IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Radic v. Bosch,*
2019 BCSC 602

Date: 20190424
Docket: M124150
Registry: Vancouver

Between:

Anna Radic

Plaintiff

And

Tyler Mark Bosch

Defendant

Before: Registrar Nielsen

Reasons for Decision

Counsel for Plaintiff:	P.G. Kent-Snowsell J. Gaydar, A/S
Counsel for Defendant:	J. Nieuwenburg
Place and Date of Hearing:	Vancouver, B.C. January 14, 15, 16, 21, 22, 23, 24, 25, and 29, 2019 and March 11, 12, 13, 2019
Place and Date of Decision:	Vancouver, B.C. April 24, 2019

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[1] This is a review pursuant to the *Legal Profession Act,* S.B.C. 1998, c. 9 ["LPA"]. The client alleges the lawyer is not entitled to any fee as he failed to follow instructions; put his and the law firm's interest ahead of the client's; misled and breached his fiduciary duty to the client; adjourned the trial when he had no instructions to do so; fundamentally breached the retainer agreement by demanding money to move the case ahead; and, improperly withdrew as counsel on the eve of a scheduled mediation. The mediation ultimately resulted in settlement of $1,126,590.77 consisting of the full insurance policy limit and the cash value of part 7 benefits and TTD benefits.

[2] The lawyer alleges the client purposefully orchestrated his requirement to withdraw from the case in order to avoid the payment of legal fees. The lawyer submits he is entitled to the 20% contingency fee provided for in the retainer agreement.

[3] At this review, oral evidence was given by the lawyer, the client, two of the client's friends, Mr. Pavlov and Mr. Kim, the client's physiatrist, Dr. Caillier, and her psychiatrist, Dr. Wiebe.

Background

[4] On November 26, 2011, the client was involved in a serious motor vehicle accident. She was taken by ambulance to hospital where it was found she had suffered fractures to her L1 and L2 vertebrae and her sternum. The client went on to develop emotional and psychological problems as a result of her injuries. She also suffered from ongoing chronic pain. The client did not return to work and was eventually dismissed from her employment.

[5] Daily living and rehabilitation efforts were difficult for the client but she persevered. During the course of her treatment it was discovered that she had a syrinx in her spine. The opinion was that the syrinx was unrelated to the motor vehicle accident and was likely not the cause of her symptoms, however it caused the client a great deal of distress.

[6] Shortly after the motor vehicle accident the client retained counsel on a 20% contingency fee arrangement. The client subsequently changed counsel after a short time period. After conducting some research she decided once again to change counsel and she retained Mr. Scott Stanley of Murphy Battista who was her third lawyer on the file.

[7] On June 7, 2012, the client signed a retainer agreement. She agreed to a contingency fee in the amount of 20% of the amount recovered. The client managed to get the law firm to reduce its interest on disbursements to 6% from the initial 10% requested. The fee agreement is brief and provides:

> I, Anna Radic, hereby instruct and authorize Messrs. Murphy, Battista LLP (MB) to act on my behalf with respect to any and all claims arising out of a motor vehicle accident which occurred on November 26, 2011, in Burnaby, British Columbia.
>
> With the exception of actually settling my claims, I authorize MB to take whatever steps they, in their sole discretion, feel are necessary to advance my claims.
>
> I agree to reimburse MB for any expenses or disbursements incurred in advancing these claims and I agree, if requested, to pay such expenses or disbursements within 30 days of receiving an account for payment from MB. In the event that MB funds the disbursements incurred on my claims, I agree to pay MB interest at the rate-of 6% per annum from the date the disbursements is funded by MB until MB is repaid.
>
> I understand and agree that legal fees payable to MB will be calculated as a percentage of any and all recovery on my claims but that no percentage fee will be charged for any monies recovered for costs. Specifically, I agree to pay to MB fees to be calculated as follows:
>
> (a) 20% of the amount recovered.
>
> This fee does not cover services for an appeal of a trial judgment or arbitration award. In the event of any such appeal, any additional fees to be charged would be negotiated with me.
>
> I agree and authorize MB to deduct legal fees and disbursements from any monies received by way of advances or upon settlement, judgment or award on my claims.
>
> I confirm that I have been advised of the following:
>
> 1. The Rules of the Law Society of British Columbia provide that, subject to the Supreme Court approving a higher fee, the maximum amount

> that a lawyer may charge in a claim for personal injury or wrongful death is 40% for non-MVA claims or 33-1/3% for MVA claims. Fees charged by different lawyers vary.
>
> 2. Legal fees are subject to HST, which a client is obliged to pay and the law firm is required by law to collect.
>
> 3. In spite of agreeing to the percentages referred to above, I have the right either 12 months after receiving a bill for fees pursuant to this agreement or 3 months after paying that account (whichever occurs first) to have this agreement reviewed by the Supreme Court of British Columbia to determine whether it was fair when entered into and whether the fees charged pursuant to this agreement were reasonable.

[8] The lawyer obtained all the necessary expert reports which, in his judgment, were needed to prove the client's claim. A trial date of September 12, 2016 was set, and all the reports were served on the defendant at the 84 day deadline.

[9] The client's financial situation was dire so the law firm advanced her an interest-free compassionate loan of $1,500 per month to assist with her living expenses.

[10] The relationship between solicitor and client began and continued on a positive and professional basis until the lawyer's assessment of the case which was particularized in a draft settlement proposal dated June 17, 2016, wherein it was opined that the client's case was worth between $950,000 and $1.3 million. The defendant had a $1 million insurance limit.

[11] A settlement proposal was sent to defence counsel proposing settlement in the amount of $1,570,000 to settle the client's tort and part 7 claim. Regretfully, there was a typographical error in the damage claim which shook the client's confidence in the lawyer. Despite the error, the final amount proposed was accurate. The client was of the view that in order to provide for herself into the future, she would need $4 million.

[12] On June 6, 2016 the client discovered she was under surveillance by ICBC. This realization, together with the assessment of her case far below what she

believed she would need into the future, lead her to express suicidal ideations during a medical appointment with her physiatrist, Dr. Caillier. Dr. Caillier advised the client she would need to commit herself for treatment, which she did on June 22, 2016 at Burnaby Hospital psychiatric unit.

[13] In an email dated June 24, 2016 the lawyer was advised that the client had been admitted to hospital. The email did not refer to the fact that the client was committed to a psychiatric facility within the hospital.

[14] In an email dated June 27, 2016 the lawyer advised the client that her case was "…in good shape should we need to take it to trial". At the time of the June 27, 2016 email, the lawyer was still unaware that the client had committed herself to a psychiatric facility. The lawyer was advised of this fact in an email from his assistant dated June 29, 2016. In the email, the assistant provided the name of a friend of the client who had known her for over 20 years and was willing to be a witness for her at the September 12, 2016 trial. The assistant also inquired with the lawyer concerning the defendant's request for an IME.

[15] The lawyer was provided with a further follow-up on the client's condition by way of email from his legal assistant dated July 7, 2016. The lawyer was advised that the client was extremely distraught and had informed the lawyer's legal assistant she intended to kill herself. The client also expressed the view that the lawyer had ruined her case. At this time, the lawyer thought it best to give the client distance given the client's condition and its relationship to him and the legal proceeding.

[16] During late June and early July 2016, the lawyer continued to make arrangements to accommodate the defence request for a functional capacity evaluation and to arrange a trial management conference.

[17] The client was discharged from Burnaby Hospital on July 14, 2016. The discharge summary provided in part:

> DISCHARGE MENTAL STATUS EXAMINATION
>
> On interviewing Miss Radic was pleasant, accessible and cooperative with good rapport. She was dressed casually in a red t-shirt, red running shoes and jeans with no hygiene concerns. She displayed no abnormal movements and made good eye contact throughout the interview. Her speech was fluent and coherent with normal rate, rhythm and volume. Her responses to questions were appropriately elaborate. Her mood was reported as good and her affect was bright and euthymic. Her affect was also congruent with her mood. She denied perceptual disturbances at this time. Her thought form was linear and goal directed. She denied suicidal ideation. Her insight into her condition, her judgement and her cognition were all intact.
>
> We are pleased to have been involved in Miss Radic's [sic] care and wish her all the best.

[18] The lawyer did not discuss the client's psychiatric condition with the discharging psychiatrist from Burnaby Hospital, nor did he speak to Dr. Caillier, her physiatrist who recommended committal, nor did he speak to Dr. Wiebe, her treating psychiatrist, concerning the client's mental state and ability to prepare for, or withstand the rigours of the trial scheduled for September 12, 2016.

[19] In fact, unknown to the lawyer, both Dr. Caillier and Dr. Wiebe felt it was in the client's best interest to proceed to trial. Dr. Caillier gave this evidence during her testimony and also in a letter dated August 19, 2016 wherein she states in part:

> August 19, 2016
>
> To Whom it May Concern,
>
> Anna Radic has been a patient of mine for several years.
>
> Ms. Radic has a pending court case pertaining to her ICBC related injuries in September 2016. I am concerned for her mental health if there is to be a delay in the court proceedings or if it is adjourned to a later time and the impact this will have on her emotional / psychological well being.
>
> Ms. Radic during the times I have been following her has not only had physical symptoms and chronic pain associated with her MVA injuries but has also struggled with her mental health secondary to pain and the inability to resume her pre-MVA life.

