
CANADA / JUDGMENT

Nieman v. Joyal

2015 BCSC 1980

COURT

Supreme Court of British Columbia

DECIDED

14 September 2015

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2015 BCSC 1980 Nieman v. Joyal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nieman v. Joyal,

2015 BCSC 1980

Date: 20150914

Docket: M48610

Registry: Kamloops

Between:

Kelly Nieman

Plaintiff

And

Amber Ann Joyal

Defendant

Before: Master McDiarmid

in Chambers

Oral Reasons for Judgment

re Application for Independent Medical Examination

Counsel for the Plaintiff:

E.C. Hughes

Counsel for the Defendant:

G. Thomson

Place and Date of Trial/Hearing:

Kamloops, B.C.

September 14, 2015

Place and Date of Judgment:

Kamloops, B.C.

September 14, 2015

- [1] THE COURT: This is an application by the defendant to compel the plaintiff to attend an independent medical examination at the offices of an occupational therapist.
- [2] The background to the litigation is set out in the affidavit of Tracey Mason, a legal assistant employed by counsel for the plaintiff. I am directing that a transcript of these reasons be ordered. Paragraphs 2 through 6 are as follows:
2. This matter arises out of a motor vehicle accident which occurred on March 23, 2012 in Kamloops, British Columbia.
 3. A Notice of Civil Claim, filed on April 3, 2013, alleges that the plaintiff sustained injuries, including:
 - a. Compound fracture of left ankle;
 - b. Injury to ribs;
 - c. Injury to neck;
 - d. Injury to back;
 - e. Bruising and contusions.
 4. The trial of this matter is scheduled to commence on March 7, 2016 to last for 14 days.
 5. The defendant conducted an examination for discovery of the plaintiff on April 9, 2014.
 6. Based on my review of correspondence and documents received from Ms. Harris, counsel for the defendant, I verily believe that the plaintiff has attended at the following independent medical examinations to date:
 - a. Dr. Latimer, psychiatrist, on May 27, 2015;
 - b. Samantha Gallagher, vocational assessment, on July 3, 2015; and
 - c. Dr. Wing, orthopaedic surgeon, on July 15, 2015

at the defendant's request.

- [3] The plaintiff resides in Kamloops. Prior to the plaintiff attending an appointment with Dr. Latimer, plaintiff's counsel, by letter dated May 14, 2015, requested conduct money as follows: mileage, 420 kilometres at 35 cents a kilometre; parking, \$5; meals, \$25; total, \$177. Counsel for the defendant sent a letter back enclosing a cheque payable to the plaintiff in that amount.
- [4] Prior to the plaintiff attending a vocational assessment and the Dr. Wing appointment, plaintiff's counsel, by letter dated June 25, 2015, requested conduct money as follows for Samantha Gallagher, the vocational assessment person: 730 kilometres mileage at 35 cents a kilometre; \$175 accommodations; \$10 parking; \$80 meals; total, \$520.50; and Dr. Kevin Wing: mileage, same 730 kilometres at 35 cents a kilometre; parking \$10; meals \$60; total \$325.
- [5] Defendant's counsel sent over two cheques, one for the vocational assessment attendance expenses and one for the Dr. Wing appointment attendance expenses in a letter dated June 30, 2015. It references the June 25 letter, encloses two cheques, and then says:

Please note the following adjustments have been made:

Samantha Gallagher Mileage (730km @ (\$0.30) \$219 . . . Meals \$60

- [6] The other two, accommodation and parking, stayed the same. The total is \$464, and:

Dr. Kevin Wing Mileage (730km @ (\$0.30) \$219 [Parking stays the same] Meals \$50 [Total] \$279

- [7] The letter, which is appended to the Mason affidavit as Exhibit D, is noted as being received on July 8, 2015. The vocational assessment appointment date was July 3, 2015. The Mason affidavit confirms that, in paragraph 8(d), the funds were not received until July 8, after the date scheduled for the Gallagher appointment. That is set out in the response at paragraph 10.
- [8] This next independent medical examination has been scheduled for September 21 at 8:30 a.m. with Gary Worthington-White. The plaintiff consents to attending an independent medical examination with Gary Worthington-White, an occupational therapist. There are some medical issues which have recently arisen, unrelated to the litigation, that may cause some problems with him attending on the date presently scheduled, but in submissions his counsel has confirmed that, assuming the plaintiff's gallstone attacks resolve and he is medically fit to attend, he will attend. Failing that, there has been discussion between counsel so that they have agreed that if he cannot attend, my order should just not set the date, but confirm that he will attend on a date to be agreed by the parties.

