No. 14853
Prince George Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	)	
KOWALCHUK ET AL	)	DECISION
PLAINTIFFS	)	OF
AND:	)	
MacADAMS ET AL	)	MASTER WILSON
DEFENDANTS	)	

Dick Byl and Mike Lavin:	Counsel for the Plaintiffs
Michael J. Brecknell:	Counsel for the Defendants
Place and Date of Hearing:	Prince George, B.C. March 6th and April 3rd & 4th, 1990

Lonni Kowalchuk sued the defendants for monetary damages, for personal injuries she suffered, in a motor vehicle collision, which occurred on February 11, 1988.

The trial of her claims was scheduled to commence on February 5, 1990.

Prior to the trial date, her claims were settled by agreement. It was a term of the settlement agreement that she would receive, in addition to an agreed sum for monetary damages, payment of her costs of the proceeding, as taxed, on a party and party tariff.

The appointment to tax her bill of costs was taken out on February 23, 1990 pursuant to Rule 57(39) of the Rules of Court.

The essential item of contention in the bill of costs is a disbursement paid to Dr. Trevor A. Hurwitz Inc., for $4,050.00.

The account for this disbursement is for professional services. It includes a charge for 12 hours of preparation time, at $275.00 per hour, and a charge for a report at $750.00.

Mr. Brecknell took exception to this account. He contended that it was unreasonable. There must be a limit, he said, on the amount the unsuccessful party to litigation must pay, to the successful party, for the martialing of expert evidence.

The issue raised by Mr. Brecknell was nicely described by Proudfoot, J. (as she then was) in Hall v. Strocel (1983) 34 C.P.C. 170, (B.C.S.C.), where she said, at page 174:

> . . . it seems as if more and more experts are becoming involved in more and more litigation. I do not wish to be misinterpreted, in most cases they are necessary and are of assistance to the court. Nevertheless, that does not mean that costs of such experts should not have a limit. The unsuccessful party should only be responsible for a reasonable fee, (a reasonable cost). At the hearing before the Registrar, Dr. Walker was

> referred to as the "Cadillac" of the economists. If the plaintiff wishes to use a "Cadillac" he may do so, but I do not think that the defendant need pay for that "Cadillac" when the job can be done by others in the industry, that is an "Oldsmobile" or a "Buick".

It is my perception of the issue as presented by counsel that it's resolution requires my determination of whether the amount of the account in question is "reasonable".

That perception presents preliminary questions.

Does the jurisdiction exist, under the present rules on taxation, for me to embark upon an enquiry into the "reasonableness" of the amount of a disbursement? If so, then by what objective standards am I to determine the "reasonableness" or otherwise of this account? If the account is not "reasonable", then what is a reasonable cost in the circumstances?

My concern over jurisdiction arises from the amendment to Rule 57 by B.C. Regulation 47/88.

Prior to the amendment, Rule 57(4) provided that:

> Disbursements and Expenses
>
> (4) On a taxation, the Registrar shall allow necessary or proper disbursements and expenses but, except as against the party who incurred them, disbursements or expenses shall not be allowed which appear to the Registrar to have been incurred or increased through extravagance,

> negligence, or mistake, or by payment of unjustified charges or expenses.

All of the authorities I have read which canvass a Registrar's assessment of the reasonableness of the quantum of a disbursement, concern considerations of that pre-amended wording.

The jurisdiction of the Registrar to consider the notion of reasonableness as to both the incurring of the expense and it's quantum, appears to me to be judicially supported in such decisions as Bowers v. White (1977) 2 B.C.L.R. 355 (B.C.S.C.), and Henry Electric Ltd. et al v. Woodwest Developments Ltd. (1983) 50 B.C.L.R. 26 (B.C.S.C.).

In Bowers, Craig, J. (as he then was) said, at page 358:

> . . . Rule 57(4) directs the Registrar to allow "necessary or proper disbursements and expenses" but to disallow any disbursements or expenses "which appear to the Registrar to have been in incurred or increased . . . by payment of unjustified charges or expenses". These words suggest that to be "necessary or proper", or to be justified, the disbursements and expenses must be "reasonable", having regard to all the circumstances.

