meal are up to the consumer. However, given this rather daily necessity, it's not an item that should be claimed from the other side. The losing party is not obliged to feed the victors*." *Sam's Auto Wrecking Co. v. Lombard General Insurance* (2012), 4 CCLI (5th) 322 (Ont. S.C.J.) See also *Clara Herbert v. City of Brantford*, 2010 ONSC 652, where is was acknowledged that "*meals will likely be incurred by counsel, no matter what they are doing*." But meals were awarded in *Loye v. Bowers,* 2020 ONSC 782 **Mileage** – per *Davies v. Clarington* (Municipality), 2007 CanLII 49484, "*mileage has been held to be assessable in some cases. The reason for the driving seems to be relevant*." The judge was not provided with reason, but simply "*assumed*" that it was mileage that "arose *from the necessity of attending the lengthy trial*," and granted the disbursement. **Parking** – approved in *Banihashem-Bakhtiari v. Axes Investments Inc.,* (2003), 66 O.R. (3d) 284 (S.C.J.) (in relation to parking paid for witness). **Taxi charges**, denied on the ground that "*they are not appropriate costs item*." *Chechui v Nieman*, 2016 ONSC 4667. See also *Davies v. Clarington* (Municipality), 2007 CanLII 49484
Treatment (in excess of any disability coverage)	**No** – this is a head of damages. *Jeremy Josey v. Joshua Trebych. et al*, 2017 ONSC 6420

Videotape Copying	**Yes**. *Stribbell v. Bhalla* (1990), 1990 CanLII 6999 (ON SC), 73 O.R. (2d) 748 (H.C.J.)
Witness Fee (i.e.: travel time to attend a discovery or motion)	**Yes. -** *Pearson v. Inco Ltd*., [2002] O.J. No. 3532 "*…if a witness, lay or expert, had to travel to be cross-examined, then the losing party is required to pay the reasonable travel expenses of the witness. However, the losing party is not required to pay for travel time nor for travelling expenses that are not reasonable*."
Westlaw/Quicklaw/Online Legal Research	**Mixed** Earlier trends appeared to deem these as assessable disbursements provided it was established that the cost was directly related to research done on the particular file, and was a reasonable amount (i.e.: Court of Appeal in *Moon v. Sher* (2004), 246 D.LR. (4th) 440). Since then, the mood has been mixed. Some jurists believe that it is simply office overhead (given the advancement in technology), and with free robust options like CanLII, the cost of paid legal research platforms is becoming more difficult justify as "reasonable" [(*Stark v Lewis*, 2019 CanLII 31647 (ON SCSM), *Hampton Securities Limited v. Christina Nicole Dean*, 2018 ONSC 1585, *Furtney v. Furtney*, 2014 ONSC 7259 (CanLII)]. Yet there are still judges who grant the disbursement based on the appellate decision in *Moon*, *supra*: *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc*., 2018 ONSC 6895, and other judges who go even further and assert it should always be considered an assessable disbursement, citing: "*…hours spent on legal research is recoverable both as a component of counsel fee and as a disbursement. The reality is that computer-assisted legal research is a necessity for the contemporary practice of law and computer assisted legal research is here to stay with further advances in artificial intelligence to be anticipated and to be encouraged. Properly done, computer assisted legal research provides a more comprehensive and more accurate answer to a legal question in shorter time than the conventional research methodologies, which, however, also remain useful and valuable. Provided that the expenditure both in terms of lawyer time and computer time is reasonable and appropriate for the particular legal problem, I regard computer-assisted legal research as recoverable counsel fee item and also a recoverable disbursement*." *Drummond v. The Cadillac Fairview Corp. Ltd*., 2018 ONSC 5350 **Update (May 2022):** It would seem that the trend is moving away from online legal research as being anything but office overhead, and thus unrecoverable, unless there are special circumstances (*Lloyd v. Bush* (2020) 2020 ONSC 2892), or the party claiming the disbursement can demonstrate why the research conducted did "not fall within standard office overhead" (*Crosslinx v. Ontario Infrastructure*, 2021 ONSC 4364. As stated in *Lloyd,* "it has become increasingly harder as time has gone by, to satisfy a court that computerised legal research is not part and parcel of the ordinary overhead expense of a law practice" (at para 101). I suppose, for example, if a party had to sign up for a unique online legal search product (ie: to search American case law that would be abnormal for the law firm), there may be a good argument to take this expense out of normal office overhead, and have it be considered a recoverable disbursement.

Witness Preparation (Payment for the Witness' time to review documents and participate in the proceeding)	**Generally No, but in exceptional cases Yes. –** It is generally expected that lay witnesses will not be paid to prepare and give evidence at trial beyond the attendance money. However, there are exceptions when the witness is key and must take out exceptional time to review voluminous material to prepare for the trial. Former employees, for example, who need to return to testify about their involvement in the underlying cause of action while employed by one of the parties is a typical example of where it may be acceptable to pay for the time it takes to review documents to assist. Ultimately, the party seeking to recover such cost must demonstrate that: a) the payment was necessary (ie: without it, the party would have been prejudiced, or the trial would have been less streamlined, etc); b) the amount paid was reasonable for, and commensurate with, the work that was undertaken by the witness; c) the opposing party was advised that the witness was going to be paid (ideally well before the pre-trial); In short, payments to a witness for preparation must be warranted in all the circumstances because it is the exception rather than the norm. The bottom line is that the court or assessment officer must be convinced that the payments were not made to "buy" favourable evidence, which would be an abuse of process. (*Legault v. TD General Insurance Company*, 2022 ONSC 3367)