> Ms. Radic has been adherent to the recommendations I have made to her and during the times she may have struggled with following recommendations, this was typically a time when her mental health became more of an issue.
>
> Sincerely,
>
> Dr. Lisa Caillier
> MD FRCPC Physical Medicine and Rehabilitation

[20] After her discharge from Burnaby Hospital psychiatric unit, the client continued to believe her case would be going to trial in September 2016. However, unknown to her, the lawyer had begun to canvas with defence counsel the possibility of adjourning the trial. Trial briefs, a TMC, and a functional capacity evaluation of the client were all on the agenda in order to ensure the trial proceeded as scheduled.

[21] Between July 25 and 26, 2016 emails were exchanged between the law firm and defence counsel concerning trial briefs and a TMC. As the lawyer was going to be on holiday in August, arrangements were made for another lawyer within the law firm to attend the TMC if it were to proceed as tentatively planned on August 10 at 2:00 p.m.

[22] However, on July 26, 2016, the lawyer emailed defence counsel stating:

> I see that neither of our offices filed a TMC brief in accordance with the new rules. As a result, the trial is in danger of being struck.
>
> This is likely not a bad thing as you need time to get your FCE arranged and my client is just coming off a period where she was hospitalized for her psychiatric issues.
>
> What are your thoughts on looking for a new trial date now?

[23] The client testified that the lawyer did not have instructions to adjourn the trial, nor was she made aware of this discussion. Indeed, she was not aware of the exchange of emails between the lawyer and defence counsel until she received them long after the fact.

[24] On July 26, 2016, a meeting took place between the lawyer and the client. Also in attendance were the client's friends Igor Pavlov and Alexa, and the lawyer's assistant.

[25] Following the July 26, 2016 meeting, the lawyer emailed the client stating:

> It was nice to see you today. I am happy you are doing better. It was also nice to meet your friends, Alexa and Igor. I confirm that I am to copy them with a copy of the email summarizing our meeting.
>
> The bottom line is that you are not following the advice and taking the recommendations of the many professionals who are trying to help you and who want to help. Unfortunately, I am one of those people you are not listening to. This is having severe consequences to your emotional health as well as your legal case.
>
> I confirm that I explained my assessment to you today and how I arrived at same. I am hopeful my explanation about present value and discounting helped you understand the figures.
>
> I believe a judge would assess your case between $900,000 and $1,300,000. I am not able to predict what a jury will do. As I indicated to you, ICBC has stated that it will be paying the jury fees so that the case will be heard by a jury. I do believe a jury is going to have some problems with your case and these are as follows:
>
> 1. Your fixation on the syrinx. Even though no doctor says this was caused by the accident or is the cause of your pain, you have convinced yourself (mostly through erroneous internet research) that this is a serious condition that is caused by the accident and this has resulted in significant emotional distress which is not caused by the accident.
>
> 2. Your fixation and worry about the amount of compensation you will recover which is not caused by the accident.
>
> 3. Your fixation and anger at the Defendant's post-accident lifestyle and behavior which you took on yourself to look into by looking at his Facebook page, and which is not caused by the accident.
>
> The Defendant now has a pretty good case to say that there are many reasons (other than the injuries they caused) to explain why you are not able to work. I think it would be a good idea to try and adjourn the trial so that you can get these issues under control before a jury is asked to determine your damages.
>
> The other problem is your wildly unrealistic assessment of your case. Today, you instructed me to make an offer of $4m which is nowhere close to reality. It also does not take into account that the defendant only has $1m in insurance. Your response to this is to say that this is not your problem that he

> only has $1m insurance. The reality is that it is a problem for you. I have suggested that you offer to settle for his limits of $1m which could put you in a position to recover more than this sum from ICBC should they turn down the offer and you obtain a larger award at trial. Regrettably, you will not follow my advice in this regard.
>
> As we discussed today, I have spent $100,000 on your case thus far. Given that you are taking such an unreasonable position with your case by not listening to me or your doctors, I am simply not able to fund the case through to a trial. As we discussed, I will need you to come up with $50,000 to fund the experts and other expenses that will be necessary for me to conduct the trial. I will need these funds provided to me by the middle of August if I am to conduct this trial for you. I certainly don't need you to pay the $100,000 that I have already spent, but I do need you to step up and be responsible for the future expenses associated with your case.
>
> The last thing I need you to do is to email the names and contact information for 6 people (work and friends) who can talk about you before and after the accident. I would like your supervisor and some co-workers for sure.
>
> Please take care of yourself and reflect on what I and others are telling you. We all want to help you very much but you need to trust us and let us do that.

[26] The client replied to the lawyer's email in an email of July 27, 2016 wherein she stated:

> It was nice to see you yesterday.
>
> I understand your concern about how jury might get destructed [sic] by some of the issues in the case, as you mentioned earlier. I agree that, in the circumstance of going to a trial, a judge would be the way to go. I also understand that the other side gets to choose if it is going to be a jury or a judge, yet you would still have the option (used in your jurisprudence "*Wallman v. Insurance Corporation of BC*") to make the case that due to the "complexity character" of the issues at hand, it is the "judge" option that would be appropriate.
>
> As of paying the portion of it in advance, it is my understanding that our contract outlined how the incurred cost is to be covered.

[27] The lawyer responded to the client's July 27, 2016 email the same day stating:

> You are doing exactly what I asked you not to do and that is to do your own research on the internet. As I said yesterday, ICBC is able to have a jury if the [sic] pay the fees. They will no doubt do that.

> Regrettably your case is not the same as Wallman and I do not believe we could apply to strike the jury in your case. The Wallman trial was much longer and involved much more complex issues.
>
> Given that you are not following my advice or the advice of your doctors, I will not be taking steps to confirm the trial dates until you have provided me with $50,000 which will cover the expenses needed to proceed with the trial. I can put you in touch with some companies who can lend you this money although the rates they charge are very high.
>
> I am also not able to continue to advance you funds as I have been doing in the past. Given the way you are choosing to run your claim and not follow my advice, there is a very good chance that these funds will not be recovered from ICBC.
>
> As I think you know, I would do anything to help you but it is pointless if you are not prepared to help yourself.

[28] The client was adamant that the trial proceed as scheduled. In an email dated August 12, 2016 the client stated "I do not want you to postpone my trial date under any circumstances".

[29] The evidence is clear that the lawyer took no steps to perfect the administrative requirements to ensure the trial would proceed as scheduled on September 12, 2016. As a result, an administrative adjournment was inevitable. This was the plan given the exchange of emails with defence counsel to this effect.

[30] Regretfully, the client was unaware the TMC had not been scheduled; a trial management brief had not been filed; or, that defence counsel wanted to schedule a functional capacity evaluation for the purpose of obtaining a defence IME. It was the client's belief that the trial was going to proceed until she received the lawyer's email of August 25, 2016, after he had returned from holiday. In his email of August 25, 2016 the lawyer states:

> We are not going to be able to keep the current trial date.
>
> I have your note from Dr. Caillier about an adjournment not being good for your mental health but this note will not be enough to help us keep the date.
>
> When you were in the hospital it prevented ICBC from obtaining a rebuttal Functional Capacity Assessment before the trial. This alone is enough to give ICBC grounds for an adjournment.

> Following our meeting on July 26/16, I outlined the problems that had arisen with your case (mostly because you have not followed the advice of me and your doctors) and advised that an adjournment would allow an opportunity for some of these problems to be corrected.
>
> The other issue is that your instructions to me at this point are completely unreasonable. You have instructed me to present a demand for $4m if we go to trial whereas I have the value of your case around $1m (and the Defendant only has $1m in insurance and no substantial assets that could be used to pay more). I have suggested that you offer to accept $1m which would possible [sic] put yourself in a position to recover more than $1m if ICBC refuses (which I expect they will) but you have refused to give me these instructions. Because you are being completely unreasonable by asking 4 times what the case is worth, there is a very good chance the judge will order you to pay ICBC's costs and deny you your costs. I have already spent about $100k on your case. It will take another $50k to get it to trial and I advised you that I would need you to cover these expenses before I would take steps to book the experts and commit to the costs of doing the trial. Based on your current instructions which are terribly unreasonable, I have little prospect of recovering the $100k I have already spent. If you want to take this unreasonable position to trial, then you will need to front the $50k it will take to bring the case to trial. I offered to put you in touch with some lenders to assist you with raising this money. You have not provided me with these funds nor have you contacted me about trying to arrange financing.
>
> Putting forward an unreasonable demand of $4m is also completely consistent with ICBC's theory that your mental health issues do not derive from your injuries but derive from your worry about your financial recovery.
>
> I strongly suggest that you continue to involve both Alexa and Igor in this process. They are good people who are both wise and caring. I don't have your instructions to send ongoing email to them but think that would be a good idea.

