

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20170711  
Docket: M133443  
Registry: Vancouver

Between:

**Kristina Lucille Ponder**

Plaintiff

And

**Peter Stephen Dodds**

Defendant

Before: Master Tokarek

As Registrar

## **Oral Reasons for Decision**

In Chambers

Corrected Decision: This oral decision has been  
corrected at paragraphs 23 and 25.

Counsel for the Plaintiff:

Ruth E. McIntyre  
Cocuta Sirian

Counsel for the Defendant:

Jennifer J.L. Brun

Place and Dates of Hearing:

Vancouver, B.C.  
July 10 & 11, 2017

Place and Date of Ruling:

Vancouver, B.C.  
July 22, 2017

[1] **THE COURT:** This appointment was taken out to address the bill of costs of the plaintiff following a global settlement of three personal injury claims. The defence raises either novel issues or issues that may not necessarily be considered novel but are raised in a novel way, if that makes sense.

[2] The overview with respect to the defence position is that the plaintiff's conduct raised a number of suspicions that were of great concern to the defence, sufficiently so that the defence applied before Mr. Justice Steeves for an order seeking that the plaintiff was not entitled to any disbursements because of her fraudulence conduct.

[3] The first aspect of the defence's concern had to do with the allegation that the plaintiff was involved in getting another person to prepare a false statement to present to the insurer.

[4] The second aspect of concern that was presented to me was that the plaintiff misrepresented her condition in the broadest sense by purporting to be virtually disabled to the extent that she could barely walk from her chiropractor's office to the massage therapist, which was some three offices away, not office blocks or office buildings, but in the same building three offices over, combined with the fact that she said she was so disabled that all she could do was lock herself in her room for two and a half weeks because of the intense migraine headaches and other symptoms she alleged.

[5] The defence is suspicious of all of that because they have photographs of the plaintiff attending a bachelorette party and a wedding during that same time frame and looking in those photographs as though she was suffering no indicia of pain or suffering of any kind.

[6] The third element, again in the broad sense, that was presented was to the effect that after three accidents, of which one was very minor, the plaintiff settled for a global amount of \$10,000 with no costs but reasonable disbursements. One of the three accidents was described as quite severe, in which the plaintiff was in a vehicle that was pushed some 20 feet forward as a result of being rear-ended.

[7] The defence application before Mr. Justice Steeves was unsuccessful. Mr. Justice Steeves said, and I am not quoting him, but words to the effect that although he could not find that there was not fraud, nor could he find that there was, and he further declined to use the evidence of the wedding pictures relative to the description of injuries as part of the determination on the issue of fraud. He was content to allow that issue to be resolved elsewhere.

[8] Defence counsel takes exception to a number of disbursements in light of the forgoing and in particular with respect to the medical legal reports, on the basis that she is not asking me to find that the plaintiff was fraudulent, but rather that the plaintiff was not completely forthcoming when she attended the various appointments with medical practitioners and described her symptoms to them.

[9] The interesting aspect of that submission is the analogy defence counsel draws to circumstances referred to in other authorities, most notably *Burton v. Williams*, 2000 BCSC 987. In that decision at paragraph 28 Master Baker said:

Moreover, if facts are essential to an expert's report, then the facts must be thoroughly researched and must be presented to the expert in a balanced manner; otherwise the consequent report is seriously devalued (*Fung v. Berkun* (1982), 1982 568 (BCSC), 36 B.C.L.R. 352).

[10] Extensive submissions were made with respect to the applicable tests the registrar should use in determining whether to allow any particular disbursement. A necessary disbursement is one essential to the conduct of the litigation and a proper disbursement is one that may not be necessary but reasonably incurred for the purposes of the proceeding, as Master Horn stated in the *McKenzie* decision, to which I was referred.

[11] As well, there were submissions made with respect to the concept of proportionality and the extent to which that concept should be a factor in assessing the reasonableness and necessity and propriety of the disbursement. I have considered all of those authorities, as well as the extensive submissions over the better part of the last two days and will deal with them in the order claimed in the bill of costs.

[12] Counsel advised that with respect to the two non-taxable disbursement on the first page, those charges are now going by consent. With respect to the taxable disbursements starting on page 2, defence counsel put plaintiff's counsel on notice that strict proof of the disbursements would be required.

[13] With respect to items 1, 2 and 3, that is photocopies, postage and facsimiles, the onus of strict proof has not been met on the material. Consequently, I would allow the sum of \$500 for photocopies simply because the evidence is clear that there were some necessary and essential photocopies, but is completely silent on the need for or propriety of some 5,000 pages of photocopies.

[14] Item 4, 5 and 6 are consented to. The next item, corporate search, is disallowed. The next item, binding of court books, on the authorities is an overhead expense and is disallowed.