In Henry Electric Ltd., the following appears, at page 28:

> In my view, the change in the Rule requires the Registrar to consider first whether a disbursement is necessary or proper, that is, whether it is reasonable

> in all the circumstances: Bowers v. White (1977) 2 B.C.L.R. 355 (B.C.S.C.). If it is, then, except as against the party who incurred it, the Registrar must further consider whether or not the disbursement has been incurred of increased through extravagance, negligence or mistake or by payment of unjustified charges or expenses. Counsel for the plaintiffs argues that personal service of a Writ on a corporate defendant cannot fall within the exception to Rule 57(4) because it is an alternative method of service made available to a plaintiff by the Company Act.
>
> I am satisfied that when the authors of the Rule chose to replace the word "over cautious" with the word "extravagance", they intended to change the test for disbursements that are not to be allowed. "Over cautious" means more cautious than is necessary: "extravagance" means unsuitable, excessive, unusual, abnormal, extreme and includes wasteful or prodigal. In my view, the circumstances must be reviewed by the Registrar bearing in mind this change of language. I cannot conclude that it is extravagance for a plaintiff to use a method of service permitted as an alternative by the Company Act.

In contrast to the preexisting Rule, the present direction in prevailing Rule 57(3) is:

> Disbursements
>
> (3) On a taxation, the Registrar shall allow those costs, charges and disbursements that were necessarily or properly incurred, and where the taxation is between a solicitor and his own client under the Barristers and Solicitors Act, the Registrar may allow charges and disbursements that were specifically authorized by the client.

In my opinion there is a significant difference in the

Registrar's authority between the former and the present Rules respecting disbursements.

Under the former Rule, necessary or proper disbursements and expenses were to be allowed, subject to a disallowance if incurred or increased, through extravagance, negligence or mistake, or by payment of unjustified charges or expenses.

Under the present Rule, as I read it, the determination is not one of necessary or proper disbursement, but rather, was the disbursement necessarily or properly incurred.

I take the word "incurred" to mean "to become liable or responsible for".

On my analysis, the notion of reasonableness would apply only in the determination of whether the disbursement was necessarily or properly incurred. If so, then the disbursement shall be allowed.

Thus, under my view of it, the procedure directed in Henry Electric Ltd., becomes:

> The change in the Rules requires the Registrar to consider whether a disbursement has been necessarily or properly incurred, that is, whether it was reasonable to have incurred the disbursement in all the circumstances.
>
> The further consideration is no longer applicable.

I find no provision in the present Rule authorizing me to embark upon an enquiry into the reasonableness of the quantum of the disbursement.

When I raised this issue at the taxation, Mr. Lavin, for the plaintiff, argued that the object of the Rules was to secure the speedy and inexpensive determination of matters on their merits. Although the wording of the Rule had been altered, he said, the meaning had not been changed. The present Rule should be construed accordingly. I took it that Mr. Brecknell agreed with that argument.

As a general proposition I, as well, agree with that argument, provided however, that the Rule may properly be subject to such a construction.

In my view, the present Rule 57(3) has not left unchanged the procedural law appertaining to the former Rule 57(4).

If no change was intended, then why was the Registrar's consideration altered from one of the necessity or propriety of the disbursement, to one of the necessity or propriety of the incurring of that disbursement.

I see some analogy with the present issue in the cases of Bayley v. Wilkinson (1864) 16 C.B. (N.S.) 161 and Cook v. Ipswich, local Board (1971) L.R. 6 Q.B. 451.

In both of those cases, authority was conferred on arbitrators, by Statute, to apportion expenditures for local improvements, among property owners. It was held that, authority to apportion did not include the authority to inquire into the reasonableness of the amount which had been expended for those improvements by the local authority.

I conclude that my jurisdiction is exhausted once I have determined whether the disbursement was necessarily or properly incurred. I have no authority to inquire into the reasonableness of the amount of the disbursement.

I have also been mindful of Richardson v. Laynes, Unreported, B.C.S.C., Vancouver Registry No. B871613, Reasons for Judgment 27, November, 1989.

In Richardson, after reviewing the amendment to Rule 57, the Court said, at page 5 of the Reasons:

> Under the new wording of Rule 57(3) the phrase "incurred or increased through extravagance, negligence, or mistake, or by payment of unjustified charges or expenses" no longer exists. The Registrar's decision under Rule 57(3) is no longer fettered by the above quoted phrase. Accordingly, there is no basis for a Judge's decision under Rule 57(2)(b) to be so restrictive.
>
> Rule 57(2)(b), as presently worded, does not prescribe any particular criteria to be considered by a Judge in allowing or disallowing any item of costs, charges or disbursements. However, without

> attempting to set out an exhaustive list of criteria to be considered on an application under Rule 57(2)(a) and (b), in my view they should include the following:
>
> (a) whether the item was necessarily of properly incurred;
>
> (b) whether, in the course of the trial, circumstances arose which indicated that it would be just or unjust to allow or disallow the item in question.

