
CANADA / JUDGMENT

Brown v. Williams

2019 BCSC 1187

COURT

Supreme Court of British Columbia

DECIDED

19 July 2019

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2019 BCSC 1187 Brown v. Williams

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brown v. Williams,

2019 BCSC 1187

Date: 20190719

Docket: 51748

Registry: Kamloops

Between:

Lenard Brown

Plaintiff

And

Sara Williams

Defendant

Before: Master McDiarmid

Reasons for Judgment

Counsel for the Plaintiff:

K. O'Bray

Counsel for the Defendant:

M.G. Howard

Place and Date of Hearing:

Kamloops, B.C.

June 13, 2019

Place and Date of Judgment:

Kamloops, B.C.

July 19, 2019

- [1] This is an assessment of costs following settlement of the plaintiff's claim against the defendant, resulting in injuries the plaintiff sustained in a motor vehicle accident on the Yellowhead Highway in the north end of Kamloops on March 18, 2015.
- [2] The defendant initially denied liability. Mediation took place in August 2018. It did not resolve the matter.
- [3] The matter was set for a 13-day trial scheduled to commence October 15, 2018. Liability was admitted on October 12, 2018, the Friday prior to the first day of trial.
- [4] Because there were no judges available, the trial needed to be rescheduled. It was reset for late May 2019.
- [5] The case settled for \$330,000.00 new money, plus taxable costs and disbursements, on March 29, 2019.
- [6] Many tariff items and some disbursements are at issue in this assessment. The discrepancy between what the plaintiff is seeking and what the defendant submits should be allowed is due in part to the fact that the initially scheduled trial could not proceed due to lack of judicial resources.
- [7] Defendant's counsel has helpfully provided a "memory stick" reproducing plaintiff's counsel's affidavit and defendant's counsel's written submissions. As is common in costs assessments, it is usual for counsel to be permitted to testify, or alternatively provide an affidavit, and then speak to that affidavit. Permission to do so was granted pursuant to the Code of Professional Conduct for British Columbia, c. 5-2.
- [8] The affidavit of Kelsey O'Bray, the lawyer who represented the plaintiff in this proceeding, deposes to relevant facts interspersed at times with comments which might be viewed at partially factual and partially submissions. Where there is that intermingling, I am able to separate out the facts from the submissions.
- [9] The affidavit is as follows:

I, KELSEY V. O'BRAY, lawyer, of Suite 600 - 175 Second Avenue, in the City of Kamloops, in the Province of British Columbia, SWEAR THAT:

1. I represented the plaintiff, Lenard Brown, in this proceeding and as such have direct knowledge of the matters deposed to in this affidavit.
2. The defendant provided the "defence position" with regard to the tariff items and disbursements in issue in this action on May 23, 2019. A summary of her position is set out on the Amended Bill of Costs, a copy of which is attached as Exhibit "A".
3. In the left column of Exhibit A I have highlighted in yellow the contested tariff items and disbursements and highlighted in green the items that the plaintiff has accepted as offered by the defendants. I have numbered the contested disbursement items 1 to 16 for reference herein. The uncontested items are not highlighted.
4. Item 9, Forensic Dynamics (October 12, 2018) under Expert Consultation heading has been removed from the Bill of Costs as it was a double charge, as has Item 16, Witness Fee of William Saxby.
5. I have added tariff items 29 and 30 to reflect the preparation and attendance at today's hearing to assess costs, and highlighted those new tariff items in pink. The additions and deletions from the costs units brings the new total to 1 80 units, and the agreed deductions from disbursements brings the new total to \$82,537.44.

FILE BACKGROUND

6. As described in the Notice of Civil Claim, on March 18, 2015, the plaintiff was injured while driving his 1999 [Volkswagen] Jetta northbound on the Yellowhead Highway, heading home to Barriere. As he approached Old Highway 5 where one would turn to go up to Sun Peaks, the defendant in her Ford Taurus turned from the southbound Yellowhead highway left turn lane into the plaintiff's vehicle. Both Mr. Brown and his wife at the time were transported to Royal Inland Hospital by ambulance. The RCMP concluded that the defendant failed to yield to oncoming traffic. Attached hereto as Exhibit "B" are the MV6020 Police Investigation Report, Synopsis and Occurrence Report from pages 1, 6 and 7 of the RCMP file produced by Consent Order.
7. Our office was retained by Mr. Brown on April 9, 2015. The Notice of Civil Claim was filed July 23, 2015. Liability was denied by the defendant in her Response to Civil Claim and twenty-six allegations of negligence were made against the plaintiff.
8. Mr. Brown was born March 16, 1966. At the time of the accident he had been employed at Gilbert Smith Cedar Mill in a labourer position for approximately 11 months. Prior to this he had generally worked seasonal heavy labour jobs. Mr. Brown did not have his high school diploma but believed that he had completed his G.E.D. while serving a prison sentence in Texas many years ago. Upon testing during the course of his action it was found that his reading and writing skills fell far below G.E.D. standard. Mr. Brown was essentially illiterate, and as a result, communication, advice, and preparation for medical assessments, examinations, and trial had to be conducted verbally and preferably in person.

9. As a result of the accident, Mr. Brown was diagnosed by physiatrist Dr. Koo in January 2016 as having suffered:
 - a. Mediastinal fracture (sternum) with 4 mm of posterior displacement and associated retrosternal hematoma;
 - b. Soft tissue injuries to the neck, shoulders, upper back, midback, and chest, with:
 - i. Chronic mechanical neck pain resulting in severe disability;
 - ii. Chronic mechanical shoulder and upper back pain, with bilateral shoulder contractures and myofascial pain; and
 - iii. Posttraumatic headaches, likely cervicogenic.
 - c. Adjustment disorder with depressed mood;
 - d. Posttraumatic stress disorder symptoms;
 - e. Chronic sleep disruption;
 - f. Financial, interpersonal, and sexual dysfunction contributing to marital dissolution.
10. Aside from a brief stint working casually a few hours per week for his landlord for cash, I am not aware of the plaintiff returning to any paid employment since the accident.
11. An examination for discovery of the defendant took place March 1, 2017. The plaintiff's examination followed on March 14, 2017.
12. A mediation took place on August 23, 2018, in Kamloops. The parties were not successful. Following the mediation it became clear to me that we may not have been able to settle due to defence counsel's understanding of some information from Gilbert Smith Mill that the plaintiff would have been laid off during a round of mill layoffs in early 2017, and the fact that the plaintiff did not have his own psychiatric medical legal report. I had previously interviewed the plaintiff's former employer and supervisors, who had provided me with quite a different understanding of the layoff situation than defence counsel harboured. As well, the defendant's own psychiatric medical legal report confirmed psychiatric diagnoses, as did various clinical counselling and psychiatric records produced in the action, which is why we intended to rely on the defence report at trial.
13. The defendant denied liability until October 12, 2018, the business day prior to the first day of a thirteen day trial that was scheduled to commence on October 15, 2018. The parties were advised by Kamloops Court Registry on October 12, 2018, that there may not be a judge available for October 15, but that one could become available, so the parties should remain ready to start trial Monday. Again on October 15 and 16 the parties were told that there was not currently a judge, but there may be one available the next morning and they should remain ready to start trial. On October 17 Registry confirmed there was no judge available by that day, and accordingly trial was to be rescheduled.

14. We notified all of our witnesses and cancelled the video-conference bookings for four out of country and town witnesses. Our office wrote to defence counsel on October 23, 2018 suggesting dates throughout 2019 to reschedule the trial. Given that both parties relied on multiple expert opinions, I thought it prudent to reschedule the trial as soon as possible so that costly updated reports would not become necessary. We were told on October 24, 2018, by Kidston & Company that neither of the two lawyers who had been assigned the file had any availability until September 2020. We obtained additional and alternative dates from Kamloops Court Registry and posed those to defence counsel by letter on October 25, 2018, advising that we would be setting a Case Planning Conference if we could not agree on dates. I scheduled a Case Planning Conference for December 13, 2018 to compel the rescheduling of the trial. At the CPC we obtained a date of May 27, 2019, and set about notifying witnesses.
15. With respect to proportionality, there were many relatively complex issues in this action. The plaintiff's past and future wage loss was of significant dispute and discussion based on his past medical, personal and employment history. The documents produced in the action disclosed that the plaintiff had a criminal record in Canada and the United States and had spent time in prison in the United States before being deported back to Canada. He had pre-existing work related injuries to his foot, finger and eye, for which he was prescribed opioid pain medication by his general practitioner, and had made pre-accident complaints of left shoulder and low back pain. The mill job at which he had been employed at the time of the accident for approximately 11 months was the highest annual salary he had received in many years, if not ever.
16. As a result of the failed settlement negotiations, I decided to obtain a psychiatric report from Dr. Atkins in Victoria, BC, in January 2019 regarding the plaintiff's ongoing symptoms showing no sign of abating. Those symptoms were diagnosed at that time as Severe Major Depressive Disorder with anxious distress and mild to moderate Posttraumatic Stress disorder. The plaintiff served the report of Dr. Atkins on February 26, 2019. After some additional negotiation, the parties agreed to settle for \$330,000 "new money" plus taxable costs and disbursements in consideration of his Part 6 and Part 7 claims on March 29, 2019.

TARIFF ITEMS

Tariff 2

17. Three different defence counsel were appointed throughout the conduct of this file. Defence counsel at the time of trial, Kyle Watts, emailed Ms. O'Bray at 4:58 pm on October 11, 2018, making an offer to admit liability if the plaintiff would agree to cap damages. The plaintiff agreed to this on October 12 at 8:59 am. All trial management orders had been complied with by that point.
18. Due to the defendant's last minute admission of liability, the plaintiff was required to obtain and prepare all expert and lay witness evidence regarding both liability and damages for this trial. Despite the clear evidence on discoveries, the plaintiff's two liability related Notices to

Admit, statement of accident scene witness William Saxby, and Offer to Settle Liability, the defendant resisted simplifying the procedure by admitting liability earlier. The plaintiff was put to much document disclosure, witness correspondence and subpoenas, expert retainment and correspondence, and trial preparation as a result.

