
CANADA / JUDGMENT

Muller v. Workman et al.

2004 BCSC 90

COURT

Supreme Court of British Columbia

DECIDED

23 January 2004

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2004BCSC0090

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Muller v. Workman et al.,

2004 BCSC 90

Date: 20040123

Docket: 27448

Registry: Nanaimo

Between:

Connie Muller

Plaintiff

And

Russell Workman, Deceased, and Douglas Workman

Defendants

Before: The Honourable Master A.N. Patterson

Reasons for Decision

Counsel for the Plaintiff:

S. McPhee

Counsel for Defendants:

A. Bookman

Date and Place of Hearing:

December 12, & 16, 2003

Nanaimo, B.C.

Introduction

- [1] At the conclusion of this assessment of costs, I reserved decision with respect to two disbursements both of which were for medical reports. In addition, counsel has requested reasons for my decision with respect to certain other disbursements decided at the hearing. These are the reasons.
- [2] All tariff items were assessed and no reasons are sought for those items. In addition, counsel settled a great number of the smaller disbursements for which I am grateful.

Background

- [3] This action arises out of an unfortunate accident which occurred on May 14, 1998, in Port Alberni. I understand that the plaintiff was driving a vehicle when a cyclist came through a stop sign and hit the car. The cyclist, a young boy, was killed. The plaintiff claimed damages primarily for psychological injuries and for post traumatic stress disorder.
- [4] At the same time the plaintiff was pursuing another action for historical sexual abuse (Nanaimo Registry No. S31303) in which, again, she was claiming damages for psychological injuries and post traumatic stress disorder.
- [5] The trial of this proceeding was set for May 26, 2003, and the case was settled on May 14, 2003. A consent order dismissing the action with costs to the plaintiff was entered June 19, 2003. That order was in the following terms:
 - 1. the within proceedings of the Plaintiff be dismissed with costs to the Plaintiff;
 - 2. the said dismissal be for all purposes of the same force and effect as if a judgment dismissing the action as against the Defendant had been pronounced after a trial of the action upon its merits.
- [6] Action No. S31303 was set for trial for November 17, 2003, and settled in October, 2003. The terms of that settlement are confidential but I understand that there was no provision for the plaintiff to recover any costs related to that action.
- [7] There is no provision in the consent order in this proceeding directing the defendants to pay any costs of any other proceeding, either the Part 7 action or action No. S31303.

General Principles

- [8] The assessment of disbursements concerning an action are governed by Rule 57(4).

- (4) In addition to determining the fees that are to be allowed on an assessment under subrule (1) or (3), the registrar must
- (a) determine which expenses and disbursements have been necessarily or properly incurred in the conduct of the proceeding, and
 - (b) allow a reasonable amount for those expenses and disbursements.
- [9] The decision of *Van Daele v. Van Daele* (1983) 56 BCLR 56 (BCCA) has long established the principle that:

. . .The proper test, it seems to me, from a number of authorities referred to us this morning is whether at the time the disbursement or expense was incurred it was a proper disbursement in the sense of not being extravagant, negligent, mistaken or a result of excessive caution or excessive zeal, judged by the situation at the time when the disbursement of expense was incurred.

- [10] The onus of proof rests on the party submitting the bill of costs for assessment to establish in the affirmative that the disbursement is reasonable (see *Holzapfel v. Matheusik* (1987) 14 BCLR (2d) 135).
- [11] While an affidavit of counsel is an indispensable requirement to support a claim for disbursements, counsel's opinion as to necessity is not binding on the registrar. In *Bell v. Fantini* (1981) 32 BCLR 322, Legg J. (as he then was) writes this at paragraph 24.

The Registrar is not bound to accept an affidavit of counsel that in counsel's opinion the employment of the expert or the incurring of the expense was justified or that it was necessary for the attainment of justice when the Registrar is considering allowing or disallowing the disbursement under this rule. He should give careful consideration to any such affidavit and he must weigh what is deposed to against any affidavit that deposes to the opposite effect. His duty under the rule is to determine whether the expense is a reasonable and justifiable expense which should be borne by the unsuccessful litigant.

Disbursements in Issue

- [12] As noted a great many disbursements were settled by counsel, however, a number remained in dispute. Some rulings were made at the hearing. Reasons for those will precede the two reserved items; that is the bills of Dr. Koch and Dr. Barale.
- (a) Part 7 writ and Service Costs
- [13] Rule 57(4) provides for recovery of disbursements "incurred in the conduct of the proceeding." There is no provision for recovery of disbursements incurred in another proceeding absent a specific order of the court to that effect.

