

CANADA / JUDGMENT

Emond v. British Columbia (Attorney General)

2024 BCSC 582

COURT

Supreme Court of British Columbia

DECIDED

10 April 2024

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2024 BCSC 582 Emond v. British Columbia (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Emond v. British Columbia (Attorney General),

2024 BCSC 582

Date: 20240410

Docket: S055295

Registry: Vancouver

Between:

Jean-Claude Emond

Plaintiff

And

His Majesty the King in Right of the Province of British Columbia as Represented by the Ministry of the Attorney General and Ministry of Public Safety and Solicitor General, His Majesty the King in Right of Canada as Represented by the Ministry of Attorney General and Ministry of Public Safety and Solicitor General of Canada, Constable K. Meglic, Constable B. Williams, Constable R. Heppell, Constable D. Thompson, Constable J. Wilson and Constable Pawar

Defendants

Corrected Judgment: The text of the judgment was corrected on

May 8, 2024

Before: Associate Judge Nielsen

Reasons for Judgment

The Plaintiff, appearing in person:

J.C. Emond

Counsel for the Defendants, His Majesty the King in Right of Canada as represented by the Ministry of Attorney General and Ministry of Public Safety and Solicitor General of Canada, Constable K. Meglic, Constable B. Williams, Constable R. Heppell, Constable D. Thompson, Constable J. Wilson and Constable Pawar:

C.N. Landsiedel

No other appearances:

Place and Dates of Hearing:

Vancouver, B.C.

October 10, 2023

March 19, 2024

Place and Date of Judgment:

Vancouver, B.C.

April 10, 2024

[1] This is an assessment of the plaintiff's party and party costs at scale B, pursuant to the order of Justice Francis pronounced April 8, 2022 wherein it was ordered:

1. Costs of this action are payable to the plaintiff by the Minister of Public Safety and Solicitor General of British Columbia at Scale B.
2. Costs of this action are payable to Her Majesty the Queen in right of the Province of British Columbia by the plaintiff at Scale B.
3. Costs are payable to the Personally Named Officers by the plaintiff for steps taken by counsel in this action on behalf of the Personally Named Officers on their behalf alone, namely as a result of the examinations for discovery of the Personally Named Officers, at Scale B.
4. Costs payable to the Personally Named Officers by the plaintiff are to be offset against costs payable to the plaintiff by the Minister of Public Safety and Solicitor General of British Columbia.

- [2] The reasons for judgement in the trial of the action are cited *Emond v. Surrey (City)*, 2021 BCSC 1331. The essential background is summarized in paras. 1, 6 to 18, 60 to 61, and 133 where the court states:
- [1] On May 4, 2005, Jean Claude Emond was arrested by the RCMP pursuant to a warrant. In the course of that arrest, he suffered multiple bites from a police service dog (the "Incident"). He was taken to the hospital from the scene of his arrest, and underwent surgery for the injuries he suffered in the Incident. He was then remanded to Surrey Pre-Trial Services Centre ("SPSC"), where he spent approximately 18 hours before being released on recognizance.
- [6] Mr. Emond was 45 years old at the time of the Incident and was 61 at the time of trial. For most of his life, he has been a gold prospector, working mining claims in the Yukon during the summer months and doing various construction jobs during the rest of the year.
- [7] Mr. Emond was married to his first wife, Kimberly Courneya, from 1990 to 2008. They have two sons: Jean-Claude and Jean-Daniel, both of whom are now adults. They lived together at 7022 141 Street in Surrey (the "Family Home"). Mr. Emond and Ms. Courneya had a very high conflict relationship.
- [8] On November 21 2004, an argument between Mr. Emond and Ms. Courneya turned violent. Ms. Courneya called 9-1-1 and Mr. Emond left the Family Home -before the police arrived.
- [9] Mr. Emond temporarily moved to Montreal after the November 21, 2004 incident and, sometime later, he returned to live in the Family Home.
- [10] On November 22, 2004, Cst. Meglic answered a dropped 9-1-1 call from Ms. Courneya. He attended at the Family Home twice on that date to interview Ms. Courneya and the two children. On the basis of those interviews, Cst. Meglic submitted a report to the Crown requesting charges against Mr. Emond. Charges of assault and assault with a weapon were eventually approved and a warrant was issued for Mr. Emond's arrest.
- [11] On the evening of May 4, 2005, Cst. Meglic was on general duty. He was forwarded a Crime Stoppers tip with evidence that Mr. Emond was living at the Family Home. Cst. Meglic was assigned to arrest Mr. Emond and was allocated resources to effect the arrest, including the use of a police service dog ("PSD") named Jeck, and the assistance of Jeck's handler, Cst. Heppell. Csts. Williams and Wilson were also assigned to assist in the arrest (Csts. Heppell, Meglic, Williams and Wilson are hereafter referred to as the "Arresting Officers"). Cst. Thompson was assigned to a roving car in the area to assist in the arrest if needed.
- [12] Cst. Meglic testified that his superior, Cpl. Sageer, was in charge of assigning officers to assist in the arrest and was the person who made the decision to use a PSD in the arrest of Mr. Emond. While Cpl. Sageer did not testify at trial, Cst. Meglic explained that a number of factors contributed to the decision to use a PSD in Mr. Emond's arrest, including: (i) the fact that Mr. Emond had fled from the police in the past; and (ii) safety considerations, such as the likely presence of firearms in the Family Home and the fact that Ms. Courneya and the

children were likely to be in the Family Home at the time of the arrest.