19. The plaintiff scheduled twenty-four witnesses to appear at trial, including co-workers, treating practitioners, expert witnesses, a scene witness, friend, and agent of ICBC.
20. Given the position taken at mediation by the defendant, it was thought that the up to date and much clearer evidence obtained and produced in mill superintendent Mr. Nickel's statement would facilitate resolution of the file particularly with respect to the wage loss claim. In addition to meeting and speaking with witnesses Mike Kennedy, Dan Doyle, Larry Campbell, Harold Ross, Shelby Nickel and Jody Huffman to obtain their statements in 2017 and 2018, I interviewed and prepared those witnesses again closer to trial.
21. All seven of the plaintiff's expert witnesses were prepared in detail for trial, including the questions I had drafted for their direct, likely cross-examination questions, and any general issues that would be central or had come up in the evidence since their assessment of the plaintiff. Treating practitioner witnesses were similarly prepared.
22. The plaintiff was prepared for each plaintiff and defendant scheduled assessment in person or by phone call, and for trial by three full day meetings with the writer, because he could not review letters, records or reports on his own due to his inability to read.
23. By October 17, 2018, my trial binder contained the chosen exhibits for each witness and a comprehensive set of questions with which each witness had been prepared, along with opening and closing submissions, report admissibility arguments and case law, and other witness related arguments and case law. Binders of reports, documents, special damages, transcripts and law were prepared, including both liability and damages issues.
24. The argument of the defendant that the plaintiff's pre-existing chronic pain issues would have restricted his ability to remain at his mill job regardless of the accident required significant evidence and argument regarding the significance and prognosis of his pre-accident injuries, as well as employment evidence to demonstrate his general work history and work ethic and experience at the mill job he had held for 11 months pre-accident. This is not to mention the complicated issue of the series of layoffs that occurred at the mill following the plaintiff's accident, and the necessary evidence of mill decision-makers as to whether or not the plaintiff would have been laid off, and if so for how long.
25. All 13 days of the October 2018 trial were scheduled to be full of evidence, including report admissibility arguments, examination for discovery read-ins of the defendant's evidence, etc. The plaintiff was fully prepared to proceed given the late adjournment partway into what was supposed to be the first week of trial. The witnesses were juggled due to court scheduling updates and I drafted deviations from the witness schedule, questions, and my submissions to ensure we were most likely to finish trial with a late start.

26. The plaintiff then had to take steps to request dates to reschedule the trial, eventually resulting in a CPC to compel a new trial date be set. All witnesses had to be recanvassed regarding the new dates. New clinical evidence with respect to the plaintiff's most recent six months of symptoms and injuries was requested and reviewed.
27. Almost four years of correspondence and instructions with the plaintiff, and factual investigation were necessary due to these circumstances. As the rescheduled May 2019 trial date approached, the plaintiff again updated the previous witness schedule, questions and submissions with respect to the last six months in order to be fully prepared to proceed given the late adjournment of the first trial date.

Tariffs 10 and 11

28. Attached hereto as Exhibit "C" are true copies of the plaintiff's 5th Amended List of Documents dated October 10, 2018, and the defendant's Third Amended List of Documents dated September 24, 2018.
29. The plaintiff's 5th Amended List of Documents lists 157 separate documents. Most documents required a detailed review and determination of whether any portions were privileged or irrelevant and should be redacted from the action. Four sets of records arrived after the most recent list of documents was drafted. The file for Mr. Brown comprises 13 file binders and 8 accordion folders of documents and correspondence, the majority of which is medical documentation.

Tariff 14

30. The plaintiff served three Notices to Admit over the course of the action, dated November 1, 2016, September 21, 2018, and September 28, 2018. The Notices to Admit and defendant's responses thereto are attached as Exhibit "D".
31. Even after the RCMP file by consent order was produced to defence on January 24, 2017, and the examinations for discoveries of both parties were complete in March 2017, the defendant did not admit or provide a substantive response to the unanswered items in the first Notice to Admit.

Tariff 17

32. Pursuant to Rule 11-6, the plaintiff served the following reports to rely upon at trial:
 - a. 2016 Physiatrist Medical Legal Report of Dr. Koo, with two updated reports up to 2018;
 - b. 2016 Functional Capacity Evaluation of OT Bevan Haley;
 - c. 2016 Occupational Assessment of OT Sue Woods;
 - d. 2018 Accident Reconstruction Report of engineer Tim Leggett;
 - e. 2018 Vocational Consultant Assessment Report of Derek Nordin;

- f. 2018 Past and Future Wage Loss Assessment Report of Economist Robert Carson;
 - g. 2019 Psychiatrist Medical Legal Report of Dr. Atkins.
33. The plaintiff served the defendant's medical legal report of Psychiatrist Dr. Milanese back on the defendant to rely upon at trial. In addition, the plaintiff obtained an orthopaedic surgeon opinion in a medical legal report from Dr. McKenzie regarding the plaintiff's sternum fracture and shoulder injury, an area of Dr. McKenzie's expertise, which we decided to retain as privileged.
34. The defendant obtained eight of her own expert reports, including from psychiatrist Dr. Laidlow in 2016, who completed two further addendum reports, a psychiatrist in 2017 who completed one further addendum report, an occupational therapist, and a vocational consultant who completed one additional rebuttal report.
35. I found it necessary to canvass updated opinions from Dr. Koo given the opinions raised by the defence experts in their reports, including that prior to the accident the plaintiff was prone to chronic pain, left shoulder, low back and chest pain, and dependent on opioid medication. Dr. Koo has expertise in opiate prescription for chronic pain and complex regional pain syndrome. Defence experts also opined that the plaintiff was by October 2016 capable of doing paid employment, based in part on the May 2016 FCE report and their own physical exam.

Tariff 18

36. Further to my comments under Tariff 2 herein, there were twenty-four witnesses scheduled to testify at the plaintiff's trial. Attached hereto as Exhibit "E" is the Plaintiff Witness List and Summary of Lay Witness Evidence ordered to be produced to defence counsel at the trial management conference. These witnesses did not comprise all of the treating practitioners the plaintiff had seen in the four years following the accident, as several of his practitioners ceased treatment part-way through his recovery when they moved, and the plaintiff was forced to find new practitioners.
37. On the Witness List, Constable Brad Matchim and William Saxby are witnesses to the accident scene, and the next nine witnesses are treating doctors or rehabilitative professionals who treated the plaintiff and whose records were produced in the action. Mr. Brown's treatment was very fragmented between different practitioners, often of the same discipline, due to the unforeseen departure of his OT, physiotherapist, and psychiatrist to Nova Scotia, Ontario, and Dubai.
38. As a result, and to respond to the defence medical legal reports that claimed that the plaintiff's physical examination demonstrated little physical damage, it was necessary to present first hand witness evidence of those treaters who had hands on contact with the plaintiff in the years following his accident. The defendant took the position that if the plaintiff was not capable of returning to his job at the Mill, it was because of a pre-existing

low back injury, rather than anything accident related, despite the fact that he had worked full time without issue prior to the accident. It was important to involve in this action the treating practitioners who noted real physical damage to his body following the motor vehicle accident.

39. ICBC cut off treatment funding for practitioner led rehabilitation in 2016 following Dr. Laidlow's first report, and refused to fund Mr. Brown's treating OT's recommendation for an Occupational Rehab Program, and insisted the plaintiff should be able to just rehabilitate himself. Accordingly, instead of all experts having up to date treatment records to review, it was necessary to obtain statements and letters from treating practitioners to attest to their hands on experience with the plaintiff in the years prior to treatment funding being cut off, so that experts and ultimately the Court would have an accurate understanding of the state of Mr. Brown's injuries.
40. I obtained written statements of witnesses William Saxby, Mike Kennedy, Dan Doyle, and Shelby Nickel, all of whom reside outside of Kamloops. Mr. Saxby was long haul truck driver and witness to the accident whose evidence was crucial for the analysis of the engineer, and to dispute the defendant's claim that a trucker at the intersection had waived her through the intersection. The accident scene witness statement was produced to defence counsel on April 28, 2017, to demonstrate the inaccuracy of the defendant's recollection and facilitate a resolution of liability.
41. Mr. Doyle, who had moved to the lower mainland, and Mr. Kennedy had acted in supervisory roles at the mill to the plaintiff at the time of the accident, and Mr. Nickel had also acted in a supervisory role, later completely taking over that role from Mr. Kennedy, after the plaintiff's accident. Each of those statements were listed on the plaintiff's lists of documents. Attached as Exhibit "F" are true copies of the statements of William Saxby, Dan Doyle, Mike Kennedy and Shelby Nickel.
42. I also obtained written statements from the plaintiff's former coworkers at the mill Larry Campbell and Harold Ross, who I met with personally, and friend Jody Huffman, who would later be called as witnesses at trial.
43. In addition to co-workers and friends, I interviewed all treating practitioners, including Leanna Mann, Dr. Raghavan, Rickardo Pickering, Dr. Vithilal, Sue Woods, Dr. Anyansi, Marcus Kapteyn, Dr. De Wet, and Tami Damini, and practitioners not listed as witnesses at trial, such as Grace from Yellowhead Community Services.
44. We served subpoenas on twelve of our eighteen non-expert witnesses, copies of which are attached hereto as Exhibit "G".
45. The defendant scheduled nine of her own witnesses for trial.