- [14] The plaintiff referred to the decision of District Registrar Sainty in *Hazbawi v. Lucier* 2001 BCSC 844. In that decision the Registrar allowed the disbursements for a Part 7 writ relying on a decision of Master Brandreth-Gibbs in *Chernoff v. ICBC* (Vancouver Registry C907843). Chernoff was not an assessment of costs but an application to the court for costs after an apparent settlement. In Chernoff Master Brandreth-Gibbs declined to make the order sought and directed that the matter be heard by a judge of the court. In an accompanying memorandum, entitled report and recommendation, the Master stated that a Part 7 writ is rarely unnecessary. That may be so but it does not necessarily follow that the costs of issuing a Part 7 writ are allowable as disbursements in a tort action.
- [15] With respect, I disagree with the result attained by District Registrar Sainty. The authority to which she referred is not authority for the proposition that disbursements in a Part 7 action are included in the disbursements for a tort action. There is no provision in the Rules to include disbursements in another proceeding. A registrar, or master sitting as a registrar, on the assessment of a bill of costs is governed entirely by the order of the court and the Rules of Court to assess those costs.
- [16] It is worth pointing out that this case is not the standard motor vehicle action defended by the Insurance Corporation of British Columbia. The suit here was against the cyclist and his father. Neither were insured through a policy of automobile insurance.
- [17] There is no provision in the consent order in this proceeding for Part 7 costs or disbursements to be added in to this bill of costs. Hence the disbursements are disallowed.
- (b) General investigation services
- [18] A private investigator retained by the plaintiff submitted a bill in the amount of \$622.31 for interviewing a witness who had come forward. The witness lived in a house at the intersection where the accident occurred. The investigator also prepared a video of the corner and of the view from the witness's home. The interview and video were done in March and June, 2002, almost four years after the accident. There is no evidence that the witness was hostile to the plaintiff though his evidence may have been adverse to the plaintiff's case.
- [19] The value of the video done four years after the event is questionable and the admissibility of the video is doubtful. The plaintiff had in hand measurements, a plan of the area and photographs from Baker Engineering making the video of even less value.
- [20] The leading decision on the use of private investigators is *Noble v. Wong* (1982) 38 BCLR 246. In that case, Esson, J. (as he then was) confirmed the decision of Boyle, J. sitting as a registrar, disallowing the costs of a private investigator. Esson, J. confirmed that only in particular circumstances would the disbursement be allowed and that interviewing witnesses was not one of those circumstances. The British Columbia Court of Appeal affirmed the decision of Esson J.

- [21] In *McCann v. Moss* (1984) 58 BCLR 129, McLachlin J. (as she then was) concluded that the ultimate test concerning the costs of retaining an investigator was whether in all circumstances it was reasonable. In that case McLachlin J. held that it was. It is noteworthy that the private investigator retained in that case was retained to try and determine liability for the accident and interview witnesses very shortly after the event.
- [22] In this case, it is my view that it is not reasonable to retain a private investigator four years after the event to make a video and interview a witness and expect the defendant to pay for it. The disbursement is disallowed.

Baker Engineering

- [23] In May, 1998, shortly after the accident Baker Engineering prepared a report for the adjuster. That report dealt primarily with the condition of the brakes on the plaintiff's vehicle. The conclusion reached was that the defective brakes were not a factor in the collision.
- [24] In March, 2002, the plaintiff retained Baker Engineering to prepare a further report. That report dated March, 2003, notes that Baker Engineering was "asked to assess what opportunity Ms. Muller likely had to avoid the collision."

- [25] The conclusion of the report is as follows:

Our analysis of this accident is based on a review of documentation provided, on examinations of the vehicle and the bicycle which were involved in the accident, and on examinations of the accident site.

The evidence of contact to the bicycle and the truck and the injuries sustained by Master Workman are consistent with the cyclist having lost control of the bicycle as he entered onto 11th Avenue, causing him to fall to the pavement and collide with the pickup truck.

We are not able to determine from physical evidence the speeds and relative positions of the bicycle and the pickup truck as they closed to impact. A large spruce tree forms a permanent obstruction to vision for a driver traveling southbound on 11th Avenue and attempting to see to the east by Ravenhill Avenue. This tree, and then the A-pillar on the pickup truck driven by Ms. Muller, could have affected Ms. Muller's ability to see the cyclist. This may explain why she did not see the cyclist until just before impact, at which time and position Ms. Muller could not avoid striking the child.

- [26] This report was prepared four years after the event. There were already available the brake examination report and a complete collision reconstruction report prepared by the RCMP. The conclusion in the RCMP report is as follows:

The Ford pickup truck was travelling southbound on 11th Avenue approaching the intersection of Ravenhill Avenue. The cyclist was travelling down a steep grade (average -6.75o) on Ravenhill Avenue towards the 11th Avenue intersection. The cyclist was unable to stop at the stop sign

although attempts seem to have been made by him to avoid the collision. The driver of the Ford pickup truck did not see the cyclist until she was parallel with the stop sign and was unable to avoid the collision herself. The cyclist began sliding towards her and under her truck. Road conditions were wet at the time making stopping difficult for the cyclist travelling down a steep grade.

