

CANADA / JUDGMENT

Lee v. Rockhill

2023 BCSC 1820

COURT

Supreme Court of British Columbia

DECIDED

17 October 2023

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2023 BCSC 1820 Lee v. Rockhill IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Lee v. Rockhill, 2023 BCSC 1820 Date: 20231017 Docket: M200563 Registry: Vancouver Between: Eun (Eunice) Kyung Lee Plaintiff And: Adelita Rockhill Defendant Before: Master Bouck (Sitting as Registrar) Reasons for Decision Counsel for Plaintiff: V. S. Maan Counsel for Defendant: B. E. McLeod Place and Date of Hearing: Vancouver, B.C. September 25, 2023 Place and Date of Judgment: Vancouver, B.C. October 17, 2023 The Appointment

- [1] This is a personal injury action. By an appointment taken out on November 8, 2022, the plaintiff seeks to have her bill of costs assessed. The total amount of costs, disbursements and taxes claimed in the original bill is \$38,384.17. As a result of negotiations and concessions, the parties have narrowed the tariff items and disbursements in dispute.
- [2] Most of the oral argument focused on the expert's charges claimed in the bill. In submitting that the registrar can only allow recovery for one of the plaintiff's five expert reports, the defendant relies on the Evidence Act, R.S.B.C. 1996, s. 12.1 and s. 4 of the Expert Evidence Regulation B.C. Reg. 210/2020, s. 4 O.C. 468/202 effective August 10, 2020 (the "Regulation"). Counsel were unable to find any reported decisions that have applied s. 4 in a cost assessment process. Other parts of the Regulation are judicially considered in British Columbia (Attorney General) v. Le, 2023 BCCA 200. Background Facts
- [3] The parties were involved in a motor vehicle accident on June 21, 2018. The plaintiff alleged that the accident caused soft tissue injuries to her neck, back and shoulders. As a consequence, the plaintiff sought treatment from various medical professionals including her family doctor, an acupuncturist, physiotherapists and an orthopaedic surgeon. In a CL-19 report made on December 14, 2018, the family doctor confirmed a diagnosis of grade II whiplash, right shoulder pain and, muscle strain.
- [4] The plaintiff's primary complaint related to her right shoulder. On the recommendation of her treaters, the plaintiff underwent an ultrasound of the shoulder followed by two MRIs, one in March 2019 and a second in December 2019.

- [5] The plaintiff retained counsel in November 2018. This action was commenced on January 20, 2020. The plaintiff's notice of civil claim asserts the usual remedies in a personal injury action. In her response to civil claim filed in June 2022, the defendant denies liability for the accident and the plaintiff's alleged injuries and losses. Each of the parties were examined for discovery on December 1, 2022. There is no evidence addressing the length of those examinations.
- [6] Lists of documents were exchanged by the parties, the contents of which will be further addressed below.
- [7] Meanwhile, a notice of trial was taken out on June 1, 2021 with the trial in the action set to commence on November 28, 2022. In preparation for trial, the plaintiff commissioned three medical legal reports from her treating orthopaedic surgeon, Dr. Regan (Specialist Referral Clinic Inc.), as well as an expert report from each of Harbourview Rehabilitation (FCE/Care report) and PETA Consultants Ltd. (Economist). The first report from Dr. Regan is dated August 22, 2019.
- [8] The 84-day deadline for service of the expert reports under SCCR 11-6 was September 2, 2022. The plaintiff met this deadline with respect to Dr. Regan's reports, but the Harbourview and PETA reports were not served until September 8, 2022.
- [9] Plaintiff's counsel issued a notice to mediate on or about June 8, 2022. A few weeks later, the defendant delivered a notice to admit seeking admissions as to the truth of six facts and the authenticity of the CL-19 report. The plaintiff replied to the notice by admitting to the authenticity of the report but otherwise denied the facts alleged.
- [10] The action was resolved at the mediation which took place on September 29, 2022 and the trial was adjourned by requisition that same day. According to a form of final release, the action was settled by a payment made to the plaintiff in the sum of \$42,500 plus taxable costs and disbursements to be agreed or assessed. Discussion
- [11] At this assessment, each party provided a form of written submission although neither sought to have the document filed with the court. The submissions were helpful in identifying the tariff items and disbursements that remain in dispute.
- [12] It is trite law that the onus is on the plaintiff to prove her bill of costs. That proof can be based on the uncontroverted statements of counsel but will usually require a fulsome affidavit of justification. A. Tariff Items
- [13] As I understood the submissions, only four tariff items require an assessment. The defendant does not object to the plaintiff's entitlement to each of these tariff items, but rather challenges the number of units claimed.