- [13] At approximately 9:30 pm on May 4, 2005, Cst. Meglic attended at the front door of the Family Home, while Cst. Williams was stationed in the front yard. Csts. Heppell and Wilson, accompanied by Jeck, were stationed in the back yard of the Family Home.
- [14] While Cst. Meglic and Mr. Emond gave conflicting testimony about precisely what happened at the front door, the following facts are not in contention: Cst. Meglic knocked on the door, Mr. Emond opened the door, Mr. Emond's Rottweiler ran out of the house, and Mr. Emond closed the door and fled out the back of the Family Home.
- [15] Thus began a chase that took Mr. Emond, the Arresting Officers, and the PSD through a number of back yards, hopping over fences from one yard to the next, and ending up in the back yard of 7044 141 Street ("7044") behind a shed. It was at that location that Mr. Emond suffered bites from the PSD and was handcuffed by the Arresting Officers.
- [16] The witnesses all testified that the following events occurred, but their evidence differs on the sequence of these events: Mr. Emond was bitten by the PSD, handcuffs were placed on Mr. Emond, the PSD removed Mr. Emond's pants leaving him half naked, and the PSD bit Cst. Meglic on the foot.
- [17] After the PSD had been called off, and the handcuffs had been placed on Mr. Emond, some form of artificial light illuminated Mr. Emond and his serious wounds were visible to the Arresting Officers. Mr. Emond recalls that this happened when the floodlights in the yard came on. Cst. Meglic recalls that, shortly after the handcuffs were placed on Mr. Emond's wrists, Cst. Thompson arrived at the scene with a flashlight. Irrespective of the source of illumination, it is clear from all the testimony that Mr. Emond's injuries were immediately apparent to the Arresting Officers once they could see them. Cst. Meglic called emergency services and an ambulance attended. Corporal Pawar attended the scene at some point after the PSD was called off, prior to Mr. Emond leaving by ambulance for the hospital.
- [18] Multiple photographs were in evidence, some taken in the hospital and some taken the following day, which show Mr. Emond with deep lacerations on his left leg, right knee, right bicep, and left ankle. He also appears to have bites on his right buttock, left thigh, left foot, left arm, and on the right side of his torso. Mr. Emond says he sustained 17 dog bites. Whether or not this precise number is correct, it is unquestionable that Mr. Emond was seriously bitten in many parts of his body by Jeck in the course of the Incident.
- [60] A reasonable police officer would have ensured that the PSD was called off immediately upon being satisfied that the suspect was no longer a danger to the Arresting Officers. It is clear on the evidence that Mr. Emond was lying on the ground, physically restrained by three officers, within seconds of his first bite from Jeck. In this case, a reasonable officer would have called off Jeck, if not at the point that Mr. Emond was on the ground, then at the latest when Mr. Emond was handcuffed. This did not happen.

- [61] I find that Cst. Heppell's failure to control Jeck after Mr. Emond was under police control was negligent.
- [133] I find that the Federal Crown is liable to Mr. Emond in negligence. Mr. Emond is entitled to non-pecuniary damages in the amount of \$85,000. Because I have found him to be contributorily negligent. I am reducing his award by 25%, and I award him \$63,750 in non-pecuniary damages.

TARIFF COSTS

- [3] In assessing tariff costs, Supreme Court Civil Rule 14-1(2) requires an assessing officer to allow those fees under Appendix B that were proper or reasonably necessary to the conduct of the proceeding, and to consider Rule 1-3 and any applicable case plan order. Tariff costs are to be determined objectively. In determining the number of units for items where there is a minimum and a maximum, the registrar is to award a lower number of units for which little time should ordinarily be spent, and a higher number of units for those matters for which a great deal of time will be typically spent. This requires a comparison to other cases that come before the courts with a view to determine where the case fits on the spectrum. Was the case simple, straight forward, run of the mill, or complex, involving a great number of parties, numerous experts, extensive legal issues and large sums of money? The factors for consideration will vary depending on the circumstances of the case. All the relevant circumstances are to be considered.
- [4] The first tariff item for consideration is tariff item 1:
- Correspondence, conferences, instructions, investigations or negotiations by a party until the start of the proceeding, for which provision is not made elsewhere in this tariff"
- [5] The plaintiff claims the maximum of ten units. He submits he spent significant time meeting with lawyers and others, there was a significant amount of emails exchanged, and numerous lawyers for the defense involved in the four months between the incident date of May 4, 2005 and the commencement of the proceeding September 28, 2005.
- [6] The defendant submits the case was not complex. The plaintiff was arrested pursuant to a warrant, and bitten by a police dog in the process. The underlying cause of action was negligence, assault, and battery. The defendant also submits that much of the plaintiff's pre-litigation time was spent self-represented and there is a lack of evidence that supports pre-litigation steps taken. The defendant submits an award of 2 units is appropriate.
- [7] The underlying cause of action is not complex. Much of the pre-litigation time was spent by the plaintiff searching for counsel to represent him. I agree that the amount of evidence to support a claim for units at the higher end of the scale is lacking. In all the circumstances the plaintiff is awarded 4 units under tariff item 1.
- [8] The plaintiff claims the maximum 30 units for tariff item 2:

Correspondence, conferences, instructions, investigations or negotiations by a party after the start of the proceeding to the completion of the trial or hearing, for which provision is not made elsewhere in the tariff

