

CANADA / JUDGMENT

Fedor v. Fedirchuk

2024 BCSC 499

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 499 Fedor v. Fedirchuk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fedor v. Fedirchuk,

2024 BCSC 499

Date: 20240326

Docket: M123628

Registry: Kelowna

Between:

Paul Fedor

Plaintiff

And

Janice Fedirchuk

Defendant

Before: Associate Judge Muir

Reasons for Judgment

Counsel for the Plaintiff:

C.W. Perry, Articled Student

Counsel for the Defendant:

C. Holloway

Written Submissions of the Plaintiff:

February 15, 2024

Written Submissions of the Defendant:

February 16, 2024

Reply Submissions of the Plaintiff:

February 22, 2024

Reply Submissions of the Defendant:

February 23, 2024

Place and Dates of Hearing:

Vancouver, B.C.

February 6, 2024

Place and Date of Judgment:

Kelowna, B.C.

March 26, 2024

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Introduction

- [1] This was an application brought by the plaintiff under s. 5(6) of the Disbursements and Expert Evidence Regulation, B.C. Reg. 210/2020 [Regulation] for an order that the following disbursements be excluded under s. 5(2)(b) of the Regulation:

- a) physiatry report, expert preparation, and trial attendance fees;
 - b) general practitioner report, expert preparation, and trial attendance fees; and
 - c) psychiatrist report, expert preparation, and trial attendance fees.
- [2] In addition, the plaintiff sought an order that all disbursements incurred up to the amended Regulation coming into force are excluded, as well as an order that any disbursements incurred by the plaintiff for the purpose of the present application are also excluded. I note that the amended Regulation came into force on November 27, 2023.
- [3] The plaintiff also sought costs of this application.
- [4] At the hearing of the application, I was advised that the plaintiff was not proceeding with the order sought in para. 1(b) of part 1 of the notice of application--that is, he was not proceeding with the application to exclude disbursements of the general practitioner.

Background

- [5] The underlying action involves injuries allegedly sustained by the plaintiff in a motor vehicle accident said to have occurred on December 28, 2015 (the "Accident"). The plaintiff was 14 years old at the time of the Accident.
- [6] The Plaintiff claims the Accident caused:
- a) Injury to neck;
 - b) Injury to left arm;
 - c) Injury to right leg;
 - d) Soft-tissue injuries;
 - e) Headaches;
 - f) Fatigue;
 - g) Shock;
 - h) Difficulty sleeping;
 - i) Nightmares;
 - j) Tension, anxiety and depression; and
 - k) General pain and stiffness.
- [7] The trial of this action is scheduled to commence on June 3, 2024. The 84-day deadline for service of expert reports was therefore March 8, 2024.

- [8] Although the hearing of this application was originally scheduled for January 31, 2024 in Kelowna, the matter could not proceed, I gather, due to defendant's counsel being on a plane that could not land and plaintiff's counsel not getting leave to appear remotely. Defendant's counsel seeks costs of both this application and the prior-adjourned application.
- [9] When this application did proceed, counsel for the defendant objected to the plaintiff's use of two affidavits from his counsel--affidavit #1 of Wesley Mussio sworn January 18, 2024 (the "Mussio affidavit") and affidavit #1 of Rachel Mannering sworn January 29, 2024 (the "Mannering affidavit").
- [10] It appeared that the defendant was arguing the exclusion of the Mussio and Mannering affidavits based on first principles. No case authority was provided. I was concerned and provided counsel with the reasons in *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, 2011 BCSC 503 [L.A. Salad]. In that decision, Justice D. Harris, as he then was, considered the admissibility of affidavits of counsel on interlocutory applications.
- [11] As neither counsel had reviewed the L.A. Salad decision, and as I was in the middle of a busy chambers day, I ordered written submissions to be provided by February 16, 2024 and responses by February 23, 2024. Obviously, even had I been able to provide written reasons immediately, the 84-day deadline was so close that it was likely impossible to comply with. If there are any issues about extending that deadline, the parties obviously have liberty to apply.
- [12] There was an initial objection to the Mannering affidavit on the basis that it was filed in reply and that it raised issues that were not properly reply. I suggested that counsel for the defendant could seek an adjournment to properly respond, but he declined to do so, preferring to argue that the affidavit was inadmissible.
- [13] I conclude that the ability to provide written submissions largely overcame counsel's argument on this point. Had there been any significant factual issues with the evidence of the Mannering affidavit, I would have expected counsel for the defendant to seek an adjournment to provide that evidence or to have specifically addressed it in submissions. He did not.