[15] Turning now to the more contentious disbursements, being the medical legal reports, I am satisfied that the clinical records and other material available to plaintiff's counsel was such as to satisfy the test that it was reasonable and necessary in the circumstances to order these reports.

[16] I am clearly suspicious of the plaintiff's conduct, but I do not know what the plaintiff told the doctors, or what she was asked. It would be reasonable to assume that had the plaintiff volunteered that in fact she was not as disabled as some of the doctors may have been led to believe, it may have affected their opinion in some way. I do not have the requisite knowledge or the requisite evidence to conclude that that would be so in light of all the other evidence and objective findings.

[17] Things may have been different if the plaintiff had taken the stand and been cross-examined or if there had been affidavit or other acceptable evidence from one or more of these doctors dealing with that issue, but I am not prepared to disallow the disbursements simply because from a layman's perspective I happen to think that being a little more forthcoming about one's abilities and lack of disabilities might

have resulted in more useful or better opinions coming from the medical practitioners.

[18] The first report of Dr. Tomaszewski is allowed. The second report was necessary because he could not reach a definitive conclusion in his report, but it is repetitive and it is open to the registrar to disallow disbursements for a number of reasons, including extensive or unnecessary narrative. Consequently, I am going to reduce that report to \$1,300 from the \$1,659. I am similarly going to reduce the next report of April 18 to \$1,300.

[19] The clinical records of \$108.70 and \$111.20 are allowed by consent. The onus has not been met with respect to the clinical records for \$160. There seems to be some confusion as to whether that is related to some telephone attendance as opposed to clinical records, so that item is disallowed. The trial preparation is allowed.

[20] With respect to the trial cancellation, the authorities to which I have been referred seem conclusive that there should be something from the doctor to suggest that the cancellation charges bear some relationship to lost income he would incur, for example, by not booking patients that day. I appreciate that doctors agree to write reports and attend as witnesses on terms they agree to with plaintiff's counsel, but that does not necessarily mean that any and everything agreed to between those parties can be passed on as a reasonable disbursement to the other side. Absent any evidence in that respect, I am disallowing the trial cancellation fee.

[21] I am, for the reasons earlier referred to, allowing the two reports and trial preparation of Finlayson. Dr. Zarkadas' report is in considerable measure a duplication of the contents of the substance of the other reports. However, he is conducting an examination from a different perspective and a different discipline. I am going to allow his report at \$5,000, as well as his review and trial preparation for \$1,500.

[22] Before I go on, did either of you address that -- the other issue for 500, Dr. Zarkadas's file?

[23] MS. McINTYRE: Yes, I did, Your Honour. That was the Rule 11 request for his file, the experts to produce their file. And my friend requested --

[24] THE COURT: Yes.

[25] MS. McINTYRE: -- you know, pursuant to Rule 11.

[26] THE COURT: That item is allowed as well.

[27] With respect to the MRIs for the knee, hip, shoulder and arthrogram for the left shoulder, the evidence was essentially that those tests or procedures were requested not for the purpose of litigation but for essentially treatment purposes and diagnostic purposes. Some or all of them may have been requested by the doctors to be done privately to save time, but there was no evidence with respect to why speed was necessary and why the imaging could not have been achieved through the normal procedures of the existing health care system.

[28] There is the further concern with respect to the knee as to whether that was as a result of or attributable to any or all of the accidents, but on balance given the suggestion that the knee problem manifested itself as a result of the hip problem and the hip problem, not to be facetious, but connected to the accident problem, I would not have disallowed it for that reason. So those four items are disallowed.

[29] The Reportex attendance is by consent, as is the Dodds, the next entry for \$377.50 and the next entry for \$505. Those all go by consent. For the reasons stated above, I am allowing Dr. Hammond's report. On page 3, the first entry of \$105 is by consent. That is allowed, as is the trial preparation and his clinical records. The report of the neurologist, Dr. Robinson, is also allowed, as is the Paul Peel report. Clinical records are by consent. Peel records and trial preparation is allowed. The JR Rehabilitation records go by consent.

[30] The PETA report actually presents some difficulty. The assumptions in that report are out by a few months with respect to one aspect of the wage loss. There is also the request that the economist consider the inability to work due to the plaintiff injuring herself. Although that injury was from a fall down the stairs as opposed to the motor vehicle accident, plaintiff's counsel was presumably going to try to tie the fall down the stairs to the hip and make some claim on that basis. Is that a fanciful, to use Master Baker's terminology, effort? I am going to allow that report at \$2,000. The consultant's file is also allowed and the administration fee goes by consent.

[31] Is that it? I can excuse myself, and you can do the mathematical calculations if you want a certificate signed today. If you do not, you can do it at your leisure and send it up to me, but it should come to me within the next five business days or so, as I am going to be difficult to reach thereafter.