In Richardson, the Court was discussing the procedure under Rule 57(2), not Rule 57(3). I note however that in suggesting some criteria to be considered, the court said that it is whether the item was necessarily of properly incurred; and not whether the item was necessary of proper.

In this matter it is my opinion that the account of Hurwitz Inc. was both necessarily and properly incurred in the circumstances.

That opinion is based upon the following considerations.

I take it from what Mr. Byl told me, that there were essentially two issues in contention, between counsel, with respect to this plaintiff's injuries.

First, the extent of permanent brain damage, if any, and, second, the extent of permanent psychological damage, if any.

Mr. Byl took the position that this plaintiff had suffered both; Mr. Pakenham, counsel for the defendants, was not persuaded that the evidence then available established the position Mr. Byl was advocating.

I am told that prior to the involvement of Dr. Hurwitz, medical reports had been prepared which included information on computer assisted tomography performed on Ms. Kowalchuk. I have drawn the inference that the results of that tomography were negative or inconclusive.

Mr. Byl had assessed the claim of this plaintiff at an amount in excess of $100,000. Mr. Pakenham had assessed the claim at an amount of approximately $40,000.

It appears that sometime in late 1989, Dr. Trevor Hurwitz was engaged to perform extensive examinations on Ms. Kowalchuk, and to report his finding to Mr. Byl.

Dr. Hurwitz is a medical specialist in two areas, Psychiatry and Neurology. Among other positions he currently holds, he is a Clinical Associate Professor, Department of Psychiatry, University of British Columbia, a Director of the Neuropsychiatric Unit WI, University Hospital, University of British Columbia, and a Consultant Medical Staff, Department of Medicine, Division of Neurology, Unversity Hospital, UBC

site. His curriculum vitae is extensive.

In addition to his expertise, I have inferred that Dr. Hurwitz was selected because of his access to the most technologically current diagnostic facilities available to the medical profession in this province today.

"Special investigations" were conducted by Dr. Hurwitz with this plaintiff. Those investigations included magnetic resonance imaging of her brain and single photon emission computerized tomography (SPECT).

In his report to Mr. Byl, Dr. Hurwitz notes that:

> Neurodiagnostic tests were normal except for the SPECT scan which showed a perfusion defect in the left parietal lobe representing a persistent disburbance of function in this area.

Further in his report he writes:

> On the basis of her 4-day stupor and post traumatic amnesia of 3 weeks, she sustained a very severe closed head injury. Her initial clinical symptoms and negative CT scans suggested diffuse brain injury which is typically secondary to widespread damage to the nerve fibers. From the outset however brain injury was maximal on the left side accounting for her diminished right-sided movement. She has since made a striking recovery but retains evidence of left pyramidal tract injury given her residual right-sided neurological findings. That maximal injury occurred to the left side of her brain is supported by the left-sided abnormaility

> on SPECT scan. The SPECT scan identifies an area of diminished blood flow presumed to reflect a persistent disturbance in brain function. A corresponding structural abnormality was not confirmed on MR imaging perhaps because residual injury is microscopic and lies beneath the resolution of the magnetic resonance imager.
>
> It is likely that microscopic brain injury has occurred elsewhere in the brain but has not been visualized by the neuroimaging techniques. in particular she has likely sustained injury to her frontal lobes to account for her changes in personality as well as injury to her temporal lobes to account for her poor performance on memory tests relative to her average intellectual functioning. Both the frontal and temporal lobes are the classic sites of brain injury following blunt head trauma. (The underlining is mine).

Upon receipt of the report, Mr. Byl, presumably with the concurrence of Mr. Pakenham, met directly with representatives of the Insurance Corporation of British Columbia, the defendant's liability insurance carrier. It was Mr. Byl's view that the report provided objective, clinical evidence to substantiate his position that there was residual permanent damage in the two areas in issue.

The I.C.B.C. representatives apparently agreed, because in the result, Ms. Kowalchuk's claims were settled at a sum in harmony with Mr. Byl's assessment.

I do not found my conclusion on the results obtained from the report. Given the nature of the controversy separating the parties, it was necessary, in my view, to obtain the evidence,

if available, to address that controversy, and to incur the expense of so doing.

The special investigations conducted by Dr. Hurwitz may have produced negative results. In which case a report to that effect would as well have addressed the controversy.

