

CANADA / JUDGMENT

Polubinski v. Twardowski

2007 BCSC 843

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 843 Polubinski v. Twardowski IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Polubinski v. Twardowski, 2007 BCSC 843 Date: 20070612 Docket: M050121 Registry: Vancouver Between: Zdzislaw Polubinski Plaintiff And Andrzej Twardowski and Marian Zapasnik Defendants

- and - Docket: M021552 Registry: Vancouver Between: Zdzislaw Polubinski Plaintiff And John G. Didmon and Randy M. Didmon Defendants Before: Master B.M. Young Decision as Registrar Counsel for the Plaintiff: L.M. Cohen Counsel for the Defendants: R. Swadden Date and Place of Hearing: April 25, 2007 Vancouver, B.C.
- [1] This is an assessment of two party-and-party bills of costs arising from two motor vehicle accident actions involving the same plaintiff Mr. Polubinski.
- [2] Mr. Polubinski was in his first motor vehicle accident on April 25, 2000. Mr. Didmon was the defendant. Mr. David Youngson represented Mr. Polubinski and commenced the action against John Didmon and Randy Didmon.
- [3] On September 29, 2004, Mr. Polubinski was in a second motor vehicle accident, and an action was commenced against Andre Twardowski and Marian Zapasnik.
- [4] Mr. Youngson retired from practice, and Mr. Polubinski retained Mr. Cohen to represent him in both actions.
- [5] Mr. Cohen requested an adjournment of the trial in the first action, which had been scheduled for trial to commence January 24, 2005. By consent, the trial was adjourned to June 19, 2006, and counsel consented to have both actions tried at the same time. Both actions settled on or about June 13, 2006, some six days before the jury trial was scheduled to commence.
- [6] Counsel were unable to agree on the bills of costs and so this appointment for an assessment was taken out.
- [7] I asked Mr. Swadden to outline the areas that were in dispute, and in my Reasons, I have followed the order of the objections. Disbursements

- [8] The disbursements claimed are all claimed under the bill of costs in Action No. M021552 between Polubinski and Didmon. Mr. Cohen attached his disbursement ledger to verify that the disbursements were paid.
- [9] Mr. Swadden has prepared a helpful schedule of disbursements from that ledger which consolidates the items into various categories, and I will rely on that schedule in these Reasons.
1. Photocopying

[10] The dispute is not over the number of copies but the rate allowed for copying. Mr. Cohen has claimed \$2,607.70 at the rate he bills the client for photocopying, which is approximately 30 cents per page. That works out to a total of 8,692 pages. Mr. Swadden says on a party-and-party bill of costs the allowable range of rates is between 15 and 25 cents, and he made reference to a practice directive which I have been unable to locate.

[11] The Continuing Legal Education Practice Before the Registrar paragraph on photocopying says that the rate allowable is 25 cents per page, unless it is proven that the actual copying cost was higher or lower. The current practice for allowance is grounded in *Bell v. Fantini* (1981), 32 B.C.L.R. 322 (S.C.).

[12] I accept that copying documents in preparation for trial requires a fair amount of work to properly collate the reports and group them in an order that will be easy to follow at trial. It is because of that difficulty that 25 cents is allowed and not the lower rate of 5 or 6 cents that commercial copying services might charge.

[13] I allow this item at \$2,173, which 25 cents per copy.
 2. Trust Administration Fee

[14] There was some question as to whether this amount is customarily allowed on party-and-party bills of costs. Mr. Cohen cited the case of *Parrotta v. Bodnar*, 2006 BCSC 787, where it was allowed at para. 25 and Mr. Swadden now concedes that \$10 item.
 3. TNT Lawyers Fee for Legal Research

[15] Mr. Cohen used the services of TNT to locate and download cases from Quick Law for him because he does not have a subscription to that service. He was charged \$50 plus disbursements for PST and GST for that service. The question is whether this is an allowable disbursement. Mr. Cohen has provided me with an excerpt from C.L.E.'s publication *Practice Before the Registrar*, which indicates that there is some debate on this issue of whether or not computer assisted research should be an allowable tariff item. I find that the use of computer assisted research is the norm now, and it is reasonable and saves time and disbursements. Had Mr. Cohen subscribed to a computer assisted research service, I would have allowed a reasonable disbursement to that service so I will not disallow it because he had to use a research company's computer service.

[16] The \$50 plus GST and PST will be allowed.