Legal Basis

- [14] Section 5 of the Regulation provides:

Limits on amount of disbursements

5 (1) In this section:

"disbursement limit" means, in relation to a vehicle injury proceeding,

- (a) the amount that is 6% of the total award of damages assessed by the court in the vehicle injury proceeding or, if an offer to settle the vehicle injury proceeding is accepted, 6% of the amount offered, or

- (b) if the court dismisses the vehicle injury proceeding or, at the conclusion of the vehicle injury proceeding, does not make an award of damages, the amount determined by the court;

"excluded disbursements" means the following:

- (a) fees payable to the Crown under the Supreme Court Civil Rules;
 - (b) fees payable to the sheriff for non-refundable deposits in civil jury trials under the Supreme Court Civil Rules;
 - (c) disbursements incurred by a party if the court ordered the costs of the vehicle injury proceeding to be paid as special costs;
 - (d) disbursements for expert evidence, or an expert report, on the issue of liability;
 - (e) disbursements that all parties to the vehicle injury proceeding have consented to allow as excluded disbursements;
 - (f) disbursements that the court has ordered to be excluded disbursements on application made under subsection (6).
- (2) Only the following may be allowed or awarded to a party in a vehicle injury proceeding as disbursements:
- (a) disbursements up to the disbursement limit;
 - (b) excluded disbursements.
- (3) Repealed. [B.C. Reg. 241/2023, s. 1 (c).]
- (4) The limits set out in subsection (2) do not apply to a vehicle injury proceeding if the trial date set out in the notice of trial filed in relation to the vehicle injury proceeding is no more than 3 months after the coming into force of this subsection.
- (5) If the trial date set out in the notice of trial filed in relation to a vehicle injury proceeding is more than 3 months after the coming into force of subsection (4), the limits set out in subsection (2) do not apply to disbursements incurred by a party if the court is satisfied that the party necessarily or properly incurred those disbursements before the coming into force of subsection (4).
- (6) On application by a party to a vehicle injury proceeding, the court may, if satisfied that the conditions set out in subsection (8) are met, order that the disbursements itemized in the order are excluded disbursements.
- (7) If disbursements to be incurred for expert evidence or expert reports are the subject of an application under subsection (6) and the applicant is also making an application under section 12.1 (5) of the Act, the applicant must make both applications at the same time.

- (8) The following are the conditions for the purposes of subsection (6):
- (a) the application is made before the disbursements are incurred;
 - (b) were the disbursements not excluded, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the vehicle injury proceeding.
- (9) In an application under subsection (6), a party must include the following:
- (a) the nature and the evidentiary value of each disbursement that is the subject of the application;
 - (b) evidence of the prejudice the party would suffer were the disbursements that are the subject of the application not excluded, which must include
 - (i) evidence that there is a reasonable risk that the total amount of disbursements the party intends to incur to resolve the vehicle injury proceeding will exceed the disbursement limit,
 - (ii) evidence that the disbursements that are the subject of the application are necessary to justly resolve the vehicle injury proceeding in light of the complexity of the vehicle injury proceeding or the importance of the issues in dispute, and
 - (iii) evidence that the party would be unable, without undue hardship, to incur the disbursements that are the subject of the application were those disbursements not excluded.
- (10) For certainty, this section applies to all vehicle injury proceedings, whether or not the proceeding was commenced before the coming into force of this subsection.
- [15] It is safe to say that, since the coming into force of the amended Regulation on November 27, 2023, the court has had a flurry of applications for orders pursuant to s. 5(6) that disbursements be excluded.
- [16] Some of the decisions were provided in written reasons for judgment and some of the oral decisions have been transcribed, but I expect that many more have been simply given orally in chambers with no ultimate transcription.
- [17] The result has, to my mind, been somewhat chaotic, with presiders, including myself, being forced to provide reasons without being able to properly consider the jurisprudence on the issue.