[31] The client replied in a lengthy email dated August 31, 2016 which provided in part:

> About me being unreasonable: "Because you are being completely unreasonable by asking 4 times what the case is worth, there is a very good chance the judge will order you to pay ICBC's costs and deny you your costs." I would like to know how the Judge can order me to pay costs to ICBC and deny my costs. I am the victim of car accident, with very serious injuries and consequences. I had no pre-existing condition, no disability. I've been on almost 5 years of rehabilitation. I also have a Court case against the person who caused the accident, not against ICBC. You should think about my legal interests not about ICBC.
>
> I am willing to consider any good settlement. Your assessment of my claim is not acceptable to me. Those are categories you should have considered when you calculated my claim:

Non-pecuniary damages
Past loss of earning capacity
Loss of future earning capacity
Past loss of Homemaking Capacity
Future loss of housekeeping capacity
Loss of interdependent relationship
Special damages
Cost of future care
Damages for managements fee,
Damages for tax gross up,
Costs,
Interest pursuant to the Court Order Act
In trust damages.

What do you mean by saying: “there is a very good chance the judge will order you to pay ICBC’s costs and deny you your costs”? The facts are that I have severe injuries from MVA, that I got disability approved, that I had a rehabilitation coordinator from ICBC assigned (ICBC assigned rehab coordinator only for severe and catastrophic injuries), that I attended 342 kinesiology sessions, over 170 physio sessions, hundreds of medical appointments. I was never late or miss any of my appointments except in February 2016 for 3 weeks when I could not walk. That was in an agreement with Dr Caillier and my Kinesiologist. When Dr Badii gave me injections, I resumed my sessions with Kinesiologist. I had been seeing Dr Anderson, once a week for about 2 years (ICBC paid for all those sessions, they would not pay for someone with minor injuries whose pain and suffering you assessed to $ 160,000!). I finished Pain Menagment [sic] course (Dr Caillier’s recommendation). I’ve been seeing Dr Wiebe for about 2 years and follow all his recommendations. I saw Dr Wiebe yesterday and he told me that my mental healt [sic] problems are associated with my MVA injuries. Dr Wiebe also sent me to the course for people suffering depression (my attendance was excellent for all 5 months). ICBC paid for the course, millage [sic] and parking. So if ICBC paid for all of that, how come that you are saying that “ICBC’s theory that my mental health issues do not derive from my injuries but derive from me worrying about my financial recovery”? What ICBC knows about my financial recovery? Correspondence between you as my lawyer and I as your client is strictly confidential.

And finally, why are you blackmailing me to come up with $ 50, 000 to proceed with the Court? What costs $ 50,000? How can you ask $ 50,000 in advance from me when you know that I have been out of work for almost 5 years, living on the disability check [sic]? I have done everything doctors ask me to do it about my rehabilitation. The only person saying that I do not listen to my doctors is you, my lawyer. I wonder did you read my specialist’s reports. You are the only person talking about my Syrinx. I stoped [sic] talking about it the moment you advised me that. You can read my specialist’s reports. Have I mentioned anywhere my Syrinx after you advised me not to do it any more? No, I did not. How come that you never mentioned my other injuries? Not a single word, like it never happens.

> I trusted you with my life, so I have no idea how come that I end up in this nightmare about my legal case. Why do I need to write all this? Why do I need to stress out myself about my legal case. I have been doing my part of rehabilitation. Why are you not doing your part as a lawyer?
>
> In a nutshell, I want you to stop putting pressure on me, I want you to stop coming up with new reasons why not to go to the Court, I want you to stop intimidating me (it does not work with me, but it stresses me out), I want you to stop blackmailing me to come up with $ 50,000.
>
> I am leaving it to you to run my claim, make the settlement proposal or run the trail [sic], whatever you deem necessary to recover the fund we discussed earlier - the reasonable proposal.
>
> In reality, I know you would do anything to help me and I believe I am now prepared to help myself by accepting what you deem reasonable. Ultimately, I am looking forward to an end of the case. Please let me know if there is anything to sign in order for you to proceed.

[32] The client was clearly eager to ensure her case was resolved. If not by settlement, she was keen on having her day in court.

[33] The lawyer responded to the client in an email later the same day stating:

> I have tremendous concerns that you continue to not take the advice of people who care considerably about you and who are trying to help you. I truly believe this is affecting you [sic] emotional health as well as your future security as it relates to your case.
>
> Because you are insistent that your case is worth $4m (and ignoring my advice) and are instructing me to advance a case for that sum and/or refusing to provide me with reasonable instructions about how to present your case at trial, there is a VERY good chance the judge will punish you by making you pay the costs of ICBC for taking such an unreasonable position. You will also likely be deprived of your expenses which will be considerable. I told you that if you insist on taking such an unreasonably [sic] position at trial and exposing yourself to a cost penalty, then you would need to fund the disbursements necessary to conduct the trial because it is not fair to expect me to pay these expenses knowing they will not be recovered. I told you that unless you provided these funds, I would not be taking steps to secure the trial date and book the necessary experts. The time for you to come up with these funds has passed and the trial is now lost.
>
> There is also the issue of you having to attend an FCE appointment which you were not able to attend because you were in the hospital. That itself was likely enough to doom the trial date. While I was successful in fending off an earlier application (largely because I did not want to expose you to the stress of this), ICBC would be permitted to seek a further FCE appointment and I am confident a judge would have granted this to him.

> The only reason the trial date is lost is because of the issues arising from the stress you inflicted on yourself by not listening to your caregivers and myself.
>
> You have a very good case but you are ruining it by not listening to me. You certainly don't have to agree with me, but you should at least listen to my advice and you are simply not doing that.
>
> At this point, the trial is adjourned and a new date will be obtained.
>
> I know that you do not want your case adjourned but this will at least give you a chance to remedy some of the problems that have arisen in the case - the self-inflicted stress.
>
> It also gives you some time to possibly look at changing lawyers if you feel that I am not representing your interests adequately. While, I would of course not want that to happen that is something you may want to look at.
>
> I would suggest that you contact Jacinda and arrange a meeting at my office with you and your two friends.

[34] The client was extremely upset that her September 12, 2016 trial date was lost. An appointment was made to meet with the lawyer at the law firm on September 27, 2016. The September 27, 2016 meeting was attended by the client, her friend Mr. Pavlov, the lawyer, and his legal assistant.

[35] The lawyer sent the client an email following the September 27, 2016 meeting stating:

> It was nice to see you and Igor today at my office.
>
> I confirm that you have instructed me to make a settlement offer of $1,780,000 which is broken down as follows:
>
> General Damages - $200,000
>
> Past Wage loss - $200,000
>
> Future Wage Loss - $800,000
>
> Specials Damages - $10,000
>
> Future Care - $260,000
>
> Tax and Gross - $150,000
>
> In trust Claim - $10,000
>
> Loss of Relationship - $150,000
>
> I will get this offer out today.

> As you know, I have your case assessed between $950,000 and $1,300,000 assuming we can prove all your problems and disability are caused by the accident. As we have discussed (and as I set out in my email to you dated July 26/16), I think there is a good chance a jury will get confused on the issue of causation and that it would be reasonable to settle your claim for something in the range of $665,000 to $910,000. The other issue is that the Defendant only has $1,000,000 in insurance and likely little or no ability to pay beyond this. In short, the offer you have instructed me to send out vastly exceeds what I think your case is worth and what you will be able to recovery [sic].
>
> I previously indicated to you that I would not be taking steps to secure a trial date and commit to funding the costs associated with the trial if you were to continue to instruct me to take an unreasonable position at the trial. I said that I would first need you to come up with $50,000 to cover these costs as it was highly unlikely they would be recovered as a judge would likely punish you for taking an unreasonable position. Previously you instructed me to present a case of $4,000,000 and that would put you in jeopardy of being punished. Today, I said that I would be willing to commit to securing a trial date and funding the costs of the trial if you provided me with irrevocable written instructions to present a case at trial around the level of the $1,780,000 offer you instructed me to make. Although this vastly exceeds what the case is worth it is less likely you would be punished for presenting a case at that level. I confirm that you are not quite ready to commit to this and as such I will not be taking steps to secure a trial date until you have sorted this out or provided me with $50,000 to cover the estimated trial costs.
>
> I confirm my advice to you that if ICBC makes a reasonable formal offer and you decline to accept, I will be looking for you to come up with $50,000 to cover the costs of the trial.
>
> The last thing we discussed today, is my very strong advice that you make an offer to settle for the $1,000,000 policy limits of the defence. If you make this offer and the defence declines it, you are actually in a position to potentially recover more than the policy limits from ICBC. I confirm that you have declined to take my advice at this point. I am hopeful you will consider following my advice at some point. You spoke about your friend whose lawyer was able to settle his claim for $1,000,000 quickly and without going to trial. With respect, I suspect that fellow followed the advice of his lawyer - something you are not currently doing.
>
> In any event, it was nice to see you today and in better spirits. Thank you for the lovely chocolate. I decided to share with others in the office today. ☺
>
> I will report back if and when ICBC responds to your offer.