4. Expert Reports

(a) Dr. Anton's Fee

[17] Dr. Anton prepared a medical legal report for the plaintiff, the cost of which is not being challenged at the assessment. When the bill did come in for the report, defence counsel did write to counsel for plaintiff with questions regarding the breakdown of Dr. Anton's fee, and Dr. Anton was asked to explain his fee. Dr. Anton billed for this explanation, and the defendant objects to the payment of a bill incurred solely to explain and justify a previous bill. Counsel for the defendant says that time should have been absorbed by Dr. Anton as part of the cost of doing business, and no professional should bill a client for any activity surrounding the preparation, explanation or justification of an account. I agree. This bill is unreasonable for either the plaintiff or the defendant to have to pay, and I will not order that the defendant pay it. I appreciate that this puts the onus on the plaintiff to now challenge this account and request a refund from Dr. Anton, but he is in a better position to do so as the person contracting with Dr. Anton than is the defendant.

(b) Dr. Harriman's Fee

[18] Counsel for the defendant says that the Harriman report was unnecessary and not helpful to the resolution of this case. The report was not released by counsel for the plaintiff but that is not the basis for the objection. Mr. Swadden says that by the time the report was prepared, it was patently clear that Dr. Harriman's opinion was going to support a finding that the plaintiff's hearing and tinnitus problems were caused by this accident.

[19] Dr. Harriman initially was a treating physician to Mr. Polubinski. His family physician referred him to her for investigation into Mr. Polubinski's headaches and hearing issues, after which she wrote two consultation reports: one in December 2002 and one on January 28, 2003. Sometime after he was retained in October 2004 but before the March 9, 2005 consultation report of Dr. Harriman, counsel for the plaintiff retained Dr. Harriman privately to prepare a medical legal report. She was, at that point, on contract with counsel for the plaintiff as a medical expert to investigate the cause of the plaintiff's hearing problems, or worsening of his hearing problems, and the cause or worsening of his dizziness and tinnitus.

[20] She did prepare a further consultation report to the family physician on February 16, 2005, after seeing Mr. Polubinski on that day to keep her informed of her findings. The plaintiff was not charged for those reports. They were prepared as a follow up to the medical consultation made by the family physician. It could be that Dr. Harriman was not retained until after that report was prepared.

[21] In the February 16, 2005 report she noted that Mr. Polubinski's severe hearing loss had shown up in a January 1998 test, so it was clearly not caused by the accident. He had inflammation of the temporomandibular joint, and further investigation by Dr. Michele

Williams was again recommended. Dr. Harriman's impressions were that the hearing loss was caused by noise exposure and that the tinnitus was probably secondary to the noise exposure hearing loss, but it might be worsened by fatigue and depression post the motor vehicle accident.

- [22] She did not think the light headedness was true vertigo, but she did order further tests to assess that.
- [23] The defendant says that the plaintiff should have reviewed those reports as they were being produced and called off the preparation of a medical legal report because it was clearly not going to be useful to the plaintiff. I have reviewed the consultation reports of Dr. Harriman attempting to use the perspective of the plaintiff's counsel attempting to prove a case and ensure that he had the proper opinion evidence before the court. It is easy for defendants to poke holes in medical evidence after the fact, but it is a much more difficult task for counsel for the plaintiff to build a case.
- [24] Firstly, I do not find that it was patently clear at the time of the last consultation report that Dr. Harriman's findings were not in the plaintiff's favour. The hearing loss issue was clearly not caused by the accidents, but she had not ruled out the possibility that the aggravation of the tinnitus and the vertigo were caused or contributed to by the accidents yet. In February 2005, when she prepared her last consultation report, Dr. Harriman was still conducting her investigation.
- [25] Counsel for the plaintiff contacted Dr. Harriman and was told that she would have to conduct further tests. She then wrote to counsel for the plaintiff and advised him that the first tests were inconclusive and that she recommended more tests. I find that it was reasonable for the plaintiff to continue to commission this investigation because the specialist conducting the tests (who is in the best position to know) was of the opinion that further investigation was warranted.
- [26] The next question is whether it was open to the plaintiff to commission and investigation but to call off the preparation of the report if a verbal report did not look favourable to the plaintiff's case.
- [27] Defense counsel says that he should have contacted Dr. Harriman before she wrote her report and asked her what her opinion was and then told her not to prepare the report if it was not going to help his case. Counsel for the plaintiff says he remained in contact with Dr. Harriman and that she discussed with him the progress of her opinion. He believed, right up until receiving the report, that he would be using it at the trial and so he commissioned her to prepare the report.