[27] At the hearing, I allowed a fee of \$3,000. The bills for Baker Engineering apparently came to a total of \$5,748.42. The actual bills from Baker Engineering were not attached to the affidavit of plaintiff's counsel. It is, consequently, not unreasonable to allow an arbitrary amount for a report which gave an opinion on the plaintiff's likelihood of avoiding the accident, identical to the opinion in the RCMP report. The opinion requested is really for the trier of fact to determine, be it judge or jury.

[28] There is no reason to change the somewhat generous allowance of \$3,000 made at the hearing.

Vocational Consulting Group

[29] Mr. Nordin of Vocational Consulting Group, at the request of the plaintiff, prepared a report dated March 27, 2003. His bill for that report was \$3,311.65.

[30] In his affidavit, plaintiff's counsel states the rational for retaining Mr. Nordin in this way at paragraph 19(f):

I have used Mr. Nordin on many cases over many years. I believe his fee to be consistent with the fees of other experts of his experience. I required a vocational report for this action as I was of the view that her employment prospects had been negatively impacted by the accident in question. In particular, she was experiencing a greater degree of Post Traumatic Stress Disorder, was having considerable problems sleeping and was experiencing fears with respect to driving. While I did not expect Mr. Nordin to be able to attribute educational and vocational difficulties to one or more particular causes, I did need to know, for the purposes of this action, her employment prospects to assist the court in determining the capacity for employability which had been impacted upon. I would have required this report even absent the existence of the other action.

[31] A review of the report makes it clear that the author reviewed a number of medical hospital reports and records and interviewed the plaintiff. The interview shows the plaintiff left school in grade 10, did not complete courses in hair dressing and office procedure in which she enrolled after school. She apparently was not working in 1999 or 2000 but since March, 2001, has worked part time as a cashier at Shoppers Drug Mart.

[32] A large part of the report consists of quotations from the reports of various treating doctors including opinions concerning the effect of the alleged sexual abuse.

[33] The plaintiff did vocational tests which showed a grade 10 level in reading and spelling. Mr. Nordin makes these findings at page 16 of his report:

Just as education is related to level of income, so too, is it related to one's occupational options. In other words, the more education an individual has, generally speaking, the more vocational options available to them. In Ms. Muller's case, she had limited education, having failed Grade 10 and thus only had entry-level, unskilled work available to her.

While her history indicates she was able to obtain such employment it is apparent she had difficulty maintaining even entry-level employment due to personal conflicts, often another hallmark of childhood sexual/emotional/physical abuse.

Ms. Muller's unfortunate experience in May 1998 occurred when she was 33 years old. While this tragic accident likely further exacerbated her already fragile emotional state, her poor history of academic achievement and employment had been well-established prior to the May 1998 motor vehicle accident.

To her credit, Ms. Muller has been gainfully employed for the past two years as a Cashier at a Shoppers Drug Mart. However, this is only part-time, entry-level work paying slightly above minimum wage (currently she earns \$9 per hour). While it is apparent she has been able to maintain such employment over the past two years, it should be recognized that she normally is only working a third of a typical work week. She feels unable to cope with much more than this, however, but at the same time feels somewhat stuck because she has no specific skills to seek better employment and feels incapable of undertaking training at this time.

[34] It is my view that the findings would be of use in both actions and consequently it is not unreasonable to allocate a portion of the fee to action No. S31303.

[35] A review of Mr. Nordin's bills and his affidavit show that he has "allocated" certain amounts of time to certain aspects of the bill. There is no statement that he actually spent that amount of time or that that amount of time was needed for the task. In addition, all amounts of time are conveniently rounded up to the nearest hour or half hour.

[36] It is difficult to see that the full amount is a reasonable disbursement for this action, particularly in view of the fact that part of the cost should be allocated to the other action.

[37] The amount allowed at the hearing of \$2,000 is, on review, more than reasonable as a disbursement for this proceeding.

Dr. Koch

[38] Dr. Koch is a clinical psychologist who was retained by the plaintiff and provided a report dated October 31, 2002. The bill for that report is \$2,325.31.

