

CANADA / JUDGMENT

Holmberg v. Ewachniuk

2000 BCSC 1396

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

RONALD HOLMBERG
CLIENT
(RESPONDENT)

AND:

A. TED EWACHNIUK
SOLICITOR
(APPELLANT)

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE THACKRAY

Counsel for the Client (Respondent): G. Turriff

Counsel for the Solicitor (Appellant): T.R. Berger, Q.C.

and M.D. Vanderkruyk

Date and Place of Hearing: September 11, 2000

Vancouver, BC

[1] This is an appeal from a ruling of Master Brandreth-Gibbs. She denied any fee to Mr. Ewachniuk for his legal services to Mr. Holmberg.

- [2] Mr. Holmberg was a passenger in a vehicle involved in a motor vehicle accident on November 7, 1995. He was rendered paraplegic. Mr. Holmberg retained Mr. Ewachniuk as counsel and entered into a retainer agreement on November 18, 1995. It provided for a contingency fee of 33 1/3% of the value of the claim, to be reduced to 25% if the claim was settled short of trial.
- [3] The retainer agreement contains a clause whereby should the client withdraw his instructions the fee payable shall be an hourly rate of \$300 or "shall be based on the value of the claim."
- [4] Mr. Ewachniuk's office conducted investigation of the accident through the services of a consulting engineer and collected general information about the claim through the services of an investigative company. Mr. Ewachniuk determined who should be named as defendants and issued a writ of summons and statement of claim on April 28, 1997. He named as defendants the driver of the vehicle in which Mr. Holmberg was a passenger, the company that constructed the highway upon which the accident happened and Her Majesty the Queen in Right of the Province, owner of the highway. Statements of defence were filed in September and October of 1997.
- [5] Mr. Ewachniuk compiled a list of medical practitioners who had treated Mr. Holmberg. He received some preliminary medical reports and obtained hospital records. Mr. Ewachniuk had telephone discussions with an adjuster for I.C.B.C. In a letter to a Mr. John Znoj dated February 13, 1997, Mr. Ewachniuk alludes to this and notes that Mr. Znoj had asked Mr. Ewachniuk to provide him with his "thoughts and quantification with a view to possibly bringing this matter to a conclusion" on behalf of the defendant driver.
- [6] The letter indicates that Mr. Ewachniuk had given thought to the liability issues. He touched upon the "possibility" of the Department of Highways being found liable as well as the issue of contributory negligence by the plaintiff in not wearing a seat belt at the time of the accident. In point form he set out the major injuries suffered by his client and mentioned that they would command the upper limit of \$250,000.
- [7] Mr. Ewachniuk then dealt with the claim for loss of income. He knew that this was a problem area, particularly before a jury, in that Mr. Holmberg carried a significant criminal record. Consequently, his past earnings were not encouraging. If this was applied to the future income issue an award might be modest.
- [8] The issue of cost of future care was detailed in the letter together with ancillary subjects such as gross-up and management fees. Mr. Ewachniuk assessed the value of the claim at \$2.13 million plus disbursements. The letter enclosed an Offer to Settle with I.C.B.C. for the driver in the amount of \$1.1 million plus costs and disbursements. He said that this document "will be filed imminently." He also enclosed an offer to settle the Part VII benefits for \$150,000 plus costs. These offers to settle were contingent upon the plaintiff remaining able to pursue the Department of Highways.