- [9] The plaintiff, as noted, does not object to attending, but sets out two conditions: firstly, that reasonable expense money be received in advance; and secondly, that notes recording any history or observations and data, including test results from the Gallagher and Wing appointments, are provided prior to attendance.
- [10] That latter point was not addressed during argument; however, the issue of reasonable expense money was.
- [11] The defendant's position is the conduct money is payable in accordance with Schedule 3, namely 30 cents a kilometre for mileage.
- [12] Schedule 3 sets out:

Travel

2 (1) For any witness, if the examination, hearing or trial is held at a place

- (a) within 200 km by road (including any ferry route . . .) of where the witness resides, 30¢ per km each way by road . . . but no travel allowance will be made if the distance . . . is less than 8 km., or
- (b) more than 200 km from where the witness resides, the minimum return air fare by scheduled airline plus 30¢ per km each way from his or her residence to the departure airport and from the arrival airport to the place of examination, hearing or trial.

[13] Schedule 3(3) sets out:

For any witness, a reasonable allowance for meal expenses made necessary by the witness' attendance, and if the witness resides elsewhere than the place of examination, hearing or trial and is required to remain overnight, a reasonable allowance for overnight accommodation.

- [14] The defendant submits that "examination" in Schedule 3 includes an order that the plaintiff submit to, and I am quoting from Rule 7-6, "examination by . . . other qualified person" as set out in Rule 7-6.
- [15] The plaintiff submits that Rule 7-6(a) permits the court to order reasonable expenses connected with the examination. The plaintiff also submits the specific reference to Schedule 3 in Rules 7-2 and 13-4 and its absence in Rule 7-6 means that I should not read into Rule 7-6 that Schedule 3 applies.
- [16] As authority for that proposition, plaintiff's counsel refers to a decision of Madam Justice Kirkpatrick in chambers in our Court of Appeal where, in *Vandokkumberg v. H. Meyer Construction Ltd.*, 2006 BCCA 423, at para. 12, she cites with approval the leading text on Construction of Statutes, Driedger, and she quotes from that text:

... "[i]n reading a statute words should not be added or deleted and the reader should not try to fill in any gaps he thinks he sees". At 104, he [referring to Driedger] cautions against "amend[ing] a statute to make it say something it does not say, or to make it say what is conjectured the legislature could have said or would have said if a particular situation had been before it". . . .

- [17] Rules 7-2(13) and 13-4(10) specifically refer to "witness fees in the amount required under Schedule 3 of Appendix C". Those words are absent in Rule 7-6, although "witness fees referred to in Subrule (13)" are inferentially referenced in subrule 7-6(6), which deals with out-of-province residents.
- [18] The appointment is more than 200 kilometres from where the plaintiff resides. I routinely review airfare disbursements for Kamloops to Vancouver return flights when I conduct costs assessments. Airfare generally exceeds what the plaintiff seeks as mileage.
- [19] I was referred to several authorities. The first is a decision of mine, *Dakin v. Roth*, 2013 BCSC 1018, where I refer to conduct money to attend an independent medical examination. This in the context of an appointment to assess the plaintiff's bills of costs. The issue that is now before me was not argued in that case.
- [20] The second case referred to by the plaintiff is a 2007 decision of Madam Justice Arnold-Bailey, *Hamilton v. Vance*, 2007 BCSC 1001, where she allows mileage to attend various accident-related medical appointments at 31 cents a kilometre. I infer that she did not consider herself bound to order the amounts that are set out in Schedule 3.
- [21] In *Holland v. ICBC*, 2008 BCSC 1582, Master Young, as she then was, dealt with conduct money. In that case, it is apparent from reading para. 9 that the parties consented to 30 cents a kilometre using the Schedule 3 tariff.
- [22] The plaintiff relies on a number of cases. In *Kahl v. Jakobsson*, 2006 BCSC 1163, Madam Justice Loo comments at para. 135 that the fees payable to witnesses has not been amended since 1991.
- [23] Counsel then refers me to the Schedule 2, fees payable to sheriff, which sets mileage at the rate of 50 cents for each kilometre travelled. I do not consider that to be particularly relevant, given the different considerations, such as security, that are involved in Schedule 2, and I have not taken that into account.
- [24] In *Schwarz & Co. Law Corp. v. Funaro*, 2006 BCSC 122, District Registrar Sainty, at para. 46, on a Legal Profession Act review of a lawyer's account allowed mileage as claimed by the lawyer in 2006 at 44 cents a kilometre.
- [25] In *Gewal-Cheema v. Tassone*, 2010 BCSC 1182, at para. 60, Mr. Justice Stewart allowed mileage at 50 cents a kilometre.

