
CANADA / JUDGMENT

Dhillon v. Bowering

2013 BCSC 1178

COURT

Supreme Court of British Columbia

DECIDED

3 July 2013

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2013 BCSC 1178 Dhillon v. Bowering

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dhillon v. Bowering,

2013 BCSC 1178

Date: 20130703

Docket: M093695

Registry: Vancouver

Between:

Steve Dhillon

Plaintiff

And

Brook David Bowering, Hardip S. Gunglay,

Darbar Singh Gunglay

Defendants

Docket: M103436

Registry: Vancouver

Between:

Steve Dhillon

Plaintiff

And

Yusef Tao,

Yusef Hair Studio Ltd.

Defendants

Before: Registrar Sainty

Reasons for Decision

Counsel for the Plaintiff in both actions:

R. K. Dewar

M. Morris (Articled Student)

F. R. Sierecki

Counsel for the Defendants in both actions:

G. Gibb

Place and Date of Hearing:

Vancouver, B.C.

February 25 and April 18, 2013

Place and Date of Decision:

Vancouver, B.C.

July 3, 2013

- [1] The plaintiff was injured in two car accidents: one on July 29, 2007 (the "2007 Accident"); and a second on October 6, 2008 (the "2008 Accident").
- [2] At the time of the 2007 Accident, the plaintiff was 28-years old and was employed as a welder at Richmond Plywood Mill. He took some time off after the 2007 Accident, but by mid-September 2007 he had returned to work full-time. At the time of the 2008 Accident he was (as he had been before) working as a welder at Richmond Plywood Mill. He was off work after that 2008 Accident until sometime in February 2009.
- [3] Plaintiff's counsel, Ms Dewar, commenced an action in respect of the 2007 Action (Dhillon v. Bowering and others, Action No. M093695) on July 28, 2009 (the "Bowering Action"). A second action (Dhillon v. Tao and others, Action No. M103436) was commenced in relation to the 2008 Accident on June 20, 2010 (the "Tao Action").

- [4] Mr. Gibb was retained to act for the defendants in each of the two actions. A statement of defence was filed in the Bowering Action on May 10, 2010. In it, Mr. Gibb admitted liability for the 2007 Accident on behalf of the defendants. Mr. Gibb filed a response to civil claim in the Tao Action on September 15, 2010 denying liability.
- [5] The two actions were to be tried together (before a jury) and a ten-day trial was set to begin on October 22, 2012.
- [6] The defendants made an initial offer to settle the two actions for \$22,500 all-inclusive on August 11, 2009. That offer later increased to \$35,000 plus provable past wage loss, special damages, and costs and disbursements. At some point in time (although I cannot say when as I did not make a note of the timing of it), the plaintiff made a formal offer of \$320,000.
- [7] The service deadline for experts' reports (84 days before the commencement of the trial) was July 30, 2012. To that date, the defendants had served no experts' reports on the plaintiff.
- [8] On September 7, 2012, counsel for the defendants advised that he had booked a defence medical examination of the plaintiff with a Dr. O'Brien. That examination was set for September 13, 2012. Ms. Dewar advised that she was prepared to instruct the plaintiff to attend the examination if Mr. Gibb would agree to accept certain late-filed expert evidence being gathered by the plaintiff. The parties were unable to come to mutually acceptable terms for the plaintiff's attendance at the examination.
- [9] A trial management conference ("TMC") took place on October 4, 2012. At that conference, the defendants admitted liability for the 2008 Accident. The defendants' TMC brief listed the defendant Tao (the driver of the other vehicle in the 2008 Accident) as a witness for trial.
- [10] The defendants brought an application to adjourn the trial on October 11, 2012. That application was vigorously defended by the plaintiff and did not succeed.
- [11] On October 15, 2012, the defendants increased their formal offer to \$145,000, plus costs and disbursements. On October 17, 2012, that formal offer was increased to \$175,000, plus costs and disbursements. The plaintiff accepted the defendants' formal offer on Friday, October 19, 2012. The trial was scheduled to commence on Monday, October 22, 2012.
- [12] The parties were unable to agree on the costs and disbursements. Ms. Dewar and Mr. Gibb appeared before me on February 25, 2013 to assess the plaintiff's bill of costs. In order to ensure that some resolution of the issues was sure to occur, I decided that the parties should first argue the tariff items and then turn to disbursements once the matter of the tariff items had been decided. I heard the parties' submissions on the tariff items only on February 25, 2013 and made a decision that day on them. We then commenced a second hearing (essentially) to deal with the disbursements. Ms. Dewar had prepared a lengthy affidavit of disbursements. Mr. Gibb wished to cross-examine Ms. Dewar on her affidavit so she took the witness stand, provided some additional evidence in chief and the cross-examination commenced. We were not able to complete the evidence on February 25, 2013 and the matter was then set for April 18, 2013. Mr. Gibb concluded his cross-examination on that

date. The parties then made their submissions on the disbursements in issue and, not having sufficient time to provide oral reasons, I reserved my decision.

[13] The disbursements in issue are:

Description

Amount

Dr. Michael Gilbert - Medical Legal Report (March 30, 2010)

\$3,850.00

Dr. Michael Gilbert - Telephone Consult (July 22, 2010)

\$200.00

Dr. Michael Gilbert - Medical Legal Report (July 24, 2012)

\$3,000.00

Dr. Michael Gilbert - Medical Legal Report (October 16, 2012)

\$600.00

Dr. Michael Gilbert - Trial prep and cancellation (October 19, 2012)

\$3,200.00

Dr. Max Kleinman - Medical Legal Report (July 16, 2012)

\$900.00

Dr. Max Kleinman - Medical Legal Report (April 24, 2012)

\$4,800.00

Dr. Max Kleinman - Trial prep and cancellation (October 9, 2012)

\$1,500.00

Dr. Max Kleinman - Medical Legal Report (October 15, 2012)

\$300.00

Dr. Max Kleinman - File Materials

\$250.00

Dr. Rhonda Shuckett - Medical Legal Report (July 18, 2012)

\$2,850.00

CMI - MRI Report (September 30, 2008)

\$1,175.00

CMI - MRI Report (June 25, 2012 & August 27, 2012)

\$2,044.49

CMI - Injection fee (June 25, 2012 MRI)

\$400.00

CMI - Injection fee (August 27, 2012 MRI)

\$400.00

OT Paul Pakulak - Functional Capacity Evaluation

\$2,712.50

Economist Curtis Peever - Loss of Earnings/Benefits Report

\$1,650.00

Dr. Chirita Jayaraman - Medical Legal Report

\$935.00

Reportex - Reasons

\$125.00

All Star Reporting - Discovery Transcript (October 16, 2012)

\$441.00

Legal Alternative Courier

\$372.99

Facsimile

\$612.50

Photocopying

\$2,587.60

Postage

\$91.81

TOTAL

\$34,997.89

[14] Rule 14-1(5) of the Supreme Court Civil Rules (the "Rules") deals with disbursements on an assessment of a bill of costs. It states:

- (5) When assessing costs under subrule (2) or (3) of this rule, a registrar must
 - (a) determine which disbursements have been necessarily or properly incurred in the conduct of the proceeding, and
 - (b) allow a reasonable amount for those disbursements.

[15] The test for determining the recoverability of a disbursement is set out in *Van Daele v. Van Daele* (1983), 56 B.C.L.R. 178 (C.A.), where Mr. Justice Macfarlane said at paragraph 11:

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 a result of excessive caution or excessive zeal, judged by the situation at the time when the disbursement or expense was incurred.