Tariffs 31 and 32

46. The plaintiff filed a trial brief on July 26, 2018. Over the next six weeks it became apparent that several developments since that time changed matters in the plaintiff's trial brief. A mediation had taken place and failed. The defendant had not paid the jury fees for her Jury Notice. The defendant had still not provided a response to the plaintiff's November 2016 Notice to Admit, nor admitted liability, nor listed the defendant as a witness for trial. The defendant had served a third report of Dr. Laidlow, a new vocational consultant report outside of the 84 day deadline, and advised of a second report from their OT, though the date of the report was yet unknown to the plaintiff. The plaintiff added four witnesses for trial. All of these new developments were reflected on the Amended Trial Brief filed by the plaintiff on September 12, 2018, attached hereto as Exhibit "H".
47. A trial management conference took place on September 12, 2018. Following adjournment of the October 2018 trial the plaintiff made efforts to coordinate dates to reschedule the trial, but ultimately was required to schedule and set down a case planning conference for which a Case Plan Proposal was filed and served on defence counsel. At the CPC the trial was reset for May 27, 2019, and the terms ordered at the previous TMC were restated with new dates related to the new trial date. Attached hereto is the filed Case Plan Order as Exhibit "I".

Tariff 34

48. The trial of this matter was set to commence on October 15, 2018, and after adjournment due to lack of available judges, again to commence on May 27, 2019. Due to the late adjournment of the trial, three days after the scheduled start date for trial, and the Registry's requirement that the parties remain ready to begin and complete their trial during the scheduled weeks, the plaintiff was completely ready to proceed each morning until trial was adjourned on October 17, 2018.
49. Each day that trial was delayed, witnesses were advised, and put on notice of any scheduling changes that may be necessary. As stated elsewhere in this affidavit, the plaintiff's Closing Submissions with Appendices and case law were drafted. As described under Tariff 2 herein, the plaintiff's preparation for trial was significant and complete, as nearly all trial preparation by a plaintiff must be done prior to trial commencing, as his case proceeds first.
50. Lawyers try to track their time on a file on the firm's Esilaw Time Tracker program. In the seven weeks prior to our October 2018 trial being adjourned, I logged 210 hours of lawyer time.

Tariff 36

51. When we were advised on October 12, 2018 that we may not have a judge available immediately for October 15, 2018, I continued drafting the plaintiff's written Closing Submissions. When we were again advised the week we were supposed to start trial that a judge may not be available for another day or two, I completed a full draft of the plaintiff's

written submissions. It was clear that if it proceeded, the trial would be short on time and likely run late on some days to hear all witnesses and make up for the late start. For those reasons I felt it reasonable to prepare those submissions in advance because I anticipated there would be less time the final week of trial to draft them.

DISBURSEMENTS

No. 1 - Photocopies

52. With regard to our claim for photocopying charges, our office uses a photocopy management system. When copies are required on a particular file, the file number is typed into a 'COPITRACK' machine and the number of photocopies is automatically posted to that individual file. Most of the photocopies as claimed were associated with the volume of clinical records received from the various doctors, other medical professionals, employment records, etc. that had to be copied and circulated to the various experts and defence counsel.
53. Attached as Exhibit "J" is our firm's detailed printout of the photocopying and printing charges recorded for Mr. Brown's file, by date, current to April 9, 2019, charged at \$0.25 per page. As of April 9, 2019, the charges totalled \$6,974.00 prior to the addition of GST and PST. Some printing jobs, marked with an asterisk, were already billed to and paid by the defendant, and those have been deleted from the total noted in our bill of costs, which is meant to reflect the up to date charges for photocopies.
54. As stated above the twenty-four witnesses scheduled for trial did not comprise all of the treating practitioners the plaintiff had seen in the four years following the accident, as several of his practitioners ceased treatment part-way through his recovery when they moved out of the interior of BC, and the plaintiff was forced to find new practitioners. This resulted in a number of medical record files that were required to be produced and disclosed.
55. Mr. Brown's paper file at our firm, separate and aside from the digital file, comprises 13 file binders, 10 binders prepared specifically for trial, and 8 accordion folders of documents and correspondence, the vast majority of which are medical records of the plaintiff. Given the plaintiff's pre-existing chronic pain injuries, the defendants requested, and were provided with, substantial pre- and post-accident records of the plaintiff. Where possible, already printed copies of reports and documents were used in the trial binders. I am not aware of how our office could have reduced the amount of paper necessary to provide the necessary medical legal evidence, notices to admit, exhibits, case law, and the unreimbursed portions of over \$30,000 in receipts for proof of special damages to the Court, witnesses, and opposing counsel for a trial that was to begin imminently.

56. All documents for trial were printed and tabbed in binders given that the October 15, 2018 trial was not adjourned until October 17, 2018. My trial binder contained printed copies of the exhibits for each witness and a comprehensive set of questions with which each witness had been prepared, along with opening and closing submissions, report admissibility arguments and case law, and other witness related arguments and case law.
57. Most of Mr. Brown's expert witnesses required a full paper file of his relevant medical records at the time of their analysis, and this was provided.

No. 2 - Long Distance

58. Attached hereto as Exhibit "K" is a copy of the printout of long distance phone tolls recorded for Mr. Brown's file from April 20, 2015 - April 2, 2019, totalling \$213.18. The additional \$14.17 added to the bill of costs total represents the additional long distance phone calls that were at that time anticipated to take place from April 2, 2019 to present with our client, opposing counsel, the ICBC adjuster, and various witnesses and third party record holders. Since April 2, 2019, our office had had at least four phone calls with our client, and at least twelve phone calls with out of town witnesses and record holders.
59. The long distance charges were applied for phone calls made to our client who resides in Barriere, the ICBC adjuster in Kelowna, opposing counsel in Vernon, and various witnesses and third party record holders located across the country and in another continent.
60. Of the twenty different clinics/practitioners listed under the "Records" heading of the plaintiff's List of Documents, only eight are local to Kamloops.
61. Of the twenty-four witnesses scheduled for trial, only four resided in Kamloops. The remainder resided in Barriere, Langley, Lillooet, 100 Mile House, Salmon Arm, Vernon, Kelowna, Vancouver, Halifax Nova Scotia, Cobourg Ontario, and Dubai. As a result, long distance phone calls, faxes and mail were necessary to correspond with these witnesses as necessary.

No. 3 - Faxes

62. Faxes were charged to the file at \$0.35 per page. Attached as Exhibit "L" is a detailed printout of the charges from April 13, 2015 - April 1, 2019, for a pre-tax total of \$313.70. Facsimiles were used and necessary for correspondence on this file with the client, third party record holders, opposing counsel, and witnesses.

No. 4 - Postage & Handling

63. Attached as Exhibit "M" is are true copies of the printouts of postage & handling charges attributed to Mr. Brown's file from April 13, 2015 - March 4, 2019. The pre-tax total of both of these printouts is \$298.93. Our office does not gross up or add a premium to these expenses. Postage was used and necessary for correspondence on this file with the client, third party record holders, opposing counsel, and witnesses. Given the number of out of town

witnesses, record holders, experts and the client himself in this case, it was not possible to arrange for pick up or delivery of documentation and correspondence from our office.

No. 5 - Meal X4D March 14, 2017

64. On March 14, 2017, defence counsel conducted a full day examination for discovery of the plaintiff. The plaintiff drove to Kamloops from Barriere for the discovery, so could not return home for lunch. The \$23.36 receipt attached hereto as Exhibit "N" is for a sandwich, cup of soup and Snapple for the plaintiff's lunch, and a sandwich for my lunch during the lunch break of the discovery.

No. 6 - Binders for Trial

65. Attached hereto as Exhibit "O" is a copy of the invoice for purchase of the trial binders with inserts for cover pages, spine labels, and inner insert for documents for this action's trial that was set to commence October 15, 2018.

No. 7 - Trust Administration Fee

66. Our firm paid the \$1 5 trust administration fee required by Law Society Rule 2-1 1 0 in relation to Mr. Brown's file.

No. 8 - Dr. G.M. McKenzie

67. Mr. Brown saw physiatrist Dr. Koo for a medical legal assessment on January 18, 2016, who rendered an Initial report of same date. By November 2015 Mr. Brown's medical records disclosed complaints of a more diffuse pain, and because of Mr. Brown's pre-accident chronic pain issues and ongoing narcotic pain medication prescriptions it was determined we would require an opinion from a physical and rehabilitation specialist with expertise in chronic pain, complex regional pain syndrome, pain management, analgesic prescription. This was necessary to determine whether Mr. Brown's ongoing sequelae and functional disability would be attributable to the subject accident, or his prior medical conditions.
68. Orthopaedic surgeon with subspecialty in shoulder injury and surgery Dr. McKenzie saw Mr. Brown for an independent medical assessment on February 2, 2016, and rendered a report dated February 4, 2016. Our office scheduled this appointment as Mr. Brown's shoulder symptoms seemed to remain problematic despite gradual improvement from his sternal fracture. Mr. Brown had not been referred for ongoing consultation with a specialist following his discharge from hospital, and so did not have the benefit of the opinion of a treating orthopaedic surgeon regarding his fracture or shoulder injury. Attached hereto as Exhibit "P" is Dr. McKenzie's invoice of \$4,725.
69. The plaintiff ultimately chose to rely on Dr. Koo's report and retain Dr. McKenzie's report as privileged.

70. Mr. Brown attended a defence medical assessment with physiatrist Dr. Laidlow at the request of defence counsel on September 19, 2016. Dr. Laidlow's report was served on plaintiff counsel on October 11, 2016, and throughout the action the defendant served two further reports of Dr. Laidlow in 2018.
71. The plaintiff attended a two day functional capacity evaluation in Kamloops at Meridian Rehabilitation Consulting Inc. on May 3 and 4, 2016. A primary purpose of the evaluation was to determine if Mr. Brown could return to his prior occupation at the Gilbert Smith Mill safely, in any capacity. Because Mr. Brown expressed that his pain levels after the forty-five to sixty minute drive from his home into central Kamloops would be extremely high, and he doubted he would be able to perform his second day of testing after driving to and from Kamloops on the first day of testing.
72. We arranged for Mr. Brown to travel to stay at the Best Western Plus for one night on May 3, the evening between his two days of testing. While day two of testing was originally planned to take place at the clinic in Kamloops, after performing the interview about the previous day's testing OT Bevan Haley obtained permission from the Mill to perform some testing at their facility, and she and Mr. Brown proceeded back to Barriere to complete testing. The invoice for that stay is attached hereto as Exhibit "Q".
73. Had the plaintiff not stayed in this discount travel hotel, he would be entitled to his mileage for having made an additional round trip to and from Barriere between the two assessment days, in the range of \$70.00. Furthermore, the results of the FCE report would have been a less reliable conclusion of the plaintiffs ability to return to work, as he would be starting the testing with already elevated pain levels that do not reflect how he would be beginning a day of work at the local Barriere Mill.

