
CANADA / JUDGMENT

Vink v. Valenzuela

2015 BCSC 232

COURT

Supreme Court of British Columbia

DECIDED

18 February 2015

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2015 BCSC 232 Vink v. Valenzuela

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vink v. Valenzuela,

2015 BCSC 232

Date: 20150218

Docket: 49894

Registry: Vernon

Between:

Melissa Vink

Plaintiff

And

Dee-Jay Valenzuela and Dante Ragadio Valenzuela

Defendants

Before: Master R.W. McDiarmid

Reasons for Judgment

Counsel for the Plaintiff:

A. Edwards on behalf of

M. Yawney

Counsel for the Defendants:

E. Harris

Place and Date of Hearing:

Vernon, B.C.

December 15, 2014

Place and Date of Judgment:

Vernon, B.C.

February 18, 2015

- [1] This is an assessment of disputed disbursements following the settlement of the plaintiff's claim for damages resulting from a motor vehicle collision in which Ms. Vink was injured on August 10, 2010.
- [2] In *MacKenzie v. Rogalasky*, 2014 BCCA 446 Mr. Justice Harris for the court writes at paras. 78 - 81 as follows:
- [78] In my opinion, the various iterations of the rule set out above permitting recovery of expenses focuses most naturally on the exigencies inherent in the particular litigation rather than capturing expenses arising from the financial circumstances or other choices of a party. Embedded in the rule is the requirement for a causal connection between the issues in the case and the expense incurred to prove or disprove them.
- [79] The rule, in its current form, permits the recovery of "disbursements...incurred in the conduct of the proceeding". In my view, quite apart from the language "incurred in the conduct of the proceeding" the term "disbursement", when used in the context of a costs rule that relates to the taxation of costs in particular litigation, does contain limits that narrow its potential broad applicability. It appears to me that the purpose of permitting the recovery of disbursements in the context of a costs regime is to permit the recovery of those expenses that arise inherently and directly from the issues in the case which relate, as the appellants suggest, to the direction, management, or control of litigation and which pay for materials and services used to prove a claim or defence. These expenses arise directly from the nature and conduct of the allegations in a proceeding. By contrast, interest expenses do not arise from the nature of the allegations or the conduct of proceedings, they arise from unrelated causes including the financial circumstances of a party. In my view, as such, they do not fall within the meaning of the word "disbursements" in the context of a costs rule.
- [80] It will be apparent that the conclusion I have reached does not depend on limiting the applicability of the word "disbursements" by reference to the phrase "incurred in the conduct of the proceeding". I consider that the meaning of the words "disbursement" or "expense" has always excluded out-of-pocket interest expenses. The addition of the phrase "incurred in the conduct of the proceeding" in the rule in 1990 did not narrow or change the meaning of the word "disbursement" or otherwise limit its application. Rather, the phrase

reinforces and confirms what has always been the case. To be recoverable a disbursement must arise directly from the exigencies of the proceeding and relate directly to the management and proof of allegations, facts and issues in litigation, not from other sources. In my view, that is what is captured by the phrase "the conduct of the proceeding".

- [81] In my opinion, this interpretation of the rule flows naturally from the purposes of a costs regime and the guidance provided on that subject by the Supreme Court of Canada, most particularly in *Walker*. Several points emerge which assist in interpreting the rule. The first is that a costs regime serves multiple functions, only one of which is indemnification. Even in respect of that function, the costs regime provides only partial, and not full, indemnity to a successful party. Accordingly, one is not compelled to conclude that interest expenses must be recoverable because the purpose of the rule is to make a successful party whole. To the contrary, partial indemnification underlies both the recovery of costs on a tariff and disbursements (because the reasonable amount awarded may not fully indemnify the cost of necessary or proper disbursements).
- [3] I recognize that the issue in *Mackenzie* was whether interest expended by a successful litigant in the course of incurring the disbursements was claimable as a disbursement. Nevertheless, the comments of Harris J.A. assist in assessing all disbursements, and have been utilized by me in the assessment.
- [4] The background facts are set out in the affidavit of Michael Yawney, the plaintiff's lead counsel, in his affidavit #2 sworn December 1, 2014 and filed December 2, 2014.
- [5] In his affidavit at paragraphs 3-4, 6 and 8-11, Mr. Yawney deposes as follows:
3. At the time of the Collision, the Plaintiff was 23 years old and just beginning her career as a chartered accountant. She was working for Meyers Penny Norris ("MNP") as an articled student, having attained her baccalaureate degree in business administration in the spring of 2009. She began working at MNP in the fall of 2009.
 4. The following is a list of the injuries suffered by the Plaintiff as a result of the accident:
 - (a) soft tissue injury and pain to the neck, shoulders and back;
 - (b) injury to the left arm;
 - (c) bruising;
 - (d) chronic headaches;
 - (e) sleep disturbance; and
 - (f) chronic pain.
 6. The force of impact was significant. The Plaintiff's vehicle was pushed into the vehicle ahead of her, a 2000 Volkswagen Passat. The Passat, in turn, was pushed into the vehicle in front of it.