[32] MS. McINTYRE: I do have one question, Your Honour.

[33] THE COURT: Yes.

[34] MS. McINTYRE: With regard to the corporate search, I had presented that to my friend and I did not get a response back. That was the search of the defendant vehicle in the second accident. And --

[35] THE COURT: But it was not, though, was it?

[36] MS. BRUN: This was something that my friend showed me at the break, and as a result of not having an opportunity to reply further, I never advised the court. But I am quite content with the \$24.50 charge --

[37] THE COURT: I thought you said that -- all right. Well, it does not matter. All right.

[38] MS. McINTYRE: It was yesterday I think --

[39] THE COURT: That was yesterday. Okay. Then okay. The search goes then for 24 whatever it was. \$24.50.

[40] MS. McINTYRE: And I just have a question, I am not sure. Procedurally there were a number of filing charges for the last three proceedings in this matter, and I do not know how -- in terms of extra disbursements that have been incurred ...

[41] THE COURT: Well, there are -- you get -- you are awarded units and disbursements with respect to this registrar's hearing. Nobody has popped up yet with offers to settle and anything of that nature. So I assume none of that is in the offing. Absent that, you would get your costs.

[42] Now, I do not know -- certainly of everything before me. Did Justice Steeves deal with any aspect of --

[43] MS. McINTYRE: In that -- in that proceeding he did not make an order on costs. Yeah, it is really -- sorry?

[44] MS. SIRIAN: I am sorry. He made an order that there are no costs payable to either party.

[45] MS. McINTYRE: That is -- yes.

[46] MS. SIRIAN: However, Registrar Cameron for the prehearing made an order that costs for that date go to the taxation. So we are dealing with Registrar Cameron and the two days before Your Honour.

[47] THE COURT: Just Registrar Cameron and the two dates, not the --

[48] MS. SIRIAN: Not Mr. Justice Steeves --

[49] THE COURT: Anything in front of Justice Steeves --

[50] MS. McINTYRE: Yeah, Mr. Justice Steeves did not make ...

[51] THE COURT: Does that accord with your recollection then, as well?

[52] MS. BRUN: I have the proceedings from the prehearing conference, so I am just looking. I -- I agree with Mr. Justice Steeves that it was the parties bear their



own costs. And, yes, my friend is correct that Registrar Cameron says costs of today's appearance will be for presider at the taxation.

[53] THE COURT: All right. Well, costs normally go to the successful party. You are awarded, then, the costs of the day before Registrar Cameron and the two days before me.

[54] MS. McINTYRE: Well, yeah. Well, the day and a half before --

[55] THE COURT: It would be two days because we did ...

[56] MS. McINTYRE: We commenced at 11:30.

[57] THE COURT: Today. And we went -- and what time -- we carried on the whole day yesterday, didn't we?

[58] MS. McINTYRE: Yes.

[59] THE COURT: One hour and one and a half -- two and a half hours today --

[60] MS. McINTYRE: So that is probably --

[61] THE COURT: -- so it is one and a half days for today --

[62] MS. McINTYRE: One and a half --

[63] THE COURT: Yes.

[64] MS. McINTYRE: -- for this, and then one for --

[65] THE COURT: And one for yesterday, yeah.

[66] So do you want to do the math now or do you want to do it later and ship it up to me?

[67] MS. BRUN: It is really up to my friend --

[68] MS. McINTYRE: If we could take a break and do the math, that might be --

[69] THE COURT: Oh, yes, I will excuse myself for 15 minutes or so and then come back. If you want. Or as I say you can take --

[70] MS. McINTYRE: It is easier that way.

[71] THE COURT: All right. I do not have a calculator that works, or I would offer it to you. But presumably you do. So all right. Thank you.

[72] THE CLERK: Order in chambers. Chambers is stood down.

**(CHAMBERS STOOD DOWN)**

**(CHAMBERS RECONVENED)**

[73] MS. McINTYRE: Okay. We have done the math.

[74] THE COURT: Okay.

[75] MS. McINTYRE: And so we have got -- we've actually agreed on the second bill.

[76] THE COURT: Agreed on?

[77] MS. McINTYRE: The second bill for these proceedings.

[78] THE COURT: Oh, I think there are two items, disbursements.

[79] MS. McINTYRE: And disbursements.

[80] THE COURT: And disbursements.

[81] MS. McINTYRE: We -- we agreed on the photocopies.

[82] THE COURT: So which one do you want me to sign? The one that is all filled in?

[83] MS. McINTYRE: Yes.

[84] THE COURT: Do you have a total somewhere. Oh, that is the total, 38 ...