It is my opinion that at the time the expense of the engagement of Dr. Hurwitz was incurred, it was necessarily incurred; and, further, that it was properly incurred in the circumstances.

The bill which was presented for taxation was inclusive of costs of the entire action. At the taxation, the items attributable to the plaintiff Lonni Kowalchuk were segregated. In the result, the tariff items were agreed upon at a total of $3,517.12.

My note is that disbursements, other than experts' reports, were agreed at $189.92.

I have concluded that I do not have authority to question the quantum of the disbursement to Trevor A. Hurwitz Inc. I therefore allow the expenditures for all reports at $10,510.02.

If my notes are consistent with counsels' understanding of their agreement, I will certify the costs of Lonni Kowalchuk

as taxed and allowed at $14,217.06.

In the event I am wrong in my conclusion on the extent of my jurisdiction, and to the end that it may be some assistance to the parties if this decision is reviewed, I will record my opinion of the reasonableness on the quantum of the account of Dr. Trevor A. Hurwitz Inc.

Mr. Brecknell submitted that there is an onus on the plaintiff to establish that the disbursement is a reasonable expense to be born by the defendants.

In my view that is an accurate submission on the law. See for example Bereti v. Schuette et al (1980) 17 C.P.C. 259 (B.C.S.C.). However, he was not so garrulous on the standard to which I should relate the disbursement, in ascertaining its reasonableness or otherwise.

There is no other evidence filed against which I could compare this particular report, and account, in making that determination. The plaintiff has provided information on one other medical/legal report. That is an account from Dr. William T. Simpson for $300.00. This account is apparently for a medical/legal report dated June 1, 1988.

Dr. Simpson's report is not before me. The information presented is of little assistance.

I have considered Mohr v. Dent (1983) 40 C.P.C. 8 (S.C.B.C.), Van Berkel v. Mitchell, Unreported, June 24, 1982 (S.C.B.C.), Grant v. Burgeson, Unreported, No. C 50/78, Fort St. John Registry, (S.C.B.C.) December 22, 1982, Nelson v. Baudin, Unreported, No. SC2645/1980, Nanaimo Registry, December 22, 1982 and Richarson v. Laynes, Unreported, Action No. B871613, Vancouver Registry, 27, November, 1989 (B.C.S.C.).

In Van Berkel, Grant and Nelson, Master Halbert had before him, among other things, the reports and accounts of doctors in the specialty of that of the doctor whose account was in issue on those taxations. There was a marked difference between the accounts rendered by the respective doctors; but not between the import of those reports. As well, Master Halbert referred to the British Columbia Medical Association guideline for fees in legal matters, and his own experience as a taxing officer.

Following a comprehensive review of the evidence before him, and the applicable authorities, Master Halbert found that the disbursements in issue in each of the taxations, were unreasonable and unjustifible. In the result, the disbursements in issue were disallowed in the amounts presented, and a lesser sum substituted.

The abundance of evidence available to Master Halbert on those taxation is not present in this case, so far as the

issue of reasonableness of the quantum of the account is concerned.

Considerations such as the dual specialties and extensive expertise of Dr. Hurwitz, although certainly material, do not appear to be necessarily determinative of the question of whether the full extent of the account should be born by the unsuccessful litigant.

Mr. Byl did tell me that in his experience in these matters, which is broad, the medical practitioners in this community, do not strictly adhere to the British Columbia Medical Association fee guidelines. In his experience, the range of fees for a medical/legal report from a Prince George specialist, is between $600.00 and $800.00. For a report from a specialist in the field of neurology in Vancouver, his experience is a fee on a range from $600.00 to $1,000.00.

These amounts are to be contrasted with the British Columbia Medical Association guidelines (as at June 1989), for item A0072, of $229.00, for a medical/legal report.

Mr. Byl also told me that the expertise and facilities Dr. Hurwitz was able to bring to bear on the question in issue were not available in Prince George, British Columbia.

I do not find that information very helpful. I have

not seen any of the reports or accounts to which Mr. Byl refers, to enable me to determine for my own mind, their relevance to this matter. I do not know whether the documents are "reports" or "opinions" as described in items A0072 and A0073 of the fee guide. I note also that Dr. Simpson's account for a medical/legal report was $300.00. It may have been more properly characterized as a "medical/legal opinion" for all I know. Certainly I regard the document compiled by Dr. Hurwitz as a medical/legal opinion, not a medical/legal report.