- [9] The plaintiff emphasizes that the proceeding lasted 16 years, spanning the filing of the notice of civil claim to the completion of trial on July 8, 2021. The plaintiff does acknowledge that nothing occurred during the proceeding for approximately 7 years, until after he filed a notice of intention to proceed. The plaintiff submits that the matter involved extensive conferences and negotiations, all of which were unsuccessful, the involvement of several different lawyers acting on his behalf, two experts acting on his behalf, the subpoenaing of lay witness's, multiple examinations for discovery, and a polygraph test in order to convince his lawyer of his credibility so he would remain acting on his behalf.
- [10] The defendant submits that an award at the upper end of the range is inappropriate in the circumstances, and a lengthy time frame in which the proceeding progressed is not an indication of complexity. Rather, the length of the proceeding was extensive because the plaintiff took no steps in the litigation for long periods of time. The defendant submits that an award of 18 units is appropriate.
- [11] The proceeding took a lengthy period of time to resolve. The plaintiff concedes, in part, that the litigation was not pursued with the utmost diligence. However, there is evidence of ongoing correspondence, instructions investigations and negotiations. In all the circumstances an award of 20 units is appropriate for tariff item 2.
- [12] The plaintiff claims the maximum 10 units for tariff item 3:

Correspondence, conferences, instructions, investigations or negotiations by a party after the trial or hearing to enforce any final order obtained in that trial or hearing, for which provision is not made elsewhere in the tariff

- [13] The plaintiff submits that the enforcement of Justice Francis's order required the plaintiff's participation and the preparation of documents to facilitate the determination of the issue of costs and the entry of two orders after trial.
- [14] The defendant submits enforcement was not necessary as the plaintiff was promptly paid the damages awarded, and the entry of the two trial related orders did not involve any difficulty. The defendant submits that 2 units is appropriate. I agree, 2 units are awarded for tariff item 3.
- [15] With respect to tariff item 4:

Instructions to an agent to appear at a trial, hearing, application, examination, reference, inquiry, assessment, or other analogous proceeding, if necessary or proper, and if held more than 40 km from the place where the instructing lawyer carries on business

[16] The parties are agreed that 2 units are appropriate for tariff item 4. Accordingly, the plaintiff will have 2 units for tariff item 4.

[17] The plaintiff claims the maximum 10 units for tariff item 5:

Process for obtaining a consent case plan order.

[18] There were two case plan orders made on January 20, 2017 and February 27, 2020, but neither were by consent. The defendant takes the position that as neither case plan order was by "consent" as required by tariff item 5, no units are applicable. I agree, no units are awarded for tariff item 5 as neither were by consent as required.

[19] The plaintiff claims the maximum 10 units for tariff item 6:

All process, for which provision is not made elsewhere in this tariff, for commencing and prosecuting a proceeding

[20] Tariff item 6 relates to the pleadings. In 2005 the plaintiff filed a writ of summons and a statement of claim. An amended notice of civil claim was filed in 2015. The pleadings allege personal injury caused by negligence, assault, and battery, occasioned by the plaintiff's arrest, during which the plaintiff was badly mauled by a police dog.

[21] The defendant characterizes the pleadings as typical of a personal injury claim, and submits that 4 units are appropriate in the circumstances. I agree, the plaintiff is awarded 4 units for tariff item 6.

[22] The parties are agreed that 5 units are appropriate for each of tariff items 10 and 11:

10 Process for obtaining discovery and inspection of documents

- (a) 1 to 999 documents
- (b) 1000 to 5000 documents
- (c) over 5000 documents

11 Process for giving discovery and inspection of documents

- (a) 1 to 999 documents
- (b) 1000 to 5000 documents
- (c) over 5000 documents

[23] The plaintiff is awarded 5 units tariff item 10, and 5 units for tariff item 11, as agreed.

[24] The plaintiff is claiming 5 units for tariff item 15:

Process for making admission of facts

- [25] The plaintiff did not serve a formal notice to admit in the proper form, however, he did make a request for an admission of facts via an email. The request for an admission was responded to formally by the defendant. The defendant submits 1 unit is appropriate in the circumstances, and I agree. The plaintiff is awarded 1 unit under tariff item 15.
- [26] The parties agree that the plaintiff's claim for 5 units pursuant to tariff item 16 does not apply in the circumstances of this case, and therefore no units are awarded for tariff item 16.
- [27] The plaintiff claims the maximum 10 units for tariff item 17:

All process and correspondence associated with retaining and consulting all experts for the purposes of obtaining opinions for use in the proceeding

- [28] The plaintiff retained two experts, Dr. Johnson, a neurologist, and Dr. Chin, an orthopedic surgeon, both of whom produced reports. Neither expert appeared at trial to give evidence. The plaintiff submits that he asked them to attend the trial but both refused and stated that since the plaintiff was not a lawyer, they would not attend. Likely, the experts were concerned they would not be paid if they attended.
- [29] The defendant submits that in the circumstances 2 units ought to be awarded.
- [30] Given that there was an apparent minimum contact with the experts beyond retaining them to produce a report, and a failed attempt to have them attend trial, I agree that 2 units are appropriate. The plaintiff is awarded 2 units under tariff item 17.
- [31] The plaintiff has claimed 10 units for tariff item 18, the maximum allowed. Tariff item 18 provides:

All process and correspondence associated with contacting, interviewing and issuing subpoenas to all witnesses

- [32] The plaintiff subpoenaed two witnesses to attend the trial, however, according to the plaintiff, the venue was changed "at the last minute". Apparently, the two subpoenaed witnesses went to the New West Courthouse, when the trial proceeded in Vancouver. The plaintiff testified on his own behalf and a further witness gave evidence concerning the plaintiff's gold mining activities. Tariff item 18 does not apply to the party himself, see *Pardo v. Young*, 2013 BCSC 2203 at para. 22. The plaintiff indicated he did not speak to, or interview, either of the two subpoenaed witness's out of a concern that it would be alleged he tampered with their evidence. The defendant submits that in the circumstances 1 unit is appropriate.
- [33] In my view, given the plaintiff subpoenaed two occurrence witness's, and a witness to speak to his alleged wage loss, 3 units are appropriate in the circumstances, and 3 units are awarded for tariff item 18.

