IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Garcha v. Gill,*
2011 BCSC 1125

Date: 20110819
Docket: M070249
Registry: Vancouver

Between:

Randhir Singh Garcha

Plaintiff

And

Mukhtiar Singh Gill

Defendant

Before: The Honourable Mr. Justice Cohen

Ruling re: Costs

Counsel for the Plaintiff:	M.S. Randhawa
Counsel for the Defendant:	T.H. Pettit
Place and Date of Hearing:	Vancouver, B.C. September 27, 2010
Place and Date of Defendant's Written Submissions:	Vancouver, B.C. March 31, 2010, February 24, 2011
Place and Date of Plaintiff's Written Submissions:	Vancouver, B.C. September 21, 2010 December 13, 2010
Place and Date of Judgment:	Vancouver, B.C. August 19, 2011

Introduction

[1] In my reasons for judgment issued December 19, 2008, (2008 BCSC 1756) I found that the plaintiff, a chiropractor in private practice, had proven on the balance of probabilities that the defendant was solely responsible for the accident and should be held 100% liable for the plaintiff's personal injuries.

[2] I also found that the appropriate award for the plaintiff's non-pecuniary damages claim was $25,000. However, under the damages head the most contentious item during the litigation centred on the plaintiff's claim for past income loss. On this item, at paras. 93 - 98, I found, as follows:

> [93] In my view, the plaintiff's claim for past income loss falls far short of satisfactorily assessing the actual or even approximate income loss he sustained as a result of the accident. In this regard, I turn to the defendant's analysis which I think appropriately identifies the flaws under this head of the plaintiff's claim for damages.
>
> [94] As the evidence unfolded at trial it showed some important inconsistencies from the claim set out in the plaintiff's letter of July 14, 2006. First, on March 25, 2005, the day of the accident, according to the evidence at trial and the exhibits the plaintiff treated six patients. The plaintiff was able to reschedule all of the other patients, save one. Thus, the plaintiff's income loss for March 25th appears to be only one patient.
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> [95] Second, while I am satisfied that the plaintiff did not work on March 26th, a Saturday, his record for this date was modified after the fact by him and therefore any income loss for this day is inadequately supported by reliable record keeping. I do not conclude that the modification of the record should cast any negative credibility finding on the plaintiff. In this regard, I accept his explanation for the modification. However, the result of the modification renders the evidence in support of any actual loss of income for this day somewhat less than reliable.
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> [96] The plaintiff's claim that from March 28, 2005 until April 25, 2005, he worked 50% of his normal workload was clarified at trial. The plaintiff explained that that he did not actually reduce his patient visits by 50%, but rather he could not perform his practice at the same level as before the accident and had to substantially adjust his techniques for treatment of his patients. He said that he scheduled more frequent breaks, did not take walk-in patients, and let patients do the exercises on their own. This same explanation apparently applies to his claim that from April 25, 2005 to May 1, 2005, he practiced at 75% of his normal workload.
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> [97] However, the defence did a thorough analysis of the plaintiff's patient numbers and fees for different periods of time so as to make a comparison with the period during which income loss is being claimed by the plaintiff. The analysis shows quite a different picture than that put forward by the plaintiff and casts significant doubt on the reliability of the plaintiff's claim of income loss based on a reduced workload, and certainly does not support his assertion that he suffered a loss of 150 patient visits as he estimated. Rather the analysis indicates that the plaintiff was working at close to full patient capacity during the period he claims that he lost income due to his accident injuries.
>
> [98] In the result, I find that the plaintiff has failed to prove on a balance of probabilities that he is entitled to the amounts he claims under either of the approaches he has submitted in support of his claim. What his claim amounts to is essentially his best guess of past income loss with no evidence that satisfactorily supports his estimate. In my

opinion, while I think that the plaintiff is entitled to some past income loss, I find that the amount of his actual income loss is at best modest, and I fix his award for past income loss at $3,500.

Applicability of Rule 66

[3] By way of background, the plaintiff's action proceeded to trial pursuant to the former Rule 66 (the "Rule") under the fast track litigation provisions which stipulated as follows:

> (1) The object of this rule is to provide a speedier and less expensive determination of certain actions the trial of which can be completed within 2 days.
>
> ...
>
> (8) This rule ceases to apply to an action if
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> (a) the parties to the action file a consent order to that effect,
>
> (b) the court, on its own motion or on the application of any party, so orders, or
>
> (c) none of the parties to the action applies for a trial date within 4 months after the date on which this rule becomes applicable to the action.
>
> (9) In exercising its discretion under subrule (8)(b), the court must take into account
>
> (a) the likelihood that a trial of the action will occupy more than 2 days, and
>
> (b) whether it is reasonable in the circumstances to continue the action under this rule.