[16] In deciding these issues, a registrar has a wide discretion. That discretion was explained in *Bell v. Fantini* (1981), 32 B.C.L.R. 322 (S.C.), at paragraphs 23 and 24, in the following manner:

I consider that Rule 57(4) entitles the registrar to exercise a wide discretion to disallow disbursements in whole or in part where the disbursements appear to him to have been incurred or increased through extravagance, negligence, or mistake, or by payment of unjustified charges or expenses. The registrar must consider all of the circumstances of each case and determine whether the disbursements were reasonably incurred and were justified. He must be careful to balance his duty to disallow expenses incurred due to negligence or mistake, or which are extravagant, with his duty to recognize that a carefully prepared case requires that counsel use care in the choice of expert witnesses and examine all sources of information and possible evidence which may be of advantage to his client.

The registrar is not bound to accept an affidavit of counsel that in counsel's opinion the employment of the expert or the incurring of the expense was justified or that it was necessary for the attainment of justice when the registrar is considering allowing or disallowing the disbursement under this rule. He should give careful consideration to any such affidavit and he must weigh what is deposed to against any affidavit that deposes to the opposite effect. His duty under the rule is to determine whether the expense is a reasonable and justifiable expense which should be borne by the unsuccessful litigant.

[17] Both counsel referred to these two cases and appeared to agree that the principals set out in *Van Deale v. Van Deale* and *Bell v. Fantini* (supra) are to guide me in making my decision in this matter.

[18] In his written submissions (citing *Holzapfel v. Matheusik* (1987), 14 B.C.L.R. (2d) 135), Mr. Gibb said:

The Defendants demand strict proof that the taxable disbursements claimed by the plaintiff were necessary and reasonable. The onus of proof rests on the party submitting the bill of costs for assessment to establish affirmatively the necessity or reasonableness of the charges he claims as disbursements.

[19] He also argued:

Disbursements incurred for convenience are not incurred necessarily or properly.

Hall v. Strocel (1983), 34 C.P.C. 170

[20] In her submissions, Ms. Dewar noted (relying on *McKenzie v. Darke*, 2003 BCSC 138 (Registrar)) that:

There is a difference between a disbursement which is necessary and a disbursement which is proper. A "necessary" disbursement is one which is essential to conduct the litigation. A "proper" disbursement is one which is not "necessary" but is reasonably incurred for the purposes of the proceeding. A disbursement need not be necessary in order to be properly or reasonably incurred. (Emphasis in the submissions)

And that:

Taxing officers ought not to second guess a competent counsel doing a competent job on the grounds that other counsel might have been more sanguine or less cautious in determining how the job should be done.

[21] Ms. Dewar also submits (relying on *Holzapfel v. Matheusik*, *supra*) that:

In deciding whether time spent and disbursements should be allowed, the Registrar has a duty to consider counsel's obligation to prepare a client's case thoroughly and with care and not to second guess counsel's views of what steps or expenses were required. Where the account submitted by the expert itself contains a reasonably detailed outline of the nature of the work and the hours and other items involved therein and such bill is attached to the bill of costs submitted for taxation, then an affidavit from the expert in addition is not necessary. It is the solicitor, not the expert, who knows what is needed to properly present the case, and it is the solicitor's affidavit that is desirable and necessary.

[22] None of the concepts cited by either counsel are incorrect. What is true is that, in making a decision on this matter, I must firstly decide if a disbursement was necessary and/or proper (and there is a difference between a disbursement that is necessary and one that is proper) judged at the time the disbursement was incurred and, if I decide it was necessary and/or proper, I must allow a reasonable amount for that disbursement. In deciding these issues, I must assess the particular facts of the particular case before me. Also, I may (and should) rely on my experience in matters of a similar nature in deciding whether the amount

charged by a particular expert is reasonable in the circumstances (see *Narvaez v. Zhang*, 2010 BCSC 78 and *Hamo v. Khan*, 2010 BCSC 205).

- [23] I must also consider "proportionality" in making my decision. But proportionality is, in my view, a two-way street. The amount of money at issue in an action (large or small) may have a bearing on both the necessity and propriety of a disbursement and whether it is reasonable in the circumstances. Here, the defendants' initial offer to settle this matter (made August 11, 2009) was the sum of \$22,500 all-inclusive. That initial offer was later increased to \$35,000. Following service of all of the plaintiff's experts' reports, the formal offer increased to \$145,000 and, as noted earlier, the actions settled the Friday before trial for \$175,000 plus costs and disbursements. No doubt the experts' reports played a part in the settlement offer and influenced the outcome. It was not until the medical reports and the Functional Capacity Evaluation were provided to the defendants that the amount of the offer increased to an amount the plaintiff was prepared to accept. In my view (and I agree with Ms. Dewar's submissions on this point), proportionality (which I must consider in assessing costs per Rule 14-1(2)(b)) refers to the significance of the claim; either small or large.
- [24] I will deal with each of the disbursements individually.
- (a) Dr. Gilbert
- [25] The plaintiff's family physician (Dr. Goel) referred the plaintiff to an orthopaedic surgeon (Dr. Currie) due to ongoing issues the plaintiff was having with his right hip. Dr. Currie recommended that the plaintiff undergo an MRI and he did so (at a private facility) in September 2008. As the MRI pointed to the plaintiff possibly having a labral tear in his right hip, Dr. Currie recommended that the plaintiff see Dr. Gilbert, an orthopaedic specialist with a particular specialty in labral tears. Ms. Dewar advised that, as Dr. Gilbert has a 36-month waiting list to see a patient for treatment purposes, she arranged for the plaintiff to see Dr. Gilbert (at the Specialist Referral Clinic) for the purposes of a medical-legal opinion and report. Dr. Gilbert prepared three separate medical-legal reports dated March 26, 2010, July 23, 2012 and October 12, 2012, respectively.
- [26] Mr. Gibb does not appear to dispute that it was necessary and proper to retain Dr. Gilbert. His submissions mostly relate to the reasonableness of Dr. Gilbert's fees. Specifically, he submits that there is no evidence "detailing any hourly rate, the number of hours spent on this matter, or any other details of why these charges were made". In addition, Mr. Gibb submits that there is no evidence as to the nature of the telephone consult in July 2010 and that the October 2012 report was served late and would not have been admitted at trial. Thus he says the costs of that consult and the last report ought not to have been borne by the defendants. Finally, with respect to the trial preparation and cancellation fees charged by Dr. Gilbert, Mr. Gibb submits that, as "Dr. Gilbert has not established that he was not able to mitigate his loss by booking patients on the day he was to appear at trial", I ought to disallow the amount charged for that (see *Mohr v. Dent* (1983), 40 C.P.C. 8).

- [27] In cross-examining Ms. Dewar, Mr. Gibb made much of the fact that Ms. Dewar had not questioned each expert as to the exact nature of the work done, the number of hours spent, the hourly rate charged, and the like, before paying the invoices rendered by each expert. In response to his queries, Ms. Dewar advised that, in making the decision to pay certain invoices, she relied on her experience as plaintiff's counsel over a number of years in practice (10 plus years). Further, she noted that the amounts charged were not "outside the norm" in her experience reviewing accounts from like experts. She said that paid them on receipt as they appeared to her to be reasonable. In his submissions, Mr. Gibb indicated that Ms. Dewar was in error in simply paying the invoices on receipt and indicated that it was incumbent upon her to question each invoice prior to paying it.
- [28] In my view, it is not essential to have evidence from each expert of their specific hourly rates; nor an exact record of all of the work done or the like. In many instances (as here), the work product speaks for itself. Also, I am of the opinion that counsel may (and in fact should) rely on their own experience in similar matters in determining the reasonableness of an expert's account. It is not required, in each instance, that counsel cross-examine her expert to determine the expert's hourly rates, the time spent by the expert in carrying out the retainer or to determine other details of the expert's charges. Upon receipt of a report (and accompanying invoice), counsel should review the report and confirm that it meets the instructions provided to the expert. As for the costs of that report, counsel should satisfy herself that the amount is reasonable (based on the instructions provided to the expert, the work product provided and her personal experience with the particular expert or others with similar expertise). If satisfied with her personal "inquiry", counsel should then pay the expert's fees. If there is a concern with respect to any of the facets of the inquiry, then counsel should seek additional information from the expert as to how that expert arrived at the fees charged.
- [29] In making my decision on reasonableness, I undertake a similar inquiry. First I consider the work product. I look at the invoice to see the amount charged. Then I compare the two, relying on my own experience with similar experts and their costs. If I have a concern with the work and the cost, I may reduce the amount requested to some more reasonable amount. On a very rare occasion, I may even ask counsel to provide (or obtain from the expert) a more specific breakdown of the expert's invoice, but that is certainly not required in every instance.
- [30] Dr. Gilbert's first report (of March 26, 2010) is comprehensive. In it, Dr. Gilbert provides a list of all of the clinical information he reviewed (which information was not insubstantial). He also confirms that he conducted a history and physical examination of the plaintiff and that his report "is based upon my review of the clinical notes and records provided, the clinical history provided to me by Mr. Dhillon, and the physical examination performed by myself." The first four pages of Dr. Gilbert's report detail the plaintiff's history (and describe the two accidents and the plaintiff's condition following each of those accidents). Pages five, six and seven describe the results of Dr. Gilbert's physical examination of the plaintiff and set out