[34] The plaintiff has claimed 40 units under tariff item 19(a) for preparation in relation to ten discoveries, and 3 units under 19(b) for one discovery of himself. Similarly, the plaintiff claims 80 units under tariff item 20(a) and 5 units under 20(b) for attendance in relation to the discoveries referenced. Tariff items 19 and 20 provide:

19 Preparation for examination of a person coming under Item 20 for each day of attendance

- (a) by party conducting examination
- (b) by party being examined

20 Attendance on examination of a person for discovery, on affidavit, on a subpoena to debtor, or in aid of execution, or of a person before trial under Rule 7-5 or 7-8, or any other analogous proceeding, for each day

- (a) by party conducting examination
- (b) by party being examined

[35] The plaintiff's action against all the individuals discovered were dismissed, except for Cst. Heppell, for whom the Minister of Public Safety and Solicitor General of B.C. is statutorily liable pursuant to s. 11 of the Police Act. Not only were the plaintiff's claims against the other individuals dismissed, he was ordered to pay their costs. Those amounts have been settled and will be offset once the plaintiff's costs are assessed. In the circumstances, the plaintiff can only recover tariff units with respect to that part of his action which was successful, and for which costs follow the event. The plaintiff is awarded 2 units under tariff item 19(a) for preparation for the half day discovery of Cst. Heppell, and 3 units for the full day preparation for the discovery of himself pursuant to tariff item 19(b). Similarly, the plaintiff is awarded 4 units under tariff item 20(a) for the attendance at the half day discovery of Cst. Heppell, and 5 units for the attendance at the full day discovery of himself pursuant to tariff item 20(b).

[36] The parties have reached agreement on tariff items 21 at 1.5 units; tariff item 22 at 2.5 units; tariff item 23 at 2 units; tariff item 24 at 0 units; and, tariff item 25 at 0 units. Those amounts agreed for these tariff items are awarded

[37] The assessment of costs occurred over two full days on October 19, 2023, and March 19, 2024. In addition, the parties appeared before the registrar for a half day on a pre-hearing conference prior to the assessment of costs pursuant to AN-8. The plaintiff would therefore be entitled to 5 units under tariff item 29, and 9 units under tariff item 30.

[38] I am advised the defendants advanced a settlement offer with respect to costs, prior to the assessment, pursuant to s. 8 of Appendix B in form 123. As a result, once these reasons are delivered, the defendant may advise whether their offer matched or exceeded the costs awarded to the plaintiff herein, and if so, the award of costs will be reduced by 12 units, comprising of 4 units for tariff item 29 and 8 units for tariff item 30, unless there are compelling reasons to do otherwise.

[39] The plaintiff claims 6 units for tariff item 31 and 10 units for tariff item 32. Tariff items 31 and 32 provide:

31 Preparation for attendance referred to in Item 32, for each day of attendance

32 Attendance at a settlement conference, case planning conference or trial management conference

[40] Within the action there were two case planning conferences and one trial management conference. All three took less than an hour, and were run of the mill. The plaintiff is awarded 3 units for tariff item 31, and a further 3 units for tariff item 32.

[41] Tariff items 34 and 35 are agreed at 75 units for tariff item 34, and 150 units for tariff item 35. Those units as agreed are awarded.

[42] The plaintiff claims the maximum 10 units for tariff item 36 which provides:

Written argument

[43] The plaintiff produced two written arguments, one four pages long and the other eight pages in length. Typically, the maximum units are reserved for those arguments that address the most complex factual and legal issues as per *Cowichan Bay Contractors Ltd. v. ICBC*, 2008 BCSC 1326 at para. 37. In the present case, the written arguments are neither lengthy nor complex, accordingly, 3 units are awarded.

[44] The plaintiff had claimed 3 units for tariff item 37 and 1 unit for tariff item 38. Tariff items 37 and 38 provide:

37 Attendance at the court for trial or hearing if party is ready to proceed and when trial or hearing not started

38 Attendance to speak to trial or hearing list

[45] Tariff item 37 is awarded where the parties appear for a scheduled trial but it does not proceed due to the unavailability of a trial judge. As that did not occur in this case, tariff item 37 does not apply and no units are awarded. The plaintiff conceded during argument that tariff item 38 did not apply, therefore no units are awarded.

[46] The plaintiff claims 3 units under tariff item 40 as the matter was set for trial on three different occasions. Tariff item 40 provides:

Process for setting down proceeding for trial

[47] The defendant submits that as tariff item 40 refers to the "process", and the tariff provides for a maximum of 1 unit, the maximum that can be awarded is 1 unit regardless of the fact that trial was set down on three occasions. I agree, 1 unit is awarded for tariff item 40.

[48] The plaintiff claims 20 units under tariff item 44 which provides:

Negotiations, including medication, and process for settlement, discontinuance, or dismissal by consent of any proceeding if settled, discontinued, or dismissed by consent as a result of the negotiations

[49] Despite ongoing negotiations during the course of the proceeding, they did not result in a "discontinuance", "dismissal", or "settlement" as required by tariff item 44, therefore it is not applicable and no units are awarded thereunder.