- [9] On August 14, 1997 an employee of Mr. Ewachniuk had a telephone conversation with Mr. Znoj. Mr. Znoj said that in spite of legal advice he would "stay with his offer of \$500,000 leaving Part VII open." Mr. Ewachniuk received a detailed medical report from Dr. A. Ciavarella dated October 12, 1997. This was Mr. Holmberg's personal physician. In a note dated December 1997 Mr. Ewachniuk recorded that he would recommend settlement for \$650,000 plus disbursements.
- [10] Mr. Ewachniuk met with Mr. Znoj on December 8, 1997. In a letter to Mr. Ewachniuk dated December 9 Mr. Znoj said that he had received a message that I.C.B.C.'s settlement offer had been accepted. He said that he could not send the funds until Mr. Baker, of the law firm Baker Newby, had approved the settlement. Mr. Znoj confirmed the settlement figure at \$650,000, of which \$618,000 would be "new money." The settlement included a second accident in which Mr. Holmberg had been involved as well as Part VII benefits.
- [11] Mr. Berger informed the Court that Mr. Holmberg attended at a pharmacy to procure prescription drugs and was informed that he would have to pay for them in that his case had been settled. This prompted Mr. Holmberg to contact Mr. Ewachniuk and for Mr. Ewachniuk to write to Mr. Znoj in a letter dated December 15, 1997. He informed Mr. Znoj that "[t]he message never was that it was settled."
- [12] On that same date Mr. Baker wrote to Mr. Ewachniuk. He confirmed the settlement and enclosed a release for execution. On December 18 Mr. G. Battista wrote to Mr. Ewachniuk and informed him that his "firm has been asked to assume conduct of all of Mr. Holmberg's personal injury files."
- [13] On December 22, 1997 Mr. Ewachniuk wrote to Mr. Battista. He said that he understood that the insurance coverage was in the amount of \$1 million but that "there are many obstacles in this case" and that the offer of \$650,000 "may very well be in the economic 'ballpark'." He went on to explain his concerns, particularly that Mr. Holmberg had a significant criminal record and the effect that this could have on damages.
- [14] The letter is lengthy and appears to plead with Mr. Battista to persuade Mr. Holmberg to accept the outstanding I.C.B.C. offer and "to rethink its transfer", i.e. transferring the file to Mr. Battista. Mr. Ewachniuk wrote to Mr. Holmberg on January 12, 1998. It is a most unprofessional letter in which he states that Mr. Holmberg's "chances of getting another 20-30,000 would more reasonably be accomplished in Las Vegas" He went on to say as follows:

For any other lawyer to state that your case is worth more is the same thing as ignoring the economic reality of my opinion letter. My opinion letter is realistic, not optimistic. For another lawyer to state that your case is worth more, he virtually has to assure you of that and I wish you luck.

- [15] This letter is incorrect in stating that "any other lawyer" would have to ignore Mr. Ewachniuk's opinion and virtually assure Mr. Holmberg that the case was worth more than the outstanding offer if he was to recommend rejecting the offer. In so saying Mr. Ewachniuk either gave no thought to the truth or ignored it. Furthermore, Mr. Ewachniuk knew that he was casting aspersions upon not just "any other lawyer" but upon Mr. Battista. Mr. Ewachniuk knew that Mr. Battista carried a solid reputation. Finally, his "I wish you luck" comment was insincere, sarcastic and unprofessional.
- [16] Mr. Turriff puts the worst of interpretations on Mr. Ewachniuk's motives in saying what he did to Mr. Battista and to Mr. Holmberg. He suggests that Mr. Ewachniuk "preferred his own interest to that of his client" in that he recommended a "grossly inadequate amount in order to earn a quick fee." Mr. Berger counters that this argument is improper in that it was not advanced before the master and the proposition was never put to Mr. Ewachniuk in cross-examination.
- [17] On February 11, 1998 a Notice of Change of Solicitor to Mr. Battista was filed. On March 24 Mr. Ewachniuk forwarded to Mr. Battista an account for legal services in the amount of \$181,356.38 for fees and taxes plus \$13,661.86 for disbursements.
- [18] Mr. Battista negotiated with Mr. Baker, now counsel on the record for the defendant driver. In a letter dated March 10, 1998 he suggested that the claim had a potential nearing \$3 million but in view of the coverage being limited to \$1 million Mr. Holmberg was prepared to settle for that figure less any advances. There was an extensive exchange of correspondence from that date until August 5, 1998 when Mr. Baker made a formal offer of settlement. It was in the amount of \$675,000. This was immediately rejected by Mr. Battista on his client's instructions.
- [19] A further exchange of correspondence ensued. On October 20, 1998 Mr. Baker offered \$900,000 less advances with the Part VII benefits remaining open. This was rejected and in subsequent correspondence Mr. Battista made much of the "bad faith" position of I.C.B.C. That is, if it refused to settle for the coverage it could be liable for excess amounts if the judgment exceeded the coverage.
- [20] The gap between the parties was closing. By early 1999 it was but a matter of working out technical details. On or about January 27, 1999 the case settled for "new money" of \$980,000 which covered both motor vehicle accidents and the Part VII benefits.
- [21] The remaining issue was that of Mr. Ewachniuk's fee but that was not I.C.B.C.'s problem. Pursuant to provisions in the Legal Profession Act, S.B.C. 1987, c. 25 as amended 1989, c. 30, a hearing was held before Master Brandreth-Gibbs on March 8 and 23, 1999. On April 3, 2000 she issued a memorandum informing counsel that she had concluded that Mr. Ewachniuk "is entitled to no fees."