the results of his review of the plaintiff's X-rays. He then provides a diagnosis and an opinion on the plaintiff's current condition and expected prognosis. The cost of this report was \$3,850. Ms. Dewar paid Dr. Gilbert's invoice for this report without questioning it.

[31] The second report followed a second physical examination of the plaintiff by Dr. Gilbert (on February 28, 2012). In his report, Dr. Gilbert confirms that he again reviewed a number of clinical records in preparation of his report, many of which were different (they were more current) than those he reviewed in connection with his first report. He also took an updated history. He provides details of his diagnosis and confirms (at some length) his clinical impressions and opinion in respect of the plaintiff. Dr. Gilbert charged the plaintiff \$3,000 for this report. Ms. Dewar confirmed that she paid Dr. Gilbert's invoice for this report upon receipt as, in her view, based on her experience with matters of a like nature, the amount billed was reasonable in the circumstances.

[32] In preparation for this assessment, Ms. Dewar did obtain from the Specialist Referral Clinic a breakdown of the fees charged by Dr. Gilbert for each of his first and second report. The breakdown for the first report is:

Review of Documents 1000

Office Consult 1200

Review of Imaging

Preparation of Report 1500

Review and Completion of Report 150

TOTAL 3850

[33] The fees for the second report are broken down as:

Review of Documents 700

Office Consult 1200

Review of Imaging

Preparation of Report 100

Review and Completion of Report 100

TOTAL 3000

[34] Although there is no specific breakdown on an hourly basis, in her affidavit, Ms. Dewar averred that the Specialist Referral Clinic confirmed that the effective hourly rate for their specialists ranges between \$600 and \$800 per hour.

- [35] Dr. Gilbert's curriculum vita (attached to his opinion) is impressive. I have seen a myriad of reports and invoices from orthopaedic surgeons during my career as a registrar of this Court. Based on my review of the report, the invoice, and my personal experience assessing costs of a similar ilk, I have no hesitation in finding that the fees for Dr. Gilbert's first and second report are reasonable in the circumstances, and I will allow the plaintiff to be reimbursed for the amounts paid to commission these two reports: \$3,850 for the first report and \$3,000 for the second one.
- [36] As for the bill for the telephone consultation, on cross-examination when questioned about the length of the call, Ms. Dewar recollected that, although not specifically mentioned in her affidavit in support of the disbursements, the call lasted some 20 minutes or so. This time does not, of course, take into account the time likely necessary prior to the conversation for Dr. Gilbert to familiarize himself with the plaintiff's file in order to respond to Ms. Dewar's queries. The cost of that telephone consultation was \$200. That amount is, in my view, reasonable in the circumstances and I will allow it.
- [37] The third report is more problematic. That third report was not only received out of time (per Rule 11-6(3) of the Supreme Court Civil Rules), it was commissioned outside the 84-day "window" for delivery of experts' reports for the trial, which was set to begin on October 22, 2012.
- [38] In her affidavit (and confirmed during her viva voce testimony), Ms. Dewar advised that upon receipt of Dr. Gilbert's second medical-legal report (which recommended that the plaintiff undergo a left hip MR arthrogram), she arranged to have the plaintiff undergo such arthrogram on August 27, 2012 "so that the trier of fact would have the best evidence at trial". On cross-examination, when questioned as to the fact that this MR arthrogram and the report related to it were late and not admissible under the Rules, Ms. Dewar exuded confidence in saying that, in her experience, they would be admitted.
- [39] Mr. Gibb submitted that I should disallow the costs of this report (\$600), as well as the costs of all of the late ordered/received reports, and the costs of the August 2012 MR arthrogram and injection, as certainly, by the time Ms. Dewar commissioned them, she should (or ought to have) known all there was to know about the plaintiff's case. There was no guarantee whatsoever that these reports and the MR arthrogram would be admitted at trial. He reminded me that Ms. Dewar vigorously opposed the defendants' application to adjourn the trial to have the plaintiff undergo a defence medical examination. If she intended to rely on this evidence, she ought to have agreed to the trial adjournment to ensure the admissibility of these reports.
- [40] In response, Ms. Dewar repeated her conviction that these reports would have been admitted at trial and advised that, as counsel, she was of the opinion that the MR arthrogram (and subsequent opinions on it) was necessary and proper for the purposes of the litigation and submitted that I must therefore allow the plaintiff to be reimbursed the costs of them. She also argued that, as the defendants were served with Dr. Gilbert's second

report (recommending that the plaintiff undergo a left hip arthrogram), the defendants ought to have then been "live" to the fact that the MR arthrogram would likely be ordered and commented upon by the plaintiff's experts. In essence she submitted that, if the defendants did not wish to pay for the MR arthrogram and the subsequent experts' opinions on the arthrogram, they ought to have advised the plaintiff of their objection when they became live to the issue.

[41] In seeking to recover the costs of this report (and the other late reports and the MR arthrogram), Ms. Dewar is asking me to decide what might have happened at trial, or at least to assume that the trier of fact would have allowed these reports and the MR arthrogram to be admitted. She is wrong to do so.

[42] Rule 11-6(3) of the Rules is clear. It says:

- (3) Unless the court otherwise orders, at least 84 days before the scheduled trial date, an expert's report, other than the report of an expert appointed by the court under Rule 11-5, must be served on every party of record, along with written notice that the report is being served under this rule,
 - (a) by the party who intends, with leave of the court under Rule 11-3 (9) or otherwise, to tender the expert's report at trial, or
 - (b) if 2 or more parties jointly appointed the expert, by each party who intends to tender the expert's report at trial.

[43] I note also the comments of Master Bouck, as Registrar, in *Wheeldon v. Magee*, 2010 BCSC 491 (at para. 27):

With respect to the necessity and propriety of a report, the assessing officer is not to "step into the shoes of the trier of fact" but rather must focus "on whether in the circumstances, it was a proper expenditure to fully and properly prepare the case for trial": *Freake v. Wilson*, 2000 BCSC 695; *Morrisette v. Smith* (1990), 39 C.P.C. (2d) 30.

[44] At the time these reports and MR arthrogram were ordered, there was no court order abridging the time for the filing of the plaintiff's experts' reports. It cannot be said then that it was proper to order these reports without an attendant order doing so.

[45] It was also not the defendants' responsibility, on receipt of Dr. Gilbert's second report, to advise the plaintiff that they would not pay for the recommended MR arthrogram or any reports related to it. It is the plaintiff who has the burden of proving the necessity and propriety of the disbursements incurred. That necessity and propriety cannot be founded on any apparent or alleged failure on the part of the defendants.

[46] Accordingly, I disallow the \$600 fee for this report.