[50] The plaintiff claims 30 units under tariff item 45, and 6 units for tariff item 46 which provides:

45 Attendance at mediation, per day

46 Preparation for a mediation, for each day of attendance

[51] The basis of the plaintiff's claim involves the many days leading up to the mediation and following it. However, tariff item 45 allows for "attendance" and "preparation" at the mediation "for each day". The mediation took place for one day on October 29, 2020, and did not result in a settlement. Therefore, 5 units are awarded for the attendance at the mediation for the one day pursuant to tariff item 45, and a further 3 units under tariff item 46 for preparation for the one day.

[52] The plaintiff claims 32 units under tariff item 48 for travel to and from the courthouse. Tariff item 48 provides:

Travel by a lawyer to attend at any trial, hearing, application, examination, reference, inquiry, assessment, or other analogous proceeding if held more than 40 km from the place where the lawyer carries on business, for each day on which the lawyer travels

In addition, reasonable travelling and subsistence expenses are to be allowed as a disbursement

[53] Initially the plaintiff was represented by Mr. Doran, however he is local counsel and does not practice 40 kms or beyond from the place of any proceeding related appearances, except travel to one of the case planning conferences. The plaintiff is awarded 2 units for the travel to the case planning conference.

[54] The plaintiff, who is self-represented, is unable to claim units under tariff item 48 for his own travel to and from the courthouse under tariff item 48 as it only applies to "travel by a lawyer", which the plaintiff is not.

[55] Therefore, subject to the defendant's offer to settle the assessment of costs, the plaintiff is awarded 327 units at \$110.00 per unit, for a total of \$35,970 in tariff costs.

DISBURSEMENTS

[56] SCCR 14-1(5) requires an assessing officer to determine which disbursements were necessarily or properly incurred in the conduct of the proceeding, and to allow a reasonable amount for those disbursements. The applicable principles to be applied on an assessment of disbursements are set out in *Schroeder v. McGivern*, 2015 BCSC 362, at paras. 11-14 where the court states:

[11] There are a number of principles to be considered on an assessment of disbursements. Those applicable principles were summarized in *Turner v. Whittaker*, 2013 BCSC 712 at para. 5, wherein Master McNaughton stated:

[5] Counsel were also able to agree on the following legal principles which are applicable on an assessment of disbursements:

1. Rule 14-1(5) requires an assessing officer to determine which disbursements were necessarily or properly incurred in the conduct of a proceeding and to allow a reasonable amount for those disbursements.
2. The consideration of whether a disbursement was necessarily or properly incurred is case- and circumstance-specific and must take into account proportionality under Rule 1-3. (*Fairchild v. British Columbia (Vancouver Coastal Health Authority)*, 2012 BCSC 1207).
3. The time for assessing whether a disbursement was necessarily or properly incurred is when the disbursement was incurred not with the benefit of hindsight. (*Van Daele v. Van Daele*, 1982 CanLII 808 (BC SC), 56 B.C.L.R. 176 (SC) rev'd 1983 CanLII 720 (BC CA), 56 B.C.L.R. 178 at para. 4 (CA))
4. A necessary disbursement is one which is essential to conduct litigation; a proper one is one which is not necessary but is reasonably incurred for the purposes of the proceeding. (*McKenzie v. Darke*, 2003 BCSC 138, para. 17-18)
5. The role of an assessing officer is not to second guess a competent counsel doing a competent job solely because other counsel might have handled the matter differently. (*McKenzie v. Darke*, 2003 BCSC 138, para. 21).

[12] To these principles, I would add those in *Holzapfel v. Matheusik* (1987), 1987 CanLII 2659 (BC CA), 14 B.C.L.R. (2d) 135, which are summarized in *Cloutier v. Wong*, [1992] 12 CPC (3d) 169 where the Court stated at para. 5:

5 In *Holzapfel v. Matheusik* (1987), 1987 CanLII 2659 (BC CA), 14 B.C.L.R. (2d) 135, the Court of Appeal approved the following principles set out in the authorities:

1. The onus of proof rests on the party submitting the bill to establish affirmatively the necessity or reasonableness of the charges he claims as disbursements (*Hall v. Strocel* (1983), 34 C.P.C. 170 (B.C.S.C.)).
2. The solicitor responsible for the preparation of the case should give evidence, which may be by affidavit, verifying that the work was necessary for the full and proper presentation of the case and that the fees charged for the work were reasonable in the circumstances (*Berite v. Schuette* (1980), 17 C.P.C. 259 (B.C.S.C.)).
3. If the expert's bill contains less than a reasonably detailed outline of the work he performed and the hours he devoted to his retainer, an affidavit sworn by the expert may be required (*Berite v. Schuette* (1980), 17 C.P.C. 259 (B.C.S.C.)).
4. The affidavit of verification does not bind the assessment officer but he should consider it carefully and weigh it against the other evidence (*Bell v. Fantini*; *Fasciana v. C.N.R.* (1981), 1981 CanLII 614 (BC SC), 32 B.C.L.R. 322 (B.C.S.C.)).

[13] In *Bell v. Fantini* (1981), 1981 CanLII 614 (BC SC), 32 B.C.L.R. 322 (S.C.) at para. 23, the Court stated:

23 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 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.

[14] These principles will be applied to the disbursements which remain in dispute.

[57] By order dated September 28, 2005, Associate Judge Scarth granted an order that the plaintiff was exempted from court fees for being impecunious. As a result, many of the typical disbursements do not arise on this assessment.

Travel Expenses

[58] The first disbursement claimed concerns travel expenses. The plaintiff resided in the Philippines for much of the time during the proceeding, having moved there after the action was commenced. He is also a professional gold miner/pro prospector and frequently travels between the Yukon and the lower mainland when necessary.