- [28] The legal test for allowing or disallowing disbursements for expert reports is set out in the B.C. Court of Appeal's decision in *Van Daele v. Van Daele* (1983), 56 B.C.L.R. 178: 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 or expense was incurred.
- [29] Also in *Dinunizio v. Gill* (1986), 5 B.C.L.R. (2d) 189 at 191, the British Columbia County Court said: When the taxation is before the registrar, the fact that the report may not have been used by the parties in effecting settlement or at the trial for the judgment finally rendered is irrelevant, provided the disbursement, when it was incurred, meets the criteria of being...a full and proper preparation of a party's case.
- [30] I find that at the time the report was requested, even if that was after February 2005, it was a proper request. It was not extravagant, negligent, mistaken or a result of excessive caution or excessive zeal, and I will allow this disbursement at \$3,375.

(c) GST on Medical Legal Reports

- [31] We have adjourned the issue of whether or not GST paid on the preparation of medical legal reports is an allowable disbursement or not. Counsel have both indicated that they are not able to deal with those submissions today and propose that this portion of the bills of costs be adjourned sine die. I will make that order and I will remain seized of that issue. Once counsel are ready to argue this point, I am directing that we have a pre-hearing teleconference to determine whether submissions will be made in writing, in person or by telephone.

(d) Dr. Toro's Fee for Engineer Report

- [32] The payment of the disbursement for preparation of an engineer's report is also being challenged by the defendant. Mr. Swadden says that he does not challenge the disbursement for investigating, but he does challenge the report for preparing the report.
- [33] Mr. Cohen says that this was a single vehicle accident in northern B.C. where the driver lost control of the vehicle on a snowy road and the vehicle left the road. The defendant was claiming that there was no negligence. This matter was set to be heard as a jury trial. Counsel for the plaintiff said that with liability in issue, it was important for me to present to the jury, on behalf for the plaintiff, evidence with respect to the dynamics of a motor vehicle collision arising from slippery road conditions. There were also some potential issues about road signage. He intended to cross examine the defendant about road signs that warned of speed or slippery conditions.

- [34] Defense counsel says it was common knowledge that once the vehicle driven by the defendant crossed the steel bridge, the defendant lost control of the vehicle and it yawed and went out of control. The plaintiff and defendants' evidence was virtually the same. None of the opinion evidence in the defence counsel's submission added any information that the parties could not have easily described. Dr. Toor could not comment on the speed the vehicle traveled at.
- [35] Counsel for the plaintiff referred me to the case of *Morrisette v. Smith*, [1990] B.C.J. No. 193 (S.C.), a decision of Mr. Justice Leggatt dated January 19, 1990.
- [36] That case was an appeal of a registrar's decision where the registrar found an expert report to be wholly useless to a trier of fact because it ignored the particulars of disabilities of the particular plaintiff and dealt instead with hypothetical workers of one sort or another and average wages. This submission is similar to the one made by counsel for the defendant in this case. He says the report was useless because it just repeated common knowledge and added nothing to the case.
- [37] In *Morrisette*, the Supreme Court allowed the disbursement because the pretrial judge had indicated that a major issue is future income loss. In the case at bar liability was a major issue. Mr. Justice Leggatt found that the registrar made an error in principle by focusing on the usefulness of the report to a trier of fact rather than on whether, in the circumstances, it was a proper expenditure to fully and properly prepare the case for trial.
- [38] I find it was reasonable for the plaintiff to order a report to help him present evidence to the jury on the dynamics of the accident. Counsel for the defendant may say that it was not rocket science now that he is challenging the disbursement, but likely if Mr. Cohen had tried to make submissions on the dynamics of the accident at trial, he would be faced with an objection against him testifying at trial or giving opinion evidence. It was the defendant who raised the liability defence, and I find it would now be unfair to say that the plaintiff has to pay the disbursement for obtaining a report to answer that defence.
- [39] I will allow the disbursement at \$2,663.50.

5. Duplicated Filing Fee

- [40] The plaintiff's disbursement for filing a trial notice is disallowed. There was already a trial notice filed, and his efforts were duplicating that task through inadvertence. The defendant should not be expected to pay that disbursement.

6. Bank Charge

- [41] I will disallow the \$5 bank charge. If the plaintiff had to borrow his retainer money and incurred a bank charge, then I do not think the interest would have been a disbursement allowed in a party-and-party bill. Likewise, I do not think that the cost of obtaining a bank draught would be.