[85] MS. McINTYRE: We totalled it after the JR Rehabilitation [indiscernible].

[86] THE COURT: Sorry, what is the date today? July 11?

[87] MS. McINTYRE: 11.

[88] THE COURT: Okay. Oh, well, you do not need the certificate part filled out or do you? I have seen the -- do you need the certificate filled out as though it is going to be a judgment, or do you expect you are going to get paid?

[89] MS. McINTYRE: Well, maybe we should get -- I hate to be that way, but maybe we should have it filled out. [Indiscernible] on my friend.

[90] THE COURT: \$830.63?

[91] MS. McINTYRE: That is the disbursements. The costs are -- yeah.

[92] THE COURT: That is what -- that is what -- oh, fine. Oh, I do not know what you have done here then. How much is this one? You have so many different numbers here. Is it ...

[93] MS. BRUN: So the -- the total costs agreed should be --

[94] MS. McINTYRE: Yeah.

[95] THE COURT: Well, that is -- that is just for today. So what does that come to?

[96] MS. McINTYRE: Oh, this one is -- you got to add it up.

[97] THE COURT: Well, I do not know, I thought it said \$830.63.

[98] MS. McINTYRE: Yeah, but that is just for the disbursements. There is the costs as well.

[99] THE COURT: \$800 disbursements for this hearing?

[100] MS. SIRIAN: Yes.

[101] THE COURT: Really?

[102] MS. McINTYRE: Yes.

[103] THE COURT: Get into the disbursement business. It seems lucrative.

[104] MS. SIRIAN: \$240 was the court fees.

[105] THE COURT: Okay. Well, she is doing that --

[106] MS. McINTYRE: [Indiscernible] total.

[107] THE COURT: What do you say the costs were \$38,640?

[108] MS. BRUN: Yes, \$38,640.40.

[109] THE COURT: Right. So you saved \$11,000. You hoped to save 30,000.

[110] MS. BRUN: You win some you lose some.

[111] THE COURT: I do not know that I would call this a loss.

[112] MS. McINTYRE: No one's a winner in this.

[113] THE COURT: No one's winner. But no -- I do not think anyone's a loser either.

[114] MS. McINTYRE: Okay. So this one ... this one is \$2,309.03. I have just written it as [indiscernible].

[115] THE COURT: Have you looked -- I mean, you got three \$500 amounts here. \$562, \$590, \$500 and then some other stuff. And then ... \$800, and then it gets to \$2,300. Have you seen this. Just have a double check. I do not know how this could be \$2,300. It is not possible.

[116] MS. McINTYRE: My friend did -- there is 12 units, which is \$1,437.40, including the GST, PST.

[117] THE COURT: Oh, okay.

[118] MS. BRUN: I think the confusion is that there is a total costs amount midway on page 2, and then a total disbursement amount.

[119] MS. McINTYRE: There is 240 non-taxable --

[120] MS. BRUN: At the bottom.

[121] THE COURT: You agree it is 23-whatever?

[122] MS. BRUN: I have not done that last calculation. I could do that just now.

[123] THE COURT: Okay.

[124] MS. McINTYRE: So add the two together? Yeah.

[125] MS. BRUN: This is for the prehearing conference in addition. So it is for two full days of hearing plus the prep. So the amount that I reach is \$2,309.03.

[126] THE COURT: And 3 cents. Yes. Okay.

[127] MS. McINTYRE: It is expensive because of the three [indiscernible].

[128] THE COURT: Okay. There are your certificates signed. I think we are done. Now I am going to return a lot of stuff to you. Not that, not that. Return. Not that, not that. I think those two I have got to return. And I suspect I wrote on all the rest. So I will just take those.

[129] Just as a matter of interest, what does a losing party pay for jury trials, per day? You still pay for the room; right?

[130] MS. McINTYRE: Per day, just to pay for the room it is -- I am trying to remember. It is \$75 per person sitting there. So 75 times eight. And then you have got -- that is for each person. And then I think you have got --

[131] MS. SIRIAN: For each day.

[132] MS. McINTYRE: For each day. And then you have the court booking of the room. And also the experts.

[133] THE COURT: Oh, the experts are the fortune. I mean, that is probably \$5,000 a pop or so, 3- to 5- anyway minimum; right?

[134] MS. McINTYRE: Yeah.

[135] THE COURT: So there is a \$50- or \$60,000 bill facing a five, six, seven day --

[136] MS. McINTYRE: Or more.

[137] THE COURT: -- jury trial or more.

[138] MS. McINTYRE: Just on the basic -- yeah. Yeah.

[139] THE COURT: Needless to say you took out the jury notice; right?

[140] MS. BRUN: That's correct.

[141] THE COURT: Okay. Thank you.

“Master Tokarek”