- [22] Master Brandreth-Gibbs reasons were released on May 1, 2000. She noted that the sum claimed was \$159,084.54. The review was undertaken according to quantum meruit principles as set out in *Yule v. City of Saskatoon* (1955), 17 W.W.R. 296 (Sask. C.A.) and in *Diligenti v. McAlpine* (1978), 9 B.C.L.R. 153 (C.A.). The master set out much of the history of this matter. She noted that Mr. Ewachniuk was aware of the policy limits, of the criminal record of his client and of the desirability of avoiding trial by jury.
- [23] The master concluded that Mr. Ewachniuk had a "particular relationship" with Mr. Znoj wherein should he receive a "will not budge" offer he would thereafter not be willing to take Mr. Holmberg's case to trial.
- [24] She further found as follows:
- Mr. Ewachniuk did not disclose [to Mr. Holmberg] that he had been tamed in his previous dealings with Mr. Znoj et al of I.C.B.C. In failing to disclose this fact, yet entering into the contingent fee agreement which contemplated trial, there was, in my opinion, a total failure of consideration. Thus, the contract terms cannot be stuck to Mr. Holmberg. Nor is the solicitor entitled to a fee.
- [25] The master was incorrect in both of these conclusions. This is acknowledged to be so by Mr. Turriff.
- [26] These errors on the part of the master are, in my opinion, serious errors. These erroneous findings by the master were used, at this point in her reasons, as a foundation to conclude that Mr. Ewachniuk was not entitled to a fee. These errors resulting in the finding that there was "a total failure of consideration" are so fundamental that a reversal of the master's decision is dictated.
- [27] Beyond this issue Mr. Berger dealt with what he deemed to be errors in principle arising in the balance of the reasons. In particular he noted the heading "ESSENTIAL CONSIDERATION - RESULT" wherein the master became quite graphic on the subject of the settlement offer that was recommended by Mr. Ewachniuk compared to the final settlement. She said that Mr. Ewachniuk "very nearly caused the extinguishment of Mr. Holmberg's claims at grossly inadequate compensation." She said that the difference in the figures is "shocking". She reflected that there was no "rationale established in evidence to justify the disparity." She then concluded that the "quality of service overall rendered by Mr. Ewachniuk to his client in this matter is such that no fee ought to be paid."
- [28] I cannot determine from the reasons whether on this issue the master concluded that Mr. Ewachniuk had failed to establish his right to a fee or if she just felt that "no fee ought to be paid." It might be that the decision had already been made that there was no legal foundation for a fee due to the "total failure of consideration" and that the quality of the legal services was such that the services were simply subject to judicial reflection. If the master's conclusion was that the failure of consideration was because of an inferior quality of legal services and that this necessarily extinguished Mr. Ewachniuk's right to a fee, I must

respectfully disagree.