Positions of the Parties

The Plaintiff's Position

- [18] The plaintiff's argument is set out below according to the requisite sections of the Regulation.

The application is made before the disbursements are incurred: s. 5(8)(a)

[19] The plaintiff, on his application for exclusion, submits that as required by s. 5(8)(a) of the Regulation, the disbursements sought to be excluded have yet to be incurred. That is confirmed in the Mussio affidavit.

Were the disbursements not excluded, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the vehicle injury proceeding: s. 5(8)(b)

[20] The plaintiff argues that he will clearly suffer prejudice disproportionate to the benefit of not increasing the cost and complexity of the proceeding. He points out that the evidence required to prove his case and hence the complexity of the case itself is a function of the Accident and its sequelae. He argues that those things are beyond his control. To prevent him from being able to bring proper evidence to the court to substantiate those injuries would likely result in him being undercompensated.

[21] In that circumstance, the impact of the 6% cap (the "Cap") would be twofold--it would result in a savings to the Insurance Corporation of British Columbia ("ICBC"), as the Regulation apparently intended: *British Columbia (Attorney General) v. Le*, 2023 BCCA 200, but it might result in the plaintiff being unable to prove his case and would undoubtedly result in an award that does not properly compensate the plaintiff for his loss. In this circumstance, the plaintiff argues that the prejudice to him is clearly disproportionate to the benefit to ICBC.

[22] The plaintiff himself did not provide an affidavit. The evidence relied upon for this application are the Mussio and the Mannering affidavits, both of counsel for the plaintiff. I was advised that there had been difficulties in obtaining an affidavit directly from the plaintiff.

[23] As to the Mannering affidavit, it is largely made on information and belief, although not properly identified as such, and based on evidence given by the plaintiff at his examination for discovery. She provides more detailed evidence of the physical and psychological injuries the plaintiff says resulted from the Accident.

[24] The evidence indicates that the plaintiff had initial neck and back pain following the Accident and that he still suffers from pain in his lower back and feels that his recovery has plateaued. Ms. Mannering also appends a report from the BC Children's Hospital which indicates that the plaintiff had a pre-existing scoliosis in his back.

[25] In addition, the evidence indicates that the plaintiff suffers from ongoing depression, anxiety, post-traumatic stress disorder, and panic attacks. There is also evidence of pre-existing psychological issues.

[26] As a result, the plaintiff submits that he has ongoing injuries from the Accident, but that the extent and causation of those injuries will undoubtedly be in issue.

- [27] The plaintiff points to the decision of this court in *Le v. British Columbia (Attorney General)*, 2022 BCSC 1146, at para. 13, where Justice N. Smith noted:
- [13] Expert opinion evidence plays a crucial role in any case where a plaintiff seeks damages for personal injury. The plaintiff has the onus of proving the existence, causation and present and future impacts of their injuries, all of which requires evidence of medical and other experts.
- [28] It is argued that given the pre-existing physical and psychological conditions, the plaintiff will obviously be required to bring expert evidence that links his ongoing conditions to the Accident.
- [29] He argues that where, as here, it is shown that expert evidence is required to substantiate causation of the plaintiff's injuries, the plaintiff would be severely hampered in proving his case without that evidence, and that he will clearly suffer prejudice disproportionate to that of ICBC. He points out that ICBC has other avenues with which to control costs, including requiring the plaintiff's costs to be assessed by the Registrar, assuming he is successful in the trial.
- [30] The plaintiff notes that this is not a case where he is attempting to retain multiple experts in support of the same conclusions--but rather one expert for his physical injuries and one for his psychological injuries.