Nos. 11 and 12 - Dr. Atkins January 15, 2019 IME Air Canada Air Fare and Hotel

74. Attached hereto as Exhibit "R" are the true copies of Air Canada Air Fare and one night at Parkside Hotel & Spa invoices for the January 15, 2019, independent medical assessment with psychiatrist Dr. Atkins that the plaintiff attended in Victoria, BC.
75. The defendant has not objected to the reasonableness or necessity of Dr. Atkins' report. As mentioned previously in this affidavit, the parties reached a settlement the month after the report was served.

No. 13 - Lawyer Travel

76. We were advised on May 24, 2019, that the defendant opposed these disbursements. On October 1, 2018, I travelled in my own vehicle to Barriere to meet with witness Mike Kennedy prior to trial. ICBC's suggestion that Mr. Kennedy had provided them with evidence contradictory to the statement he had provided to me resulted in his position as a contentious witness at trial. I met with him in person to review what ICBC claimed he had told them, reclarify his previous evidence, and go over some additional information I had

obtained from other Gilbert Smith employees since my last discussion with him, prior to trial.

77. On October 6, 2018, I travelled similarly to 100 Mile House to meet with the plaintiff's long term pre- and post-accident general practitioner, Dr. Vithilal. The defendant's experts reports made much of the plaintiff's pre-accident chronic pain conditions and narcotic prescriptions, which were treated and prescribed by Dr. Vithilal.
78. As I expected her to be subject to a rigorous cross-examination at trial, I met with her in person to prepare her for this and discuss specific entries in her records, prior to the trial.

No. 15 - Client Travel

79. The mileage charges reflect \$0.50 per kilometre for one roundtrip to Barriere (64 kilometres), and one roundtrip to 100 Mile House (185 kilometres). Attached hereto as Exhibit "S" are the cheque stubs for said mileage charges.
80. As the plaintiff resides in Barriere, he was required to travel out of town for each independent assessment he attended in person. The timing of available flights is also more difficult based on Mr. Brown's need to travel from Barriere to Kamloops for flights, such that sometimes he required more than one night's stay out of town in order to attend an appointment. Our firm calculates any necessary mileage at a maximum of \$0.50 per kilometre, anticipated parking charges, and a meal stipend based on time spent travelling away from home, and sets the amounts provided to the client out on a Client Travel Outline form.
81. The Client Travel Outline form also includes fund spent by the firm for hotel and airfare, but aside from the Dr. Atkins airfare and hotel, the defendant has agreed to those charges for the other IMEs. Disputed No. 15 refers only to the non-airfare and non-hotel charges.
82. Due to the poor quality paper restaurant receipts are often printed on, the receipts provided by the client for food receipts are particularly illegible, as the ink has worn off of the cashier slips. I have included as exhibits the receipts which are still legible, and confirm that the amount of money set out on the Client Travel Outline represents the money provided to the client to account for their meals, mileage, taxi, parking, and bus ticket as appropriate. This client's rural residential location made travel a more complex endeavor than if he resided in a larger center with its own airport. The amount given for meals/taxi/parking is determined by the particular location, whether parking/taxi is required to get to and from the appointment, and how many meals he would have to consume over the necessary days of travel.
83. The plaintiff claims the travel expenses for each of the below out of town assessments.

Dr. Koo January 18, 2016 255.00

84. Please find attached as Exhibit "T" the Client Travel Outline for the January 2016 Dr. Koo IME. Mr. Brown was provided with funds for a Greyhound bus ticket for roundtrip from Barriere to Kamloops, meals and taxi for a two day trip to Vancouver. Unfortunately, the Greyhound bus from Barriere broke down, and Mr. Brown incurred a \$50.00 taxi fare to make it into Kamloops on January 17, 2016.
85. Mr. Brown was in Vancouver for this appointment for two nights, He was provided \$70 for his meals, \$150 for taxi, and \$27.51 for Greyhound bus ticket.

Dr. McKenzie February 2, 2016 220.00

86. Attached hereto as Exhibit "U" are Mr. Brown's Greyhound bus ticket receipt three legible food receipts, and taxi receipts.
87. Please find attached as Exhibit "V" the Client Travel Outline for the Dr. McKenzie IME. Mr. Brown was provided with funds for Greyhound bus ticket, taxi, and meals to travel from Barriere to his appointment with Dr. McKenzie at 1144 Burrard Street, Vancouver, 8:15 am on February 2, 2016. He travelled to Vancouver on February 1, 2016.
88. Attached hereto as Exhibit "W" are Mr. Brown's Greyhound bus receipt, eight legible food receipts, and seven taxi receipts.

Meridian Rehab May 3 & 4, 2016 125.00

89. Please find attached as Exhibit "X" the Client Travel Outline for the Bevan Haley Functional Capacity Evaluation. Further to my comments under disputed disbursement No. 10, Mr. Brown was provided with \$20.00 for parking to get to and from his appointment and \$70 for meals, as he would need lunch, snack and dinner his first day, and breakfast and lunch the second day of testing.
90. Attached hereto as Exhibit "Y" are five of the most legible food receipts Mr. Brown was able to provide.

Dr. Koo January 5, 2018 490.00

91. Please find attached as Exhibit "Z" the Client Travel Outline for the January 2018 Dr. Koo IME. Mr. Brown was provided with mileage, meals and parking funds to drive from his residence to his appointment with Dr. Koo at his 1211 West 8th Avenue, Vancouver office scheduled for 9 am January 5, 2018, an approximate 425 kilometre distance. Mr. Brown was in Vancouver for this appointment for two nights. He was provided \$50 for his meals, and the hotel provided a standard breakfast both mornings.
92. We do not have any legible food receipts from this trip.

Derek Nordin May 14, 2018 520.00

93. Please find attached as Exhibit "AA" the Client Travel Outline for the Derek Nordin Vocational Assessment. Mr. Brown was provided with mileage, meals and parking funds to drive from his residence to his appointment with Derek Nordin at his 1338 West Broadway, Vancouver office scheduled for 10 am May 14, 2018, an approximate 425 kilometre distance. Mr. Brown was in Vancouver for this appointment for two nights. He was provided \$20 for parking, \$50 for his meals, and the hotel provided a standard breakfast both mornings.

Dr. Atkins January 15, 2019 292.00

94. Please find attached as Exhibit "BB" the Client Travel Outline for the Dr. Atkins IME. Mr. Brown left Barriere the morning of January 14, 2019 to take his 1:40 pm flight from Kamloops to Victoria. He was provided with \$60.00 in mileage for the approximately sixty-nine kilometre drive to and from the Kamloops airport, and \$20 for airport parking. He arrived in Victoria around 3:45 pm. His return flight after his appointment departed Victoria at 6:35 pm and arrived in Kamloops around 9:05 pm, after which he would have to drive home to Barriere.

During this trip Mr. Brown would have consumed approximately five meals. He was provided with \$75.00 for this purpose. We do not have any legible receipts from Mr. Brown's food purchases.

The 810 Humboldt Street location of Mr. Brown's hotel was 4 kilometres away from Dr. Atkins' office address at 2130 Hall Road, in Victoria, BC, and over 26 kilometres away from the airport. Mr. Brown's hotel Mr. Brown has confirmed to me that he took a taxi to and from the airport and his appointment, but cannot locate the receipts.

- [10] Mr. Howard filed a response affidavit. I reiterate the comment I made in para. 8 above respecting interspersing relevant facts with comments which are partially in the nature of submissions. That affidavit is as follows:

I, MATTHEW G. HOWARD, lawyer, of Suite 200, 3005 - 30th Street, Vernon, British Columbia, SWEAR THAT:

1. I represented the Defendant, Sara Williams, in this proceeding and as such have direct knowledge of the matters deposed to in this affidavit.
2. Paragraph 17 of the Affidavit of Kelsey O'Bray made on May 27, 2019, correctly notes that three different counsel held conduct of this file throughout its lifespan.
 - (a) Ms. Melody Martin held conduct of the file for the period of September 29, 2015 through to approximately June 1, 2017. A copy of a letter to counsel for the plaintiff dated September 29, 2015 advising that Ms, Martin of Kidston and Company has been retained to act on behalf of the Defendant is attached as Exhibit A.

- (b) On July 1, 2017, I commenced a contractual associate position with the law firm of Kidston and Company, and soon thereafter received conduct of the Defence. A copy of a letter to counsel for the plaintiff dated July 6, 2017 advising of a change of lawyer is attached as Exhibit B.
 - (c) The subject trial was scheduled to commence on October 15, 2018 for 13 days. On September 24, 2018, I commenced a 9 day trial out of the Cranbrook Registry (the "Cranbrook Trial"). Due to the anticipated trial conflict in my trial calendar, on or around September 15, 2018, Mr. Kyle Watts received conduct of the Defence. Upon completion of the Cranbrook Trial, I resumed a second chair role of the subject action.
 - (d) As such, I have personal knowledge of the facts and matters hereinafter deposed to, except where the same are stated to be upon information and belief and where so stated, I verily believe the same to be true.
3. Paragraph 2 of the of the Affidavit of Kelsey O'Bray made on May 27, 2019, notes that the defendant provided the "defence position" with regard to tariff items and disbursements in issue in this action on May 23, 2019, The pre-hearing of this matter was conducted on May 13, 2019. The defence was directed to provide the items under dispute by May 17, 2019. Due, in-part to the May long-weekend, I was unable to confirm instructions by May 17, 2019 but was able to indicate a number of items that would more likely than not be disputed. A copy of the aforementioned May 17, 2019 correspondence is attached as Exhibit C.
 4. On May 21, 2019 Ms. O'Bray responded to the points raised in my correspondence of May 17, 2019: See Exhibit D referenced below.
 5. On May 22, 2019 at 10:48 AM, I confirmed with Ms. O'Bray the issues in dispute for this subject Costs Hearing. Attached as Exhibit D is a copy of Exhibit C with additional comments made by Ms. O'Bray on May 21, 2019 (see highlighted portion) and confirmation and clarification of disputed items made by the writer on May 22, 2019 (see red portion).

