

CANADA / JUDGMENT

Mali v. Balram

2025 BCSC 665

COURT

Supreme Court of British Columbia

DECIDED

28 March 2025

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2025 BCSC 665 Mali v. Balram

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mali v. Balram,

2025 BCSC 665

Date: 20250328

Docket: M189943

Registry: New Westminster

Between:

Shyamlal Mali

Plaintiff

And

Balram Balram

Defendant

Before: Associate Judge Nielsen

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

D. Gautam

Counsel for the Defendant:

M. Switzer

Place and Dates of Hearing:

New Westminster, B.C.

March 27-28, 2025

Place and Date of Judgment:

New Westminster, B.C.

March 28, 2025

- [1] THE COURT: This is an application pursuant to s. 5(6) of the Disbursements and Expert Evidence Regulation by the plaintiff for an order that the expert evidence of a physiatrist and an economist be excluded for the purpose of s. 5(2) of the Regulation.
- [2] The plaintiff alleges he sustained injuries to his neck, back, abdomen, shoulders, and chest in a rollover motor vehicle accident that occurred on October 11, 2016. The plaintiff was 46 at the time of the motor vehicle accident and he is now 53 years old. The defendant has denied liability. The trial is scheduled to proceed July 7, 2025, for five days. The 84-day deadline for service of the expert reports is April 11, 2025, and the 42-day deadline for rebuttal reports is May 26, 2025.
- [3] The plaintiff has already undergone an IME by a physiatrist retained by the defendant, but the report has not yet been served.
- [4] The plaintiff has been working as a cook and has a side business doing catering. The plaintiff alleges his ability to work has been negatively affected and, as a result, has sustained past and future loss of income. The plaintiff's income tax records and current pay stubs from 2015 to present indicate he earned \$5,153 in 2015; \$13,893 in 2016; \$18,888 in 2017; \$18,901 in 2018; \$34,854 in 2019; \$39,918 in 2020; \$23,649 in 2021; \$24,526 in 2022; \$23,840 in 2023; and \$59,000 in 2024.
- [5] The plaintiff's income for 2024 is almost three times his prior year's earnings. However, he has since lost his job due to cutbacks and is currently searching for work. The Disbursements and Expert Evidence Regulation caps disbursements at six percent of the plaintiff's total damages following trial or settlement, unless the court determines the disbursements sought are excluded for the purposes of the Regulation. In order to have the disbursement excluded, the plaintiff must meet the requirements of ss. 5(6), 5(8), and 5(9).
- [6] 5(6) provides:
- (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. M-189943

[7] 5(8) provides:

(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.

[8] And then 5(9) provides:

(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.

[9] In the present case, the plaintiff has not incurred the disbursement and therefore the requisite of s. 5(8)(a) is met. The next hurdle for the plaintiff is whether he would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding for the purpose of s. 5(8)(b).

[10] In terms of the plaintiff's medical condition, the defendant has seen fit to request a medical IME from a physiatrist. Therefore, there is unanimity on the issue of the need for a physiatrist.

[11] The need for an economist is hotly in dispute. The plaintiff works partially as a salaried employee and partially as a self-employed caterer. The plaintiff submits an economist can provide essential evidence of past and future losses occasioned by the plaintiff's injuries. It is possible an economist may streamline the evidence concerning past and future losses, with the end result being a net saving of trial time, making it easier for the trier of fact to arrive at a result if losses are proved.