The nature and the evidentiary value of each disbursement that is the subject of the application: s. 5(9)(a)

- [31] The plaintiff points out that he will be required to prove his claim under all heads of damages with respect to his physical and psychological injuries. He will need to show that the Accident caused these injuries, and the injuries in turn caused him loss.
- [32] The physiatry report and psychiatry report would go to the causation of the plaintiff's physical and psychological injuries, show the extent of these injuries, whether there is a continuing disability, and the necessary future care.
- [33] The plaintiff says that without these reports, he will be unable to bring proper evidence regarding causation and the various heads of damage.
- [34] The plaintiff submits that the evidentiary value of these reports is high as they are probative regarding facts critical to the plaintiff's case.
- [35] The inquiry then turns to prejudice to the plaintiff if the exclusion is not granted. He must bring evidence under the three subsections of s. 5(9)(b).

Evidence that there is a reasonable risk that the total amount of disbursements the party intends to incur to resolve the vehicle injury proceeding will exceed the disbursement limit: s. 5(9)(b)(i)

- [36] Mr. Mussio sets out, on information and belief, a general description of the plaintiff's injuries and provides his opinion in para. 25 that, based on his experience in such cases, he would expect the plaintiff to recover between \$100,000 and \$500,000. That is somewhat at odds with para. 8 of his affidavit where he deposes that the plaintiff expects to seek damages within the range of \$50,000 to \$500,000.
- [37] Mr. Mussio then sets out in his affidavit that based on his experience with experts hired in other motor vehicle actions, he expects that the physiatry report will cost between \$5,000 and \$7,000 and the psychiatric report between \$6,000 and \$7,000. Totalling between \$11,000 and \$14,000 before trial.
- [38] Mr. Mussio also provides his view that, given the severity of the plaintiff's claimed injuries, reports from a physiatrist and psychiatrist are necessary to enable the court to assess causation and all heads of damage.
- [39] Mr. Mussio anticipates preparation and trial attendance costs for each expert to be \$5,000 to \$7,000.
- [40] Mr. Mussio then opines at para. 25 of his affidavit that there is a reasonable risk that the total amount of the disbursements will exceed the limit.
- [41] He then deposes:
26. I am concerned that given the plaintiff's modest income, the plaintiff has modest savings and will not be able to pay the disbursements if they are not excluded.
27. I am therefore concerned that if the disbursements in question are not excluded, the plaintiff will suffer prejudice in that he will be prevented from having his losses remedied and will not be made whole by a settlement or award at trial.
28. Given the forgoing, I am concerned that the plaintiff will face undue hardship were the disbursements not excluded.
- [42] These paragraphs were objected to by the defendant and the plaintiff said he would not rely on them in his submissions. Rightly so. Paragraphs 25-28 of the Mussio affidavit are clearly argument and I agree with the defendant that they will be struck.
- [43] The plaintiff argues, based on the evidence of Mr. Mussio as to the likely recovery and the likely cost of the experts required, that it is clear that there is a serious risk that the disbursements would exceed the Cap.

Evidence that the disbursements that are the subject of the application are necessary to justly resolve the vehicle injury proceeding in light of the complexity of the vehicle injury proceeding or the importance of the issues in dispute: s. 5(9)(b)(ii)

- [44] The plaintiff points to the evidence of his pre-existing conditions and the ongoing back pain, panic attacks, anxiety, and depression that he says result from the accident.

[45] He argues, as set out above under s. 5(8)(b), that the court will require evidence from experts to ascertain whether, and to what extent, the pre-existing injuries or the Accident, or both, are the cause of his ongoing symptoms.