[47] As for the trial preparation and cancellation fees, Dr. Gilbert's final invoice dated October 19, 2012 noted the following:

service date

description

amount

10/19/12

cancellation of court/deposition less than 2 weeks

\$2,000.00

10/18/12

Telephone conversation lawyer

\$1,200.00

TOTAL

\$3,200.00

COMMENTS:

Telephone conversation 1 hour 15 minutes (5:30 - 6:35) and

45 min review of clinical records on October 17, 2012 = 2 hours total

[48] The defendants' formal offer to settle was made on October 18 and accepted on October 19. Mr. Gibb, in cross-examining Ms. Dewar on her October 18 conversation with Dr. Gilbert, indicated that it was unreasonable to have that conversation when, at the time the conversation took place, Ms. Dewar should have known that the formal offer to settle was to be accepted and thus it was not necessary or proper to embark on that conversation. Mr. Gibb also pointed out (through cross-examination of Ms. Dewar) that Dr. Gilbert apparently erred in his comments on his invoice in that, if the times noted therein are correct, Dr. Gilbert charged for a one hour and 15 minute conversation but only recorded one hour and five minutes of time to it (5:30 - 6:35). I assume he wishes me to adjust Dr. Gilbert's charges downward by the fee equivalent to 10 minutes of his time (\$100).

[49] I disagree with Mr. Gibb's inference that Ms. Dewar ought to have "downed tools" on October 18 on receipt of the defendants' formal offer if it was to be accepted. In her testimony, Ms. Dewar confirmed that she herself did not know for certain that the plaintiff would accept the defendants' formal offer until the morning of October 19. She submits that it was reasonable for the plaintiff to sleep on that offer before giving his final instructions to Ms. Dewar to accept it.

- [50] In my view, it would have been remiss of Ms. Dewar not to continue to prepare as if the matter would proceed to trial on the (not insubstantial) possibility that the plaintiff might wish to have his day in court and not accept the formal offer. As for the (apparent) error in Dr. Gilbert's time recording, I do not find that to be of sufficient consequence that I should disturb the fee charged for that conversation and I will allow the plaintiff to be reimbursed the \$200 paid for the conversation between Ms. Dewar and Dr. Gilbert on October 18, 2012.
- [51] I am of a different view when it comes to the fee charged by Dr. Gilbert for "cancellation of court/deposition less than two weeks."
- [52] In his submissions, Mr. Gibb said that, absent confirmation that Dr. Gilbert was unable to find fill up the time he was set to testify at trial with remunerative work, I ought to disallow the cancellation fee (*Mohr v. Dent*, *supra*).
- [53] Ms. Dewar countered by noting that, in retaining Dr. Gilbert, the plaintiff agreed with Dr. Gilbert's cancellation policy (that two weeks' notice of cancellation was required or Dr. Gilbert's trial fee must be paid). As such she submits that the plaintiff ought not to be penalized for paying this fee when the matter settled so close to trial necessitating de-notification of witnesses (resulting in cancellation fees being charged).
- [54] It should be noted that Dr. Gilbert was scheduled to attend at trial and testify on October 29, 2012. These actions were settled on October 18. Thus Dr. Gilbert has a full 10 days' notice of the cancellation.
- [55] In the case referred to by Mr. Gibb (*Mohr v. Dent*), Hutchison J. stated at paras. 64 and 65:
- It must be borne in mind that this action arose out of a motor vehicle accident. The defendant, driver of a motor vehicle in his Province, is required to be insured by the Insurance Corporation of British Columbia. In effect, the expenses paid by the defendant in a case such as this are expenses paid by all of the driving citizens in British Columbia. Just as all taxpayers suffer if exorbitant write-offs for income tax are allowed by Revenue Canada, so all drivers suffer when exorbitant medical fees are paid by I.C.B.C..
- 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.
- [56] That case has been followed in a number of decisions in this Court relating to this issue of whether a plaintiff may recover cancellation fees paid to an expert witness. For example, in *Summers v. McGinnis*, 2005 BCSC 523, Registrar Bouck (as she then was) allowed a portion of the cancellation fee when the physician was given only two days' notice. In *Gill v. Widjaja*, 2011 BCSC 1822, Harvey J. affirmed the decision of Master Baker (*Gill v. Widjaja*, 2011 BCSC 951) disallowing a "standby fee" for the plaintiff's general practitioner who was de-notified some seven weeks before trial that his testimony would not be required.

- [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*).
- [58] In that case, the experts both attended at court on the morning of the day they were to testify but it soon became clear that the trial could not proceed (due to no judge being available) and it was adjourned to some future date. In respect of the doctor's cancellation fees I held:
- [51] However, with respect to the trial cancellation fees, there is, in my opinion, an overcharge by both doctors. Firstly, both have billed for an entire day's testimony even though both were scheduled to testify only in the afternoon. Secondly, neither doctor made any real effort to salvage his day after being advised of the settlement. Each took the day off (essentially at the plaintiff's expense). This expense should not be borne by the defendant.
- [59] In my view, the following additional passage from *Mohr v. Dent* is also instructive (para 54):
- Whether those sums charged are fair as between the doctor and his patient is of course not for me to concern myself with. They may well have been contracted for. If they were being charged against the patient on a quantum meruit basis I would find the fees excessive.
- [60] Here the matter was settled at approximately 11:30 a.m. on the morning of October 18, the Friday before the trial was set to commence. Dr. Gilbert had sufficient time (10 days and certainly one work week) to fill the time he had set aside for testifying at trial with some remunerative work. There is no evidence before me that Dr. Gilbert was unable to mitigate this lost time. Whether Ms. Dewar agreed to the cancellation fee (and paid it) is between her and Dr. Gilbert. My task is to decide whether the defendants should bear this expense. I find that they should not. I therefore disallow the \$2,000 fee charged for cancellation.

(b) Dr. Kleinman

[61] Dr. Kleinman is a physiatrist with a specialty in physical and rehabilitation medicine. He assessed the plaintiff on April 25, 2012 and provided two medical- legal opinions: one dated May 2, 2012 (wherein he diagnosed a chronic left hip soft tissue sprain) and a second, addendum report, dated July 23, 2012, which dealt with the effect on his original opinion of the MRI arthrogram of the plaintiff's left shoulder done on June 25, 2012. In his second report, Dr. Kleinman's expressed opinion is that the partial thickness tears shown on that MRI were consistent with his physical findings and original opinion in his original report. Dr. Kleinman was also asked to (and did) provide his opinion on the effect (if any) on his prior opinions of the plaintiff's injuries after receiving and reviewing the left hip MR arthrogram dated August 27, 2012. Dr. Kleinman's opinion did not change as a result of such review.

[62] It is important to note that Dr. Goel was the plaintiff's family physician immediately following both accidents. Ms. Dewar requested that Dr. Goel provide a medical-legal report but none was forthcoming. On following up (in April 2012), Ms. Dewar learned that Dr. Goel was on extended medical leave. In her affidavit sworn in support of this assessment, Ms. Dewar says (para. 9):

Once I learned of Dr. Goel's probable inability to provide a medical legal report, I advised the [ICBC] adjuster of this and that I would be retaining an expert to provide the necessary medical evidence in order to respond to a settlement offer from ICBC. The adjuster did not object to this and asked that I provide the report once I had received it.

[63] Ms. Dewar confirmed in her viva voce testimony that she retained Dr. Kleinman once she learned that Dr. Goel would not be available to provide a medical- legal opinion. Ms. Dewar confirmed that Dr. Kleinman charges the same rates for medical-legal opinions he provides to plaintiffs as he does when retained to prepare a defence medical examination. In a letter to Ms. Dewar of March 4, 2013 (attached to Ms. Dewar's affidavit of April 16, 2012), Dr. Kleinman confirmed that his invoice for the full medical-legal report which he submitted to CIRA[1] was for \$3,500. He confirmed that CIRA charges a "markup" on each of his invoices and that his (personal) total fees were \$5,293, but those charged to the plaintiff by CIRA were \$7,500. Dr. Kleinman notes that:

the preparation of a medicolegal report is a time-intensive process which included document review, meeting with the client, report writing, which requires analysing the documentation in the context of the clinical picture, analysis of the entire file, and proofing the report from the dicta typist before release to the referring parting [sic]. My fee is based on being retained as a medical expert as well as the time spent on the file.