8. Ms. Vink was taken from the Collision scene to Vernon Jubilee Hospital by ambulance.
9. In the period following the Collision, Ms. Vink [reported] experiencing severe headaches, neck pain, jaw pain, eye sensitivity, ringing and pain in her ears, pain in her shoulders, in the back of her head, in her right knee and her back.
10. Ms. Vink did not return to work until approximately three months after the Collision. When she did return in October 2010, she [reported] experiencing a significant increase in her pain levels and was forced to cease working again entirely by late November 2010. She next attempted a return to work in July 2011. She completed approximately five months of primarily part time work before she stopped working altogether in December 2011 at the direction of her family doctor. She did not return to work again until the summer of 2013. When she did return, it was on a part time basis (i.e. 3 days a week).
11. Up until the time of settlement of her claim on August 14, 2014, Ms. Vink continued to report experiencing headaches and neck pain on a constant basis. She stated that the pain fluctuated in intensity, but was ever present. She also continued to suffer from light and noise sensitivity (particularly when her headaches were severe), pain in her jaw and pain in her low back.
- [6] Mr. Yawney confirms that he was retained in August of 2010, filed a notice of civil claim on July 12, 2012, and the defendants admitted liability in their response filed September 4, 2012.
- [7] Paragraph 14 of Mr. Yawney's affidavit reads as follows:
 14. Trial was set for five days in the Vernon Registry, to begin on August 18, 2014. The matter settled on August 14, 2014, with the Defendants agreeing to pay \$800,000.00 in damages with costs and disbursements to be assessed.
- [8] At the commencement of this assessment hearing, I was provided with an amended bill of costs. The parties agreed on tariff items and on several of the disbursements. The balance of the disbursements are in issue and will be dealt with under headings following the order in which they were argued by counsel for the plaintiff.
- [9] I was provided with a detailed affidavit from Christine Bigler, a legal assistant for Mr. Yawney. Her second affidavit sworn December 1, 2014 and filed December 2, 2014, confirms by attachment of printouts and invoices that all of the disputed sums were either paid by the plaintiff or by her lawyers, or alternatively, tracked as internal charges to her file.

Photocopies, Scanning and CD/DVD Copying

- [10] The plaintiff claims \$3,802 based on photocopies and printing in the amount of 15,208 pages charged at \$.25 per page.
- [11] The defendants submit that half that amount would be a reasonable amount.

- [12] There is no breakdown in the materials between printing of photocopies used in the litigation and printing of other materials, such as correspondence, which would be considered part of overhead and subsumed in the tariff items.
- [13] In addition, the plaintiff claims \$128.20 for putting the documents on a CD based on \$.15 per page per scan for scanning.
- [14] The issue of his charges for scanning was dealt with in *Arnason V Nerio*, 2014 BCSC 185 at para. 15, where Master Young, quoting from Master McNaughton's decision *Turner v. Whittaker*, 2013 BCSC 712, writes:
- [13] Conceptually, because scanned electronic documents are a substitute for photocopies, and because the courts are encouraging use of this new technology, I conclude that it is not just an overhead cost and that a disbursement amount should be allowed. Rather than set a block amount for each case in which scanning is used, I conclude that it is more appropriate to allow an amount per page for scanned documents. That is because scanning is intended to reduce, and eventually replace, photocopying and both processes create an image of each page of an original document.
- [15] The issue of proportionality has been dealt with by Registrar Sainty in *Dhillon v. Bowering*, 2013 BCSC 1178, where at para. 23 Registrar Sainty writes as follows:
- [23] I must also consider "proportionality" in making my decision. But proportionality is, in my view, a two-way street. The amount of money at issue in an action (large or small) may have a bearing on both the necessity and propriety of a disbursement and whether it is reasonable in the circumstances. No doubt the experts' reports played a part in the settlement offer and influenced the outcome. In my view ... proportionality (which I must consider in assessing costs per Rule 14-1(2)(b)) refers to the significance of the claim; either small or large.
- [16] In that same case, I am assisted by what Registrar Sainty has written at para. 132 as follows:
- [132] I also observe that, generally speaking, not all photocopies made on a file are made for the purposes of the litigation and thus necessary or proper to its conduct (see *Turner v. Whittaker*, 2013 BCSC 712 (Master, as Registrar) and *Raju v. Bui and Insurance Corporation of British Columbia*, 2008 BCSC 1230 (Registrar)). Also, just as with faxes, the use of new technologies (such as scanning and electronically storing of documents) ought to be endorsed as that encourages efficiency and likely will serve to reduce costs (see *Stapleton v. Charambidis*, 2010 BCSC 1642 (Master, as Registrar)).
- [17] This was a somewhat complex case. I was advised that documents were contained in 12 binders.
- [18] I am satisfied that scanning is more efficient than copying.
- [19] On this issue, Ms. Bigler deposes in paragraph 20 of her affidavit as follows:

20. Attached hereto and marked as Exhibit "7" is a true copy of the Nixon Wenger LLP disbursement history ledger showing itemized costs for DVD/CD copying for a total of \$20.00. The Plaintiff has only charged \$10.00 for this disbursement on her Bill of Costs. From time-to-time records are copied onto a DVD/CD for purpose of providing copies of records to doctors. This saves the cost of photocopying expenses that would otherwise be incurred for copying of voluminous records.
- [20] I allow what is claimed for scanning in full at \$128.20. I allow the \$10.00 for the CD. I have taken my determination for allowing those items into consideration and, using the "rough and ready" approach often utilized in dealing with photocopying and apportioning photocopying between what is necessary and/or proper, and what is overhead, reduce the photocopies claimed by 15%. That is a lower reduction than other registrars have made; in making that reduction I have considered the efficiencies deposed to with respect to scanning and putting documents on a CD and have also considered that this is a significant claim and one where photocopying a large volume of documents was probably necessary. Photocopies are allowed at \$3,231.70.