Evidence that the party would be unable, without undue hardship, to incur the disbursements that are the subject of the application were those disbursements not excluded: s. 5(9)(b)(iii)

[46] Ms. Mannering appends to her affidavit the plaintiff's income tax returns for 2016 to 2020 which show that the plaintiff earned the following income:

2016

\$1,737

2017

\$7,316

2018

\$12,180

2019

27,726

2020

\$29,062

[47] Ms. Mannering also provides evidence, again on (unstated) information and belief from the plaintiff's examination for discovery, that in 2021 and 2022, the plaintiff earned approximately \$25,000 per year and that he is experiencing food insecurity and relies on food banks at times.

[48] The plaintiff argued that, given his historic income since the Accident, it is clear that he could not incur the cost of the required disbursements without undue hardship.

Admissibility of the Mussio and Mannering affidavits

[49] The plaintiff argues that both the Mussio and Mannering affidavits are admissible and argues that position is supported by the decision in L.A. Salad.

[50] He says that para. 16 of L.A. Salad acknowledges that in British Columbia the practice is for counsel to swear affidavits respecting uncontroverted matters or matters relevant to the interlocutory issue before the court and that the evidence of counsel, as noted in para. 17 of L.A. Salad, may be the best evidence available.

- [51] The plaintiff argues, essentially, that it would be nonsensical to require expert evidence regarding the cost and necessity for the disbursements where the whole point is that incurring these costs would cause hardship to the plaintiff.
- [52] Further, the plaintiff argues that it would not be economical or timely to do so and would defeat the purpose of the Supreme Court Civil Rules.
- [53] He references the decision in L.A. Salad, at para. 17, where Harris J. noted (in part):
- [] It may often be economical and timely to have counsel swear an affidavit in support of an interlocutory application. Introducing a legal rule that upset this practice would defeat the object of the Supreme Court Civil Rules to secure the just, speedy and inexpensive determination of every proceeding on its merits []
- [54] The plaintiff argues that questions of the nature and extent of injuries claimed by the plaintiff, the need for expert evidence, the potential cost of expert reports, the estimated quantum of the plaintiff's loss, and whether the plaintiff would suffer hardship if the costs were not excluded are not "controverted" matters, as "controverted matters are matters that are in dispute in the action": L.A. Salad, para. 21.
- [55] In support of the use of evidence from counsel, the plaintiff pointed to the decision of Associate Judge Robertson in Kwiatkowski v. Russo, 2024 BCSC 278:
- [15] Plaintiff's counsel provided hearsay evidence as to the anticipated costs of these reports, which I do note does not include any cost quotes or statements from any particular experts but rather a sworn statement by counsel for the plaintiff as to costs based on his professional experience. He deposes that the [functional capacity evaluation] and cost of future care report will fall between \$5,000 and \$7,000 and an economist will fall between \$2,000 and \$5,000, and a further \$3,000 to \$7,000 for trial attendance, mediation. He also states that his office can expect to incur \$1,500 to \$2,000 in mediation fees, which is half the total of such costs.
- [16] As I said, there are no materials from the proposed experts as to their costs themselves or, for that matter, any actual proposed experts identified, merely these general statements from counsel for the plaintiff.
- []
- [25] Here, the evidence is from plaintiff's counsel, and is general in that it is based on more than one potential outcome as to a damage award ranging anywhere from \$65,000 to \$400,000. While it is unfortunate that a potential outcome cannot be narrowed down, I do not fault plaintiff's counsel for that and nor is more evidence required in respect of the risk factor. In fact, I would go so far as to say it could be unjust to require a plaintiff to come to court and throw open its own file, disclose its strategy and set out an analysis as to all the negatives and weaknesses of its case, in order to satisfy the court that there is a risk that the Cap will be exceeded.

[]

[27] As to the hardship, the defendant makes a similar argument as to the sufficiency of the evidence. While ideally there would be an affidavit as to the prejudice of carrying the costs given the risk, in some cases the risk will be obvious based on the applicant's income level. As the plaintiff's counsel points out here, if these disbursements were incurred, they would essentially amount to 25% of his gross earnings. It is reasonable to conclude that the plaintiff will suffer a hardship by bearing an extraordinary cost amounting to 25% of their income, as will be case if these disbursements exceed the Cap.