- [39] Dr. Koch is an expert on post traumatic stress disorder and the plaintiff retained him expressly for the purpose of providing an opinion on the extent of post traumatic stress disorder in relationship to the motor vehicle accident.
- [40] The defendant argues that it was unnecessary to retain Dr. Koch and argues that as the plaintiff had been treated by Dr. Waterman and reports from Dr. Waterman had been delivered this would be duplication. Dr. Koch interviewed the plaintiff, reviewed the reports of Dr. Waterman, Dr. Janke and others and conducted a number of tests. Dr. Koch gave as his opinion:

Ms. Muller's case is admittedly complex. Based on the sources of information available to me, I believe that she suffered some significant psychological distress secondary to the sexual assaults by Mr. Taylor. This was likely aggravated by both her parents' harsh parenting style and by a later negative sexual experience by a family friend. Her difficult interpersonal relationships during childhood and adolescence, impulsivity, and sexual concerns then as well as during her adulthood are likely long term consequences of these negative sexual experiences. However, it is clear that her marriage to Mr. Muller did her no favours and likely aggravated already existent PTSD symptoms and other psychological difficulties. Unfortunately, the 1998 MVA overlapped with her relationship with Mr. Muller and so it is impossible to temporally disentangle the effects of her abusive second marriage and the subject MVA. Suffice it to say that she has some behavioural characteristics (e.g., modest driving fear, dream content thematically related to the dead boy and Mr. Taylor, fear of harm to her own child) that appear more likely attributable to the subject MVA than to her domestic violence experience.

- [41] In view of the criticism of Dr. Waterman contained in Dr. Janke's reports and Dr. Janke's opinion that Dr. Waterman had been acting as an advocate for the plaintiff, it was not unreasonable, in my view, for the plaintiff to retain Dr. Koch for an opinion.
- [42] Clearly, part of the report deals with the plaintiff's other problems including those in action No. S31303 and it follows that a portion of this bill should be nominally allocated to action No. S31303. It is my view that \$1,550 would be a reasonable amount as a disbursement in this proceeding. The remainder of the bill, approximately one-third, would be allocated to action No.31303
- [43] The cost of attendance on Dr. Koch of \$80 is a reasonable disbursement.

Dr. Barale

- [44] Dr. Barale is a psychiatrist who has produced a report dated March 7, 2003, shortly before the action settled. The bill for this report is \$1,020.
- [45] Dr. Barale reviewed the reports of Dr. Koch, Dr. Waterman, and Dr. Janke and gives this summary of the plaintiff's situation.

Ms. Muller has multiple overlapping pathologies, the most troublesome of which, currently, is Post Traumatic Stress Disorder. There is little doubt that the 1998 accident, and the death of the boy, stressed a very vulnerable, fragile and neurobiologically compromised brain and that inadequate treatment and perpetuating stresses have seen Ms. Muller become mired in a cycle of anxiety and depressive features which have left her largely joyless and unable to engage life fully.

[46] This opinion is little different from that of Dr. Janke contained in his two reports dated May 8, 2000, and April 17, 2003. Dr. Janke reviewed reports from Dr. Koch and Dr. Waterman and for his latest report, that of Dr. Barale as well. His opinion is as follows:

It is clear that Ms. Muller is suffering from a degree of Post-Traumatic Stress Disorder. Some of the symptomatology is related to the motor vehicle accident, some of it is related to the sexual abuse she experienced as a child, some of it will be attributed to the stalking experience, and some of it will be attributable to the various traumatic relationships she has had beginning in childhood and extending up to the present. The impact of the motor vehicle accident will be quite specific in that it would cause some restriction in driving and cause her to experience distress in particular situations. In the absence of a job that requires her to drive near children or to drive by the accident site, the specific impacts of PTSD symptoms that are attributable to the motor vehicle accident in my opinion would be minimal with regard to employment. It is my opinion that much of the rest of Ms. Muller's symptomatology, specifically her chronic depressive symptoms, her chronic sleep disturbance, her chronic interpersonal relationship difficulties, her chronic difficulties in dealing with figures of authority, and her chronic self-mutilation (trichotillomania), are attributable to events other than the 1998 motor vehicle accident. They were present to a significant degree prior to the accident and in my opinion would have remained present to a significant degree independent of the motor vehicle accident of 1998.

[47] Again, the defendant argues that the retention of Dr. Barale as an unnecessary duplication. The opinions in the reports of Dr. Barale and Dr. Janke are not vastly different. However, interestingly, the defendant felt it necessary for a further referral to Dr. Janke after receiving Dr. Barale's report.

[48] In my view, it was not unreasonable for the plaintiff to retain a psychiatrist with respect to the motor vehicle accident. However, again, a part of the report relates to action No. S31303. It follows that approximately one-third of the fee should be allocated to that action as well.

[49] I will allow \$680 as a reasonable disbursement for this proceeding.

Conclusion

[50] Based on these reasons, counsel can calculate the total amount of fees and disbursements. A certificate can be prepared in that amount and can be submitted for signature.

"Master A.N. Patterson"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/04/00/2004bcsc0090.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/muller-v-workman-et-al-2004>

Prepared on 29 October 2026 · Esheria