- [14] Where a tariff item provides for a range of units, the determination of an appropriate number of units is an objective exercise. The units awarded will reflect the amount of time that the particular step ought to have reasonably taken, based on the whole spectrum of civil litigation proceedings: *Fairchild v. Vancouver Coastal Health Authority*, 2011 BCSC 616 at para 24, reversed in part (2012) BCSC 1207. Item 1-Correspondence, conference, instructions, etc. until the start of the proceeding
- [15] The plaintiff claims 8 units out of the maximum 10 allowed, while the defendant says 5 units is more appropriate. There is no evidence addressing the steps taken by the plaintiff or counsel in the approximate 14 months between the accident and the commencement of the action. It might be fairly assumed that counsel undertook some investigative steps and clearly took instructions after November 2018. Based on the limited information provided, I allow 5 units. Item 2-Correspondence, conferences, instructions, etc. after the start of the proceeding to the completion of trial
- [16] The work necessarily and reasonably undertaken under this tariff item would have been conducted over a period of two years and eight months. Again, other than describing the steps taken to prepare the matter for trial, the affidavit evidence presented by the plaintiff does not provide much assistance on the assessment of this item. I allow 10 units. Item 11-Process for giving and inspection of documents
- [17] The plaintiff prepared and issued three lists of documents. The final list includes 61 documents, including five listed in Part 4. The list does not provide a page count per se and the breadth of the documents listed under Part 4 is impossible to discern. It might have been helpful for the registrar to have that information. However, the plaintiff's affidavit of justification exhibits most of the medical and financial records that have been disclosed. The affidavit is 500 in pages in length but also exhibits expert reports. Considering the reasonable time required to review the documents and prepare three lists, I allow 5 units. The plaintiff has not demonstrated that an allowance at the higher end of the scale is warranted and the authorities relied on in that regard are fact specific. Item 15-Process for making admissions of fact
- [18] The plaintiff has claimed 6 out of the maximum of 10 units for her response to the notice to admit. Given that the plaintiff simply states "deny" to the facts and only one document was sought to be admitted, I find that the 4 units proposed by the defendant is a proper allowance for this item. B. Disbursements
- [19] The disbursements remaining at issue are set out in the chart below: INVOICE DATE
DISBURSEMENTS AMOUNT n/a Copying \$360.00 n/a Faxes \$364.00 22-Jan-2020 Specialist Referral Clinic Inc. - Dr. Regan Addendum Report \$550.00 31-Jan-2022 Specialist Referral Clinic Inc. - Dr. Regan Updated Report \$4,900.00 31-Aug-2022 Harbourview Rehabilitation - FCE/Care Report \$3,283.75 08-Sept-2022 PETA Consultants Ltd. - Economist Report \$2,666.00

- [20] The approach to be taken in the assessment of disbursements is described in *Turner v. Whittaker*, 2013 BCSC 712 at para. 5: The Applicable Legal Principles [5]
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 Dael v. Van Dael*, 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)
- [21] In this case, the assessment is made more complicated by the application of s. 12.1 of the Evidence Act and s. 4 of the Regulation. The relevant provisions of s. 12.1 are: Limitation on expert evidence in vehicle injury proceedings 12.1 (1) In this section and section 12.2: "fast track vehicle injury proceeding" means a vehicle injury proceeding prescribed by regulation as a fast track vehicle injury proceeding; "joint expert" means an expert that is jointly appointed by all parties to a vehicle injury proceeding; "vehicle injury damages" means damages for personal injury, or death, resulting from the use or operation of a vehicle as defined in the Motor Vehicle Act; "vehicle injury proceeding" means a civil proceeding in the Supreme Court that includes a claim for vehicle injury damages.
- (2) Except as provided under this section or the regulations,
 - (a) a party to a vehicle injury proceeding, other than a fast track vehicle injury proceeding, must not tender the following at trial:
 - (i) expert evidence on the issue of vehicle injury damages, of more than 3 experts; (ii) more than one report on the issue of vehicle injury damages from each expert referred to in subparagraph (i),
 - (b) a party to a fast track vehicle injury proceeding must not tender the following at trial:

- (i) expert evidence on the issue of vehicle injury damages, of more than one expert; (ii) more than one report on the issue of vehicle injury damages from the expert referred to in subparagraph (i), and
- (c) the court must not allow a party to tender expert evidence at the trial of a vehicle injury proceeding if doing so would result in exceeding the limits set out in this subsection.
- (3) Despite subsection (2), if the parties to a vehicle injury proceeding appoint a joint expert, a party may tender at trial the expert evidence of that joint expert.
- (4) With the consent of all other parties to a vehicle injury proceeding, a party may tender at trial
 - (a) expert evidence of one or more additional experts, despite the limit set out in subsection (2) (a) (i) or (b) (i), or
 - (b) one or more additional reports from an expert referred to in subsection (2) (a) (i) or (b) (i) or paragraph (a) of this subsection, despite the limit set out in subsection (2) (a) (ii) or (b) (ii), as applicable.
- (5) On application by a party to a vehicle injury proceeding, the court may, if satisfied that the conditions set out in subsection (6) are met, grant leave to
 - (a) allow expert evidence of one or more additional experts to be tendered, despite the limit set out in subsection (2) (a) (i) or (b) (i), or
 - (b) allow the party to tender as evidence one or more additional reports from an expert referred to in subsection (2) (a) (i) or (b) (i), (4) (a) or paragraph (a) of this subsection, despite the limit set out in subsection (2) (a) (ii) or (b) (ii), as applicable.
- (6) The following are the conditions for the purposes of subsection (5):
 - (a) the subject matter of the additional evidence to be tendered is not already addressed by expert evidence of the party making the application as permitted under subsection (2) or (4);
 - (b) without the additional expert evidence, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding.
- (7) In an application under subsection (5), a party must include the following:
 - (a) the name of each expert whose evidence the party intends to tender at trial;
 - (b) the scope of expertise of each expert whose evidence the party intends to tender at trial;
 - (c) records that support the need for the additional evidence. (my emphasis)

- [22] Section 4 of the Regulation provides that: Disbursements allowed for expert reports in vehicle injury proceedings 4(1) Subject to subsection (3) and section 5, only the following amounts may be allowed or awarded to a party in a vehicle injury proceeding, other than a fast track vehicle injury proceeding, as disbursements for reports from experts on the issue of vehicle injury damages:
- (a) the amount incurred by the party for up to 3 reports, whether or not the reports were tendered at trial, provided that
 - (i) each report was served in accordance with all applicable rules of the Supreme Court Civil Rules, and (ii) each report was prepared by a different expert;
 - (b) the amount incurred by the party for any of the following reports, provided the report was served in accordance with all applicable rules of the Supreme Court Civil Rules:
 - (i) a report referred to in section 3 (1) or (2) of this regulation; (ii) a report allowed under section 12.1 (3), (4) or (5) of the Act;
 - (c) the amount incurred by the party for a report prepared by an expert appointed by the court on the court's own initiative under Rule 11-5 (1) of the Supreme Court Civil Rules.
- (2) Subject to subsection (3) and section 5, only the following amounts may be allowed or awarded to a party in a fast track vehicle injury proceeding as disbursements for reports from experts on the issue of vehicle injury damages:
- (a) the amount incurred by the party for one report, whether or not the report was tendered at trial, provided that the report was served in accordance with all applicable rules of the Supreme Court Civil Rules;
 - (b) the amount incurred by the party for a report referred to in subsection (1) (b);
 - (c) the amount incurred by the party for a report referred to in subsection (1) (c).
- (3) The limits set out in subsections (1) and (2) do not apply
- (a) to amounts that were necessarily or properly incurred before February 6, 2020 for a report from an expert, or
 - (b) to a vehicle injury proceeding if
 - (i) a notice of trial was filed and served before February 6, 2020, and (ii) the trial date set out in the notice of trial filed in relation to the vehicle injury proceeding was before October 1, 2020. (my emphasis)
- [23] On a plain reading of s. 4, the assessing officer may only allow for the charges of three different expert's reports and then only if those reports have been served in accordance with SCCR 11-6 (3) (i.e. the "applicable rule").