[36] Following the September 27, 2016 meeting the possibility of a mediation was explored. The lawyer was of the view initially, that ICBC would not agree to a mediation given the client's initial high settlement demand.

[37] In early October 2016 the client returned to Croatia to be with her mother who was terminally ill.

[38] In late October 2016, ICBC offered the defendant's policy limit of $1 million, less any monies they had advanced or paid to repair vehicles and property damage.

[39] The lawyer's advice in an email dated October 29, 2016 was to accept the offer of the $1 million policy limit.

[40] The client rejected the offer in an email dated November 3, 2016, believing it did not adequately compensate her for future wage loss and care. The client wanted to proceed with a mediation.

[41] The lawyer replied to the client the same day by email dated November 3, 2016 stating:

> There will be no mediation. They have offered all the money they have. If you don't want to accept this offer, then your next move would be to proceed to set a new trial date. I have concerns you would get less at trial. Even if you got a judgment for more, then you would not likely collect if [sic] from the defendant.
>
> Again, I will need you to fund the disbursements for the trial if that is what you want to do since you are not following my advice. I would need you to supply me with $50,000 to secure the new expenses associated with the trial.

[42] Discussions continued as the client was simply not prepared to accept the $1 million policy limit despite the lawyer's urgings in that regard. The lawyer suggested the client obtain a second opinion, and suggested a reputable lawyer, and offered to pay for the cost of the consultation and advice.

[43] The client did not take the lawyer up on his offer. The client wanted a breakdown of ICBC's offer and the financial status of the defendant investigated. In an email dated November 18, 2016 the lawyer advised the client:

> Hi Anna,
>
> As I have said several times the offer form [sic] ICBC is not broken down by heads of damages. It has been lumped together which is very common.

> When we spoke the other day, I told you that if you wanted to investigate the assets of the defendant it would be necessary to retain a lawyer in Alberta to do that. This expense would not be recoverable from ICBC. I told you that if you wanted me to pursue this, I would need you to provide me with $5,000 to cover this expense as I am not inclined to spend money that you will not recovery [sic].
>
> I am actually in the process of sending you an email that sets out the net amount I expect you will recover.

[44] The lawyer did a rough calculation of the client's anticipated net recovery based on ICBC's policy limit offer. The expected net recovery was $710,000 after the deduction of fees, taxes, and amounts advanced in interest-free loans to the client, and after the client's recovery of costs.

[45] The client would not accept the offer on these terms and began to further question the adjournment of her trial and the level of pretrial preparation that had been previously done. She also raised the issue of part 7 benefits.

[46] The lawyer responded in an email of December 14, 2016 which states [italics as in original]:

> We seem to be going round and round with the same questions. My answers to your questions are below in *blue italics*.
>
> In a subsequent email you have asked me to offer to settle for $1m from ICBC and $800k from the Defendant and leaving the Part 7 open. One thing that you must understand is that if you make an offer to ICBC, you revoke their offer. This means that they do not need to remake their policy limit offer. Frankly, it takes all the pressure off of them because they can say that they made a policy limit offer which you rejected. If you do this, you put ICBC in an extremely strong position to offer you something considerably less.
>
> Rather than make the offer you propose, I suggest a better approach would be for me to call the adjuster and see if she will keep the Part 7 claim open and still pay the $1m policy limit. I would ask that you give strong consideration to doing that instead. I am happy to discuss this with you in the New Year as I am about to be away from the office soon.
>
> From: Anna R [mailto:ca_homeland@yahoo.com]
> Sent: Monday, December 12, 2016 10:14 AM
> To: Jacinda Chapman; Scott Stanley
> Subject: Anna Radic
>
> Hello Jacinda,

I would like to know what is happening with a copy of Part 7? I want to know how much money was left from $ 150,000.

Jacinda will get this information to you.

Did Scott or ICBC file a Notice to mediate 77 days before scheduled trial date on September 12, 2016?

No. ICBC has now offered as much as they can possible offer so this is not an issue.

I would also like to know who decided that 10 days would be enough for my trial. Would 10 days be enough for the complex case like mine?

We had 15 days set aside which was likely enough time to do your trial. The length of trial was not the reason your case was adjourned. I have explained this to you many times and don't find it productive to continue to do so.

Would a cancellation of trial from my lawyers [sic] side (despite my and my specialists written instructions and recommendations) be a breach of our agreement?

You would need to talk to another lawyer about that as I cannot give you advise [sic] about anything that involves your relationship with me. I have told you in the past (and will repeat this) that the letters from your doctors are not determinative of whether or not your case would proceed to trial. You were hospitalized over concerns you would take your life (something you told me many times you planned to do) following the advice I gave to you about your claim and this prevented you from attending a defence medical appointment which was needed before the trial.

I would like to know what exactly was done to prepare my trial before Aug 25, 2016, when Scott notified me at he is not proceeding with a trial.

Your case was ready to proceed had the issues we spoke of not arising [sic]. Specifically, I spent many thousands of dollars on expert reports and assessments that were all timed such that I had these materials before trial.

Please answer my questions in timely manner.

Sincerely,

Anna

[47] The client became increasingly frustrated and in an email of January 6, 2017, threatened a lawsuit against the lawyer and the law firm if settlement was not reached by the end of January 2017. The client also threatened to report the lawyer to the Law Society insinuating he was incompetent. To add to the client's difficulties,

the law firm had stopped advancing her the $1,500 per month. As a result, the client's financial difficulties were compounding. The client's total income was roughly $1,300 per month.

[48] The lawyer responded to the client in an email of January 6, 2017 stating:

> It makes it very difficult to represent you under threat of complaint to the Law Society. It will soon come to the point where I am not able to represent you if you continue on in this fashion. If I am forced to withdraw as your lawyer I suspect ICBC may pull its offer. When a lawyer withdraws it always signals difficulties to the other side which they often try to exploit. I really do not want to do that as I do not consider it to be in your best interests.
>
> You are certainly free to report me to the Law Society if you feel that I have done something wrong. The Law Society is there to protect the public and to regulate lawyers.
>
> I have suggested that you speak to another lawyer and get a second opinion. I STRONGLY suggest you do that. I am prepared to give you $2,000 so that you may go and have a second lawyer of your choosing review my file and give you some advice. This lawyer could also give you some advice about whether or not I have done something worthy of complaint with the Law Society.
>
> I strongly suggest that you accept ICBC's offer. If you don't want to do that, you should have me (or perhaps another lawyer you trust) have hour [sic] case proceed to trial. While, I don't believe it to be wise to have your case proceed to trial that is where it will likely end up if you don't accept ICBC's offer. Again that is a choice you will need to make. I have told you the things you would need to do to have the case proceed to trial, namely to fund the future disbursements.
>
> The one thing you might have me do is to go back to ICBC and see if they will leave the Part 7 claim open in addition to paying you $1m. I suspect they may very well do this. Unfortunately, I have not been able to have any meaningful discussion with you about possibly doing this.
>
> You seem to imply that I have delayed the resolution of your claim because of the interest charges. I have told you that I do not plan to charge any interest.
>
> Given the tone of your last email, this is the last one I will respond to. If you send any further emails, I will simply not respond to them. As I am still your lawyer, I am quite happy to meet with you in person to discuss any aspect of your case.
>
> I do wish you the best for you and I have always tried to pursue you [sic] best interests (both legal and otherwise).

[49] A further meeting between the lawyer and client took place on March 28, 2017 at which the lawyer's legal assistant was also present. The lawyer's email of March 28, 2017 summarizes his understanding of what took place. It states:

> I have told you that I would not respond to your emails but that you are welcome to speak to me in person at my office. I will respond to this one as I want to confirm what took place today at my office. While I am certain you will respond to this email I will not respond further.
>
> Your email to me follows our meeting at our office today in which both Jacinda and I were in attendance. Afterwards, you met with Joe Murphy and Jacinda as I had to get back to Court.
>
> You began our meeting by apologizing for your past behavior which I took to mean your conduct in late 2016 and early 2017 wherein you threatened to report me to the law society; accused me of not looking after your best interests; accused me of not properly preparing your case; and accused me of not caring about you as a client. Those were very serious allegations to make against me and really made it difficult for me to continue to act for you. You were in a tough emotional situation at the time and I attributed these allegations you made against me to your emotional state.
>
> I was hopeful that we could have a productive meeting today so that I could take your instructions about whether or not you wish to accept ICBC's offer or to take the steps necessary to have your case reset for trial (i.e. be prepared to pay $50,000 for the disbursements needed to conduct the trial). Unfortunately that was not possible as you said that you would never accept ICBC's offer of $1m plus costs and that you did not want to have your case go to trial. Instead you insisted that I try and get a better settlement from ICBC or the driver. I told you that I had spoken to ICBC to see if they will pay you the $1m and leave your Part 7 claim open but the adjuster told me she was not prepared to do that and that their offer was final and that I was confident that was correct.
>
> You then insisted that I take steps to arrange a mediation and I told you that was not advisable because 1) ICBC was not going to offer any more money; 2) if you make a counter offer it revokes the $1m offer and takes the pressure off of ICBC to offer their limits to you in the future as they can say they offered it and you refused; and 3) it would likely be a waste of money and cost about $5,000 which I would need you to pay upfront before I would take steps to set up a mediation.
>
> You stated that you want to pursue the Defendant to make a contribution to the settlement as you are of the view that he has assets based on your observations of the posts he makes on social media. I told you that it was highly unlikely that the Defendant would do this and stated again that making an offer that the Defendant must pay would revoke the $1m offer. I told you (as I have in the past) that if you want me to do an investigation into whether or not the Defendant has assets, that I would need you to provide me with $5,000 to cover the costs of doing this. You have not agreed to do this.