7. Tariff Items

[42] The following is a chart showing what tariff items were claimed by the plaintiff, what the defendant submits the item should be, and what my decision is: Plaintiff Claims Defendants Suggest Allowed 1 Correspondence, Conferences, etc. 1st Action - this was a fairly standard motor vehicle accident case 12 units 6 units 6 units 2nd Action - again, this was a fairly standard motor vehicle case 12 units 6 units 6 units 3 Commence Proceeding 1st Action - there is nothing complex or unique about the pleadings 10 units 3 units 3 units 2nd Action - same comment 10 units 3 units 3 units 7 Obtain Discovery Documents 1st Action - documents were not extensive 5 units 2 units 3 units 2nd Action - same comment 5 units 2 units 3 units 8 Give Discovery Documents 1st Action - documents were not extensive 7 units 2 units 3 units 2nd Action - same comment 7 units 2 units 3 units 11 Notice to Admit 1st Action

2nd Action - I did not see a copy of the notice to admit, but two units is less than half the maximum, and so I find it reasonable 2 units 1 unit 2 units 14(a) Preparation for Examination of Mr. Twardowski 1st Action (the defendant says it is not a true Rule 28 examination because Mr. Twardowski did not refuse to give the information) - following *Elder v. Stewart and Ambelcote Estate Ltd.*, 2007 BCSC 73, of Registrar Bouck, I will allow this item 2 units 0 units 2 units 2nd Action 2 units 2 units 2 units 14(a) Preparation for Examination of Ms. Zapasnik 1st Action

2nd Action 2 units 2 units 2 units 14(b) Preparation for Examination of the Plaintiff 1st Action 2 units 3 units 3 units 2nd Action 2 units 3 units 3 units 15(a) Attend Examination of Mr. Twardowski 1st Action - for the same reason that the preparation was allowed 4 units 0 units 4 units 2nd Action 2 units 4 units 4 units 15(a) Attend Examination of Ms. Zapasnik 1st Action

2nd Action 1.5 units 3 units 3 units 15(a) Attend Examination of the Plaintiff 1st Action 5 units 5 units 5 units 2nd Action 5 units 5 units 5 units 16(a) Application December 2004 1st Action - I will allow this application which the plaintiff prepared before the defendant consented to the adjournment 2 units 0 units 2 units 2nd Action

20 Preparation of Bill of Costs 1st Action 1 unit

1 unit 2nd Action 1 unit 1 unit 1 unit 21 Attend Assessment of Costs 1st Action - disallowed because only allowed one attendance 2 units 0 units 0 units 2nd Action 2 units 2 units 2 units 22 Preparation for Settlement Conference (1/2 day) 1st Action 1.5 units 0 units 1.5 units 2nd Action - I am allowing it. My recollection of Mr. Cohen's evidence is that there had been a mediation of the first action - perhaps by Mr. Youngson but it did not settle the matter. There was then a settlement conference in June 2006 before the trial date. I have no notes on this point so if I am in error, please advise me and I will revise this tariff item. 1.5 units 1.5 units 1.5 units 23 Attend Settlement Conference (1/2 day) 1st Action - same comment 2 units 0 units 2 units 2nd Action 2 units 2.5 units 2.5 units 24 Preparation for Trial 1st Action (January 2005) (Defendant submits that one can only claim one trial preparation, and the first trial was adjourned over a month before the trial) - I will allow some preparation because the consent adjournment was adjourned December 10, 2004, and the jury trial was to commence January 24, 2005. Some trial preparation was completed before the adjournment. 5 units 0 units 3 units 2nd Action (June 2006) 5 units 5 units 5 units 30(a) Setting Down for Trial 1st Action 1 unit 1 unit 1 unit 2nd Action (the defendant set the matter down) 1 unit 0 units 0 units 30(a) Requisition to Adjourn Trial 1st Action - parties are only allowed to claim to set the matter down for trial one time 1 unit 0 units 0 units 2nd Action

31 Consent Order to Join Trial 1st Action - the order was only required in one action 1 unit 0 units 0 units 2nd Action 1 unit 1 unit 1 unit 31 Consent Order to Assess Costs 1st Action (See Item 34 - when it is claimed, one cannot also claim for the consent order) - this is disallowed for the reason argued by the defendants 1 unit 0 units 0 units 2nd Action 1 unit 0 units 0 units 34 Negotiations 1st Action 5 units 5 units 5 units 2nd Action 5 units 5 units 5 units Total Units: 1st Action 75.5 27 43 2nd Action 71.5 52 54 Scale 3 - \$80 per Unit: \$11,760 \$6,320 \$7,760

[43] The tariff units allowed in the first action are 43 and in the second action are 54 for a total of \$7,760. GST will be \$465.60 and PST will be \$543.20 for a grand total of \$8,768.80.

Disbursements are allowed at \$26,160. I will leave the calculation of taxable versus non-taxable disbursements for counsel to work out.

[44] These costs are payable forthwith. Payment should not be delayed pending the presentation of the medical legal report GST agreement. "B.M. Young" Master B.M. Young

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