- [24] Thus, the defendant submits that an allowance can only be made on this assessment for one of Dr. Regan's reports. The defendant is willing to concede that the plaintiff should be reimbursed for the first and costliest (\$6,500) of those reports. On this point, I find that the Regulation does not apply to this first report, having been commissioned and prepared prior to February 6, 2020: s. 4(3)(a). I note that the s. 4(3) exceptions to the application of the Regulation are disjunctive. The result is that the charges for Dr. Regan's first report are allowed, leaving for determination whether one or more of Dr. Regan's remaining charges will also be allowed.
- [25] The plaintiff does not challenge the application of the Regulation to this assessment. However, she argues that the late service of the Harbourview and PETA reports does not preclude recovery of the associated charges given that the court can order the 84-day deadline to be abridged in the interests of justice: *SCCR 11-7 (6)* and relying on *Cambie Surgeries Corporation v. British Columbia (Attorney General)* 2017 BCSC 581 at para 56.
- [26] Moreover, the plaintiff points to the following decisions where more than three expert reports have been admitted into evidence at trial despite the Evidence Act restrictions: *Avishek v. Insurance Corporation of British Columbia*, BCSC, M209063; *Ghane v. Bhullar*, 2022 BCSC 929; *Raniga v. Kang*, 2021 BCSC 2340; and *Vespaziani v. Lau*, 2021 BCSC 1224. See also *Le* at para. 33, where the court of appeal noted the Supreme Court's discretion to make exceptions to the three-expert limit.
- [27] Alternatively, the plaintiff relies on *Dhillon v. Bowering*, 2013 BCSC 1178 for the proposition that a registrar can allow for the charges of a late served report so long as there is finding that the report was a necessary and proper disbursement. Without in any way questioning the reasoning of this decision, I find the result to be distinguishable as neither s. 12.1 nor the Regulation were in force at the time.
- [28] The difficulty with the plaintiff's main position is that it fails to distinguish between the powers of the court and those that can be exercised by a registrar on an assessment. It is indisputable that the court can make exceptions to the three-expert limit and admit late served reports at trial. However, those powers are exclusively given to the court and the registrar is not the court. The registrar on an assessment should not speculate on what the court might do if faced with a certain set of circumstances.
- [29] This analysis is supported by the language of the Regulation. There is a distinction made in s. 4 between amounts that may be allowed (a registrar's function) or awarded (the court's function, see *SCCR 14-1 (7)* and (16)). The language might reflect the fact that an assessment can occur even if the court makes no order with respect to costs as is the situation here. A party may not have recourse to seek a direction from the court under *SCCR 14-1(7)* if the action is settled before trial, although I make no ruling in that regard. Nonetheless, the cost claimant is not without a remedy as the settlement terms could preclude the application of s. 4 to the assessment process.

- [30] In the result, the charges for late served reports of Harbourview and PETA must be disallowed.
- [31] With respect to Dr. Regan, I find that the charges for the January 31, 2022 report ought to be allowed and counted as the one report from this expert pursuant to the Regulation. The report was a necessary and proper disbursement in the preparation for trial and the \$4,900 charged is reasonable given its content. Photocopying and Fax charges
- [32] The plaintiff acknowledges that the photocopying and fax charges are claimed at rates excessive to those set out in Administrative Notice 5. The affidavit of justification does not give any basis on which the registrar might depart from the presumptive rates. I allow these charges at \$225.00 and \$127.57, respectively. Summary
- [33] The disputed tariff items are allowed as follows: Item 1- 5 units Item 2- 10 units Item 11- 5 units Item 15- 4 units
- [34] The photocopying and fax charges are allowed at \$225 and \$ 127.57, respectively. The charges of Harbourview Rehabilitation and PETA Consultants are disallowed. The charges of Dr. Regan/Specialist Referral Clinic Inc. are allowed in total at \$11,400.
- [35] If the parties are unable to arrive at a common figure with respect to the total costs and disbursements as allowed by these reasons or agreed to, or if s. 8 of Appendix B might be in play, further written submissions will be considered. The parties are directed to deliver those submissions to the Manager of Supreme Court Scheduling in the Victoria registry by no later than November 3, 2023. "Master C. P. Bouck"

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