At this point, you repeated the same allegations that you have made against me in the past suggesting that I have not prepared your case properly (ex. why the trial was adjourned, why there was no mediation, why I used certain experts whom you disagree with, why I did not use certain experts you thought I should use) all of which I have provided you with an explanation in the past but which you refuse to accept. You accused me of various acts of dishonesty and professional misconduct suggesting that I have withheld information from you and that I made settlement offers on your behalf that I was not authorized to make. Actually your email below confirms this allegation as you attach the draft settlement proposal dated September 27, 2016 (for the sum of $1,780,000) which is the one you allege I sent out without your instructions. This is utterly incorrect as I met with you and your friend, Igor, on September 27, 2016 and obtained your specific instructions to make this offer and set [sic] a confirming email to you and Igor on September 27, 2016.

You concluded our meeting by saying that you felt you have no choice but to make a complaint against me to the law society.

You met with Joe and Jacinda afterwards and then sent your email below.

I take your email to be a threat that unless I somehow come up with a better settlement that your plan is to report me to the law society. As I made it very clear that there is no way to get a better settlement based on my communications with ICBC. Your options are to take their offer or go to trial. If you want to make an offer you are free to do that but you left me no instructions.

Given the allegations that you have made against me in the past and for which you repeated again today, you have frustrated our agreement and made it very difficult (most likely impossible) for me to continue to act for you. I really do not want to take steps to stop acting for you as I have stated to you in the past that this will be seen negatively by ICBC and may very well reduce the amount of money they are prepared to pay you in the fututre [sic]. I have told you several times to consult another lawyer and get a second opinion or perhaps even have another lawyer take over the case from me since you feel that I have done such a poor job on your behalf. I strongly think you should speak to another lawyer as soon as possible.

I am going to review this matter at the end of April. Hopefully by that time you will have either spoken to another lawyer who can assist you and replace me or you have truly come to a place where you can instruct me to either accept the settlement that ICBC has offered or are prepared to take the steps necessary to have your case set for trial.

I apologize for not accepting your gift today. While I do appreciate the gesture, I did not think it was appropriate for me accept it given the allegations you were making against me. It struck me that it would be unprofessional to accept it.

[50] The client was determined to mediate and managed to borrow $3,000 from a friend in order to make that happen. She sent the lawyer an email dated May 23, 2017 which states:

> I spoke to Jacinda today, asking her to make or a meeting [sic] or arrange for you to call me. She said you'll call me after your morning meeting. So far, you did not call.
>
> We spoke about scheduling a mediation. You had asked me to send you $3,000 check [sic] to pay for the costs of mediation. I agreed to do that.
>
> I would like to choose two mediators. If ICBC disagrees with my choice of mediators, then Mediate BC can decide which mediator will be assigned for my case. I called Mediate BC and they said, if I am paying I can choose mediators.
>
> I would like one my friend to be present on mediation. Please contact ICBC and ask their permission. Mediate BC said there is no problem, as long as ICBC agrees.
>
> I would like you to require $1, 780.00 [sic], as you did on Sep 27, 2016 in an official offer to settle. I would like you to be very specific and mention that offer in the request for mediation.
>
> I would like you to forward me all correspondence from now on between you, paralegals and ICBC and Mediate BC.
>
> Please let me know if you agree, and I will mail you the check [sic].

[51] The lawyer replied in an email of May 29, 2017 where he states:

> Thank you for your email.
>
> Please send me a cheque and the names of the two mediators that you want to use. I like Marion Allan, Mary Ellen Boyd and Barbara Cornish. The first two were judges before they became mediators.
>
> As you know, I do not think mediation is a good idea but you are free to proceed as you wish.
>
> I will send out the offer for $1,780,000 once the mediation date is scheduled. However, I must caution you that by making this offer this will act to revoke ICBC's offer of $1,000,000. ICBC faced tremendous pressure to offer you the policy limits of $1,000,000 and you will effectively be taking away this pressure by making your current offer. There is no guarantee that ICBC will remake this offer. It is my advice that what you are doing is tremendously foolish. I have told you that many times.

> I will carry out your instructions and proceed to set up the mediation once you have send [sic] me your cheque for $3,000.

[52] A mediation was scheduled for September 18, 2017 however, matters did not go smoothly. The client was advised that the lawyer was double booked that day. It was hoped that his trial scheduled for that day would go away and the mediation would then proceed. In addition, the client was concerned about past events involving the lawyer and defence counsel, and she wanted a freedom of information request made so that she could get all of ICBC's documents. The client expressed her frustrations in an email of June 24, 2017 wherein she states:

> I have a problem with a potential adjournment of my Mediation. When Scott agreed to go for mediation he knew about 60 days time frame (since the appointment of a mediator). I want to have a firm date of the Mediation. I am very tired of being adjourned. I am very tired of my lawyer working for more important clients than I. Just a reminder, that Scott notified me about not going to the trial 19 days before scheduled trial last year. I do not want anything like this happen again. The whole year has passed, and he did not do anything about my legal case. I sent required money on May 31, 2017 and I expect a timely service. It is time to finish my legal case.
>
> I also want to get my ICBC MVA file (from May 2016 until present) trough [sic] the Freedom of Information and Protection of Privacy Acts [sic]. Scott never provided answers to certain questions, or copies of documents (like ICBC's formal offer to settle or an offer to settle sent Sep 27, 2016, he said he does not have it, ICBC lawyer has it). It is really unusual that in the time of electronic devices, my lawyer can not provide me with an important document, related to my legal case. My question is, do you want to ask my adjuster for my file, or I will do it, trough [sic] the Freedom of Information and Protection of Privacy Acts [sic].

[53] The lawyer replied the same day by email stating:

> We are proceeding as we have proposed. If you do not like what we have arranged, you are free to fire me and retain another lawyer.
>
> I do not need any further documents from ICBC and I am telling you not to make a request directly from ICBC. If you insist on us making the request, please send me a cheque for $300 to cover the costs associated with this.

[54] The relationship between the lawyer and client continued to deteriorate as the client pressed her grievances and sought ICBC's documents through an FOI request. On July 6, 2017 the client wrote the following email to the lawyer:

I never got information I have asked you. It is totally correct that you've been withdrawing [sic] information and documents related to my legal case from me.

Everything you said or did is documented. It won't be too hard to find out the truth. Let me know if you quit, then I'll take steps certain steps [sic] that I've tried to avoid so far. You might become the most known injury lawyer in Canada.

Authorization you sent to me is non [sic] related to any of my questions. I do not need any documents and information about me, like how much money I owe to ICBC. I owe none! My driving record is perfect. I know that much, so why would I asked information like that.

I also do not need, quoting you: "communication to and from your office". I need my offer to settle sent to ICBC in Sep 2016, ICBC formal offer to to [sic] settle from Oct 2016. You told me that you sent my offer to settle on Sep 27, 2016. You notified me in October 2016 that ICBC is offering me to settle, so why would not you provide me with ICBC formal offer to settle?! How can I consider accepting proposed settlement if I can not get a settlement document?

You send me mail stating that ICBC wants me to pay for my write off car, so why can't I get a copy of that request? You sent me e mail stating that ICBC adjuster refuse to leave part 7 and TTD benefits pen[sic] for me, so why would not you provide me with a copy of that?! You know very well that best Canadian doctors approved my disability and that I need ongoing therapies and care. So what did you do as my injury lawyer to make sure that I get all that in previous year and in the future? Since my therapies stopped last year, my health deteriorated.

You sent me numerous of e mails stating that my trial was adjourned because I did not attend ICBC FCEA, but you never told me when was scheduled. I attended all assessments scheduled by your paralegals. The service deadlines for reports was June 17, 2016. You blamed my stay in the hospital from June 22, 2016 for me not attending ICBC FCEA. How is that possible? You never explained that discrepancy to me. Maybe you did not have time to deal with my case, you were on vacation.

Even though I had asked numerous of times, I never got Court's decision about me not attending ICBC FCEA scheduled May 20, 2016. I just got e mail from your paralegal not to attend it ICBC FCEA on May 20, 2017.

I've been asking those questions since adjournment of my trial. I could not get answers from you or your paralegals. Why are you surprise that I want to get my file from ICBC file trough [sic] the FOI.