- [29] Mr. Berger cited *Birnie, Sturrock & Co. v. Farrell Estates Ltd.* (1991), 54 B.C.L.R. (2d) 23 (S.C.). This case involved a quantum meruit review of a solicitor's fee. Mr. Justice Spencer mentioned the principles applicable and then said that the question before him was whether the registrar "either awarded so much for the services or reduced so much from the account that he is clearly wrong."
- [30] Mr. Berger submitted that if the master in the case at bar "weighted the result of the final settlement" and as a result of this consideration made the nil award, then her approach was an "error in principle." I agree with this submission and it appears that the master did put significant emphasis on the disparity. I take this, at least in part, from the descriptive language used by the master.
- [31] If this falls short of being an error in principle it falls, in my opinion, into the category of being a "clearly wrong" foundation for denying a fee. The alternate basis of "clearly wrong" is taken from the judgments in *Birnie, Sturrock*, supra, and *Davies v. Hunter* (1995), 40 C.P.C. (3d) 273 (B.C.S.C.). Therein the Court, following case precedents, held that on appeal from a review of a solicitor's fee, a judge of this Court should not lightly interfere with a decision of a registrar or master unless he or she "acted on a wrong principle or was clearly wrong."
- [32] Mr. Ewachniuk carried out legal services designed to uncover the strengths and weaknesses of the case both as to liability and damages. He obtained medical reports, obtained an engineering report, issued a writ of summons, drafted and issued a statement of claim and argued that in spite of his client's dismal employment history there was still a substantial claim available to him under this head of damages. I conclude that there was value in these services.
- [33] I am buttressed in this opinion by the fact that Mr. Battista charged \$100,000 for his legal services rather than the \$175,000 that he would ordinarily charge. Mr. Battista testified (p. 26 of the March 23, 1999 transcript) that Mr. Holmberg entered into a contingency fee agreement with him for 18%. The fee that he charged is about one half of that. I can only conclude that was because much of the groundwork had been done by Mr. Ewachniuk.
- [34] A finding that Mr. Ewachniuk's legal services had, ultimately, value to Mr. Holmberg does not, in itself, dictate that a fee must be awarded. In *Roberts & Muir v. Price* (1986), 7 B.C.L.R. (2d) 211 (S.C.) the Court concluded that where a taxing officer finds that a solicitor has shown reasonable care and skill but also concludes that "the work is not up to standard he may deprive the solicitor of his fee, in whole or in part." [my underlining]

- [35] As to whether "the work was up to standard", Mr. Turriff made the following submissions: Mr. Ewachniuk failed to communicate properly with his client; he employed an "odd" technique in asking for the money and a release if he had no instructions; his technique led I.C.B.C. to conclude that the matter was settled; he failed to bring it home to I.C.B.C. that they might not be able to hold the trial with a jury; and he failed to use the "bad faith" argument to his client's advantage.
- [36] Some of these submissions are subject to dispute. On the first point, that Mr. Ewachniuk did not communicate properly with his client, Mr. Ewachniuk testified (p. 28) that after the telephone conversation with Mr. Znoj of August 14, 1997, he spoke on the telephone with Mr. Holmberg. He said that Mr. Holmberg rejected the offer. Mr. Ewachniuk testified that he thought I.C.B.C. "would budge". However, the conversation that Mr. Ewachniuk had with Mr. Holmberg on August 15 was initiated by Mr. Holmberg. Mr. Ewachniuk testified (p. 34) that when the pharmacy informed his client that the case was settled, he, Mr. Ewachniuk, "heard from my secretary who heard from my client loud and clear, and that's the last time I had ever heard from the client."
- [37] The matter of an "odd technique" is difficult to assess. No doubt each lawyer has his or her own method of negotiating and dealing with clients. Mr. Ewachniuk acknowledged in his testimony (p. 81) that he asked "for the release and the cheque before [he] talked to Mr. Holmberg about that amount." That strikes me as "odd" but, as Mr. Ewachniuk said to Mr. Turriff, "you don't do personal injury work."
- [38] Whether the technique is appropriate or not, it certainly indicates that Mr. Ewachniuk was going to press Mr. Holmberg to accept the settlement. Mr. Turriff suggested to Mr. Ewachniuk (p. 82) that the reason for having the money on hand was to "act as a real encouragement for the client to accept your view of things, right?". Mr. Ewachniuk answered: "Call it what you want."
- [39] Mr. Ewachniuk testified that he wanted the money in hand so that he could "offer the client money. This is pre-Christmas encouragement to settle." I would have thought that the time of year should not take precedence over an appropriate amount.
- [40] Naming Her Majesty as a defendant had particular significance in that it denied I.C.B.C., subject to severance, a jury trial. This is pursuant to the Crown Proceeding Act, R.S.B.C. 1996, c. 89, s. 4(2). Mr. Ewachniuk testified that exclusion of a jury was significant in view of Mr. Holmberg's criminal record. When asked by his own counsel (page 17 of transcript) the reason for joining Her Majesty he replied: "For sure to keep the jury away." The joining of Her Majesty is not criticized. To the contrary. The issue is as to whether Mr. Ewachniuk took advantage of the matter by bringing it to I.C.B.C.'s attention that a jury was not available.