- [59] The plaintiff attended multiple defense IME's but the expenses related to those examinations have already been reimbursed. The plaintiff has claimed disbursements involving trips to see his various medical providers during the course of the proceeding for treatment of his injuries, but these expenses are properly "special damages" within the proceeding, not a disbursement pursuant to SCCR 14-1(5).
- [60] In *MacKenzie v. Rogalasky*, 2014 BCCA 446, the Court stipulated that to be a recoverable disbursement, the expense claimed must have been incurred within the proceeding, and directly relate to the management and proof of allegations, facts and issues in the litigation. Many of the disbursements claimed by the plaintiff herein are not recoverable as they do not relate to the management and proof of allegations, facts and issues within the litigation.
- [61] There is a dispute concerning the travel costs occasioned by the plaintiff's move to the Philippines. In *Moser v. Mackie*, 1950 CanLII 513 (B.C.S.C.) p. 721, the court stated:
- In respect to the first point, I am of the opinion that the registrar was wrong. The plaintiff did not have to remain within the province until the action was heard and acted in a normal way in returning to his original place of abode. To my mind, the decision of *Drake, J.*, *supra*, has no bearing on the subject-matter of this application. In that case it was true that travelling and subsistence allowance of the plaintiff for travelling outside of the province was not allowed but this was prior to the commencement of the action and I am quite in agreement with the same. In divorce actions, petitioners have sought to obtain fees paid to detectives prior to commencing the proceedings, the evidence so obtained by the detectives justifying the proceedings. I have refused to allow these costs. In the present case the plaintiff was a bona fide resident of Camrose, Alberta, at the time of the trial. He was a necessary witness at the hearing of the trial and should be properly paid the regular witness fees and subsistence allowance which might be paid to any other witness.
- [62] The defendants rely upon *Senner v. GE Canada Leasing Services Co.*, 2018 BCSC 1256 at para. 137, where the opposite view was taken. In *Senner*, the Court found that the "defendants ought not to be responsible for the expenses incurred by the client who initially lived close to his counsel, then moved and had to travel for meetings". However, no cases are cited in *Senner*, in support of this proposition. In my view, the question boils down to what is "necessary or proper" in the circumstances.
- [63] At the time of trial, the plaintiff was resident in the Philippines and was required to return to Canada in order to conduct the trial and be a witness in his own cause. As per *Moser*, "he was a necessary witness at the hearing of the trial and should be paid the regular witness fees and subsistence allowance which might be paid to any other witness".
- [64] The plaintiff was required to travel to Canada from the Philippines twice for the purpose of trial, once when the trial did not proceed for reasons beyond his control, and the second in 2021 when the trial proceeded before Justice Francis. The plaintiff has produced many receipts, not all of which correspond to the dates surrounding the litigation. In the plaintiff's affidavit #5 one round trip to the Philippines cost the plaintiff \$1,067.48. The plaintiff has

also produced evidence of hotel and food costs. Some of the expenses are blended with his expenses related to his prospecting activities in the Yukon while in Canada.

- [65] In my view, the travel expenses back and forth from the Yukon and the Lower Mainland are not recoverable in the context of the proceeding. However, I allow two round trips from the Philippines involving air travel, hotel and food costs, as well as transportation costs. Considering the receipts and bank statements provided, on a rough and ready basis I allow \$2,500 for air fare, \$4,000 for hotel costs, \$2,500 in meal costs, and, \$400.00 in transportation costs, for a total of \$9,400 for travel expenses. This amount relates to travel to and from the Philippines, all travel within the lower mainland during the proceeding, including, but not limited to, travel related to trial, discoveries where applicable, conferences, mediation, and to attend his experts for the purpose of all IME's needed by the plaintiff.

Emails and Phone Calls

- [66] The plaintiff claims disbursements for emails and phone calls. These disbursements claimed do not have sufficient evidence to support the amounts claimed. Further, claims of this nature are typically disallowed as overhead. However, the plaintiff is a resident of the Philippines and communication carries with it added expense within the proceeding. On a rough and ready basis, the plaintiff is awarded \$200.00 towards these claims.

Legal Fees and Paralegal Fees

- [67] The plaintiff claims legal and paralegal costs as disbursements. These costs are not recoverable on an award of ordinary Schedule B party-party costs. To be recoverable, the court must order an award of special costs pursuant to SCCR 14-1(3). Accordingly claims for legal fees and paralegal costs are disallowed.

Storage Costs

- [68] The plaintiff has claimed storage costs in the amount of \$921.96. The plaintiff submits that as he resided in the Philippines, he was required to store his many bankers' boxes of court related materials in the lower mainland. The receipt references the location being Merritt, B.C. The plaintiff submits that this was a mid point between the Yukon where he was prospecting, and the lower mainland being the location of the proceeding. Storage costs would typically not be recoverable as they are an overhead expense. However, given that the plaintiff ordinarily resides in the Philippines, travelling back and forth with multiple bankers' boxes of documents would not be practical or reasonable. This is an exceptional circumstance warranting an exception to the ordinary rule. The plaintiff will recover the storage costs in the amount of \$921.96.

Clinical Records of Dr. Nagaria

- [69] The plaintiff claims \$336.00 in clinical record costs from Dr. Nagaria, a neurologist. The records consist of seven pages of records, and a short four-page report. The defendant argues the cost is excessive and neurological intervention was either unnecessary, or of no help within the litigation. They submit \$150.00 towards the cost is appropriate.
- [70] In *Van Daele*, the time for assessing whether a disbursement was necessarily or properly incurred is when the disbursement was incurred, not afterward with the benefit of hindsight. The plaintiff suffered permanent nerve damage in his leg as indicated in the reasons of Justice Francis. The intervention of a neurologist, and the obtaining of their records is reasonable in the circumstances. The plaintiff is awarded \$336.00 for the cost of the clinical records.