[56] He argues that relying on counsel's evidence as to these issues is proportionate and necessary.

The Defendant's Position

[57] The defendant submits that the evidence presented by the plaintiff on this application is not sufficient, and, indeed, is inadmissible.

[58] The defendant argues that compelling evidence is required, such as in *Nagra v. Prasad*, 2023 BCSC 2297, where the plaintiff provided evidence that:

- a) there was a scheduled examination by an occupational therapist and the cost of the examination and report were estimated;
- b) an affidavit from Mr. Nagra established he has limited financial resources; and
- c) an expert opinion from a physiatrist evidenced the plaintiff's partial disability.

[59] The defendant relies on *Kundan v. Hoogstra*, 2024 BCSC 57, where Master Krentz dismissed an application on the basis that he did not have any expert opinion evidence or medical records establishing that the plaintiff was suffering the injuries alleged and they could be causally linked to the accident.

[60] The defendant says the plaintiff must show that experts have been identified or scheduled to provide the opinions, absent which, there is not sufficient evidence that the disbursements are necessary and will be incurred.

[61] He argues that the costs expected to be incurred must be established on the basis of actual estimates from the proposed experts, rather than counsel's estimate based on his experience in similar actions. He argues that counsel's opinion is based on unattributed hearsay from other actions and is therefore inadmissible.

[62] He argues that the Mussio affidavit is inadmissible as it contains double hearsay and unattributed hearsay, opinion evidence on the plaintiff's injuries, causation and prognosis, argument, and speculation. I note, however, that there was no evidence brought by the defendant that controverted the evidence of Mr. Mussio.

- [63] Further, the defendant argues that the opinion of Mr. Mussio as to the potential range of recovery that the plaintiff could expect is unhelpful as it lacks precision. Also, he argues that it is unsubstantiated as there is no expert evidence of the plaintiff's condition.
- [64] He suggests that the test would require the opinion of other counsel not involved in the litigation as to the damages the plaintiff could expect to receive, based on expert evidence of the nature and causation of the plaintiff's injuries.
- [65] The defendant objects to the reliance by plaintiff's counsel on the plaintiff's examination for discovery evidence in support of his injuries and income. He argues, based on *Lee v. Chau*, 2021 BCSC 70, at para. 40, that a party cannot rely on his or her own discovery evidence. And further, He argues that it is double hearsay and that the plaintiff's subjective description of his injuries is of no probative value in determining that expert evidence is required.
- [66] He also objects to the Mannering affidavit as "cherry picking" parts of the examination for discovery transcript and providing a distorted picture of the plaintiff's evidence. He argued that the transcript should, at the very least, have been appended.
- [67] As a result, the defendant argues that there was simply no sufficient evidence of the severity and nature of the plaintiff's injuries and no explanation of why those injuries will require expert evidence in support.
- [68] Further, the defendant argues that the evidence is not sufficient to establish financial hardship, as there is no admissible evidence that the plaintiff does not have other means of support, such as savings.
- [69] As to the decision in *L.A. Salad*, the defendant argues that the decision supports the exclusion of the evidence of Mr. Mussio and Ms. Mannering.
- [70] The defendant points out the provisions of Chapter IX, Section 5 of the Canadian Bar Association Code of Professional Conduct (the "Code") and Chapter 8, Rule No. 9 of the Professional Conduct Handbook of the British Columbia Law Society, (the "Handbook") both referenced in *L.A. Salad*.

[71] The current edition of the Code provides at section 5.2-1:

A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless

- (a) permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal;
- (b) the matter is purely formal or uncontroverted; or
- (c) it is necessary in the interests of justice for the lawyer to give evidence.

[72] The commentary accompanying section 5.2-1 of the Code provides:

A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect or receive special treatment because of professional status.