TARIFF ITEMS

Tariff 10(a) and 11(a)

6. Attached as Exhibit E is a copy of the Defendant's Third Amended List of Documents dated September 24, 2018. This was the final list of documents prepared by the Defendant.

Tariff 18

7. Attached as Exhibit F is a true copy of the front page of the examination for discovery transcript for the Plaintiff, the certification page, as well as pages 173 and 174, which expresses evidence affirmed to by the Plaintiff with respect to the levels of friendship which he had in Barrier, BC.

Tariff 31 and 32

8. Attached as Exhibit G is a true copy of my time management entries for September 12, 2018 and December 13, 2018, related to attendance at the September 12, 2018 Trial Management Conference and December 13, 2018 Case Planning Conference.

DISBURSEMENTS**Photocopying Fees**

9. Attached as Exhibit H is a true copy of a photocopy management system report for the period of August 21, 2015 to May 30, 2019. The report indicates that the photocopying disbursements incurred by the defendant were \$790.66 (exclusive of GST). Our firm charges \$0.05 per black and white photocopy and \$0.30 per colour photocopy.

Medical Report of Dr. G.M. McKenzie, February 9, 2016

10. Attached as Exhibit I is a true copy of the instruction letter dated December 10, 2015 provided by Plaintiff's Counsel to Dr. Koo.
11. Attached as Exhibit J is a true copy of the Raw Data Records of Dr. Koo regarding a January 18, 2016 independent medical assessment
12. Attached as Exhibit K is a true copy of a medicolegal report dated January 18, 2016, authored by Dr. Koo, regarding an independent medical assessment of the Plaintiff performed on January 18, 2016 and served upon the Defendant pursuant to Rule 11-6.

Functional Capacity Evaluation by Ms. Haley, Meridian Rehabilitation, May 3, 2016

13. Attached as Exhibit L is a true copy of a functional capacity evaluation report dated June 27, 2016 prepared by Ms. Bevan Haley of Meridian Rehabilitation Consulting and served upon the Defendant pursuant to Rule 11 -6.

Client Travel

14. Attached as Exhibit M is a true copy of a letter dated January 15, 2016 from Plaintiff's Counsel to the Plaintiff with an itinerary surrounding the medical assessment of Dr. G.M. McKenzie.
15. Attached as Exhibit N is a true copy of a Hotel Receipt from Best Western Plus Kamloops Hotel regarding a stay on May 3, 2016.
16. Attached as Exhibit O is a true copy of an instruction letter dated December 19, 2017 from Plaintiff's Counsel to Dr. Koo, with respect to an "updated assessment" scheduled to occur on January 5, 2018 at 9:00 AM.

17. Attached as Exhibit P is a true copy of an instruction letter dated March 20, 2018 from Plaintiff's Counsel to Derek Nordin, with respect to a vocational assessment scheduled to occur on May 14, 2018 at 10:00 AM.

Dr. Koo, Cancellation Fee, Trial Appearance

18. Attached as Exhibit Q is a true copy of a trial schedule prepared by counsel for the Plaintiff, indicating that Dr. Koo was scheduled to take the stand on the 7th day of trial. This is confirmed in the comments made by counsel for the Plaintiff in her email of May 21, 2019 to the writer: See Exhibit D of this affidavit.
19. Attached as Exhibit R is a true copy of an email dated May 30, 2019 from Defendant's Counsel to counsel for the Plaintiff advising of the Defendant's ongoing intention to contest the cancellation fee of Dr. Koo.

[11] The second affidavit of Ms. O'Bray is in response to additional contentious matters, primarily the cancellation fee of Dr. Koo. It is as follows:

I, KELSEY V. O'BRAY, lawyer, of Suite 600 - 175 Second Avenue, in the City of Kamloops, in the Province of British Columbia, SWEAR THAT:

1. I represented the plaintiff, Lenard Brown, in this proceeding and as such have direct knowledge of the matters deposed to in this affidavit.
2. Further to paragraph 5 of the affidavit of Matthew G. Howard, provided at 4:14 pm on Friday June 7, 2019, after the email correspondence referenced in Mr. Howard's affidavit, Mr. Howard and I had a phone conversation regarding the remaining disputed items in the plaintiff's bill of costs. I clarified those remaining disputed tariff and disbursement items in email correspondence of May 24, 2019. Attached hereto is a true copy of that email exchange as Exhibit "A".
3. Further to my 1st Affidavit in this action sworn on May 27, 2019, defence counsel has since advised that the defendant also opposes the \$3,063.90 invoice of Dr. Koo, dated October 17, 2018, for "Expert Testimony in court per day - late cancellation." A true copy of that invoice is attached hereto as Exhibit "B".
4. Dr. Koo resides in Vancouver and was scheduled to testify in person, at 10 a.m. in Kamloops on the seventh day of trial, being October 23, 2018. The trial was not permitted to be adjourned due to lack of available judge until the third day of the intended trial, being October 17, 2018. As such, Dr. Koo was provided with only three full business days' notice of the cancellation of his testimony appearance. Due to the scheduling shuffling that was occurring due to the Registry's requirement that we remain ready to start trial as late as three days into the scheduled start date, Dr. Koo was set to be the first plaintiff expert testifying in person at the trial.

5. A true copy of my email correspondence with Maica, the medical office assistant at Dr. Koo's practice is attached hereto as Exhibit "C". Maica confirms that the office was not able to fill Dr. Koo's day on October 23, 2018, as it was late when they received notice that the trial was adjourned, and the office policy requires a charge of \$2,918 per the BCMA fee guide when cancellation of a court appearance is made with less than five business days' notice. The email attaches the formal Alder Medical Clinic Office Policy with a description of applicable policies.
 6. A true copy of Dr. Koo's Curriculum Vitae is attached hereto as Exhibit "D".
 7. I was under the impression that the defendant was not objecting to the air fare and hotel disbursements related to IMEs. In the event I am mistaken with respect to those scheduled assessments with Dr. McKenzie, Dr. Koo, Derek Nordin or Dr. Atkins, we have attached true copies of those invoices hereto as Exhibit "E".
- [12] Mr. Howard, counsel for the defendant, provided focused written submissions. Although not evidence, they are helpful. They set out Rule 14-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Civil Rules] and then succinctly set out the defendant's position on the contested matters.
- [13] Counsel prepared a joint brief of authorities. Many of the authorities were with respect to specific unit entitlements for the various tariff items. The assessment by a registrar for appropriate unit items is very much fact dependant. The starting point for assessment of necessity and/or propriety of a disbursement was set out by Mr. Justice McFarlane in *Van Daele v. Van Daele*, (1983), 56 B.C.L.R. 178, [1983], B.C.J. No. 1482 (BCCA) as follows:

There, in my opinion, lies the error of principle into which Meredith J. fell. The proper test, it seems to me, from a number of authorities referred to us this morning is whether at the time the disbursement or expense was incurred it was a proper disbursement in the sense of not being extravagant, negligent, mistaken or as a result of excessive causation or excessive zeal, judged by the situation at the time when the disbursement or expense was incurred.

TARIFF ITEMS

Tariff Items 2 and 34

- [14] While it might seem unusual to conflate these two tariff items, issues between the parties in large measure focussed on the portion of the wording for tariff item 2 "for which provision is not made elsewhere in this tariff."
- [15] For tariff item 2, the plaintiff claims 29 units. The maximum is 30 units. The defence position is that I should allow 17 units. For tariff item 34, the plaintiff claims 65 units; the defence position is that I should allow 5 units.

- [16] Dealing firstly with tariff item 34, as set out in the evidence, the trial was originally scheduled to commence on October 15, 2018 for 13 days and did not proceed due to an inability to secure a trial judge. It was rescheduled to commence May 27, 2019 for 13 days. It settled March 29, 2019.
- [17] Subsection 4(4) of Appendix B to the Civil Rules provides:
- (4) If, in the Tariff, units may be allowed for preparation for an activity, the registrar may allow units for preparation for an activity that does not take place or is adjourned up to the maximum allowable for one day.
- [18] That wording changed slightly from the preceding analogous section of the Supreme Court Rules. The change did not affect the meaning. The subsection was considered by Groberman J., as he then was, in *Ebrahimi v. Stevenson*, 2006 BCSC 983, where at paras. 26-33 he writes:
- [26]. Item 24 of the tariff is, "Preparation for trial, if proceeding set down for each day of trial." The per diem amount is 5 units. Section 4(4), which is part of s. 4 under the heading "Per Diem Rates" states:
- Where in the Tariff units may be allowed for preparation for an activity, the registrar may allow units for preparation for an activity that does not take place or is adjourned up to the maximum allowable for one day.
- [27] Counsel for the plaintiff argues that item 24 should be read as allowing 5 units per day based upon the estimated length of a trial. She says that item 4(4) of Appendix B is either inapplicable, since item 24 is more specific, or that it merely gives the registrar discretion to reduce the amount payable for trial preparation where he or she finds that appropriate. Counsel says that the use of the words "if proceeding set down" in item 24 are important and that the amount payable is therefore dependant on the number of days that the trial is set down for, rather than the actual number of days on which it proceeds. She points out that an injustice might occur if item 24 were not so interpreted, as a party would not be entitled to reasonable compensation for preparation for an anticipated long trial that does not ultimately go ahead.
- [28] Counsel for the defendant argues that the words, "if proceeding set down" in tariff item 24 simply means that the item can be claimed more than once if a trial sets down but does not proceed on more than one occasion. The amount that can be claimed where the trial does not proceed on the day that it has been set down to proceed, she says, is limited to one day for each time the trial is set down, pursuant to section 4(4).
- [29] His matter is not one of first impression. In *Clark v. Magdanz*, [1994] B.C.J. No. 3243, the plaintiff made arguments similar to those of the plaintiff in this case. R. Holmes, J., rejecting the argument, stated at paras. 6 - 8:

I find that to be a strained and unsupportable interpretation of the plain words of the appendix. It may be that in certain circumstances the limitation imposed on recovery for trial preparation where settlement occurs will not, in fact, achieve the approximate 50% indemnity that the tariff, at its inception, was hoped to provide.