[64] In their submissions, the defendants say, firstly, that Dr. Kleinman's opinion was not necessary for the litigation as the issues he addressed in his (original) medical-legal report had already been addressed by Dr. Gilbert. Secondly, the defendants submit that the amounts charged by Dr. Kleinman for his reports are not reasonable and, further, that one report was requested and served late. Again, Mr. Gibb notes that there is no detailed invoice

from Dr. Kleinman setting out his hourly rate, the number of hours he spent on the matter; nor are there any other details of how the fees were arrived at.

- [65] Mr. Gibb also notes that Dr. Kleinman, even though he received the same materials as several of the other experts, charged significantly more than those other experts for his time spent reviewing them. In addition, the defendants note that Dr. Kleinman charged \$1,500 for trial preparation and a cancellation. They submit that Dr. Kleinman intended to testify by video link and thus it cannot be said that he lost any time from his practice as he intended to be out of town anyway and, regardless, could not have attended to patients following his de-notification.
- [66] Finally, Mr. Gibb suggests that the costs added to the actual expert's costs by CIRA are not defensible and ought not to be allowed. Specifically, he said that CIRA "takes their pound of flesh" and charges an exorbitant fee simply for making an appointment with an expert.
- [67] I am satisfied that it was necessary and proper for the plaintiff to retain Dr. Kleinman. Dr. Kleinman has a specialty in physical and rehabilitation medicine. Ms. Dewar said that Dr. Kleinman's opinion was obtained to counteract the (usual) defence adverse inference claim where there is no general practitioner's report. Unfortunately, the affidavit materials filed in support of the plaintiff's bill of costs contains only the odd-numbered pages of Dr. Kleinman's reports. I was, however, still able to piece together the essence of his reports. In his first report (of May 2, 2012), Dr. Kleinman confirms the plaintiff's symptoms and recommends certain treatment. In preparing his report, Dr. Kleinman reviewed a number of medical records. He met with the plaintiff, took a medical history and performed an examination. He recommended MRI imaging and that the plaintiff meet again with his orthopaedic surgeon to be reassessed as a surgical candidate. He also suggested vocational evaluation and (eventual) retraining. He charged \$4,800 for that report. The bill for that report simply states:

PHYSIATRY ASSESSMENT

BY DR. KLEINMAN \$4,800.00

No additional breakdown of these fees was provided in the original invoice sent.

- [68] As noted earlier in these reasons, it is not incumbent on counsel to obtain a full breakdown of the hours expended by an expert on his/her report. Counsel may rely on her experience in determining if the costs of an expert's report are reasonable in the circumstances. Ms. Dewar testified that, in her opinion, the account was reasonable and she paid it when it was received. I, as well, am familiar with the costs of experts' reports and may use that knowledge in deciding whether the costs of a report are reasonable: *Narvaez v. Zhang* and *Hamo v. Khan*, *supra*.
- [69] In *Dosanjh v. Martin*, 2001 BCSC 1759, I allowed the plaintiff to claim the costs of a physiatrist at \$400 per hour. In *Turner v. Whittaker*, 2013 BCSC 712, Master MacNaughton (sitting as a registrar) allowed the costs of a physiatrist's report at \$2,940. In *Narvaez v.*

Zhang, Romilly J. (on an appeal from Registrar Blok, as he then was) determined that the Learned Registrar was not wrong in allowing the plaintiff to claim \$3,000 in costs in respect of work done by a US-based physiatrist. These cases are illustrative of the range of costs charged by like experts.

- [70] I note that the CIRA fees are somewhat new to me and I am not aware of any reported cases where they have been either specifically allowed or disallowed following submissions on the issue. I know that I have allowed fees for experts retained through CIRA, although on those assessments, the opposing party did not argue the reasonableness of the CIRA fees. I am aware that the Insurance Corporation of British Columbia (who is the de facto defendant here) uses experts whom it retains through CIRA. It pays the fees CIRA adds onto experts' fees retained by defence. Thus it is not appropriate in my view for the defendants here to claim that somehow these fees are unreasonable when they pay them themselves without dispute. I will therefore not reduce those of Dr. Kleinman's fees that I do allow by the amounts added onto those fees by CIRA.
- [71] In my view, the costs of Dr. Kleinman's initial report (even with the CIRA fees included) are not out of line with those of similar experts and I will allow the costs of this report as claimed (\$4,800).
- [72] As for the addendum report of July 16, 2012, it was a three-page letter, reporting Dr. Kleinman's opinion after reviewing the left shoulder MRI. It notes that the findings in the left-shoulder MRI are consistent with his findings in his first (comprehensive) report. Dr. Kleinman charged \$900 (plus tax) for that letter. Again, that amount is not disproportionate to the amounts I am familiar with as usually charged for addendum reports of this nature. I will allow the plaintiff to recover the costs of this report.
- [73] As for the third "report"[2], as with the last report of Dr. Gilbert, it was requested and received after the date for the delivery of expert's report provided for in the Rules. As such, it was not necessary or proper to commission this report and I will not allow the plaintiff to recover the costs of it (\$300).
- [74] In his initial submissions, Mr. Gibb disputed the final invoice from Dr. Kleinman (for \$1,500). He submitted that it ought not to be recoverable as it represents a trial cancellation fee. The invoice associated with that disbursement notes:

10/9/2012 Teleconference with Dr. Max Kleinman \$1,500.00

- [75] In her testimony Ms. Dewar confirmed that the invoice was for a teleconference between herself and Dr. Kleinman and was not a fee for cancellation of his testimony at trial. She also testified that her recollection was that she spoke to Dr. Kleinman for about two hours. On the basis of that testimony, Mr. Gibb agreed that this cost was reasonable and withdrew his objection. Therefore the \$1,500 for the telephone consultation is allowed (by consent).

(c) Dr. Rhonda Shuckett

[76] The plaintiff says that Dr. Shuckett is a pain specialist. Specifically, Ms. Dewar submits that:

Dr. Shuckett was retained to provide an expert opinion on the Plaintiff's ongoing injuries due to her considerable experience in dealing with patients suffering from chronic injuries involving soft tissue pain, neck, shoulder, back and hip problems which the Plaintiff had been suffering from now nearly 5 years post the 2007 Collision.

[77] The defendants claim that Dr. Shuckett simply repeated the findings of Dr. Gilbert and, further, that she opined on areas that were outside of her expertise and therefore it was neither necessary nor proper for the plaintiff to retain Dr. Shuckett and I ought to disallow all of the costs for Dr. Shuckett.

[78] Dr. Shuckett is an expert in internal medicine and rheumatology. Her qualifications also note that she has some expertise in fibromyalgia, a form of pain syndrome often suffered by persons who have been involved in motor vehicle accidents.

[79] In preparing her report, Dr. Shuckett met with the plaintiff and took a thorough medical history. She reviewed the MRI arthrogram of the plaintiff's left shoulder. She opined that she did not believe the plaintiff had chronic pain syndrome and that he does not have fibromyalgia syndrome. Dr. Shuckett recommended that the plaintiff may need intermittent physiotherapy treatments but she left it to Dr. Gilbert to assess whether the plaintiff required a hip arthroscopy and to Dr. Gilbert's expertise to decide if the plaintiff may find relief from cortisone injections.