I can't even believe that you blackmailed me to get you $ 300 for a file with no charge. You asked $ 50,000 to prepare my trial (I do not know how would you prepare it when you missed a deadline to file a court documents and how would you prepare my trial from you [sic] vacation). You asked me to provide

> you $ 5,000 to get information about defendant assets one year after you suppose to have that report (June 17 was service delivery report deadline). You asked for $ 5,000 to set up a mediation. When I complained why do I need to pay 100% of costs, you said send me $ 3,00 [sic], which I did. Then you asked $ 300 for ICBC FOI file. We have a fee agreement about financing my legal claim, which you have breached. What is a legal term for you as my injury lawyer to ask money from me? I am not a lawyer like you so please tell me are you blackmailing me, or what? I am your injured client with approved disability!!!
>
> I told you that I'll get to the bottom of it. The first time we met I told you that I did not have a brain injury. All my body is injured except my brain. My thought are clear, I know what is right what is wrong.
>
> I also told you that my legal case is not just going away or disappearing. It is my life, my struggle with all those injuries and disability; struggle with pressure of everyday living in pain. On the top of everything I need to suffer the pressure and stress from you. Your excuses are never ending story. If you quit, I'll let BC Law society to deal with everything you did or did not do in my legal case. At least I will have a peace of mind that I put lot of effort to finish this legal case with you as my lawyer. It will be what is meant to be.

[55] The client's grievances and sense of mistreatment continued to fester and emails were exchanged canvassing many of the issues already discussed. A meeting was arranged for September 14, 2017 at the lawyer's offices in order to prepare for the mediation of September 18, 2017. The meeting did not go as planned.

[56] There are no notes from the meeting, just an email confirming events and a letter by the lawyer authored after the fact.

[57] Present at the September 14, 2017 meeting were the lawyer, his legal assistant, the client, and her friend, Mr. Kim. With the exception of the lawyer's legal assistant, all participants at the September 14, 2017 meeting provided oral evidence on this review.

[58] Several days prior to the September 14, 2017 meeting, on August 31, 2017, ICBC had advanced an offer to settle which consisted of the policy limits and the part 7 benefits, or their cash out value. The fact that ICBC had increased their offer was not disclosed to the client before or during September 14, 2017 meeting.

[59] At the beginning of September 14, 2017 meeting, the client was critical of the lawyer for not properly complying with the mediation regulations. It was the lawyer's view that the 2016 offer previously made was sufficient and also complied with the spirit of the regulation. The client had done her own research and had spoken to an individual at Mediation BC and was convinced the mediation was imperiled because of the lawyer's perceived failure to comply with the regulations.

[60] Old grievances surfaced including her prior lost trial date, the typographical error in the former offer to settle, and the lack of a search or inquiry into the defendant's assets. The client had brought photos from social media showing the defendant allegedly owning a house and vehicles. In her frustration, the client reiterated that she should report the lawyer to the Law Society and sue the law firm. At this point, the lawyer and his legal assistant stood up and the lawyer advised he had no alternative but to withdraw from the case.

[61] It is the lawyer's belief that the client attended the meeting with the sole intention of backing the lawyer into a corner in order to force him to withdraw and forfeit his fee.

[62] Mr. Kim, who met with the client prior to the September 14, 2017 meeting, attended the meeting, and sat with her afterwards, testified that there was no plan or discussion indicating a conspiracy to force the lawyer to withdraw from the case. He recollects the client stating she should report the lawyer to the Law Society, but he did not recall a threat to sue the law firm.

[63] The events which followed the September 14, 2017 meeting were equally regrettable. The client attended the mediation with her friend, Mr. Kim. Before the mediation began, the client was confronted by the lawyer who showed up in order to serve her with an application for a declaration of lien regarding his fees.

[64] Before the mediation, in response to a request from ICBC, the client had tried to obtain receipts for the disbursements incurred by the law firm to date, in order to

press a claim for costs at the mediation. Regretfully, the lawyer refused to provide those documents.

[65] Feeling abandoned and now being "sued" by her lawyer, the client settled her claim at the mediation for $1,126,590.77, representing the policy limit of the defendant, the cash value of the part 7 benefits and the TTD benefits. Despite not being provided with the receipts for the disbursements incurred, ICBC offered to pay the plaintiff's bill of costs as claimed, together with the disbursements, in the amount of $67,732.12. Subject to the client obtaining legal advice, the client's case was settled on this basis on September 18, 2017.

Legal Analysis

[66] In *Campney v. Arctic Installations (Victoria) Ltd.,* 1994 CanLII 1676 (BC CA) Madam Justice Southin describes the duty of utmost good faith on the part of a lawyer within that the solicitor-client relationship. At para. 55 she states:

> 55 As I described that obligation in *Ladner Downs v. Crowley*:
>
> The relationship is also one of utmost good faith (*Tyrrel v. Bank of London* (1862), 10 H.L. Cas. 26 at 44, 11 E.R. 934 at 941, per Lord Westbury):
>
> My Lords, there is no relation known to society, of the duties of which it is more incumbent upon a court of justice strictly to require a faithful and honourable observance, than the relation between solicitor and client ... a solicitor shall not, in any way whatever, in respect of the subject of any transactions in the relations between him and his client, make gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled.
>
> Because the solicitor, when he accepts a retainer, is contracting with his own client, he has a duty to advise the client fully and fairly concerning the terms of that contract. That is a duty which arises from the second principle. (See *London Loan & Savings Co. v. Brickenden*, 1933 CanLII 7 (SCC), [1933] S.C.R. 257 at 261-62, [1933] 3 D.L.R. 161.)
>
> There is nothing new about this principle. In *Lyddon v. Moss* (1859), 4 De G. & J. 104, 45 E.R. 41, the court considered an agreement by the client to pay interest.
>
> Of it, Turner L.J. said [p. 51]:

> In the first place it is founded upon, and gives effect to, an agreement by a client, to allow his solicitor interest, and even compound interest, upon his bills of costs. Every such agreement is a bargain between the solicitor and the client, and can be supported only under the same circumstances as would support any other bargain between them. It is the bounden duty of a solicitor, before he enters into any such bargain with his client, to inform the client that the law allows of no such charge of interest, and that although he may decline to conduct the client's business without such an allowance, others, of equal ability, may be found who will conduct it upon the scale of allowances which is sanctioned by the law. There is here no evidence of any such information having been given, nor can I find anything which could warrant an agreement for the charge of interest. The business, so far as it was not connected with the suit, seems to have been the ordinary business of every solicitor; and so far as the suit is concerned, the position of the Defendant does not seem to me to have differed from that of every other country solicitor employed in a heavy Chancery suit. To hold that this agreement for interest standing by itself could be maintained, would, as it seems to me, be to hold that every solicitor may, at his own will, charge his client with interest, which would lead to intolerable injustice and oppression.

Kay L.J. also adverted to this principle in *Re Romer and Haslam*, p. 304, where he said:

> There is another consideration which operates upon my mind: that if it was intended, when these bills were taken, to treat them as absolute payment of the bills of costs, so as to preclude the solicitors from exercising their right to sue, and the clients from exercising their right to tax, without shewing special circumstances, in such a transaction as that *between solicitor and client it is the solicitor's duty to shew that he made clear to his client its necessary result*. Here nothing of the kind has been done; and I am clearly of opinion that the solicitors never intended to deprive the clients of their right of taxing their bill. [The italics are mine.]

In my opinion, any contract entered into by a solicitor with a client, or any act or omission by a solicitor in his dealings with his client, which deprives the client or is asserted to deprive a client of any of his legal rights existing under the principles of entire contract, can only be given effect to if the solicitor establishes "that [it] ... preclude[s] *any* suspicion of an improper attempt to benefit himself at his client's expense".

In "act or omission" in that formulation, I include insisting on payment during the course of an entire contract and then taking the position that the client has no right to tax. A solicitor might be able to "preclude any suspicion" by showing that the client with full knowledge and understanding made a bargain giving up his right to tax.

[67] Section 71(4) of the LPA provides that on a review of a lawyer's bill, the registrar must consider all the circumstances including:

> Matters to be considered by the registrar on a review
>
> 71 (4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including
>
> (a) the complexity, difficulty or novelty of the issues involved,
>
> (b) the skill, specialized knowledge and responsibility required of the lawyer,
>
> (c) the lawyer's character and standing in the profession,
>
> (d) the amount involved,
>
> (e) the time reasonably spent,
>
> (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
>
> (g) the importance of the matter to the client whose bill is being reviewed, and
>
> (h) the result obtained.

[68] Section 71(5) of the LPA provides that the discretion of the registrar under section 71(4) is not limited by the terms of an agreement between the lawyer and the lawyer's client.

[69] The client's position is that the lawyer should be disentitled to any fee in the circumstances arising because of multiple breaches of the contingency fee agreement by the lawyer which include: the refusal to carry out instructions; misleading client; demanding prepayment for disbursements; and, a lack of an appropriate level of service.