That does not give interpretive licence to do violence to the express provision of the tariff, but is a matter that can only be remedied by an intentional change to the wording of the tariff. It must also be borne in mind that the hoped for objective was to be the product of the whole of the cost taxation structure, and not that each item must necessarily achieve that standard.

I would also note that there are many tariff items for matters that might, in the ordinary context, be considered part of trial preparation. The entire discovery process, both examinations for discovery and document discovery, and interlocutory motions are extensively provided for. It is also apparent that a good deal of the trial preparation contemplated in tariff item 24 was preparation occurring during the course of an ongoing trial, and therefore, not applicable at all to trials that never commence.

[30] To similar effect, at least in result, are two decisions of Master Bolton sitting as registrar in *Wong v. Leung* (1998), 20 C.P.C. (4th), 159 and *Tudge v Koo*, [1998], B.C.J. No. 2937.

[31] Counsel for the plaintiff notes that the cited decisions of the registrar are not binding on me. While the decision of this court in *Clark v. Magdanz* is, as a matter of comity, normally one that I should follow, counsel argues that it comes within an exception to the general rule in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590, because it was an oral decision delivered from the bench, after limited time for reflection. I am not certain that I would so regard the decision in *Clark v. Magdanz* which, while oral, does not appear to be delivered under exigent circumstances that required an immediate decision without consideration.

[32] In any event, it seems to me that it would be unwise to depart from an earlier decision of this court which represents the longstanding and uniform practice of all registrars of the court, unless I was of the view that the decision was clearly in error. In *Tudge v. Koo*, Master Bolton said:

With all respect to the drafters, [section 4(4) of appendix B] is perhaps not as clear as it might be. Is the "preparation for an activity" - e.g., a trial - preparation for a trial of any duration, or preparation for each day of trial?

The answer given by all the registrars has been the former, as the less strained of the two interpretations.

That is, indeed, my understanding of the practice of the court.

[33] I am not persuaded that R. Holmes J. was wrong in the decision in *Clark v. Magdanz*, and would respectfully follow it. Accordingly, the appeal insofar as it relates to tariff item 24 and section 4(4) of Appendix B. is dismissed.

- [19] Tariff item 24 referred to by Groberman J. is now tariff item 34.
- [20] Trial preparation can commence sufficiently ahead of the start of the trial to entitle a successful party to claim 5 units.
- [21] I have reviewed Master Bouck's decision in *Wheeldon v. Magee*, 2010 BCSC 491. That was not a case where the matter settled before trial.
- [22] The principles discussed by Groberman J. in *Ebrahimi* are binding on me. I allow 5 units for tariff item 34.
- [23] Tariff item 2 was discussed by Master Keighley in *Huizenga v. Davidson*, 2015 BCSC 266, where at paras. 19-20 he writes:
- [19] Tariff Item 2 (more accurately, its predecessor, 1B) has been characterized by former Registrar Sainty as a "catch all", intended to compensate the litigant for all work undertaken and for which compensation is not made elsewhere in the tariff: *Capital Resource v. Coronado Resources*, 2008 BCSC 692. I have not had an opportunity to review the correspondence and emails and cannot, as a result, consider the purpose of these communications. Mr. Lester's affidavit refers to some 224 letter and 107 emails between counsel not including correspondence for which provision is made elsewhere in the tariff. The settlement amount was significant; the matter took a little more than four years from the date of the accident to the date of settlement and a claim anticipated to require 10 days of trial represents a significant undertaking.
- [20] I will allow 20 units.
- [24] I was also referred to the decision of Master Young, as she then was, in *Green v. Conley*, 2014 BCSC 2243, wherein in discussing tariff item 2 in a situation where counsel was claiming 25 to 30 units, she writes at paras. 15-16:
- [15] Some of what Ms. Green's counsel is claiming for is provided for in other areas of the tariff. The obtaining of records from Ms. Green's physicians is provided for under tariff item 11. I do agree with Ms. Green's counsel that preparing an expert witness for trial is not covered by tariff item 17, which deals exclusively with retaining and consulting with experts for the purpose of obtaining opinions. Preparing the witness for giving evidence at trial is properly included in either item 2 or 34: *Wheeldon v Magee*, 2010 BCSC 491.
- [16] It is my view that the 5 units allowed under item 35 do not adequately compensate this plaintiff for the work done in preparing all experts to testify at the trial. I am mindful of the fact that this matter was set and ready to go and settled one day before the trial. For this reason and because of the inadequate compensation in tariff item 34, I will allow extra units under item 2.
- [25] She allowed 17 units in that particular case.
- [26] I reiterate what I wrote in *Dakin v. Roth*, 2013 BCSC 1018 in para. 22:

- [22] It is important to keep in mind the wording repeated in Appendix B in the description for tariff items 1, 2, 3, and 6. The description for each of these items contains the words "for which provision is not made elsewhere in this tariff". Registrars must be careful to separate out, for example, activities which are allowed under item 17, and, therefore, cannot justify additional units under item 2. In reaching my decision on the appropriate number of units to be allowed on each bill of costs under each item, I have kept this wording in mind.
- [27] This was a case which required substantial investigations, in particular, firstly up to the first abort of trial, and then subsequently, ultimately resulting in a substantial settlement. Liability was denied until the business day prior to the scheduled first day of the abort of trial.
- [28] The personal circumstances of the plaintiff, including the fact that he was essentially illiterate, had a checkered background, and was at the time of the accident employed at the highest annual salary he had apparently ever received (see Ms. O'Bray's first affidavit at paragraph 15). The matter was further complicated by employment issues unrelated to the plaintiff, but which might have affected both past income loss and future loss capacity claims.
- [29] In reaching my decision, I have considered the wording "for which provision is not made elsewhere in this tariff" particularly with respect to the plaintiff's claims under tariff items 10, 11, 17 and 18. I have also considered the evidence provided in Ms. O'Bray's affidavit, some of which deposes to trial preparation under tariff item 34.
- [30] I allow 25 units under tariff item 2.

Tariff Items 10(a) and 11(a) - Discovery and Inspection of Documents

- [31] The defendant submits that this is not, to use his words, "an incredibly document-heavy and complex file." That is why the claims are properly brought under tariff items 10(a) and 11(a). Document-heavy files would be assessed under tariff items 10(b) and/or (c) and 11(b) and/or (c).
- [32] There was extensive medical documentation. There were six plaintiff's lists and four defendant's lists. There was overlap between the lists, which is common.
- [33] I allow 3 units under tariff item 10(a) and 9 units under tariff item 11(a).

Tariff Item 14 - Notices to Admit

- [34] The plaintiff served three Notices to Admit. There was overlap between the first two, both of which were attempts to obtain admissions of fact which would have the effect of admitting liability. The second and third Notices to Admit primarily were to seek admission of authenticity of documents.
- [35] I allow the plaintiff 3 units as claimed.

Tariff Items 17 and 18 - Expert Evidence and Witnesses

- [36] The plaintiff has claimed the maximum of 10 units under tariff item 17 and the maximum of 10 units under tariff item 18. The defendant submits that 5 units are appropriate under tariff item 17 and 6 units are appropriate under tariff item 18.
- [37] The plaintiff retained six experts, including an engineering expert.
- [38] The retention and consultation of experts was complicated somewhat by the adjournment of the trial. This required additional consultation.
- [39] This was not a case where it was what I would consider process and correspondence associated with retention and consultation which would approach the maximum. I note that in *Scott v. Truter*, 2015 BCSC 2403, I discussed these tariff items at paras. 32-33 and allowed 4 units for retention of four experts. I have also considered Registrar Sainty's oft-cited decision of *Fairchild v. Vancouver Coastal Health Authority*, 2011 BCSC 616, which was a medical malpractice case. In that case, Registrar Sainty awarded 8 units under tariff item 17. In *Perron v. Catalano*, 2016 BCSC 1285, Master Scarth, as registrar, awarded 5 units in a case where ten experts were consulted.
- [40] There were some other factors in that case which appear to have affected the 5 unit allowance.
- [41] I was assisted by the comments of Master Young in *Green*, where she discusses tariff items 17 and 18 at paras. 22-26.
- [42] I agree with what Master Young wrote in that considering the range of cases, the case before me does not fit within the most extreme category allowing the maximum number of units.
- [43] In considering the process associated with "contacting to all witnesses", that includes the expert witnesses.
- [44] The difficulties arising from the trial adjournment take this matter somewhat above the mid-point with respect to the experts. I allow 6 units under tariff item 17.
- [45] I agree with the submissions of the defendant with respect to tariff item 18. I allow 6 units for tariff item 18.

Tariff Items 31 and 32 - Case Planning Conference and Trial Management Conference

- [46] There was a Trial Management Conference on September 12, 2018 which required preparation by the plaintiff of an Amended Trial Brief: Ms. O'Bray's affidavit #1 at paragraph 46. There was also a Case Planning Conference which reiterated the Trial Management Conference orders as set out in Mr. Howard's affidavit that set a billing of .5 hours for the Trial Management Conference, which includes some additional work, additional to attendance. .8 of an hour is recorded with respect to the Case Planning Conference, again

with some additional matters referenced on the time entry.