[80] I conclude that an insufficient basis has been shown for retaining this expert. Dr. Shuckett added little to the mix here. It must be said that Dr. Shuckett was retained out of excessive caution or abundant zeal and thus the costs attendant with retaining her must be disallowed (*Bell v. Fantini* (1981), 32 B.C.L.R. 322 (S.C.)).

(d) The MRIs

[81] A total of three MRIs were ordered: one of the plaintiff's right hip; a second of the plaintiff's left hip (with an injection); and a third of the plaintiff's left shoulder (also with an injection).

[82] The first MRI was ordered by plaintiff's counsel (based on a recommendation from Dr. Currie). That MRI was ordered in September 2008 and was conducted on a private basis (as were each of the MRIs in this action). In his letter to Dr. Goel of April 7, 2008, Dr. Currie notes:

Clinically I suspect that he had a soft tissue injury to the posterior right hip area. It is difficult to correlate the results of the bone scan and x-ray findings to the right hip. Clinically I suspected a possibility of a labral tear however it appears to be more related to right hip posterior soft tissue area.

In any event, I have suggested to continue on with his stretching, strengthening and range of movement exercises. If his symptoms remain persistent or increase in severity then it might be beneficial to consider an MRI of the right pelvis.

[83] Mr. Gibb says that this MRI report was ordered for medical diagnostic purposes and thus should be considered an item of special damages and not a disbursement recoverable on this assessment of costs (see *Ward v. W.S. Leasing Ltd. et al*, 2007 BCSC 877 (Registrar)). Ms. Dewar, on the other hand, says that the MRI was recommended by Dr. Currie to "aid in the litigation process to clarify and confirm the extent of the Plaintiff's injuries" and thus is a recoverable expense (per *McCreight v. Currie*, 2008 BCSC 1751 (Master, as Registrar) and *Colasimone v. Ng and Mo*, 2007 BCSC 1179).

[84] It is up to the party claiming the disbursement to satisfy me, on the balance of probabilities, that the MRI was "necessarily and properly incurred for the conduct of the litigation". In making that decision, I must apply (*Ward v. W.S. Lessing Ltd.* (supra) at para. 14):

some judgment , perhaps with medical input, in considering the necessity for the procedure in a litigation context, given the injuries involved, the likely damages, what the MRI is expected to achieve from a litigation standpoint, and so on.

[85] The evidence here indicates that the MRI was ordered for two purposes: to determine the extent of the plaintiff's injuries and for (possible) treatment purposes. Where the purpose is dual, the cost of the MRI should be allowed (see particularly *Colasimone v. Ng and Mo*, supra, at paras. 23 and 24). Therefore the plaintiff is entitled to recover the costs of the first MRI scan (\$1,175.00).

[86] The June and August 2012 MRI reports (and injections) were ordered on the advice of Dr. Shuckett who saw the plaintiff for a medical-legal assessment on April 25, 2012.

[87] Specifically because the latter two MRIs were recommended by Dr. Shuckett, whose report the defendants claim was ordered out of an abundance of caution or excessive zeal, the defendants submit that neither the MRIs nor the injections associated with them were necessary or proper for the purposes of the actions.

[88] I will start with the last MRI first: the one of the plaintiff's left hip performed August 27, 2012. In my view, this disbursement was neither necessary nor proper as it was ordered after the service deadline for experts' reports. I have provided my views on this subject earlier in these reasons and I will not repeat myself here. For the same reasons I denied the plaintiff recovery for the late reports ordered and received, I disallow the plaintiff's claim to recover the costs of the last MRI (\$995.00 + interest (of \$21.78) = \$1,016.78) and the injection fee (\$400.00).

[89] As for the June MRI and injection fee (respecting the plaintiff's left shoulder), it appears that this MRI was recommended (and ordered) by Ms. Dewar at the request of Dr. Shuckett after she saw the plaintiff in April of 2012.

[90] An MRI of the plaintiff's left shoulder was first suggested by Dr. Gilbert in his report of March 26, 2010. On the last page of his report, Dr. Gilbert says:

Mr. Dhillon has some pain in the region of his left shoulder. He has some intermittent clicking within the left shoulder. He has no objective evidence of any significant injury to the rotator cuff, of the left shoulder. It is possible that he may have a labral tear of his left shoulder and, as a result, an MR arthrogram of the left shoulder could be performed. He has difficulty placing his left shoulder in an abducted externally rotated position.

[91] On cross-examination, when asked why the MR arthrogram of the plaintiff's left shoulder was not requested in 2010, Ms. Dewar suggested that it was not until Dr. Shuckett also suggested an MR arthrogram of the plaintiff's left shoulder that it became "required" rather than simply "recommended".

[92] I am not satisfied on the evidence before me that the costs of this June 2012 MR arthrogram (and injection) were necessarily or properly incurred particularly given the time that they were ordered.

[93] In my view, Ms. Dewar was imprudent in not ordering the left shoulder MR arthrogram in 2010 when it was suggested by Dr. Gilbert. When the MR arthrogram was performed (at the end of June 2012) Ms. Dewar knew that the final date for service of experts' reports was July 30, 2012. She therefore must have known that it was highly unlikely (if not impossible) for any of the experts to receive, review and opine on the results of the left shoulder MR arthrogram. Only Dr. Shuckett was able to do so. Her report was dated July 17, 2012 and included her opinion on the results of this MR arthrogram. She, however, would have been aware that the MR arthrogram had been ordered. As well, she was certainly made aware of the filing deadline for experts' reports and would have ensured that her report was provided in time to meet that deadline. None of the other experts were likely able to provide a timely report on that MR arthrogram, given the service deadline for experts' reports.

[94] I will not allow the plaintiff to recover the costs of the June 2012 MR arthrogram (\$995.00) and injection (\$400). The interest accrued on this disbursement is also disallowed (\$32.71).

(e) The Functional Capacity Evaluation ("FCE") (Mr. Paul Pakulak)

[95] Plaintiff's counsel says:

Due to his evidence at his discoveries of difficulties with his work duties, the Plaintiff underwent a Functional Capacity Evaluation ("FCE") with occupational therapist Mr. Paul Pakulak on May 8, 2012 to determine his objective, functional ability and limitation.

Following the FCE which is a full day long evaluation, Mr. Pakulak provided his [medical-legal report] dated July 16, 2012 wherein he found that the Plaintiff was not well suited for being a welder which is what the Plaintiff's training was in.

[96] The defendants say:

Mr. Pakulak's report was based on faulty information and not based on provable facts. The plaintiff was employed as a welder, a physically demanding occupation, at all times both before and after these accidents. He had a demonstrable functional capacity. The defendants take the position that the report included unnecessary, irrelevant material and that the amount charged should be reduced accordingly.

[97] In his oral submissions, Mr. Gibb stated that Mr. Pakulak was not told of Dr. Gilbert's opinion that the plaintiff was capable of continuing to work as a welder and that he was working as a welder. Mr. Gibb says that Dr. Gilbert had all of the information required from Mr. Dhillon about his capacity to work as a welder when he wrote his 2010 report some two years post the 2008 Accident. Mr. Gibb says that had Mr. Pakulak had that information he would have been better able to focus his report on the plaintiff's actual circumstances. Mr. Gibb submits that the FCE went too far in that it failed to focus on the areas of most concern to the plaintiff: the hips and shoulders.

[98] It appears that Mr. Gibb is not disputing the necessity and propriety of retaining Mr. Pakulak to do the FCE but that rather he is suggesting that the amount charged for the work done is excessive given the fact that he relied on faulty information in preparing his report.

[99] I reviewed the FCE report prepared by Mr. Pakulak. It clearly notes that the plaintiff worked as a welder post each of the 2007 and 2008 Accidents and that he continues to work as a welder. Specifically, Mr. Pakulak notes:

With respect to his current work as a Welder, the physical demands of this work are described in the NOC under the category of Welders (7265.1). The work is classified as requiring heavy level strength, upper limb coordination, other body positions, limited hearing and close visual acuity. . . In my opinion, based on the testing results he did not demonstrate the capacity to complete this work at a competitive or sustainable pace on a full or part time basis. To his credit he has persisted with the work despite ongoing difficulties and reduced activity levels outside of work.