[26] That decision has been followed by Mr. Justice Schultes in *Liu v. Thaker*, 2012 BCSC 612, at para. 72, and again by Mr. Justice Schultes in *Fadai v. Cully*, 2014 BCSC 290. All those cases allowed mileage at 50 cents a kilometre.

[27] Evidence was also presented as attachments to the affidavit of Tracey Mason as follows:

- Thompson Rivers University reimburses mileage at 50 cents per kilometre;
- The Legal Services Society of British Columbia has a "meterage" allowance per kilometre of 52 cents per kilometre as of April 2015;
- The Canadian Employee Relocation Council Survey of Corporate Reimbursement Rates for Personal Vehicles when used for Business Travel summarizes a survey of 44 participating organizations setting out that the lowest rate of reimbursement is between 31 and 33 cents per kilometre. The highest rate of reimbursement is between 55 and 57 cents per kilometre and the average rate of reimbursement is 49 cents per kilometre based on an online survey conducted from December 5, 2012 to January 2, 2013;
- The Government of Canada automobile allowance rates for 2015 are 55 cents per kilometre for the first 5,000 kilometres driven and 49 cents per kilometre driven after that. Slightly lower rates are shown for 2010 to 2014;
- Lastly, extracts from Canadian Automobile Association show total annual driving costs based on 20,000 kilometres driven annually for a mid-sized vehicle are 52 cents per kilometre; for a cross-over vehicle are also 52 cents per kilometre; for a minivan are 57 cents per kilometre; for a full-size vehicle are 62 cents per kilometre; for an SUV are 63 cents per kilometre; and for pick-up trucks are 67 cents per kilometre.

[28] A careful reading of Rule 7-6 reveals that it refers to an order that the person submit to examination by a medical practitioner, and then the court is permitted to make an order respecting any expenses connected with the examination. No specific reference is made to the Schedule 3.

[29] It seems to me that there is no difference in principle between the reasonable expenses of a plaintiff attending his own doctor, such as was awarded at 50 cents a kilometre in several of the cases, including the ones of Justice Stewart and Justice Schultes, and a plaintiff attending an independent medical examination, especially where the plaintiff agrees to attend an independent medical examination located in a different city.

[30] Accordingly, I order the following:

- 1) the plaintiff is to attend to be examined by Gary Worthington-White, an occupational therapist, on a date to be agreed upon by the parties, with liberty to apply if there are difficulties;

- 2) the defendant must provide conduct money as follows: firstly, mileage for 730 kilometres at 50 cents a kilometre, which is \$365; secondly, overnight accommodation for one night at \$175; and third, meals in the amount of \$75. I apprehend that there will be at least four;

I know that it is approximately three and a half hours' driving time from Burnaby to Kamloops, and it seems to me that what is reasonable here is that if the appointment ends before 4:30 p.m., it is reasonable for the plaintiff to drive home. So this is the next part of the order: If the appointment ends after 4:30 p.m. on the date it commences, the defendant must promptly reimburse the plaintiff for one additional night's accommodation and \$12 additional meal allowance;

- 3) if there are parking expenses not included in the hotel accommodation, those are to be promptly reimbursed upon being provided with the invoicing;
- 4) the plaintiff can submit actual meal expenses, including alcohol, less whatever he has received in his allowance, as costs and the registrar can determine the reasonableness on assessment; and
- 5) any notes recording any history or observations and data, including test results, are to be provided by October 31, 2015, or at such other date as may be agreed upon by counsel, if the presently-scheduled examination does not go ahead.
- [31] It does seem to me that the plaintiff has been largely successful here, and so the costs of this application are to the plaintiff in any event of the cause.

"Master R.W. McDiarmid"

MASTER McDIARMID

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