- [47] Tariff item 31 has a range of 1 to 3 units; the plaintiff has submitted I should allow 2 units, the defendant has submitted I should allow 1 unit. I allow 2 units as claimed by the plaintiff.
- [48] Tariff item 32 has a range of between 1 and 5 units. The plaintiff has submitted I should allow 5 units (the maximum); the defendant has submitted I should allow 3 units. I agree with the submissions of the defendant. I allow 3 units.

Tariff Item 36 - Written Argument

- [49] The range for tariff item 36 is 1 to 10 units. In paragraph 51 of her first affidavit, Ms. O'Bray deposes to what she did to draft the plaintiff's written closing submissions. Drafting closing submissions differs from preparation for trial. I am satisfied that they were partially drafted. Obviously, they could not be completed because the trial did not proceed and thus no evidence was taken.
- [50] However, in the somewhat unusual circumstances of this case, which was that counsel were on standby essentially for three days, and then the matter was adjourned for lack of a judge, it is appropriate to allow for a portion of the written argument which would have been finalized had the trial proceeded. I allow 2 units as claimed.

Tariff Items 29 and 30

- [51] Tariff items 29 and 30 may be dependant upon whether or not there were offers to settle costs. I leave it to counsel to sort out whether either party is entitled to tariff items 29 and 30.
- [52] If there are no offers to settle costs which impact on this assessment, then the plaintiff is entitled to 2 units for tariff item 29 and 4 units for tariff item 30. If there was an offer by the defendant which exceeded the amount of costs, including disbursements, ordered by me, then the defendant is entitled to those units for those tariff items. If there was an offer to settle costs by the plaintiff which was exceeded by my decision, then the plaintiff is entitled to 4 units under tariff item 29 and 8 units under tariff item 30. Taxes are to be added to the appropriate unit values.

Disbursements

Photocopies

- [53] The plaintiff has claimed \$6,901.00, plus taxes, for photocopies charged at \$.25 per copy. This equates to approximately 27,600 photocopies.
- [54] The defendant's photocopying disbursements set out in exhibit H to Mr. Howard's affidavit total \$790.66, inclusive of taxes. However, those are charged out at a rate of \$.05 per copy as opposed to \$.25 per copy claimed by the plaintiff and often allowed pursuant to Administrative Notice 5, which states in Direction 1:

1. The following charges may be allowed on a party/party bill of costs:

- a. photocopying 25¢ per page
- b. faxes 35¢ per page.

[55] The Administrative Notice states that these amounts are a guideline only. Photocopies are often considered a profit centre by law firms. On the other hand, making photocopies is not just the cost of the actual printing of the copy; labour is also involved.

[56] The defendant submits that I should allow \$4,000.00 based on an equivalent number of photocopies utilized by the defendant, including what is referred to as a "second chair position" used by the defendant.

[57] On the other hand, this matter was ready for trial and required the substantial trial preparation set out in paragraphs 55 and 56 of Ms. O'Bray's affidavit, including the substantial medical records of the plaintiff.

[58] Registrars do utilize a "rough justice" approach, recognizing that some of the photocopying is subsumed under office overhead and not directly related to the trial. I commented on this in Dakin at paras. 46-51. That case had a little less than half of the photocopying proposed to as taking place in this case. I allowed \$2,500.00 for photocopying in Dakin.

[59] I allow the plaintiff \$5,500.00 for photocopying, plus applicable taxes.

Long Distance Charges

[60] The evidence respecting long distance charges is set out in Ms. O'Bray's first affidavit at paragraphs 58-61.

[61] In some cases, long distance charges would be considered overhead. However, the evidence here is that the long distance charges were all necessary in the sense of being connected to this litigation. They are allowed as claimed at \$227.45, plus applicable taxes.

Faxes

[62] In paragraph 62 of her affidavit, Ms. O'Bray deposes to the use and necessity of faxes. A print out is attached to her affidavit proving that the faxes were sent. \$308.93 plus \$15.45 taxes totalling \$324.38 was claimed.

[63] The defendant submits that faxes are part of the overhead or alternatively that a reasonable amount to allow would be \$240.00.

[64] Generally speaking, correspondence these days is either done electronically by attachment to email or, if original documentation is required, by courier. Plaintiff's counsel has deposed that the faxes were necessary. I agree with the alternate submission of the defendant that a reasonable amount in this case would be as submitted, \$240.00, plus applicable taxes.

Postage and Handling

- [65] In *Rainville v. Zheng*, 2017 BCSC 767, I wrote at para. 96:
- [96] I have in previous cases found that postage and handling constitutes overhead and is not an appropriate disbursement to be paid by a losing party. I disallow the claim for postage and handling.
- [66] I agree with the defendant that postage and handling charges should form part of the overhead of a law firm and not be borne by the defendant. I disallow that claim.

Examination for Discovery - March 14, 2017

- [67] The amount claimed is supported by a receipt, but includes lunch for both the plaintiff and counsel. The plaintiff's lunch is a legitimate disbursement expense which should be borne by the defendant. I allow \$15.00, plus applicable taxes.

Binders for Trial

- [68] Ms. O'Bray attaches to her affidavit a receipt for \$1,116.78, which includes the purchase of 46 binders. It also includes items such as staples, notepads, post-it notes, paper and other items which the defendant submits are typical overhead expenses necessary for the operation of a law firm. I agree with that characterization.
- [69] Binders are obviously re-useable, even though initially purchased for this case.
- [70] The defendant submits that \$100.00 is reasonable for this disbursement and I agree. I allow \$100.00 for binders for trial, plus applicable taxes.

Trust Administration Fee

- [71] The defendant submits that the trust administration fee ("TAF") is part of the law firm's overhead and should not be borne by the defendant.
- [72] With respect, that is an incorrect submission.
- [73] The TAF is imposed by the Law Society to protect all persons who deposit trust funds with lawyers.
- [74] Once the settlement was confirmed, it was paid by the defendant's insurer to the plaintiff's lawyer. If the defendant's insurer had tried to pay it directly, it could not have imposed what I will call the usual undertakings to protect the payor. It is a very small amount to be paid, when compared to the protection it offers to the payor. It is without question a necessary disbursement, directly connected to the litigation. It is allowed as claimed.

Dr. McKenzie Invoice - February 9, 2016

- [75] Dr. McKenzie is an orthopedic surgeon with a sub-specialty in shoulder injury and surgery.

- [76] Prior to the plaintiff obtaining a report from Dr. McKenzie, the plaintiff had seen a physiatrist for a medical-legal assessment at the request of plaintiff's counsel. The plaintiff also attended a defence medical assessment with another physiatrist.
- [77] Dr. McKenzie billed \$4,500.00, plus applicable taxes.
- [78] The defendant submits that judging by the situation at the time when Dr. McKenzie was retained, his retention and the resulting disbursement, was neither necessary nor proper.
- [79] In reliance on this position, the defendant is cognizant, as am I, of what Ms. O'Bray has deposed to in her first affidavit in paragraphs 67 and 68. I have reviewed the instruction letter to Dr. Koo from plaintiff's counsel dated December 10, 2015. The third paragraph refers to the fact that the plaintiff suffered a fractured sternum and has upper back pain, especially between his shoulder blades. The raw data of Dr. Koo, attached to Mr. Howard's affidavit, makes reference to what appeared to be x-rays on August 5, 2015 and September 14, 2015, showing "an old, healed fracture deformity without evidence of complication or new bone/joint abnormality."
- [80] In his submissions, counsel for the defendant submits that Dr. Koo opined as to a diagnosis with respect to the sternum fracture and shoulder injuries.
- [81] The injuries for which the opinion of Dr. McKenzie were provided had been opined on at the time Dr. McKenzie was retained - Dr. Koo's report is dated January 18, 2016. Dr. McKenzie was retained subsequent to that; the assessment was scheduled for February 2, 2016. Because the instruction letter to Dr. McKenzie was not put into evidence, I do not know precisely when he was retained, but it is apparent that the examination took place over two weeks after Dr. Koo's letter was provided to the plaintiff and his counsel.
- [82] Defence counsel points out that the plaintiff has not provided to the defendant, nor put into evidence for this assessment, either the instruction letter to Dr. McKenzie or his report.
- [83] The onus of proving necessity and/or propriety of a disbursement rests with the person claiming.
- [84] I agree with the defendant that this was not a proper disbursement. It is disallowed.
- [85] The associated client travel, including Air Canada airfare of \$371.96, including taxes, Greyhound ticket of \$27.51, including taxes, and travel expenses of \$220.00 are also disallowed.

Other Disbursements in Issue

- [86] The plaintiff resided near Louis Creek, which is just south of Barriere, about 60-65 kms. north of Kamloops, three-quarters of an hour drive, give or take. He was scheduled to attend and did attend a two-day functional capacity evaluation on May 3 and 4, 2016.

- [87] It was initially anticipated that the functional capacity evaluation would take place in Kamloops on both days; it appears that on May 4 the occupational therapist who was testing the plaintiff obtained permission to have some testing performed at the plaintiff's workplace. The plaintiff drove back to Barriere on May 4, after spending the night in Kamloops.
- [88] Like all disbursements, propriety is to be determined at the time the disbursement was incurred. It was proper to make arrangements to have the plaintiff spend one night in Kamloops, even though subsequently it turned out that he returned quite early the next morning for a continuation of the functional capacity evaluation at his workplace.
- [89] Propriety of disbursements is not to be determined utilizing hindsight.
- [90] The charge for the hotel in the total amount of \$162.61 is allowed as claimed.
- [91] The plaintiff has claimed for mileage charged by his lawyer for two meetings - one to meet with a witness in Barriere and one to meet with the plaintiff's long-term pre and post-accident general practitioner, Dr. Vithilal in 100 Mile House.
- [92] With respect to the meeting with the witness in Barriere, as set out in paragraph 76 of Mr. O'Bray's first affidavit, there was a suggestion that the witness had given contradictory evidence. One of the issues facing the plaintiff was his present work situation, which included the potential for a lay-off as set out by Ms. O'Bray in paragraph 12 of her affidavit.
- [93] Ensuring that the evidence of an employer is accurate is proper, and probably necessary. That makes the disbursement also at least proper and probably necessary. It is allowed as claimed.
- [94] In paragraph 77, Ms. O'Bray deposes that she expected Dr. Vithilal to be subject to a rigorous cross-examination at trial. Meeting with the doctor in-person, with the documentation, strikes me as the proper way to prepare such a witness. That disbursement is also allowed as claimed.
- [95] The plaintiff's travel disbursements contain some duplication. As pointed out in submissions, the \$255.00 claimed includes the Greyhound charge of \$27.51, which is claimed elsewhere on the Bill of Costs as the third heading under "Client Travel Greyhound Ticket Dr. Koo January 18, 2016".
- [96] In addition, the claim for mileage duplicates travel between Barriere and Kamloops by bus and taxi.
- [97] The evidence is that the \$50.00 taxi expenditure was required because the Greyhound bus had broken down. There is evidence that the \$50.00 was paid by the plaintiff as there is a receipt dated January 17.