What remains, in my view, for me to consider on this issue is:

1. The British Columbia Medical Association guideline for fees, as at June, 1989 (Dr. Hurwitz first interviewed the plaintiff in February, 1989);
2. My own experience in these matters;
3. The report dated January 2, 1990;
4. The account of Dr. Trevor A. Hurwitz Inc.; and
5. The proposition that the onus is upon the plaintiff to persuade me that the account is a reasonable charge against the defendants on a party and party taxation.

I referred to the fee guidelines with considerable reservation, in view of the comment by Hutchinson, J. in Mohr (Supra) at page 17:

> In my view, the B.C.M.A. fee schedule is a guide to the medical profession, and has nothing to do with what is a proper fee for an unsuccessful defendant to pay.

The guideline is however helpful to me because I agree with Master Halbert's observations in Van Berkel (Supra) at page 9, with respect to the fee guideline, that:

> . . . . in my opinion a consideration of what his peers consider to be reasonable and justifible is very important. . .

I understand the comment by Hutchinson, J. to be made within the context that the fee guideline is directed to fees to be charged by a doctor to his own patient (or that patient's representative). In that sense it does not address the issue on a party and party taxation of what an unsuccessful litigant must pay in compensation. And to that extent it has nothing to do with what may or may not be binding upon me, on the taxation of a party and party bill of costs.

Presumably, the schedule of fees was promulgated by the medical profession with reason. An individual practitioner may choose not to apply the guidelines. That, in my opinion, does not detract from their general utility.

The guide is, in my view, of assistance in objectively defining what the medical profession itself considers a reasonable fee, on a doctor/patient basis, for the several services described in the schedule.

As will become apparent, my decision on this issue is founded on that schedule.

I am indisposed to introduce my own experience in these matters. It suffers from at least two shortcomings. It must, perforce, contain some element of subjectivity, and, second, it is not open to cross examination by Mr. Byl.

I do go this far however, and observe that the report and the account are dated January 2, 1990. This is the very eve of the time limitation, for delivery of a copy of the report or notice thereof, to the defendant, prescribed by s. 11 of the Evidence Act.

It may be that there is some degree of premium in the account for acceleration in this instance.

The report consists of 13 1/2 typewritten pages, of which 6 1/4 pages are devoted to the circulum vitae of Dr. Hurwitz.

A description of special investigations and the exercise of the particular expertise for which Dr. Hurwitz was engaged, is contained in two pages of 7 1/4 pages of the text of the document. The balance is made up of a recital of the circumstances of the collision, the course of prior treatment and convalesance and examinations by Dr. Hurwitz, not described as "special".

I have previously referred to the critical content of

the document. On the whole document, it is my opinion that the text of item A0073 of the fee guideline is a precise description of the document.

The only item in the schedule dealing with fees on a hourly rate, strictly so called, is item A0091, "court preparation by expert witness, per hour $190.00". I note that this does not include charges for extra record keeping necessary to provide expert testimony. These charges are in addition to the hourly rate.

I also note however that the per diem rate for expert testimony, in items A0074 and A0075, translate, approximately, to an hourly rate of $190.00, (based upon a full court day of approximately 5 hours).

Finally, I note that this is an hourly rate for activity outside of the practitioner's field of endeavour. In this case, Dr. Hurwitz has charged the plaintiff at a rate of $275.00 per hour for activity, to a great extent, within his field of endeavour.

Whether I look at the fee guidelines, Dr. Simpson's account or the customary fees for reports in Mr. Byl's experience, the account from Dr. Trevor A. Hurwitz Inc., in total, is unusual.

If I am to embark upon a determination of reasonableness

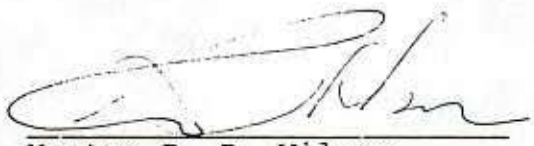
of the quantum of the Dr. Trevor A. Hurwitz Inc. account, then I consider myself bound to apply the above noted observations by Huddart, J., in Henry Electric (Supra) at page 29.

The plaintiff has not persuaded me that the quantum of that account is a reasonable charge to be born by the defendants.

It is my opinion that, being as objective as possible, on the information available, a reasonable charge for the defendants to bear for the preparation time referred to in the account is (12 x $190.00) $2,280.00.

A reasonable charge for the defendant to bear for the report is $456.00 (fee item A0073).

If I thought I had jurisdiction to assess the quantum therefore, I would disallow $1,314.00 of that account, and allow it at $2,736.00.



Master R. D. Wilson

Prince George, B.C.
May 14, 1990