[4] The first issue I must decide is whether the award of costs to the plaintiff should be calculated using the limits set out in subsection 29 of the Rule which provided, as follows:

> (29) Unless the court orders otherwise or the parties consent, and subject to Rule 57(10), the amount of costs, exclusive of disbursements, to which a party is entitled is as follows:
>
> (a) if the time spent on the hearing of the trial is one day or less, $5,000;
>
> (b) if the time spent on the hearing of the trial is more than one day, $6,600.

[5] The trial commenced on May 28, 2008, but did not complete within two days and was reset for continuation on October 27, 2008, for a further five days.

[6] By way of further background, in November 2007 the defendant made an offer to settle pursuant to the former Rule 37 in the amount of $19,000 plus costs. On May 20, 2008, the plaintiff made an offer to settle pursuant to Rule 37 in the amount of $22,499 plus costs.

[7] In my opinion, the award of costs to the plaintiff is not bound by the provisions of the Rule.

[8] The defendant's position is that he continued to be of the belief that the action could be heard within two days until either the day before or the morning of the trial. He asserted that on the day prior to the commencement of the trial, counsel for the plaintiff for the first time addressed the issue of the trial length, a matter first raised by defence counsel, over one year earlier, in his letter to plaintiff's counsel dated April 27, 2007, wherein he said, as follows:

> We note that your office has set this matter down in the fast track program and are representing to the court that the trial will take 2 days or less. Kindly therefore provide the following:
>
> - Trial witness list with time estimates;
> - Provision of all expert reports that the plaintiff intends to rely upon at trial;
> - Summary of claims;
> - As requested, particulars re claims of past income loss and special damages.
>
> The foregoing is necessary for our review of this matter from a trial management standpoint so that we may consider whether or not the matter is properly within Rule 66.
>
> We reserve the right to trial by jury should it turn out this matter is not appropriate for Rule 66.

[9] The defendant submitted that it was not until the morning of the first day of trial that the plaintiff confirmed that the trial would last longer than two days.

[10] The plaintiff submitted that on May 27, 2008, his counsel discussed with defence counsel the potential witnesses and the time estimates associated with each witness and that subsequently counsel forwarded a trial agenda to defence counsel. Thus, he submitted, both parties were aware prior to the commencement of the trial that it could not complete in two days.

[11] The defendant relies most heavily on the decision in *Majewska v. Partyka*, 2010 BCCA 236 as a complete answer to the plaintiff's position on this issue. In that case, at paras. 18- 29 and 34-36, Neilson J.A. held, as follows:

> [18] In *Reid v. Insurance Corp. of British Columbia*, 2000 BCSC 1334, Shaw J. affirmed that the objective of R. 66 was to keep the costs of litigation low. While he recognized the discretion inherent in R. 66(29), it was his view that judges should not depart from the costs limits set out in that sub-rule unless "special circumstances" existed

that made it unjust to award the capped costs. He accordingly declined to order double costs for a defendant who had delivered an offer to settle under R. 37.

[19] The decision in *Reid* led to the enactment of R. 66(29.1), which clearly permits the court to consider a settlement offer as a "special circumstance" in exercising its discretion as to costs under the rule. Many decisions have now recognized that an offer to settle or a trial extending beyond two days are special circumstances that justify an award of costs that exceeds the limits in R. 66(29). These cases, however, have not demonstrated a unified approach as to how those costs should be calculated.

[20] In some cases in which a R. 37 offer was the only special circumstance, trial judges have ordered costs under the usual tariff, including double costs for items occurring after the date of the offer, but set a cap of twice the amount provided in R. 66(29). These cases suggest, however, that if there are additional special circumstances, such a cap may not be appropriate: *Bishop-Austin v. Brown*, 2004 BCSC 944, 34 B.C.L.R. (4th) 355; *Linekar v. Andreko*, 2004 BCSC 1244, 34 B.C.L.R. (4th) 142.

[21] In *Girvan v. Raffele*, 2002 BCSC 1105, 4 B.C.L.R. (4th) 52, the judge used a more complicated formula. He directed the plaintiff to prepare one bill of costs under the usual tariff as if no offer had been delivered, and a second bill of costs that recognized her entitlement to double units for those steps taken after the offer was made. He then used the difference between those amounts as a percentage increase to be applied to the fixed costs under R. 66(29) to calculate the award of costs.

[22] Other decisions, such as that before us, have directed that all costs be calculated under the usual tariff. Some judges have justified this approach by finding that the case should not have been brought under R. 66 due to its complexity and the time taken to hear it: *Kailey v. Kelner*, 2008 BCSC 224; *Schnare v. Roberts*, 2009 BCSC 656.