- [98] It may be that someone is entitled to a receipt for the Greyhound ticket. However, I am satisfied that the disbursements have been incurred by the plaintiff to the extent of \$192.49, and confirm that that is the amount that is appropriate to be allowed to him for that heading.
- [99] The client travel claim for attendance with Dr. Koo on January 18, 2016 is allowed at \$192.49.
- [100] With respect to the additional plaintiff travel claim of \$125.00 for the rehabilitation on May 3 and 4, 2016, I have already determined that it was reasonable for the plaintiff to spend the night.
- [101] The plaintiff has claimed \$125.00; the defendant submits that \$25.00 is reasonable in the circumstances, namely the cost of one meal and \$10.00 for parking. For the reasons given above, I found it reasonable for the plaintiff to stay in Kamloops. I do not know why there would be any charge for parking; the defendant submits \$10.00 might be reasonable. Meridian Rehabilitation is in an area of Kamloops where the business owners provide parking and there are no parking meters.
- [102] I allow the plaintiff's claim for expenses at \$100.00, a reduction of \$25.00.
- [103] The plaintiff has claimed for client travel over and above hotel in an amount of \$490.00, primarily for mileage (\$420.00) and then \$50.00 for meals and \$20.00 for parking. In addition, there is a claim for \$330.32 for hotel.
- [104] There is a slight discrepancy in that the Bill of Costs claims \$336.55.
- [105] He has claimed for two nights.
- [106] The defendant questions the need to stay the second night and points out that these assessments are typically performed over a period of one to three hours.
- [107] The same argument is made with respect to the travel for visiting to Derek Nordin for a vocational assessment. That appointment was scheduled to commence at 10 a.m. Again, the defendant submits that the plaintiff ought to have returned after the appointment, without incurring a second night in the hotel. The disbursements in both cases were incurred. Again, the test is whether it was proper at the time they were incurred.
- [108] It is prudent for the plaintiff, through counsel, to provide for contingencies such as lengthy appointments, other travel issues (the travel to see Dr. Koo was in early January, a notorious difficult time to count on driving the Coquihalla Highway, especially after dark), and other issues. On the other hand, the defendant should only be required to pay a reasonable amount. I allow the claims (mileage, meals, parking and hotel) together in the amount of \$700.00, a reduction of \$123.32. I allow the amount claimed for Derek Nordin in the total amount of \$800.00, a reduction of \$219.92.

[109] These should be deducted from the two Holiday Inn claims, one respecting Dr. Koo for January 5, 2018 and one respecting Derek Nordin for May 14, 2018. With those deductions, the client travel of \$490.00 for Dr. Koo for January 5, 2018 and \$520.00 for Derek Nordin for May 14, 2018 are then allowed as claimed.

Cancellation Fee - Dr. Koo

[110] As noted above, Dr. Koo was the plaintiff's physiatrist.

[111] Dr. Koo was initially scheduled to take the stand on the seventh day of trial. His cancellation fee of \$2,918.00, plus \$145.90 tax, was claimed on the Bill of Costs.

[112] On May 17, 2019, Mr. Howard wrote to Ms. O'Bray by email setting out detailed objections to the matters in issue.

[113] With respect to Dr. Koo's cancellation fee, he wrote:

Unnecessary: The witness was scheduled on the seventh day of trial. A minimum, the witness was given 6 days of notice that he was not required for trial. It is more likely than not that the expert was able to fill the time that he had set aside for testifying at trial.

[114] In her response to that email, on May 21, 2019 Ms. O'Bray wrote:

On the plaintiff's most recent witness schedule for the October 15/18 trial, Dr. Koo is scheduled to testify on October 23. The Supreme Court Registry would not permit us to adjourn the trial until it was clear on Wednesday October 17, that no judge would be made available. The parties were advised on October 12, 15 and 16, that they had to remain ready to start trial the next day should a judge become available. On October 17, when a judge was still not available, court registry permitted us to adjourn the trial, and only then were witnesses advised of the cancellation. Per the terms of the IME contract with Dr. Koo, a late cancellation fee of \$2,918 + tax was charged due to the less than three full business days' notice of testimony cancellation. Dr. Koo was scheduled to testify in person, not by video-conference, and his travel arrangements had been made.

[115] On May 22, 2019, Mr. Howard advised Ms. O'Bray of some notations which were in red, but the exhibit I have was only in black and white so I was unable to determine those with precision.

[116] On May 23, 2019, Ms. O'Bray emailed Mr. Howard setting out confirmation of which tariff items and disbursements were to be responded to and contained the wording "as the remainder are agreed." Mr. Howard responded the next day with an email saying "The only other disbursements contested are Lawyer Travel."

[117] Both lawyers appear to have overlooked the dispute respecting the substantial cancellation fee. I make this comment without attribution of fault or neglect; there were a lot of issues in this costs assessment. They were handled by counsel efficiently and appropriately. Sometimes things get missed.

[118] This resulted in Ms. O'Bray attempting to get the requisite evidence together with respect to the cancellation fee, which is contained in the exhibits to her second affidavit. Exhibit B is the account, which is in the amount claimed and has been paid. Exhibit C starts with an email exchange between Ms. O'Bray and Maica, obviously an employee of the Alder Medical Clinic, which is the entity which rendered the aforementioned account on behalf of Dr. Koo. Maica's email is as follows:

Unfortunately, we were not able to fill Dr. Koo's full day as it was late when we received the notice that the trial was adjourned. As per our office policy giving us less than five business days notice, we have sent the invoice of this late cancellation.

Attached is our office policy.late when we received the notice that the trial was adjourned. As per our office policy giving us less than five business days' notice, we have sent the invoice of this late cancellation.

Attached is our office policy.

[119] The policy contains the following wording:

Cancellation of Court or legal appearances where the patient or legal counsel fails to give five business days' notice will be charged \$2,918.00 (full day); \$1,761.00 (half day) as per BCMA fee guide.

[120] Exhibit D is Dr. Koo's curriculum vitae. He obviously has significant expertise and is a fellow of the Royal College of Physicians of Canada with a specialty in physical medicine and rehabilitation. He is also a clinical assistant professor in the division of physical medicine and rehabilitation in the Department of Medicine at the University of British Columbia and also gives an affiliation address of the G.F. Strong Centre.

[121] There is no doubt that he is highly qualified.

[122] One of the criticisms of fees billed by medical professionals is that as a general proposition these experts retained as independent experts generally bill more than is permitted by the British Columbia Medical Association fee guide.

[123] In *Dhillon v. Bowring*, 2013 BCSC 1178, Registrar Sainty writes:

[57] In *Dosanjh v. Martin*, 2001 BCSC 1759, in considering whether a cancellation fee was recoverable, I made these comments about Hutchison J.'s decision in *Mohr v. Dent*:

[47] With respect, I do not believe that fees in motor vehicle cases should be treated differently simply because the defendant is, essentially, the Insurance Corporation of British Columbia. I must, however, satisfy myself that the fees charged were reasonable at the time the disbursement was incurred. It is not essentially the province of the registrar to review the contracts entered into between plaintiffs and their experts in respect of fees. Registrars however may, using their own experience and the B.C.M.A. fee guide as guides, determine the reasonable amount that should be charged. I may consider the fact that other experts

charged different amounts (those hired by the defendants), but that is not determinative of my decision.

[48] In addition, I must satisfy myself that, in respect of the amount charged for the cancelled court appearances, the doctors could not have used the time suddenly available to them in remunerative activities (per *Mohr v. Dent*, supra).

[124] As pointed out by Registrar Sainty, some of what was written in *Mohr v. Dent*, [1983] B.C.J. No. 323, a decision of Hutchison C.C.J., as he then was, has been criticised.

[125] In that decision, in para. 65, he writes:

[65] For that reason before awarding fees for time lost because of a short cancellation of a trial, the taxing officer should satisfy himself that there was in fact a loss suffered by the doctor which justifies him in rendering a fee payable by the defendant. Such a loss is more likely to be suffered by a less expert doctor than a specialist, since the neophyte is less likely to have other patients knocking at his door readily available to be attended to.

[126] That last line strikes me as being speculation and, without evidence, I would not adopt it. On the contrary, I think I can take judicial notice of the fact that general practitioners are hotly in demand these days.

[127] However, the onus does remain on the plaintiff in this case to adduce evidence that the specialist could not have filled his time.

[128] The evidence from Maica at the Alder Medical Clinic is that they were not able to fill Dr. Koo's full day.

[129] The cancellation fee is in accordance with the BCMA fee guideline. The plaintiff has paid it. It is allowed as claimed.

[130] Utilizing these reasons, counsel should prepare a revised Bill of Costs and submit it. If need be, it should include the appropriate costs assessment respecting tariff items 29 and 30, and any disbursements associated with the costs hearing.

"Master R.W. McDiarmid"

MASTER McDIARMID

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