Faxes

- [21] Plaintiff's counsel revised the plaintiff's claim to \$124.95, which defendants' counsel agreed to.

Courier

- [22] Courier expenses are claimed at \$263.97. In submissions, I was advised that these were used primarily to send documentation to experts.
- [23] Ensuring that appropriate documentation is received by witnesses, and ensuring that expert witnesses provide the reports in a timely way is a necessary part of the litigation process. I have considered proportionality, in the context of this matter being of significant monetary value. In that context, the disbursement is also reasonable. It is allowed as claimed at \$283.97.

Long Distance Calls

- [24] These are claimed at \$94.09; the defendants submitted that half that amount should be allowed. Most of the expert witnesses were from places other than within local calling distance of plaintiff's counsel's office. Defence counsel practised in a different city. The long-distance charges appear in exhibit pages 12 and 13 and show slightly over 100 long distance telephone calls. They do not appear to me to have been supplemented by some sort of additional charge.
- [25] Paragraph 14 of Ms. Bigler's affidavit confirms that the ledger shows "each itemized cost and the date it was incurred." On the facts of this case, long-distance charges are necessary and the amount is reasonable. Those charges are allowed in full at \$94.09.

Postage

- [26] Charges for postage include charges for what is referred to in the law firm's ledger as "Medi-tran" courier service, all of which has been combined into one charge under the heading "postage".
- [27] Postage is claimed at \$139.90. Counsel for the defendants has submitted that half of that amount, \$69.65, should be allowed. I agree. A significant component of postage charges is represented in overhead and, while that overhead may have been incurred with respect to the file, it is not reasonable that the amount in its entirety should be borne by an unsuccessful litigant. I allow postage at \$69.65.

Electric Paper Company (Colour Copies)

- [28] In paragraph 15 of her affidavit, Ms. Bigler deposes that these are costs which were paid to the Electric Paper Company representing the costs of colour copying photographs of the vehicles and the accident scene. No explanation was given as to why these needed to be copied out-of-office. In-office colour copies are allowed as a necessary and/or proper disbursement. It is common knowledge that they cost more per sheet to produce than black and white photocopies. No evidence was led as to what in-house colour copying should be allowed at. Counsel for the defendants has submitted that these colour copies be allowed at half of what is claimed, \$42.10, and I agree.

Semita Solutions Ltd. (Investigation)

- [29] The plaintiff claims \$250.00 for payment made to Semita Solutions Ltd. Their invoice sets out that firm provided services in January 2011 and in June 2011. I have reviewed their account which was exhibited as exhibit 4 to Ms. Bigler's affidavit.
- [30] The work done by Semita Solutions Ltd. appears to me to have been completely subsumed in tariff item #1 which is for correspondence, conferences, instructions, investigations or negotiations by a party until the start of the proceeding, for what provision is not made elsewhere in this tariff. The parties agreed that 7 units of the tariff were allowed.
- [31] The proceeding started in July of 2012.
- [32] In many cases, disbursements paid to interview witnesses will be included under tariff items #1, 2 and/or 18. Sometimes circumstances exist where it is either necessary or proper to incur a disbursement for interviewing witnesses or otherwise investigating. There may be situations where the investigator testifies. There may be situations where it would be unwise for paralegals employed by the parties' lawyers, such as where credibility of the witness is in issue. It must be remembered that the onus remains on the party claiming the disbursement. In this case, there is no evidence which meets that onus. The claim of \$250.00 for the disbursement paid to Semita Solutions Ltd. is disallowed.

MNP Records

[33] In paragraphs 17 through 19, Ms. Bigler deposes as follows:

17. Attached hereto and marked as "Exhibit "5" is a true copy of the account of MNP LLP, dated February 7, 2013, for \$778.40, for production of the Plaintiff's personnel file. Also attached with Exhibit "5" is correspondence from Elizabeth Harris dated December 28, 2012, wherein she requested that the Plaintiff provide a complete copy of her employment records from Meyers Norris Penny from 2009 to present. On February 19, 2013, a letter was sent to Ms. Harris from Nixon Wenger LLP providing a copy of the account for production of the requested records and asking for payment. On February 27, 2013, Nixon Wenger received a letter from Ms. Harris stating she wished to speak to MNP about the account. On July 8, 2013, Ms. Harris wrote to Nixon Wenger offering to pay \$200.00 for production of the file; Nixon Wenger LLP replied to Ms. Harris by letter dated July 11, 2013, that it was not agreeable to the reduced rate of \$200.00. On March 3, 2014, Ms. Harris obtained an Order from this Honourable Court for production of the MNP records.
18. I am advised by Pat Gavins, Human Capital Advisor for MNP, by telephone conversation with Ms. Gavins on November 12, 2014, and verily believe it to be true, that she personally had to inspect the Plaintiff's personnel file as it was privileged in nature in order to decide which documents could be disclosed. Ms. Gavins also indicated that the records were voluminous in nature and this was a time-consuming project. Once she had sorted out the materials for disclosure, she then needed to scan and save the documents as well. Ms. Gavins went on to explain that she could not assign this task to a lower paid individual to complete due to the sensitive nature of a personnel record. As a result, this is why the account of MNP LLP dated February 7, 2013, was \$788.40 plus [of] \$94.61.
19. I am further advised by Allyson Edwards, associate employed by the firm of Nixon Wenger LLP, that by email correspondence with Ms. Gavins on or about November 13, 2014, that Ms. Gavins provided to Ms. Edwards a copy of her email explanation to Elizabeth Harris of March 8, 2013, together with a copy of MNP's WIP showing the dates and time spent by Ms. Gavins to prepare the personnel file. Attached hereto and marked as Exhibit "6" to this my Affidavit is a true copy of the email from Ms. Gavins to Elizabeth Harris together with a copy of MNP's WIP.

[34] Exhibit 5 is an invoice rendered by MNP LLP to Michael Yawney dated February 7, 2013. The invoice states "For Professional Services", and then on the next line says:

Providing copies of Melissa Vink's personnel file for MVA

788.40

The invoice adds HST.

[35] On December 18, 2014, I received a supplementary memo to which was attached an email from Pat Gavins to Christine Bigler. The email sets out Ms. Gavins' credentials which state that she holds a professional and human resources designation from the Society for Human Resources Management, was certified in December 1994 and, through job experience at the manager level, continues to hold that designation. She goes on to talk about her 20 years' experience in several disciplines related to employment and human resources. She then goes on to state that her current position is the Regional Human Capital Advisor with MNP in Kelowna and gives a description of her responsibilities.

[36] She then goes on to state the following:

MNP Billing Rates and Confidentiality Policy

All Partners and staff at MNP have billing rates which are assigned based upon an individual's title. My title is that of Manager and my billing rate at the time of the invoice was \$214.

MNP has a strict policy of confidentiality as it relates to its personnel files. I am the only individual at MNP Kelowna, other than my supervisor, Tim Dekker, the Regional Managing Partner, who is permitted access to the staffs' personnel files for the Kelowna and Vernon offices where Ms. Vink worked. Melissa Vink's personnel file contains confidential information, thus I am the only person who could review, photocopy and scan the documents in her file. This was a very time consuming process. The copying of Ms. Vink's personnel file could not be delegated to an individual with a lower billing rate as I am the only one permitted to access the files. I relied upon my expertise in human resources to sort through Ms. Vink's numerous files in order to produce all that was relevant while adhering to the confidentiality policy of MNP.

[37] While I appreciate that professional organizations often charge their clients based on hourly rates and while there is no doubt that obtaining the employment file in this case was necessary, it seems to me to be unreasonable to expect a litigant to pay a charge-out rate which an employer charges out to its clients. There are some things which employers are required to do as part of their position as employers for which they are not entitled to receive remuneration. When orders compelling disclosure are made, they are usually framed in terms of "reasonable disbursements" for production and photocopying, i.e. out of pocket costs.

[38] Without intending to be in any way critical of the employment practices of MNP, privacy concerns of physicians in relation to their patients are of at least equal importance to the privacy concerns that this employer has vis-à-vis an employee who has requested the documents. Physicians' charges for file production, which often include a fee for reviewing their file, are substantially less in most cases than what is claimed here. All documents are subject to litigation privilege.

[39] The defendants' counsel's offer of \$200.00 in these circumstances was reasonable. The account is allowed at \$200.00.

Gumtree Catering

- [40] There was a mediation on July 10, 2014. The affidavit of Ms. Bigler deposes that it was for lunch for the mediation that was booked to take place at the offices of plaintiff's counsel.
- [41] It is typical when motor vehicle accident cases settle at a mediation for the mediation fee to be paid by the defendants. Mediators often hold mediations in their own offices and charge for the use of such offices, either directly or indirectly.
- [42] In this case, there does not appear to be any charge claimed by the law firm apart from this charge for the lunch.
- [43] The case did not settle at the mediation, but it settled approximately one month later.
- [44] In the circumstances, that disbursement is proper, reasonable and allowed as claimed.

O.K. Process Servers

- [45] There was some confusion about which amounts were not in dispute and which amounts were disputed. It appeared from submissions that of the two claims, one in the amount of \$160.00 for two subpoenas, one in the amount of \$80.00 for one subpoena (service of one of the subpoenas was not contested).
- [46] By submission, not evidence, it appeared that the disputed subpoena disbursement was for service on two ICBC adjusters to deal with one of the issues that the plaintiff expected to face.
- [47] If there is any suggestion that a potential witness may not attend, it is necessary for counsel to have proven issuance and service of subpoenas. The amounts are reasonable. The two claims for disbursements for O.K. Process Servers; one in the amount of \$160.00 and a second one in the amount of \$80.00 are proper and are allowed as claimed.