- [73] The defendant argues that the Mussio and Mannering affidavits are inadmissible as the Mussio affidavit opines on controverted matters, such as the injuries sustained by the plaintiff, the cause of those injuries, and the potential quantum of recovery, and provides inadmissible opinion evidence regarding those issues and the necessity of expert opinion.
- [74] He argues that it does not matter whether the issues are controverted on the action or only on the application, that the same concerns arise.
- [75] The defendant argues that the Mannering affidavit contains an incomplete and self-serving description of the plaintiff's examination for discovery evidence. He says the evidence goes to controverted matters such as the cause and extent of the plaintiff's injuries.
- [76] He argues that the absence of a competing affidavit from the defendant is not a basis for concluding the evidence is not controverted. Further, regarding the Mannering affidavit, that he could not have adduced conflicting evidence as the affidavit was improperly submitted in reply.
- [77] He submits that the Mussio and the Mannering affidavits are argument in the guise of evidence and they clearly concern matters in dispute in the action or the application.
- [78] He argues that plaintiff's counsel have placed themselves in the situation the Code and the Handbook are intended to prevent, and since they have done so with respect to controverted matters, the two affidavits are inadmissible.

Analysis

- [79] I cannot agree with the defendant that, on an application of this kind, it is necessary to adduce expert opinion evidence regarding the plaintiff's injuries, the need for expert reports, the potential costs of expert evidence, or the potential quantum of damages.
- [80] The whole point of the application to exclude disbursements is to show that the plaintiff is not in a position to incur the cost of experts without undue hardship. To require the plaintiff to incur the cost of experts to prove that point is to exacerbate the problem.

- [81] Further, there is no requirement in the amended Regulation that, on an application for an exclusion, the plaintiff must prove he has suffered injury caused by the accident. What the plaintiff is required to show is that the expert opinion that he intends to obtain is probative of his claim and necessary "to justly resolve the vehicle injury proceeding in light of the complexity of the vehicle injury proceeding or the importance of the issues in dispute".
- [82] Thus, it is the issues that are in dispute that are at the heart of the inquiry.
- [83] Nor do I agree that Mr. Mussio's opinions as to these matters are objectionable based on the Code prohibitions regarding evidence going to controverted matters or presenting personal opinions.
- [84] These questions are certainly not controverted questions in the action itself. Although the extent of the plaintiff's injuries and the appropriate award of damages are controverted issues, the extent of the injuries that the plaintiff is claiming or trying to prove and the range of damages that he expects to recover at trial are not controverted issues. They are what the plaintiff seeks to prove in the action. The latter are what found the basis for an exception to the amended Regulation.
- [85] It cannot be otherwise. If the plaintiff was required on an exclusion application to "prove" his injuries and damages, he essentially would be required to bring some or all of the expert evidence he intends to use at trial in order to support his claim that those costs be excluded. The amended Regulation would then prohibit recovery for those costs because it requires that the disbursements not be incurred before the application for an exclusion is made. That would, at least to some extent, defeat the purpose of the exclusion application.
- [86] I agree too, with the point made by Associate Judge Robertson in Kwiatkowski that it is not appropriate to require a significant invasion of the plaintiff's privilege in support of an exclusion application.
- [87] I note the following comments of Harris J. in L.A. Salad:
- [15] No authority was cited to me in that establishes a binding general rule that solicitors cannot not swear affidavits in interlocutory proceedings in which they or their firm are counsel. To the contrary, even the professional guidelines support such a practice within limits. The case law also indicates that counsel is legally competent to swear an affidavit, even in relation to matters in dispute, although that practice is to be discouraged: see, *National Financial Services Corporation v. Wolverton Securities Ltd.* (1998), 52 B.C.L.R. 302 (S.C.) at para. 7.
- [16] The Canadian Bar Association Code of Professional Conduct qualifies its statement of principle about lawyers swearing affidavits by referring to local rules or practice authorizing lawyers to do so. In British Columbia it is the practice for counsel to swear affidavits, on occasion, particularly in respect to uncontroverted matters or matters relevant to the interlocutory issue before court. The practice obviously carries risks, not least that a solicitor may be cross-examined on the affidavit, waive privilege or may succeed

inadvertently in putting his or her credibility in issue. There are many good reasons for counsel to take great care in swearing affidavits in cases in which they are counsel.

