

BC Injury Litigation - An Expensive Business

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Ask any personal injury lawyer in BC and they will tell you that Injury Claim prosecution can be a very expensive business.

The greatest expense associated with this type of litigation involves the services of expert witnesses. It is very rare to prosecute an injury claim without hiring at least one expert to address issues such as diagnosis of injury, cause of injury, prognosis and future care needs. Medical experts cost money and these expenses are usually paid by Plaintiffs lawyers up front.

Reasons for judgement were released today by the BC Supreme Court, New Westminster Registry, demonstrating just how expensive the services of expert witnesses can be.

In today's case ([Hamo v. Khan](#)) the Plaintiff was injured in a 2001 BC Motor Vehicle Accident. After the accident the Plaintiff started to suffer from collapsing spells. The Plaintiff's lawyer retained Dr. Hurwitz who is trained as both a psychiatrist and a neurologist to provide an opinion with respect to the relationship of the collapsing spells to the trauma. Dr. Hurwitz generated two reports and billed the Plaintiff's lawyer \$69,543 for his services.

The parties to the lawsuit could not agree whether this expense was reasonable and the matter was brought before the BC Supreme Court. Ultimately Registrar Blok held that the disbursement as presented was not reasonable and considerably reduced the amount recoverable for the disbursement associated with Dr. Hurwitz's services. In addressing this disbursement Registrar Blok provided the following useful reasons:

[47] I conclude that the time spent on the summarizing of the collateral medical information was excessive; in fact, vastly excessive, particularly given that a fair amount of the pertinent history seems to have been summarized elsewhere in the reports. I also agree that, based on Dr. Hurwitz's own evidence, in the case of the first report there was inefficiency as a result of the lengthy time it took to complete the process.

[48] As Master Joyce made clear in [Cloutier v. Wong](#), and also as stated in [Chandi v. Atwell](#), there is simply no need to prepare meticulous summaries of medical information obtained from other sources. I accept that there was a need for Dr. Hurwitz to read and fully absorb this other medical information, but there was no need to do

it in this expensive and time-consuming way. If that is the only way Dr. Hurwitz can accomplish this task then that is all very well as between Dr. Hurwitz and counsel who retain him, but for the purposes of costs between party and party it is excessive and that excessive element cannot be passed on to the opposing party.

[49] I turn now to the hourly rate. This was the subject of much debate, mostly on the significance of the B.C.M.A. fee schedule, which at present has a guideline fee of \$356 per hour for “court preparation” and a fee of \$1,495 for preparation of a “medico-legal opinion”. The defendant did not rely on the “medico-legal opinion” guideline fee (and here I note that the defendant’s own experts did not appear to adhere to it) but did rely on the court preparation fee as providing guidance when considering the \$500 per hour rate charged by Dr. Hurwitz. For her part the plaintiff cited *Mohr v. Dent* (1983), 40 C.P.C. 8 (B.C.S.C.), where the court said that the B.C.M.A. fee schedule was a guide to the medical profession and had “nothing to do with what is a proper fee for an unsuccessful defendant to pay” (at para. 62).

[50] Both submissions are correct, in their way. The B.C.M.A. fee schedule is not determinative of the proper amount that ought to be allowed as a disbursement but, as was noted in *Moore v. Dhillon*, [1992] B.C.J. 3055 (S.C.), it is “of some assistance ... to know what the medical profession, in this province, views as a fair, and, presumably, competitive rate, for that particular service” (at para. 212).

[51] In my experience the B.C.M.A. fee schedule can be somewhat helpful in more straightforward cases, but as the cases become more complicated and the medical experts more specialized or accomplished its utility is much less. Of more relevance, in my view, is the \$375 hourly rate charged to the defendant by Dr. Davis, a psychiatrist, who although he does not have a dual specialty in psychiatry and neurology like Dr. Hurwitz, does have a postgraduate specialist degree in both disciplines. I accept that, all other things being equal, Dr. Hurwitz could rightly charge a higher hourly rate than Dr. Davis because of his additional specialty, but the question is whether the plaintiff has met the burden of showing that Dr. Hurwitz’s hourly rate ought to be 33% more than that of Dr. Davis.

[52] I should say, because it was argued, that I did not find any assistance in knowing the hourly rate of the neuropsychologist, Dr. Crockett. His specialty is really quite different than that of the medically-trained experts.

[53] The plaintiff made much of the unique nature of Dr. Hurwitz’s qualifications, and submitted that since he is the only one around with this dual specialty “he is the market”. But this is circular reasoning which could be used to justify any rate at all (he charges this rate, he is the market, therefore it is the market rate and it is ipso facto reasonable). It also ignores the alternative avenue of retaining two experts instead of one very expensive expert. Counsel for the defendant did not advance this argument, but it seems to me that a good case might have been made that the plaintiff ought to be limited in her costs recovery to the possibly cheaper reasonable alternative of retaining two experts.

[54] Although the plaintiff submitted that Dr. Hurwitz’s dual qualifications avoided the “wasteful” alternative of having to retain specialists in two different fields, that argument falls rather abruptly in light of the evidence of the charges of the other medical experts, neurologists Dr. Cameron (\$2,182) and Dr. Robinson (\$2,500), and psychiatrists Dr. O’Shaughnessy (\$2,600) and Dr. Davis (\$3,850 for his first report), compared to the \$45,000 (exclusive of GST) charged by Dr. Hurwitz for his first report.

[55] For these reasons I have concluded that the plaintiff has not met the burden of showing that Dr. Hurwitz’s hourly rate is reasonable. Doing the best I can on the evidence available I am satisfied that an hourly rate of \$425 is a reasonable one in all the circumstances.

[56] For the first report I conclude that fees of \$18,000 (plus GST) are appropriate. In general, this reflects my conclusions on the hourly rate, the unproductive and unnecessary clinical records summaries (though accepting and allowing for time that had to be spent reviewing those records) and the element of inefficiency due to the lengthy report-creating process, while accepting the time spent on the examination of the plaintiff and related

interviews (that is, all the time spent prior to February 16, 2005) and the time that was shown to have been spent on the actual preparation of the report.

[57] For the second report I would allow fees of \$9,800, plus GST, based in general on the elimination of the time spent on the records summaries (while allowing for time to have been spent reviewing those records) and the reduction in the hourly rate.

[58] The trial preparation charges I would allow at \$936.25, based solely on the reduction in the hourly rate. For some reason GST was not included in the subject invoice and therefore GST is not to be added to this disbursement.

[59] I disallow the "administration and processing" charges included in the first two accounts. While it may be an interesting debate whether these charges should be disallowed because they are part of overhead (as they usually are with lawyers' bills) or may be charged in addition (which, for reasons unknown, is by case authority allowable for receivers and bankruptcy trustees), I leave the answer to that question for another time because in this case there is no (or at least, insufficient) evidence to show what Dr. Hurwitz's actual costs were or the relationship between the round-figure charges of \$500 and \$250 and his actual costs.