Binders for Trial

- [48] The plaintiff claims \$24.93 for office expense for binders for trial.
- [49] While binders were used, they are reusable and are an item of overhead. That claim is disallowed.

Dr. Woolfenden

- [50] Mr. Yawney, in his second affidavit sworn December 1, 2014 and filed December 2 2014, deposes at paragraphs 24 to 39 inclusive with respect to the fee charged by Dr. Woolfenden.
- [51] Dr. Woolfenden is a neurologist who conducted a neurological independent medical examination.
- [52] At paragraphs 25 to 32 of his affidavit, Mr. Yawney deposes as follows:

25. I asked Dr. Woolfenden to provide his opinion on the following three issues:
 - (a) Whether the Plaintiff's headache symptoms were attributable to the subject Collision;
 - (b) Present and future treatment and rehabilitation recommendations; and
 - (c) The Plaintiff's prognosis for the future with respect to her headache symptoms and how these might affect her in the future.
26. The invoice for Dr. Woolfenden's report is attached and marked as Exhibit "C" to this Affidavit. The total bill for the report is \$7,745.42 plus tax and indicates that said fees pertain to "patient evaluation, review of records (- 2 inches), verbal opinion, written report and treatment letter." Dr. Woolfenden's expert file contains 16 pages of handwritten interview notes, 20 pages of handwritten notes relating to his review of the medical documentation, and three draft copies of his reports.
27. The Defendants have argued that Dr. Woolfenden's fees were "excessive".
28. As set out above, the Defendants took the position in their Response to Civil Claim that the Plaintiff was not injured in the Collision and that any medical condition she suffered from was attributable to other causes. As a result, I believed it was necessary to retain a headache specialist to assess the Plaintiff's headaches in the post Collision period and to provide an opinion relating to the cause of these headaches, their prognosis and recommended treatment for same.
29. In Dr. Woolfenden's opinion, as set out at page three of his report, the Plaintiff developed a chronic headache attributed to whiplash as a result of the Collision.
30. For their part, the Defendants retained a neurologist, Dr. Cameron, to independently assess the Plaintiff. Dr. Cameron essentially agreed with Dr. Woolfenden on the nature of the headaches attributable to the Collision.
31. In my experience, having retained Dr. Cameron myself in the past, I know that he charges similar amounts for these types of assessments as Dr. Woolfenden did in this instance.
32. Prior to the Collision, the Plaintiff suffered from occasional migraine headaches. As part of his assessment, Dr. Woolfenden was required to analyze the pre Collision medical history and put the post Collision headaches into context.
- [53] In paragraphs 33 to 39 of his affidavit, Mr. Yawney provides a summary of Dr. Woolfenden's opinions, including future treatment, recommendations in the event of worsening of the plaintiff's pain symptoms, prognosis and affect the headaches will probably have on the plaintiff. He also deals with causation and with the worsening of headache symptoms which coincided with the plaintiffs attempt to resume full time work.
- [54] Dr. Woolfenden's report was appended as exhibit "B" to Mr. Yawney's affidavit. In that report under "Qualifications", Dr. Woolfenden writes as follows:

I am a duly qualified neurologist and a Fellow of the Royal College of Physicians and Surgeons of Canada. I have been licensed to practice neurology in the Province of British Columbia since 1998. My scope of practice is general and cerebrovascular neurology. I practice at Vancouver General Hospital, the Province's largest tertiary care referral center. Approximately 95% of my time in neurology is clinical and 5% administration/teaching. About 70% of my clinical time is spent seeing patients with general neurological disorders and 30% with cerebrovascular diseases. The most common referral to my general neurology practice relates to evaluation of patients with pain (of both neurologic and non-neurologic origin), including those with spinal strain injury and/or headache.

- [55] Ms. Bigler attached as exhibit 8 a copy of Dr. Woolfenden's account, together with a breakdown of components and time spent. In the comments section of the account, the following is written "For patient evaluation, review of records (-2 in), verbal opinion, written report, and treatment letter."
- [56] The second page of the exhibit (exhibit page 63) sets out what is essentially a retainer letter signed by Mr. Yawney in two places as the "requester", and as the "payer". It sets out an agreed-upon hourly rate of \$625.00, and then gives some average component times for an IME, including in particular two to three hours (usually two and a half to three hours) for patient history, examination of documentation of evaluation, 75 to 120 minutes per inch of records, four to six hours for a written report, including the first round of content editing, and some other charges. Exhibit page 64 is a detailed breakdown of the time spent.
- [57] It shows in this case that Dr. Woolfenden expended 12 hours and seven minutes to which was added \$172.50 representing 5.75 hours at \$30 an hour for typing. From my review of that exhibit page 64, it is apparent that the review of records in this case took in excess of four and a half hours (4 hours 33 minutes are billed), preparation, dictation and editing of the report, including dictating the treatment letter took just under four and a half hours, evaluation of the plaintiff and documentation of that took in excess of three hours.
- [58] In response, the defendants provided as an attachment to the affidavit S. Babcock made and filed December 11, 2014, the British Columbia Medical Association ("BCMA") Guideline for uninsured services effective April 1, 2014, and also exhibited to that affidavit an invoice from Dr. Cameron (the same Dr. Cameron referred to by Mr. Yawney) which charged a fee for "neurological assessment, review of clinical records, and enclosure), presumably the requested medical-legal opinion regarding Ms. Vink, a fee of \$3,945.92, plus GST.
- [59] Under the heading "medical-legal fees", his Clause A 000734 for a "medical legal opinion", which sets out in eight lines what is covered with a guideline fee of \$1,659.00.
- [60] The test for evaluating expert fees was set out by the court of Appeal in *Van Daele v. Van Daele* (1983), 56 B.C.L.R 178 (C.A.), as quoted by Master Young in *Green v. Conely*, 2014 BCSC 2243 at para. 35:

[35] In *Van Daele v. Van Daele* (1983), 56 B.C.L.R. 178 (C.A.), the court articulated the test for evaluating whether expert report fees should be approved:

[11] ...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 or expense was incurred.

[Emphasis in original.]

Master Young then considered several claims for expert fees at paras. 36-87.

[61] The issue of how much it would be reasonable to expect an unsuccessful litigant to pay to a successful litigant for expert fees is at times a difficult issue. As has been stated in other decisions, experts charge what they charge, and a party who requires expertise must pay what the expert charges.

[62] As is apparent from Dr. Woolfenden's qualifications, he is in active practice. He treats patients. A common referral to his general neurology practice relates to the evaluation of patients with pain, including those with headache. His rate, which is obviously many times the hourly rates charged by skilled tradesmen, and at least double the hourly rates charged by many of the lawyers whose accounts come before me to be reviewed in accordance with the Legal Profession Act. On the other hand, it is an hourly rate which is not markedly different from some lawyers' hourly rates. His hourly rate seems to me to be appropriate considering his specialization.

[63] No evidence was led as to how many hours were expended by Dr. Cameron.

[64] While some medical practitioners charge in accordance with the BCMA Guideline for uninsured services, many do not. So far as I know, there is nothing which requires them to charge in accordance with those Guidelines.

[65] A litigant who requires the assistance of an expert for the purpose of providing expert testimony in court, of necessity requires that expert to take time away from what, in Dr. Woolfenden's case, is the mainstay of his practice, which is assessing and treating patients. It is important for the court to have that expert properly prepare reports.

[66] I have reviewed Dr. Woolfenden's report. I find that the time he expended was reasonable, his hourly rate is reasonable given his qualifications (expertise) and his account is allowed as presented at \$7,745.42.

Meridian Rehabilitation Consulting Inc. (Lydia Phillips)

[67] Mr. Yawney deposes to his reasons for retaining Lydia Phillips, an occupational therapist with Meridian Rehabilitation Consulting Inc.

[68] He sets out in his reasons in paragraphs 40 to 49 of his affidavit. Paragraph 41 is as follows:

41. The functional capacity assessment provided an objective assessment of the Plaintiff's limitations, particularly relating to her household abilities and work duties. This information provided evidence to support the Plaintiff's claim for wage loss, past and prospective, and impairment of housekeeping capacity.

[69] He deposes in paragraphs 47-49 as follows:

47. According to Ms. Phillips, the Plaintiff's functional tolerances with respect to sitting and neck positioning did not meet the demands of her sedentary job as an accountant. According to Ms. Phillips, this fact explained why the Plaintiff had been "unable to return to full time employment at her job, she regularly aggravate[d] her symptoms to a level where she [was] not able to function."

48. In May 2014, I asked that Lydia Phillips review the report prepared by Dr. Gordon Wallace (psychological and vocational rehabilitation consultant) dated March 24, 2014, and provide a brief supplemental report if the contents of Dr. Wallace's report changed her opinion in any material way. In response, Ms. Phillips prepared a one page report dated June 7, 2014, a copy of which is attached and marked as Exhibit "F" to this Affidavit. In her report she addresses the findings of Dr. Wallace and stated that his findings did not change her opinion; she was still "not confident that [the Plaintiff] would be able to return to full time employment." Ms. Phillips indicated that Dr. Wallace's recommendations for future vocational consulting ought to be included in the future care recommendations set out in her own prior report. The total amount billed by Ms. Phillips for this one page report was \$247.50. A copy of the relevant invoice is attached and marked as Exhibit "G" to this Affidavit. The Defendants dispute the cost of the supplemental report.

49. The supplemental report of Ms. Phillips was not served on the Defendants. In my experience, it is prudent to provide experts with the reports of other experts prior to trial to determine whether their opinion changes in any respect after reviewing same. If this is not done, the experts are often not fully prepared to be cross examined by the defense.

[70] Exhibit E to Mr. Yawney's affidavit sets out the invoice, which details that ten hours were spent February 17 and 18 doing a two-day assessment and interview, and then between February 18 and February 28 the functional capacity evaluation report was written.

[71] Ten hours were charged for the February 17 and 18 two-day assessment and interview, and an additional ten hours were charged for the report writing.

[72] In addition, there was a charge of 1.5 hours for reviewing medical documents and 2.5 hours for a cost of care report. All of the reports were billed at an hourly rate of \$170.00.

[73] The defence argues that the Meridian charges are excessive. I disagree.