- [17] Nonetheless, there are occasions when the use of counsel affidavits is justified as a matter of practice. Sometimes, at least in respect of interlocutory matters, the evidence of counsel may be the best evidence available. It may often be economical and timely to have counsel swear an affidavit in support of interlocutory application. Introducing a legal rule that upset this practice would defeat the object of the Supreme Court Civil Rules to secure the just, speedy and inexpensive determination of every proceeding on its merits including conducting the proceeding in ways proportionate to the amount involved in the proceeding, the importance of the issues in dispute and the complexity of the proceeding.
- [88] Even accepting the defendant's proposition that the issues addressed in the Mussio and Mannering affidavits are controverted on this application, the fact is, as L.A. Salad establishes, that affidavits of counsel on controverted matters will be accepted where, as here, they are necessary, proportionate, or the best evidence.
- [89] As to the opinions of Mr. Mussio, the opinions advanced were not personal opinions in the sense identified in the Code. They were professional opinions based on his experience as counsel in motor vehicle litigation and, as such, are exceptions to the hearsay rule and admissible.
- [90] Such opinion was accepted without comment by N. Smith J. in his decision in *Le*, and as noted was accepted by Associate Judge Robertson in *Kwiatkowski*.
- [91] I agree that providing counsel's opinion on applications of this kind is an acceptable practice.
- [92] As to the Mannering affidavit, I agree that the plaintiff may not rely on his own examination for discovery evidence at trial. However, I do not agree that the use of the plaintiff's examination for discovery evidence by Ms. Mannering to found her information and belief as to his injuries and financial status is objectionable on this interlocutory application.
- [93] The evidence was apparently both necessary (as counsel advised me there were difficulties in obtaining an affidavit from the plaintiff) and reliable (based as it was on the sworn evidence of the plaintiff).
- [94] I do not accept that it is necessary, where Ms. Mannering--an officer of the court--provides evidence based on information and belief from evidence sworn by the plaintiff at his examination for discovery, to actually append the transcript.
- [95] Thus, other than paras. 25-28 of the Mussio affidavit that I have ordered be excluded, the balance of the evidence is admissible.

- [96] I have evidence that the plaintiff will claim he suffered and continues to suffer injuries from the Accident. I have evidence of pre-existing mental and physical conditions such that causation of those injuries will likely be an issue at trial. The issues in dispute in the action are clear. It is obvious given the complexity of the issues that expert evidence will be required to resolve them. Thus, the necessity and evidentiary value of the expert evidence is established.
- [97] The estimates of counsel as to the cost of the expected disbursements and the likely quantum of damages ranges from \$20,000 to \$28,000. At the low end of the estimated range of recovery, the Cap will be significantly exceeded. Although at the high end of \$500,000 the disbursements would be within the Cap, I conclude that there is a reasonable risk that the disbursements will exceed the Cap.
- [98] The evidence of the limited income of the plaintiff and his evidence that, as a result, he is suffering from food insecurity is sufficient to establish the requisite hardship here.
- [99] As a result, I conclude that the plaintiff would suffer the disproportionate prejudice required to justify the exclusion sought.

Conclusion

- [100] In summary, the plaintiff's application to exclude the cost of the psychiatry and psychiatric reports, expert preparation, and trial attendance fees for the purpose of s. 5(2) of the amended Regulation is allowed.
- [101] The disbursements incurred prior to the amended Regulation coming into force were not challenged and, in any event, are reasonable. Accordingly, the application that they be excluded is allowed.
- [102] As to the disbursements incurred by the plaintiff for the purpose of this application, I cannot conclude that they can be excluded. I find that they were incurred prior to the application being made and, hence, fall afoul of s. 5(8)(a) of the amended Regulation. That application is dismissed.

Costs

- [103] The plaintiff having been substantially successful will have his costs in the cause.

"Associate Judge Muir"

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