- [12] In terms of 5(9)(a), the nature and evidentiary value of a physiatrist and an economist, the evidentiary value of a physiatrist is essentially conceded. However, this is not the case for the economist. The defendant submits the case does not require an economist.
- [13] Pursuant to s. 5(9)(b)(i), the plaintiff submits there is a reasonable risk that the total amount of disbursements will exceed the six-percent disbursement limit. The plaintiff has already expended \$3,089 plus tax and, if the damages were \$100,000, the total amount recoverable would be \$6,000, being six percent of \$100,000. The plaintiff submits that more than half that amount has already been expended. The plaintiff estimates the cost of a physiatrist would be \$7,000 to \$8,000. The cost of an economist is estimated to be in the range of \$5,000 to \$6500. Further, if the matter proceeded to trial, the plaintiff expects those costs could double, with the cost of attendance and rebuttal reports.
- [14] The plaintiff also submits that the fact that liability is in dispute also raises the risk that the costs of the disbursements will exceed the six-percent cap in the event there is some form of contributory negligence.
- [15] The plaintiff also references the fact that the defendant has advanced a settlement offer which is less than \$100,000.
- [16] In *Chan v. Hogan*, 2024 BCSC 328 at para. 13, the court references an estimate of anticipated costs of experts as being acceptable evidence when provided by a lawyer. Here we have the estimate from a paralegal which I find equally acceptable.
- [17] The defendant objects to the plaintiff's submission, which includes reference to the offer of the defendant being less than \$100,000, on the basis that this is a violation of the without-prejudice basis upon which it was made. The plaintiff's submission does not indicate the amount of the offer, nor any particulars beyond the fact that an offer was made of less than \$100,000. In my view, this does not violate the rules of privilege: see *Sekhon v. McCullagh*, 2024 BCSC 595 at para. 13 through 16. Further, a reference to the lack of a settlement offer in relation to the value of the claim is made in *James v. Riar*, 2024 BCSC 605 at para. 41.
- [18] The defendant also submits that the plaintiff's evidence concerning the cost of both a physiatrist and an economist's report are pure speculation falling short of the proof needed. I disagree. First, the plaintiff's evidence is based on experience in such matters of retaining experts with the same qualifications. There are going rates in regard to such matters, and in circumstances where the plaintiff cannot incur the disbursement before making the application, there will always be an element of uncertainty. To an extent, it is a Catch-22 situation.
- [19] Further, the defendant retained a physiatrist who did an IME of the plaintiff, but they have not disclosed the cost, nor have they suggested that the plaintiff's anticipated cost is unreasonable by comparison.

- [20] In all the circumstances, I find there is a reasonable risk of the total amount of the disbursements exceeding the disbursement limit.
- [21] In terms of the necessity of the disbursements to justly resolve the issues in dispute and the complexity pursuant to s. 5(9)(b)(ii) of the Regulation, I find this issue is conceded with respect to the psychiatrist, given the fact that the defendant has retained their own. The need for an economist, as I indicated, is disputed.
- [22] The submission is essentially that the case is not sufficiently complex enough to justify an economist. I disagree. The plaintiff's earnings appear to be highly volatile and inconsistent. Further, he works as both a salaried employee and is self-employed. Further, he continues to suffer from symptoms alleged to be caused by the motor vehicle accident which allegedly impact his earnings and the need for future care.
- [23] In my view, an economist is necessary in the circumstances and may, in fact, make the trial more efficient by assisting the court in determining the plaintiff's losses.
- [24] Finally, addressing the issue of whether the plaintiff would incur undue hardship if the disbursements were not included, the plaintiff's historical earnings are marginal at best and are inconsistent. His 2024 earnings are his best, but he has since lost that job and is currently unemployed. His future is uncertain. Even with his best earnings, the total disbursements would, by my calculation, require him to pay 25 percent of his total yearly earnings for disbursements and this calculation does not include the bump-up in the costs should the matter go to trial.
- [25] The defendant submits the plaintiff's earnings may be more than he has indicated, given his frequent trips to India. It would appear he has travelled to India five times since the motor vehicle accident and there are references in the clinical records that he obtained treatment while in India, but the evidence in that regard is sketchy at best.
- [26] There is no evidence concerning the cost of the travel to India, or whether the plaintiff paid the cost himself, or whether someone paid the cost on his behalf. In either event, it would be pure speculation to decide one way or the other.
- [27] In all the circumstances, I find the cost of the psychiatrist and the economist are excluded for the purpose of the Regulation and, given that the plaintiff has been successful, they will have their costs of the application in the cause.

"Nielsen A.J."

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