- [74] A functional capacity evaluation requires sufficient time to conduct an assessment. Assessments cannot be "piecemealed". In some cases, assessments can be done in one day; this was obviously a serious case as summarized by Mr. Yawney in paragraph 47 of his affidavit.
- [75] It is apparent that the cost of care report was prepared utilizing, in part, the results of the functional capacity evaluation. Similarly, there is overlap between reviewing medical reports for a functional capacity evaluation and reviewing medical documents for a cost of care report, as is apparent from a review of the report dated March 3, 2014. A functional capacity evaluation and cost of future care report are contained in one report. This strikes me as efficient and not extravagant.
- [76] The linkage between the two components is succinctly summarized in the first paragraph of the cost of future care section, where the author notes:
- I have been asked to provide recommendations for medications, therapies and equipment to assist Ms. Vink to reach a functional state that is as close as is reasonably possible to her pre-injury state.
- [77] The defendants have submitted that \$2,000.00 should be allowed; no evidence has been led as to how these two issues, for which it is probably necessary, but certainly proper, to have opinion evidence, could be adequately done for the amount submitted by the defendants.
- [78] Meridian Rehabilitation Consulting Inc. has a head office in Vernon. In submissions, as confirmed by the address to which the pre-bill notes Ms. Vink's residence, she lives in Vernon. She is not entitled to be paid conduct money to attend at Meridian's office. The claim for conduct money is denied.
- [79] As set out in paragraphs 48-49, the occupational therapist was asked to review the psychological and vocational consultant's report and provide a brief supplemental report, which was not served.
- [80] The test with respect to these reports is not whether or not they were served, but whether at the time they were ordered they are either necessary or proper, and if either necessary or proper, what is a reasonable amount which ought to be borne by the unsuccessful litigant.
- [81] Such a report is not necessary, but it is proper. It is somewhat extravagant, and I would allow half of what is claimed, \$123.75.

Dr. Stewart

- [82] Mr. Yawney deposes at paragraphs 50 to 54 with respect to Dr. Stewart, a physiatrist.
- [83] The defendants did not object to, and indeed agreed, to pay the \$3,000.00 charged by Dr. Paramonoff, also a physiatrist.

- [84] In paragraph 50 of his affidavit, Mr. Yawney deposes to the prior experience with Dr. Paramonoff and the delay and difficulty his office had in obtaining a report in a timely fashion. That is why he chose to retain a different physiatrist.
- [85] His rationale for doing so cannot be criticised. However, there was obviously significant overlap necessitated by retaining a second physiatrist to do an updated report. Dr. Paramonoff's report dated May 10, 2012, but actually received by Mr. Yawney on November 27, 2012, is appended to his affidavit as exhibit A. Dr. Stewart's report, dated May 16, 2014, is appended as exhibit I. I have reviewed them both. There are significant areas of overlap. In addition, Dr. Stewart properly reviewed Dr. Paramonoff's report.
- [86] It is unreasonable for the defendants to bear the costs arising from the duplication. It is, however, proper for an updated report. The claimed conduct money for travel, airfare and hotel relating to attendance on Dr. Stewart total \$561.15. I allow half that amount of \$280.58 for those three claims, recognizing that there are some minor discrepancies between the actual expenses and what was claimed.
- [87] I allow \$1,750.00 for Dr. Stewart's report and \$46.35 for his file charges.

Dr. Gordon Wallace

- [88] Dr. Gordon Wallace holds a PhD in clinical psychology. He is a registered psychologist. He was retained to assess the plaintiff's residual employability potential. His report dated May 24, 2014 was appended as exhibit J to Mr. Yawney's affidavit.
- [89] On page 5 of his report, he poses the question "If Ms. Vink can return to accounting, will she be able to competitively maintain that occupation on a full-time or part-time basis?" Dr. Wallace concludes this section as follows:

From a rehabilitation psychology perspective, this therefore leaves Ms. Vink in a tenuous situation in terms of being able to meet the basic foundational skills required of competitive employment for the rest of her working life. She will likely continue to require an understanding and accommodating employer who is willing to make allowances for the negative effects of her ongoing pain and discomfort.

- [90] Mr. Yawney deposes to why he felt it was prudent to obtain the opinion of a rehabilitation psychologist regarding the plaintiff's residual employability potential. He sets this out in paragraphs 55 through 62 of his affidavit.

- [91] In paragraph 55 of his affidavit, he deposes as follows:

I felt that such an opinion would assist the trier of fact in understanding the extent of the impact of the Collision on the Plaintiff's ability to work and earn income, particularly in a more complicated claim such as this where the Plaintiff was injured when she was just beginning her career as a chartered accountant.

[92] At paragraph 61 of his affidavit, he deposes:

61. At page seven of his report, Dr. Wallace identified the vocational limitations imposed upon Ms. Vink as a result of the Collision. These included:

- (a) A delay of approximately two years in her professional development;
- (b) A negative impact on her residual earning capacity;
- (c) A reduction in the range of available accountancy positions (owing to her ability to work only part time hours);
- (d) A reduction in her eligibility for promotional advancement in accountancy; and
- (e) Being at a higher risk of being let go from her position on account of her reduced work capacity and need for accommodation.