- [41] Mr. Turriff relies upon the testimony of Mr. Battista. Mr. Battista testified (p. 18 of the March 23, 1999 transcript) that when he brought it to Mr. Baker's attention that a jury trial was not in the works, Mr. Baker "seemed surprised about the revelation." I cannot say that this proves that I.C.B.C. did not know that they were barred from having a jury trial, but it is some indication that this defence strategy was not in the forefront of negotiations.
- [42] This conclusion is supported by the evidence of Mr. Battista. He testified (p. 33 of the March 23, 1999 transcript) that the case settled "quite quickly" after he brought it to Mr. Baker's attention that there would not be a jury trial.
- [43] On the bad faith issue, Mr. Ewachniuk testified (p. 21) that his negotiations were meant to "open the door to perhaps a bad faith case." When asked (p. 24) why he suggested a potential claim of \$2.13 million he answered that it was "to open the door for a potential bad faith argument." Mr. Ewachniuk's position is supported by his letter to I.C.B.C. of August 15, 1997. In that letter he formally offered to settle for \$1 million and he went on to speak of "problems" that I.C.B.C. might have with policy limits. However, apart from that early gambit Mr. Ewachniuk did not stress this issue which, I would have thought in a paraplegic case, to be a most vulnerable area for the insurer.
- [44] I am not required to resolve precisely what weight should be given to each of Mr. Turriff's criticisms of Mr. Ewachniuk's legal services. I am prepared, however, and do conclude that Mr. Ewachniuk's legal services, overall, were not of the highest quality. I am therefore forced to assess the fee on a somewhat arbitrary basis. Mr. Berger acknowledged that there would be arbitrariness and suggested a fee in the vicinity of \$100,000.
- [45] I am not able to assess the fee based upon hours spent times \$300. Mr. Ewachniuk testified (p. 48) that he does not record time spent on files. From what I have heard a fee based upon hours would be extremely modest. Mr. Turriff suggested that it should be and that it should equate to what was billed to Mr. Ewachniuk by Acme Personal Consultants Inc. That amount was \$2,835. I do not agree.
- [46] The fee must reflect many matters, many of which I have already enumerated. Amongst those matters are the importance of the case to the client and the amount involved. It would not, in my opinion, be just to award to Mr. Ewachniuk a percentage of the ultimate settlement. If Mr. Holmberg had accepted Mr. Ewachniuk's advice the settlement would have been \$615,000 out of which Mr. Ewachniuk would have extracted \$160,000 for his fee and disbursements. The net to Mr. Holmberg would have been in the vicinity of \$455,000.
- [47] One of the ironies of the situation is that should Mr. Ewachniuk not be entitled to a fee, Mr. Holmberg would "be in pocket" (called "a windfall" by Mr. Berger) in the sum of \$75,000. This is the difference between Mr. Battista's usual fee and what he actually charged. Consequently, Mr. Holmberg would not be hurt if Mr. Ewachniuk's fee was set at that amount.

- [48] However, it would not only be arbitrary to set the fee on that basis but could be taken as fanciful. It ignores the finding that the legal services were not up to standard. In saying that, I expect that they were not even up to Mr. Ewachniuk's usual standard.
- [49] Balancing all of the matters as best I can I set the fee at \$50,000.
- [50] The disbursements are not an issue before me. The master ordered that they be paid. They did not include the \$2,835 paid to Acme Personal Injury Consultants Inc. Master Brandreth-Gibbs expressed concern about the retaining of and billing of the services of Acme. I have similar concerns.
- [51] That company was retained by Mr. Ewachniuk. It rendered accounts to Mr. Ewachniuk and the details reveal that the tasks carried out were a combination of accident investigation, quantum assessment, case research and document preparation. These services appear to me to be, for the most part, legal services. In the hearing before this Court Mr. Berger, sensitive to this issue, volunteered that it might be expected that Acme's services would be carried out by employees, such as para-legals, of the solicitor.
- [52] Mr. Ewachniuk has agreed to "absorb" this disbursement. Mr. Ewachniuk well should have "absorbed" them. Indeed, they never should have been charged in the first place. What was done by that company was the very work that Mr. Ewachniuk had been retained to perform as evidenced by the retainer agreement. Mr. Battista testified that this kind of disbursement is "normally not awarded by a Registrar on a taxation." I expect that this is correct. What is worrisome is that some of Mr. Ewachniuk's clients might be paying this form of disbursement.

"A.D. Thackray, J."

The Honourable Mr. Justice A.D. Thackray

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