[70] The client submits that the lawyer refused to carry out her instructions in not preparing for the September 12, 2016 trial, and acted contrary to her instructions in allowing an administrative adjournment to take place. The client submits that the lawyer never had an intention of taking the matter to trial, which she submits is

evidenced by the exchange of emails between the lawyer and defence counsel, and the fact that the lawyer went on holiday during the weeks before trial. The client further submits that the refusal to carry out her instructions in the circumstances is exacerbated by the fact that both Drs. Caillier and Wiebe believed the trial would be in her best interests medically, but the lawyer never inquired with any of her treating physicians, or herself.

[71] The lawyer testified he made the unilateral decision to allow the trial to be administratively adjourned out of a concern for the client's mental health and the belief that she could not withstand the rigours of trial. The lawyer also indicated a concern about contacting the client given his belief that her suicidal ideations were triggered by his involvement in the assessment of her case.

[72] While the lawyer's concerns were entirely legitimate, they were based upon hearsay provided to him by his legal assistant. Further, the emails from his office gave rise to an expectation on the part of the client that the trial was proceeding as scheduled. She was not informed of any exchanges between defence counsel and plaintiff's counsel that were leading towards an eventual administrative adjournment.

[73] In all the circumstances, further inquiries were warranted regarding the client's condition but were not made.

[74] The client also cites the lawyer's refusal to conduct an asset search of the defendant, without payment of $5,000 on her part, as another example of the lawyer's refusal to carry out her instructions. The client had information from social media indicating the defendant possibly owned a home and multiple vehicles.

[75] The lawyer testified he has no experience in obtaining an exigible judgment in excess of insurance coverage. He further testified that at the defendant's examination for discovery, the defendant was young, driving a 2005 Mazda of little worth, and had moved to Alberta. This, in his view, did not justify inquiries into the defendant's financial status. I disagree.

[76] The defendant was young but the case itself spanned five and a half years. A lot can happen in that time frame. Also, the client had some evidence from social media that the defendant may have had some assets. While not a certainty, given the fact that the insurance was limited to $1 million, and the lawyer's own assessment of the case had an upper end of $1.3 million, inquiries in this regard were warranted and ought to have been made. It may have impacted the client's decision to settle for the amount she did.

[77] The Law Society of British Columbia's practice check list manual "General Litigation Procedure" provides, in part, at s. 4.2:

> 4.2 Commence proceedings and exchange pleadings:
>
> .1 Identify the defendants and determine, if possible, the defendant's ability to pay a judgment. Consider conducting land title and PPSA searches in this regard.

[78] There is no evidence to suggest the equivalent of a land title search or a PPSA search in Alberta would cost $5,000. Absent evidence to suggest an asset search was financially unjustified, or otherwise unwarranted in the circumstances, it was an appropriate inquiry which might have advanced the client's claim.

[79] The client also cites the lawyer's refusal to obtain wage loss information directly from the shop steward of her former employer, and the lawyer's refusal to prepare a formal statement of facts and issues required by the mediation regulations, as further refusals to carry out her instructions.

[80] I accept the lawyer's explanations in both these matters. The lawyer had obtained the necessary wage loss information from the expert he retained to determine past and future wage loss, and did not require further information from the shop steward. In regard to the mediation regulations, the lawyer testified that he followed his usual practice, and doing more was unnecessary in the circumstances. Further, it would not jeopardize, in any way, the client's mediation scheduled for September 18, 2017.

[81] The client also cites the lawyer's refusal to set her case for trial after the adjournment of the September 12, 2016 trial date without paying $50,000 to fund disbursements; refusing to set down the mediation without $3,000 to fund same; and, the lawyer demanding $300 to conduct a freedom of information search as refusals to carry out her instructions.

[82] The contingency fee agreement envisions the law firm carrying the expense of disbursements until the conclusion of the lawsuit, subject to a demand for the client to pay same within 30 days of demand. No demand was made during the period of the lawyer's retainer.

[83] In these circumstances, demanding the advance payment of future disbursements before carrying out the client's instructions was a breach of the contingency fee agreement. It was exacerbated by the fact that the client had not worked since the motor vehicle accident and had only CPP income after the law firm terminated its compassionate interest-free loan to her of $1,500 per month in late 2016. The client had no money. Demanding payment, particularly $50,000, before setting the matter for trial virtually guaranteed there would be no trial and the client would be held hostage in the interim.

[84] The lawyer did direct the client to high interest lenders who would fund the $50,000 in disbursements. However, this would significantly bite into whatever financial results might come from her case.

[85] The lawyer testified he regretted making the demand for $50,000, but hoped it would make the client see reason and divert her from the path of what he characterized as "self-destruction" with respect to her case by making unrealistic compensation demands. He realized the client would not be able to pay. The lawyer testified that if he had received realistic instructions to advance the client's claim for as high as $1.78 million, he would have abandoned the demand for $50,000 and taken the matter to trial.

[86] I accept the lawyer's evidence in this regard. I also acknowledge that the lawyer suggested the client obtain a second opinion from a distinguished and experienced personal injury lawyer and offered to pay the costs. However, the demand for $50,000 was still a breach of the retainer agreement. It was also used as a means to pressure the client to accept the defendant's initial offer of the $1 million policy limit. If the client had capitulated when the initial demand for $50,000 was made, she would not have gotten the cash value of the part 7 and TTD benefits.

[87] The client further submits that the $50,000 demand for disbursements was particularly egregious because the law firm had taken out an insurance policy over the disbursements and there was never really a risk of non-recovery, despite what the lawyer was telling the client. The existence of the insurance policy over the disbursements was never disclosed to the client.

[88] The client further submits that even if there was a risk that the $50,000 worth of disbursements might not be recovered, to make such a demand, put the lawyer's and law firm's interests ahead of the client's.

[89] Likewise, the client submits the demand for $3,000, in advance, before booking the mediation was also a breach of the retainer agreement. The client had to borrow the $3,000 from a friend. With the benefit of hindsight, the mediation produced results. A settlement was reached in the amount of $1,126,590.77, with a further payment of $67,732.12 in costs and disbursements.

[90] The client alleges that the lawyer's withdrawal as counsel on September 14, 2017, one business day before her mediation, was a fundamental breach of the retainer agreement. The client testified she did not say that she was going to report the lawyer to the Law Society or sue the law firm, only that it was justified in the circumstances.

[91] An email from the client to the lawyer indicates otherwise, although I acknowledge that English is not the first language of the client. The client had raised

the specter of reporting the lawyer to the Law Society on at least one prior occasion which is noted in the exchange of emails.

[92] Mr. Kim, a close personal friend of the client, attended the meeting of September 14, 2017. His evidence was that the client did indicate her intention to report the lawyer to the Law Society during the meeting. He has no recollection of the client indicating she would sue the law firm.

[93] The lawyer testified the client indicated unequivocally that she was going to report him to the Law Society and sue the law firm. In these circumstances, he believed he had no choice but to withdraw. It was the lawyer's belief that the client had deliberately orchestrated this in order to attempt to avoid paying any fees.

[94] The evidence of Mr. Kim was that there were no such discussions or conspiracy in this regard to his knowledge. The client also gave evidence that this was not her intention.

[95] I find that the client did make the threat to report the lawyer to the Law Society and to sue the law firm and that September 14, 2017 was not the first time she did so. Although I am not entirely satisfied with the explanation why the lawyer did not withdraw as counsel when the threat was made the first time, I am of the view that he was justified in doing so on September 14, 2017. Conversely, I am of the view that some of the client's criticisms were justified. Regardless, it was clear that the solicitor-client relationship had broken down and could not continue. In all the circumstances the lawyer's withdrawal was justified.

[96] The client also alleges she was misled by the lawyer on multiple occasions.

[97] The client alleges she was misled by the lawyer when he allegedly feigned preparation for trial when the trial date was lost, by not advising her of the failure to file a trial brief, by not advising her of his failure to conduct a TMC, and finally, by not advising her of the defendant's right and attempts to arrange a functional capacity evaluation.

[98] Preparation for trial was occurring at the time of the client's voluntary admission into the Burnaby General Hospital psychiatric facility. The expert reports had been served by the 84 day deadline, and the lawyer was beginning to obtain the names of witnesses to support the client's claims. When news reached the lawyer of the client's psychiatric episode and committal, preparation for trial stopped for all intents and purposes and the lawyer and defence counsel began to take the path to the inevitable administrative adjournment. The lawyer believed the client was unable to withstand the rigours of a trial, albeit without consulting the client or her caregivers who were of the opposite view. The lawyer did not inform the client that an adjournment was inevitable when he was first aware of this fact, nor did he provide the client with the specific particulars which led to the adjournment, until it was too late.

[99] I accept however, that the lawyer believed an adjournment was in the client's best interests. However, the lawyer's good faith belief that the client's best interest were served by an adjournment did not absolve him of his duty to inform and consult. It was the client's right to make the decision in this regard.

[100] The client alleges she was misled about risks of a jury trial when the lawyer knew the defendant had not paid the jury fees as required by Supreme Court Civil Rule 12-6, and the trial could have proceeded by judge alone on September 12, 2016. The last day upon which jury fees could be paid was July 29, 2016, 45 days prior to trial.

[101] The client submits that the lawyer's representations regarding the risks of a jury trial were misleading after the July 29, 2016 date.