[93] The defendants have submitted that the retention of Dr. Wallace was unnecessary. I disagree. The reasons deposed to by plaintiff's counsel in retaining Dr. Wallace was proper.

[94] His account is appended as exhibit 17 to Ms. Bigler's affidavit. It sets out that 14.25 hours was expended by him at a billing rate of \$300.00 per hour. I have reviewed his qualifications.

[95] It is difficult to accurately compare accounts from one professional with accounts from a completely different professional, such as, for example, a neurologist.

[96] I am mindful of what Harris J.A. wrote in para. 81 of MacKenzie in that a cost regime serves multiple functions and provides only "partial and not full indemnity to a successful party". While obtaining the report from Wallace & Associates was proper, not all the cost of that report ought to be borne by the defendants. I allow the report at \$3,000.00 for professional services, plus \$625.00 for technical support services, plus \$75.00 for test materials, for a total of \$3,700.00, plus applicable taxes.

[97] Dr. Wallace maintains an office in Kelowna. As noted, Ms. Vink resides in Vernon. The travel distance between Vernon and Dr. Wallace's office is, in terms of time (and possibly distance), less than travel between municipalities situated within the Greater Vancouver Regional District. Conduct money to attend one's own witness who resides nearby is not a reasonable expense. It is an expense which the plaintiff should be expected to bear on her own. Her claim for \$72.00 conduct money is denied.

[98] On May 26, 2014, defendants' counsel requested the contents of Dr. Wallace's file and a complete copy of his file, including letters and accounts, as well as some other items as set out in that letter. All of that was provided. Dr. Wallace billed plaintiff's counsel \$196.56, which included a fee for review of the file for production of records and a copying fee of 10 pages at \$1.45 per page and 159 at \$.30 per page.

[99] Some file review is appropriate. The defendants requested this file. The disbursement for production of the file is allowed as claimed at \$187.20, plus GST.

Associated Economic Consultants (Robert Carson)

[100] Mr. Yawney deposes at paragraph 65 of his affidavit to why he retained an economist and also sets out some of the complications with respect to this plaintiff's situation based on:

the Plaintiff's inability to resume full time work as an accountant [which] caused her to lose income prior to the scheduled trial date and it presented a multitude of future employment scenarios, all requiring identification and analysis.

[101] The defendants do not suggest that such a report is not proper; rather, they take issue with the amount and suggest that instead of the charge as presented, at \$4,350.00, \$3,305.00 should be allowed. Similar to the reasons I gave in reducing the account of Dr. Wallace, I find that a reasonable amount is the amount suggested by counsel for the defendants, \$3,305.00.

[102] In reaching this conclusion, I have considered other accounts of Robert Carson on other files. They are often presented as simple multipliers, for which an account in and around \$500.00 is often rendered. In allowing this account at six times that number, I recognize the complexities, but also recognize that this is one of those disbursements where full indemnity of a successful party is reasonable.

[103] As deposed to by Mr. Yawney, the matter was settled on August 14, 2014, four days prior to the scheduled commencement of the trial.

[104] In paragraph 67 of his affidavit, Mr. Yawney deposes that he had a telephone conference with Mr. Carson in order to prepare for trial and to specifically address the objections to Mr. Carson's reports raised by the defendants. That sort of discussion was probably necessary in the circumstances, but in any event, it was certainly proper and the amount charged, \$135.00, is reasonable. That invoice is allowed as presented.

SUMMARY OF DISPUTED ITEMS

Disbursement:

Allowed At:

Photocopies:

\$3,231.70

Long distance telephone calls:

\$94.09

Faxes:

\$124.95

Courier:

\$263.97

Scanning:

\$128.20

Postage:

\$69.65

Electric Paper Company:

\$42.10

Semita Solutions:

Disallowed

MNP Records:

\$200.00

CD/DVD in-house copying:

\$10.00

Dr. Woolfenden:

\$7,745.42

Melissa Vink's expenses re Stewart IME, including airfare and hotel:

\$280.58

Melissa Vink's expenses re conduct money for Phillips' IME:

Disallowed

Melissa Vink's expenses re Dr. Wallace's IME:

Disallowed

Meridian Rehabilitation IME report:

\$4,080.00

Dr. Stewart's report:

\$1,750.00

Wallace & Associates' report:

\$3,700.00

Meridian Rehabilitation comment report:

\$127.75

Wallace & Associates' expert file:

\$187.20

Dr. Stewart's expert file charge:

\$46.35

Associated Economics Consulting report/Cost of Future Care report:

\$3,305.00

Gumtree Catering:

\$67.65

O.K. Process Servers:

\$160.00

Office expenses - binders:

Disallowed

Associated Economics Consulting telephone conference:

\$135.00

O.K. Process Servers re subpoena:

\$80.00

[105] The tariff items are assessed by consent as agreed at 107 units, for a total, including taxes, of \$13,182.40. The remaining disbursements are assessed by consent as agreed. Either counsel has liberty to present a certificate, setting out the total costs and disbursements, including applicable taxes, with liberty to apply if there are any other issues which arise.

"Master R.W. McDiarmid"

MASTER MCDIARMID

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