[100] Mr. Gibb's submissions are not substantiated by the evidence. While it may have been useful for Mr. Pakulak to have had the benefit of Dr. Gilbert's March 26, 2010 report, he was made aware of the plaintiff's work history by the plaintiff himself (during the testing).

[101] Dr. Gilbert's opinion regarding the plaintiff's future work is somewhat equivocal. He says (at page 9 of his 2010 report):

Overall Mr. Dhillon is able to perform most of his daily activities. He is able to continue to work as a welder. I anticipate he will be able to continue with this type of work in the future. Overall, he is at risk of some ongoing pain in these regions noted above in the future, but he is not at a significantly increased risk of degeneration as a result of the injuries sustained in this motor vehicle accident.

The overall prognosis of his condition is good, although the overall likelihood at this point in time for significant functional improvement is poor.

[102] In his 2012 report, Dr. Gilbert also noted that the plaintiff continues to work as a welder but that he has some ongoing hip and shoulder pain. Specifically he notes:

I would anticipate that he will be able to continue with this work in the future, but he will do so with some pain.

[103] Dr. Gilbert is not a functional capacity expert. He did not do any testing of the plaintiff particularly directed to his ability to function as a welder. He based his opinion on the plaintiff's "self-reporting" and not on any special knowledge of the requirements for work as a welder. Mr. Pakulak however performed a series of very specific tests designed to determine if the plaintiff was suited for continued work as a welder. He concluded that he was not.

[104] The amount charged for the FCE is within the usual range for reports of this nature. I see no reason to reduce the costs of this report and I will allow the plaintiff to be reimbursed the full amount paid to Harbourview Rehabilitation (Mr. Pakulak) for this report (\$2,712.50).

(f) Associated Economic Consultants

[105] The plaintiff retained Mr. Peever, an economist with Associated Economic Consultants, to provide a report setting out the plaintiff's future loss of earning and non-wage benefits due to the 2007 and 2008 accidents. The defendants do not dispute the necessity or propriety of retaining this expert. They also acknowledge that it was reasonable for the plaintiff to obtain the present day value tables contained in Mr. Peever's report. However, they take the position that "the amount charged by Mr. Peever should be reduced on account of unnecessary, irrelevant material" which I have taken to be the same "faulty information" provided (or not provided) to Mr. Pakulak. I disagree. There was no faulty information. The underlying information given to the economist and on which his report was based (including Mr. Pakulak's report and Dr. Kleinman's May 2, 2012 report) was truthful and accurate. Mr. Peever's invoice discloses that he spent some two hours reviewing records, three-quarters of an hour conversing with Ms. Dewar and three and a half hours preparing and writing his report. The total amount charged for his work is \$1,650 (plus HST). That amount is within the range of the usual charges for a like report and I will allow it.

(g) Dr. Jayaraman

[106] Dr. Jayaraman took over as a locum for Dr. Goel while he was on medical leave sometime in early 2012. Dr. Jayaraman first saw the plaintiff as a patient on April 27, 2012. Dr. Jayaraman responded to the medical-legal report request made by plaintiff's counsel to Dr. Goel on February 27, 2012 by providing a medical-legal report dated May 29, 2012. In preparing her report, Dr. Jayaraman reviewed the plaintiff's chart (specifically Dr. Goel's clinical notes, specialists and physiotherapists' reports, various radiological reports). She also relied on

her assessment of the plaintiff of April 27, 2012.

- [107] Dr. Jayaraman received her license to practice medicine in British Columbia in 2009. She has a practice in Qualicum Beach and, as noted, became a locum for Dr. Goel in 2012.
- [108] The defendants take the position that it was unnecessary and extravagant to order a medical-legal report from Dr. Jayaraman as Dr. Jayaraman did not see the plaintiff prior to April 2012 and, in fact, was not even a qualified doctor at the time of either the 2007 or the 2008 Accident.
- [109] Ms. Dewar confirmed on cross-examination that she had not, in fact, requested a report from Dr. Jayaraman but that Dr. Jayaraman seemingly took it upon herself to do the report when she saw the request for the medical-legal report that Ms. Dewar sent to Dr. Goel.
- [110] I find that it was neither necessary nor proper to order a report from Dr. Jayaraman. In fact, none was ordered. The defendants ought not to bear the costs of Dr. Jayaraman's apparent enthusiasm in preparing a report based on one examination of the plaintiff and a review of the clinical notes. I will disallow the plaintiff the costs of her report (\$935.00).

(h) Reportex - Reasons

- [111] Ms. Dewar ordered the reasons for judgment following the defendants' failed chambers application to adjourn the trial. In her affidavit, Ms. Dewar says that these reasons were required for trial "due to the defendants' advice of issues they would be raising at trial". The plaintiff's submissions state that the reasons were ordered to "respond in the event that Mr. Gibb might attempt to raise similar arguments and seek similar relief at trial".
- [112] The defendants say that these reasons had no utility in the matter and it was not necessary or proper to order them and therefore this is not a cost that ought to be borne by the defendants.
- [113] The application was for an adjournment of the trial. It is however clear from the reasons that the prevailing argument at the application related to the late reports; specifically the fact that the plaintiff would not agree to the defence medical examination and the hurdle that both the plaintiff and the defendants would have to overcome of the causal connection between the accidents and the labral tear which was mentioned in Dr. Gilbert's report but not confirmed until Dr. Shuckett's (late) report.
- [114] In my view, it is likely that these same issues would have been canvassed at trial and it was prudent for Ms. Dewar to order Master Taylor's reasons in anticipation of this. Accordingly, I allow the cost of ordering these reasons (\$125).

(i) All Star Reporting - Examination for Discovery Transcripts

[115] Only the amount of the invoice dated October 16, 2012 is in issue. Both the plaintiff and the defendant Tao were examined on September 15, 2011 but Ms. Dewar did not order the transcripts of their discoveries until October 12, 2012. The issue is not the fact that the transcripts were ordered. The defendants agree that it was reasonable and proper for the plaintiff to order these transcripts. However, the defendants question the reasonableness of the charges. The invoice from All-Star Reporting notes:

TO:

Transcript of Examination for Discovery of Yusaf Tai, original and two copies, 32 pages at \$6.15 per page (Expedited)

\$196.80

TO:

Transcript of Examination from Discovery of Steve Dhillon, three copies, 66 page at \$3.70 per page

\$224.20

Subtotal

\$441.00

TO:

HST

\$52.92

Total

\$493.92

[116] Mr. Gibb submits that, firstly, it was not necessary for Mr. Tao's transcript to be ordered on an expedited basis and, secondly, that there was no need for the plaintiff to have three copies of his own examination for discovery transcript.

[117] Ms. Dewar advised that she did not order the transcript of Mr. Tao's discovery until it was clear that she would need it for trial purposes. She did not initially order it as she thought perhaps the defence might admit liability for the 2008 Accident and, if so, then she would not need the transcript. The defendants did not admit liability for the 2008 Accident until the October 4, 2012 TMC and, as noted earlier, the defendants' TMC brief listed Mr. Tao as a witness. Ms. Dewar advised that:

As trial was set to proceed on October 22, 2012 and Mr. Gibb had listed the Defendant Tao as a witness he was calling in the Defendants' case, Discovery transcripts of both the Plaintiff and the Defendant Tao were ordered.