[102] The client alleges that the continued demands for $50,000 to cover the cost of future disbursements to avoid the law firm's risk of non-recovery was also misleading as the law firm had taken out a policy of insurance in order to remove the risk of non-recovery. The client was never made aware of this insurance coverage. Further, the client alleges that it was clear from the defendant's examination for discovery that he was 100% liable for the motor vehicle accident. The only reason

liability was denied was because of the limited insurance coverage. The lawyer agreed on cross examination that it was clear that the defendant was 100% liable for the collision.

[103] Despite the insurance coverage and the fact that the defendant was 100% liable, for the motor vehicle accident, the lawyer continued to advise the client of the risk to his law firm of not recovering the disbursements, and that it was not prepared to fund disbursements any further because of that risk. In the circumstances, I agree with the submissions of the client that the continued demand for $50,000, based upon risk to the law firm of non-recovery of disbursements, when the defendant's liability was certain and the insurance policy was in place, was disingenuous.

[104] The lawyer continued to strongly recommend the acceptance of ICBC's policy limit offer. In my view the demand for $50,000 to fund the disbursements, $5,000 to do an asset search on the defendant, and $3,000 to set the matter for mediation, all became part of a pattern to pressure the client to accept ICBC's policy offer.

[105] The retainer agreement gave the law firm the contractual right to demand the payment of disbursements within 30 days of making such a demand, however, no such demand was made during the course of the retainer.

[106] In the circumstances, the continued demand for $50,000 to fund disbursements was a breach of the retainer agreement and did not meet the duty of "utmost good faith" within the solicitor-client relationship.

[107] The client alleges the lawyer's failure to advise her of ICBC's policy limit offer together with the cash value of the part 7 and TTD benefits when first received by him in late August, further misled her.

[108] The lawyer testified he planned to discuss the offer with the client during their meeting of September 14, 2017 however, he was precluded from doing so by the events which unfolded. In any event, the lawyer submits the client was advised of the offer prior to the mediation of September 18, 2017.

[109] It would have been preferable had the client been advised of the offer in a more timely fashion, but I find the client was not misled in this regard.

[110] Finally, the client alleges the law firm breached the retainer agreement by billing the client prior to “the recovery of an amount” within the legal action.

[111] Following the termination of the solicitor-client relationship on September 14, 2017, the lawyer prepared a bill and an application for declaration of a solicitor’s lien. He attended the mediation on September 18, 2017 and personally served the client with his application for a declaration of a solicitor’s lien and his bill.

[112] The client had previously requested copies of the bills for the disbursements incurred so that she could make a claim for the reimbursement at the mediation. The lawyer refused the client’s request. Despite this refusal, ICBC did agree to reimburse the client fully for the disbursements even though she did not possess the receipts.

[113] The retainer agreement provides that the law firm is entitled to 20% of the amounts recovered. At the time the bill was drawn and served on the client she had not made a recovery of any amount. However, within hours of service of the bill, the client had received and accepted an offer of settlement, plus taxable costs and disbursements, subject only to the client receiving legal advice.

[114] While the lawyer presenting his bill when he did was a technical breach of the retainer agreement, of more concern is his failure to provide the receipts for the disbursements when requested by the client. The lawyer’s failure to do so put the client’s ability to settle the action and recover the disbursements in jeopardy.

[115] Given the existence of the lawyer’s common law solicitor’s lien over any funds recovered, of which ICBC had notice, and the lawyer’s pending application for a formal declaration of lien, not providing receipts for the disbursements incurred, when requested by the client, was unnecessary.

[116] The client submits that the lawyer's breaches of the retainer agreement and his behaviour should disentitle him to any fees whatsoever, and to do otherwise would be a travesty of justice. For the reasons which follow, I disagree.

[117] At common law a lawyer can recover fees on a *quantum meruit* basis, where termination of the solicitor-client relationship was justified. See *Green v. John M. Richter Law Corp.,* 2018 BCSC 1840, para. 35.

[118] The lawyer had conduct of the case since June 7, 2012, roughly 5 years. During that time period the lawyer reviewed over 3,850 pages of medical documents and rehabilitation records; there were 325 written correspondences with counsel for the defendant; 165 written correspondences with insurance adjusters; 375 written correspondences with the client; 201 written correspondences with medical professionals; and 67 written correspondences with other miscellaneous entities.

[119] The lawyer obtained and funded all the necessary expert reports which formed the evidentiary basis to prove the client's losses and ultimately settle the case. The client was unhappy with the lawyer's assessment and believed it was not sufficient for her future needs. However, the client's subjective views in this regard, and her perceived needs, are not the basis upon which damages are proven.

[120] The lawyer quantified the case between $950,000 and $1.3 million. The lawyer's assessment was not contradicted, or seriously challenged during the course of the review. He is an experienced and capable counsel with a proven track record. I have no doubt that this case is an anomaly.

[121] To assist the client with her living expenses, the law firm provided the client with an interest-free compassionate loan of $1,500 per month. The total of which exceeded $40,000. The client agrees this amount must be reimbursed, and it does not form part of this review.

[122] The client's case was complicated medically. She sustained significant physical injuries with an equally significant emotional and psychiatric overlay. The

client had a pre-existing condition involving a syrinx in her spine which added to the complexity of the case and the client's emotional reaction.

[123] The case was of the utmost importance to the client as she would never work again, and would be entirely dependent upon whatever result came of the legal action. The evidentiary record indicates that the client required extra care and attention throughout the course of the litigation.

[124] Ultimately, the case was resolved one business day after the lawyer withdrew, for an amount previously offered by the defendant during the lawyer's watch. The lawyer had assessed the upper end of the client's damages at $1.3 million and the case resolved at $1,126,590.77. In my view, this was an excellent result given the lawyer's unchallenged assessment of the client's case.

[125] Considering all that transpired in the conduct of the case I am of the view that the lawyer's fee warrants a significant reduction to reflect the transgressions which have occurred. To deprive the lawyer entirely of a fee in all the circumstances would, in my view, be too severe. The lawyer's fee is reduced by 50% to a 10% contingency. The contingency fee will not extend to the cash value of the part 7 and TTD benefits, as the bill dated September 14, 2017 makes no such claim, and the lawyer testified it is not his practice to do so.

Disbursements

[126] The client takes issue with the lawyer's claim for faxes in the amount of $83.50, photographs in the amount of $255.30, copying costs in the amount of $7,309.60, courier costs in the amount of $223.58 and $17.50 in travel costs. Otherwise, the balance of the disbursements claimed by the law firm are agreed.

[127] The client objects to the fax, photograph charges, and copying expenses on the basis that the lawyer's evidence was that his legal assistant would have answers to those questions, however she was never called to testify.

[128] There is a dearth of evidence in regard to these claimed disbursements. However, I do have multiple volumes of evidence consisting of correspondence, pleadings, emails and medical reports. The law firm clearly expended monies on copying and faxes.

[129] The assessment of the reasonableness of photocopy charges is not an arithmetical exercise but rather a consideration of what is reasonable in all the circumstances. In assessments under Supreme Court Civil Rule 14-1 it has been referred to as a rough and ready calculation. See *Sovani v. Jin,* 2006 BCSC 855 and *Gill v. Widjaja,* 2011 BCSC 1822. Although this is a review under the LPA, and not an assessment under Supreme Court Civil Rule 14–1, I am of the view that I can take a rough and ready approach where necessary to determine a reasonable amount for copying expenses given the volumes of materials I have before me and my experience as Registrar in similar situations. Applying a rough and ready approach, I allow a total of $4,500 for faxes, photographs and copying.

[130] The courier charges in the amount of $223.58 are allowed. In a case such as this, where there is a need to protect the confidentiality of the client's medical records, the use of couriers is warranted.

[131] The travel costs of $17.50 are disallowed as the evidence was entirely speculative.

Costs

[132] Pursuant to s. 72(1)(a) of the LPA, as the lawyer's bill has been reduced by more than one-sixth, the client is entitled to the costs of the review, unless there are "special circumstances" pursuant to s. 72(2). No special circumstances have been brought to my attention and none are apparent. However, if special circumstances exist of which I am unaware, an appointment may be taken out within 15 days of these reasons to address the issue. Otherwise, the client will have the costs of the review.

[133] Pursuant to s 73(2)(b) of the LPA, the registrar may summarily determine the costs of the review. This review occupied 11 1/2 days of hearing and a brief pre-hearing conference.

[134] Subject to an appointment being filed within 15 days of these reasons, the client's costs are summarily assessed at $18,000 which is inclusive of taxes and disbursements.

Disposition

[135] The contingency fee is reduced to 10% of $995,123.34.

[136] The disbursement claim for faxes/telecopying, photographs and copying is reduced to a total of $4,500.

[137] The disbursement of $223.58 for courier costs is allowed.

[138] The disbursement of $17.50 for travel expenses is disallowed.

[139] The client is entitled to costs of this review in the amount of $18,000 inclusive of taxes and disbursements, subject to the proviso noted above.

[140] If a certificate is required, one may be submitted through the registry for signature.

"REGISTRAR NIELSEN"