Printing and Photocopying

- [71] The plaintiff claims \$7,083.55 for printing/photocopying expenses. Pursuant to AN-5, photocopies are reimbursed at .25 cents per page, subject to any circumstances warranting an increase, or decrease. A cost of \$7,083.55 would entail 28,334 photocopies at the .25 rate. In *Schroeder*, at paras. 17 and 18 the court states
- [17] In my view, the laser printing described by the plaintiff would be recoverable as it directly arises from the exigencies of the proceeding and relates directly to the management and proof of allegations, facts and issues in the litigation. That is what is captured by the phrase "the conduct of the proceeding" in *Supreme Court Civil 14-1(5)* and is therefore a recoverable disbursement as per *MacKenzie v. Rogalasky*, 2014 BCCA 446 at para. 80. However, the specifics relating to each and every laser copy, not surprisingly, are lacking. As explained in *Sovani v. Jin*, 2006 BCSC 855 and *Gill v. Widjaja*, 2011 BCSC 1822, the assessment of the reasonableness of copying charges is not a precise arithmetical exercise but rather requires a consideration of what is reasonable in the circumstances of the action. This approach has been referred to as a "rough and ready calculation".
- [18] The cases also make clear that not every copy made in the litigation will be necessary. The more detailed the evidence concerning copies made, the more likely that the charges will suffer less of a discount, if at all. The evidence which exists in this case is limited but not completely lacking. In the circumstances, I allow \$350 for this disbursement.
- [72] In addition to the contingencies referenced above, the plaintiff was only partially successful in the litigation. A significant portion of his claims were dismissed. Considering the passages quoted above, and the specific circumstances of this case, applying a rough and ready approach, the plaintiff is awarded \$4,000 for printing/photocopy expenses.

Examination for Discovery Transcripts

[73] The plaintiff has claimed the costs of transcripts which have been consented to by the parties. They include Pacific Court Reporting in the amount of \$1,433.25; Pacific Court Reporting in the amount of \$1,315.65; Pacific Court Reporting in the amount of \$451.50; A portion of Pacific Court Reporting invoice #1816 in the amount of \$980.70; and a portion of the Pacific Court Reporting invoice #2052 in the amount of \$758.63, for a total of \$4,939.73 for discovery transcripts.

Trial Transcripts

[74] The plaintiff has claimed the cost of trial transcripts from JC Word Assist LTD for January 11, 18, and 19 in the amount of \$1,375.00; and for January 20 and 22 in the amount of \$603.50. The defendant objects to these disbursements on the basis that they were unnecessary, or at most, a mere convenience.

[75] In *Kemp v. Ross*, 2021 BCSC 447, the court canvasses the law with respect to the circumstances where trial transcripts will be allowed as necessarily or properly incurred:

[2] The law firm alleges the disbursement was not necessarily or properly incurred, relying on *Roesner v. Roesner*, 1997 CanLII 4352 (B.C.S.C.), 32 BCLR (3d) 289, where Registrar Wellburn disallowed a disbursement claimed for trial transcripts, stating at paras. 20 to 22:

[20] The question of whether a transcript was a reasonable and necessary disbursement was considered in *Jamieson v. Jamieson* (1980) 1980 CanLII 621 (BC SC), 22 B.C.L.R. 11. A transcript had been ordered in a custody case in which there was a 14 day trial and it was argued that because there had been a lapse of time between the hearings, transcripts were required to properly handle the case. Madam Justice Proudfoot held at page 13:

While it may be more convenient and undoubtedly would facilitate counsel in the conduct of a case of this kind, it simply is not necessary.

Having a complete transcript in this type of case is an expensive luxury and there is no reason why the respondent should pay for this luxury. The appeal is allowed of item 2. \$1,565.15 will be taxed off the bill. While I can appreciate the necessity of a complete transcript in some cases, custody cases do not, in my opinion, fall within that class of cases.

[21] In my experience, trial transcripts are rarely claimed on a bill of costs except when there has been some significant controversy as to the evidence of a particular witness or where there has been a direction made by the trial judge which counsel need to have clarified. In those instances a portion of the transcript only is ordered.

[22] I find that it was not reasonable and necessary to incur the cost of a complete transcript of the trial in this case and therefore disallow the disbursement.

- [3] A similar finding was made in *Connor Financial Services International Inc. v. Carver*, 2016 BCSC 1363, where the court states at para 24:
- [24] With respect to the transcripts, the defendant is correct in suggesting they are generally considered a luxury and the recovery of their costs disallowed (*Jamieson v. Jamieson* (1980), 1980 CanLII 621 (BC SC), 22 B.C.L.R. 11 (S.C.)). While the defendants submit the passage of time necessitated requesting the transcripts, Madam Justice Proudfoot (as she then was) held in *Jamieson* that despite the lapse of five months between the first and the final hearing, the transcript was not anything more than a convenience for counsel (at 13). The defendants did not outline an aspect of this case that would distinguish *Jamieson*.
- [76] At the assessment I did not hear any submissions that there was controversy concerning the evidence, or that the transcripts were used extensively at trial, or at all. In the circumstances, the claim for the cost of the trial transcripts is denied.