- [118] I will not penalize the plaintiff for deciding not to order the Tao transcript until just before trial and therefore requiring it on an expedited basis. It seems Ms. Dewar was trying to avoid unnecessary expense by not immediately ordering the transcript following the Tao discovery. I expect that, had liability been admitted shortly after the discovery and had the transcript been ordered, the defendants would be submitting it was unnecessary to order it so quickly. In fact, I have heard that argument on assessments of costs on motor vehicle matters. I will allow the costs of the Tao transcript (\$196.80 plus tax).
- [119] As for the three copies of the plaintiff's transcript, Ms. Dewar advised that she ordered one transcript for the plaintiff to use personally to prepare himself for trial as the defendants' TMC brief suggested that Mr. Gibb would be some four to five hours in his cross-examination of the plaintiff. Further, one transcript was for Ms. Dewar personally and the other was for the Court (if needed). Ms. Dewar also reminded me of the prohibition that transcription companies place on copies of the transcripts (being work product of the transcription company and thus subject to copyright by them).
- [120] I agree with the logic behind ordering three copies of the plaintiff's examination for discovery transcript and find that it was reasonable and proper to order them. The plaintiff shall recover the costs of this disbursement from the defendants (\$224.60 plus tax).
- (j) Legal Alternative, Couriers and Postage
- [121] The plaintiff seeks \$372.99 for "legal alternative and couriers" and \$91.81 for postage. The defendants say that the plaintiff has failed to provide any information about the number of items sent by legal alternative, courier or mail. As such, they say they cannot assess whether the charges are reasonable.
- [122] The plaintiff's only submission on these items was that these types of expenses are recorded in counsel's office and that the amount on the bill of costs is the amount charged for each service. Ms. Dewar specifically notes that, as the defendants had "significant document production demands", she was careful to track these expenses.
- [123] No doubt some couriers were employed and legal alternative was used to deliver documents. I am sure, as well, that some items were also mailed. These are disbursements of the type where some sort of "rough and ready justice" must be employed. This is also an area where proportionality should come into play. An assessment of costs has been said to sometimes be a matter of rough justice which requires a certain degree of "sensible approximation": *Re Eastwood*, [1974] 3 All E.R. 603 (C.A.). It is not required on every assessment of costs that a party go through his file and count each and every piece of paper or each and every letter that was mailed, sent by courier or delivered to another to ensure that internal controls (tracking systems) have maintained an accurate record of such things. To do so is nonsensical and out of proportion to the amounts at issue. Parties should bring some degree of common sense to these issues when discussing resolution of costs matters.

[124] This was not a simple straightforward motor vehicle accident case. There were some complexities and a number of experts were employed, each of whom received confidential information about the plaintiff. That confidential information is best delivered by a secure source, such as a courier and not entrusted to "regular" post. It is useful, as well, to note that plaintiff's counsel's office is in Burnaby and defense counsel's is in Port Moody. That in and of itself necessarily raises the costs of delivering materials between counsel beyond what might be the usual course were both counsel located in downtown Vancouver or in New Westminster, for example. That being said, this was not a matter where there were a myriad of interlocutory motions requiring delivery of materials between counsel.

[125] Based on my experience in like matters (which I am entitled to and ought to bring to this matter), I find that a reasonable amount for legal alternative and couriers is \$250 and for postage \$80.00.

(k) Facsimile

[126] The plaintiff seeks \$612.50 for facsimiles. The defendant says that these costs are excessive and there is no evidence regarding the numbers of facsimiles sent or received and that the \$0.50 per page cost for faxes is higher than the \$0.35 per page "registrar's rate" prescribed in Administrative Notice No. 5 issued May 1, 2010.

[127] Mr. Gibb is correct. The presumptive registrar's rate for faxes is \$0.35 per page. A party to an assessment is entitled to rely on that presumption. Ms. Dewar has not adduced any evidence that would lead me to believe that the actual costs associated with facsimiles in her office are higher than the presumptive rate and so I will apply that rate. Assuming all faxes were tracked at \$0.50 per page, the \$612.50 claimed for faxes indicates that 1,225 faxes in total were sent and received. That appears to be an extraordinary number of faxes for a case of this sort. Further, technology has evolved to such a degree that, for the most part, faxes are falling into disuse and documents are now being scanned and sent electronically. Scanning and emailing is a much more cost-effective and efficient way to deal with the plethora of documents forming part of a Supreme Court civil action.

[128] Plaintiffs (in fact all parties) ought to be encouraged to employ these more economical and environmentally friendly options. The defendants submit that I ought to reduce the number of faxes to 1,100 and allow them at registrar's rate. While I might have reduced the amounts even further than suggested, I will agree with the defendants' submissions and will allow the plaintiff to claim the sum of \$385 ($1,100 \times 0.35 = \$385$) for faxes.

(l) Photocopies

- [129] I turn now to the last disbursement in dispute: the photocopies. The plaintiff seeks \$2,587.60 in photocopying expenses for black and white copies (which have been claimed at \$0.35 per page) and colour copies (claimed at \$0.50 per page). Other than noting that her office tracks these expenses and did so in this case because of the defendants' significant document production demands, no other evidence was provided regarding the numbers of black and white or colour copies made.
- [130] The issue of photocopies on assessments of costs has been said to be a "perennial, never-ending and vexing question" (Registrar Blok, as he then was, in *Sovani v. Jin*, supra). I cannot agree more. That is why, as I noted earlier, some "rough and ready" justice must be brought to bear on this question.
- [131] Photocopies also have a presumptive rate: \$0.25 per page and thus the plaintiff's bill of costs is in error. Certainly the black and white photocopies should have been included on the bill of costs at \$0.25 per page and not \$0.35 per page. There is no presumptive rate for colour copies. I am aware that, generally, colour copies are more expensive as they require, not only more, but also specialty ink. I have no hesitation in holding that \$0.50 per page is a reasonable rate for colour copies made in-house at a law firm.
- [132] I also observe that, generally speaking, not all photocopies made on a file are made for the purposes of the litigation and thus necessary or proper to its conduct (see *Turner v. Whittaker*, 2013 BCSC 712 (Master, as Registrar) and *Raju v. Bui and Insurance Corporation of British Columbia*, 2008 BCSC 1230 (Registrar)). Also, just as with faxes, the use of new technologies (such as scanning and electronically storing of documents) ought to be endorsed as that encourages efficiency and likely will serve to reduce costs (see *Stapleton v. Charambidis*, 2010 BCSC 1642 (Master, as Registrar)).
- [133] Ms. Dewar's affidavit on the necessity and propriety of the photocopies made is somewhat lacking. I would have expected it to set out the actual number of copies made (including those made in colour), describe any unusual features of the actions (necessitating a larger number of copies than usual), the nature and extent of the documents copied, what items were required to be copied in colour, and the like. Without that evidence, it falls to me to use some rough and ready to decide on an appropriate number of copies and allow the plaintiff to be reimbursed for that appropriate amount.
- [134] The only colour copies that might have been necessary on this file would be copies of the photographs of the vehicle damage for use both at trial and, also, sent to the various experts to provide them with a visual rendering of the accidents. On a rough and ready basis, I am prepared to allow a total of 50 colour copies at \$0.50 per page, for a total cost of \$25 for colour copies.
- [135] As for the black and white copies, I will allow an additional \$1,250 for those (or a total of 5,000 copies at \$0.25 per page).

[136] I believe that I have dealt with all of the disputed items. It is not my intention to do the arithmetic as I am certain that counsel are capable of doing that themselves. If there is a need to appear before me to perform the arithmetic, the parties have liberty to apply.

[137] If a certificate of costs is needed, counsel may prepare one and forward it to me for my signature. It should include all of the tariff costs and disbursements. Both counsel should endorse the certificate as correct to satisfy me that the mathematics are correct.

"Registrar Sainty"

[1] CIRA is a provider of independent medical evaluations and services for a variety of industries across Canada, including medical-legal reports for use in litigation.

[2] On October 10, 2012, Dr. Kleinman issued a letter noting simply that, upon his review of the left hip arthrogram he found nothing that changed his opinion in his original independent medical assessment report.

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Prepared on 28 October 2026 · Esheria