Medical Legal Costs

- [77] The plaintiff retained two experts, Dr. Chin, an orthopedic surgeon who produced a report dated May 11, 2018, at a cost of \$5,617.50, and Dr. Johnson, a neurologist, who produced a report dated January 20, 2017, at a cost of \$4,252.50.
- [78] The defendant objects to the cost of both reports. The defendant submits that only the report of Dr. Chin was served, and neither expert testified at trial. The defendant further submits that the report of Dr. Chin was more "supportive" of the neurologist's opinion, and is duplicative and therefore ought to be discounted or disallowed.
- [79] The plaintiff submits that the cost of both reports ought to be allowed as he asked both experts to attend trial to give evidence on his behalf but they refused stating that as he was not a lawyer, and therefore, they would not attend.
- [80] The fact that the report of Dr. Johnson was not disclosed is not determinative of whether the disbursement is recoverable. This issue was canvassed in *Ward v. Pasternak*, 2015 BCSC 1190, where the court stated at paras. 31 and 32:
- [31] A similar situation arose in *Forsythe v. Strader* (1987), 1987 CanLII 2568 (BC CA), 17 B.C.L.R. (2d) 124 (B.C.C.A.), where the defendants took issue with being liable for costs of an expert report that was undisclosed prior to settlement. In dismissing the defendants' appeal, the Court stated:

The first report was obtained, of course, in preparation for trial on the first occasion to which I have referred. Had it been the intention of counsel for the plaintiffs to use the report and file it as an exhibit at trial he would have had to give the defendants the notice called for by the Rules. Aside from that, however, it was not necessary for him to disclose the report to the defendants.

Notwithstanding the failure to disclose it, it would appear to me from the facts found by the Registrar and the local judge, the report was a report which it was necessary for the plaintiffs to have in order that their case could be prepared in a proper fashion. In these circumstances I think no exception can be taken to the decision of the Registrar, affirmed as it is by the local judge. I would dismiss this appeal.

TAGGART, J.A.

CARROTHERS, J.A.:-- I agree.

[32] In a concurrent judgment, Mr. Justice Esson stated:

The report was of a kind which it was clearly right and reasonable to obtain. The report itself was properly and professionally prepared. After the report had been obtained there were legitimate reasons, in the interests of putting forward the plaintiff's case most effectively, which led plaintiffs' counsel to retain the second expert and rely on his report and opinion.

In the circumstances there was no obligation to disclose the existence of the first report to the defendant, so there is no significance in the failure to do so. The governing rule is this:

"57(4) On a taxation, the registrar shall allow necessary or proper disbursements and expenses but, except as against the party who incurred them, disbursements or expenses shall not be allowed which appear to the registrar to have been incurred or increased through extravagance, negligence or mistake, or by payment of unjustified charges or expenses."

[81] I have reviewed both reports of Dr. Chin and Dr. Johnson. Each provides an opinion on the diagnosis, prognosis and the etiology of the plaintiff's condition and injuries within the ambit of their respective medical specialty. I do not consider the opinions duplicative. In my view, both reports were necessarily and properly incurred. The cost of both reports is allowed in full.

Investigator Costs

[82] When the plaintiff was represented by counsel, consideration was given to retaining an investigator to interview witness's who were the plaintiff's neighbors at the time of the incident. The plaintiff was able to produce a letter with a summary of the investigator's fees, and a letter from his former lawyer dated August 1, 2017 inquiring about retaining the investigator, but was unable to produce a report, or a bill for service. In the ledger of the plaintiff's former lawyer there is no specific entry which relates to an investigator's report. There is an unexplained entry in the ledger in the amount of \$2,164.70 dated March 28, 2017, however, this predates the lawyer's letter to the investigator by four months. In the absence of an investigator's report, or bill for their services, the disbursement is an unknown, unproven, and purely speculative. The claim for the investigator costs are therefore disallowed.

Polygraph Costs

- [83] The plaintiff claims \$525.00 for the cost of a polygraph test taken by him. The plaintiff advised he underwent the polygraph for the purpose of proving to his former lawyer that he was not lying about the events arising in the case. The plaintiff was concerned that his lawyer would withdraw from the case. The plaintiff has produced both the report and the bill. In my view this is not a recoverable disbursement. It does not "directly relate to the management and proof of allegations, facts and issues in the litigation" as per MacKenzie. Rather, it relates purely to a matter between solicitor and client. The claim for the polygraph disbursement is disallowed.

Witness Fees and Notary Costs

- [84] The plaintiff claims for witness fees in the amount of \$40.00 paid to "Nick, Kathy and Stan" who were subpoenaed to attend the trial, and \$85.00 paid to a notary to produce an affidavit of service. The witnesses did not attend trial due to confusion regarding the venue. Apparently, they attended the New Westminster Law Courts rather than the Vancouver Law Courts where the trial proceeded. The plaintiff was unable to produce the actual receipts for the conduct money paid, or the notary costs. Copies of the subpoenas to the witness's, and the affidavit of service notarized by the notary were also not produced. Ordinarily these expenses would be recoverable, however, given the complete lack of any evidence of these expenditures, the claim is unproven, and the disbursements are disallowed.
- [85] The plaintiff is awarded a total of \$29,666.73 in disbursements which, together with the award of \$35,970 in tariff costs, totals \$65,636.73 in costs before adjustments for contributory negligence, or any reduction of costs due to the defendant's offer to settle.
- [86] The parties may submit written submissions on the final amount to be awarded for costs and entered as a certificate in Form 64 pursuant to SCCR 14-1(27). The plaintiff will have two weeks from the date of these reasons to submit his submissions, and the defendant will have two weeks from receipt of the plaintiff's submissions to submit theirs. The plaintiff will then be able to submit their reply submissions within one week of receiving the defendant's submissions.

"Associate Judge Nielsen"

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