[23] In other cases where the trial exceeded two days judges have simply awarded the maximum available under R. 66(29): *Bove v. Lauritzen*, 2009 BCSC 1698, *Laroche v. MacPhail*, 2007 BCSC 1451; *Lopez v. VW Credit Canada Inc.*, 2008 BCSC 320.

[24] Finally, some judges have used the amounts provided in R. 66(29) as the reference point for adjusting costs upward. In *Duong,* at paras. 17-19, Macaulay J. awarded more than the R. 66(29) limit because the plaintiff had "beaten" an offer delivered by the defendant 10 days before trial. He did so, however, by breaking down the amounts in R. 66(29), which were at that time $3,600 and $4,800, into pre-trial and trial costs. He took the $1,200 difference between those figures as representative of the cost of one additional day of trial. He then subtracted $1,200 from the $3,600 provided for a one day trial, and found the balance of $2,400 reasonably represented pre-trial costs. Because the offer to settle had not been delivered until just before trial, he declined to double the pre-trial portion of the costs, but awarded $4,800 for trial costs, representing double costs for two days of trial calculated at $1,200 per day.

[25] Mr. Justice Macaulay's approach has been adopted in other cases: *Bowen v. Martinec*, 2008 BCSC 104; *Park v. Arthur*, 2007 BCSC 1365. It was also considered and adopted by this Court in *Anderson*. In *Anderson*, the plaintiff's R. 66 action had been dismissed at trial. The defendant had delivered an offer to settle, but the trial judge found it was uncertain and did not comply with R. 37. On appeal, this Court set aside that decision, and then dealt with the question of how costs should be calculated. The defendant sought costs at Scale 3 under the usual tariff at that time, and double costs from the date of the offer.

[26] Prowse J.A., writing for the Court, stated the issues were whether the Court was bound to apply R. 37 and award double costs and, if so, whether those costs should be determined by reference to the fixed costs set out in R. 66, or under the usual tariff. On the first point, she affirmed that R. 66(29.1) gave the court discretion to depart from the costs fixed by R. 66(29) if an offer has been made under Rules 37 or 37A.

[27] As to how those costs should be calculated, Madam Justice Prowse acknowledged the variety of approaches set out in the cases, rejected the defendant's position, and adopted the method used by Macaulay J. in *Duong*. She stated:

> [46] …If [a settlement offer under R. 37] is the only special circumstance, however, it is reasonable to expect that the court's discretion would generally be exercised to award double costs, as was the case in *Duong*. This is so because, as earlier indicated, the fixed costs under Rule 66 are designed to reflect the costs that would normally flow in an action which can be heard in one or two days, and the need to encourage settlements by penalties in costs is present in these actions, just as in the case of ordinary actions. Thus, I agree with Macaulay J.'s suggested approach to the exercise of discretion where a Rule 37 offer is the only special circumstances before the court.
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> [47] I also agree with Macaulay J. that the intent of the Rule was to avoid the necessity of a taxation and that it would frustrate that intent to order a taxation of costs under the Rule. For that reason, his approach to double costs also makes sense. Rather than have double costs assessed under Appendix B and then taxed, Rule 66 provides a mechanism whereby double costs can be given effect without the necessity of taxation. That methodology is described by Macaulay J. in the passage quoted from his reasons for judgment at para. 40, *supra*.

[28] Since the offer to settle had been delivered early in the action, Madam Justice Prowse calculated the costs by doubling the limit of $4,800 in R. 66(29), and then deducted a ten percent discount for work done before the offer had been received. She acknowledged this was an arbitrary process, but reiterated that it best reflected the intent of the rule by avoiding taxation yet giving significant credit to the defendant for making an early offer to settle.

[29] Thus, *Anderson* established two principles. First, it confirmed that there is discretion to award costs beyond the limits in R. 66(29) if there are special circumstances. Second, where such an award is justified, it affirmed that costs should be calculated using those limits as reference points, rather than under the usual tariff.

...

[34] Moreover, it is important to recognize that parties to a R. 66 action are not compelled to remain in the fast track process. If the spectre of "special circumstances" emerges at any time during the action, whether in the form of complex issues, offers to settle, increased trial time, or any other situation, the parties may consent to removing the case from R. 66, or obtain an order to that effect under R. 66(8). Thus, if a concern arises that costs under R. 66(29) will not be adequate, this can be remedied by taking appropriate action during the proceeding.

[35] In this case, the plaintiff twice approached the defendant to consent to removing the action from R. 66. When the defendant refused, she did not pursue it by applying for removal even when, at the outset of trial, it appeared certain the trial would last more than two days. The trial judge considered this and stated:

> [6] In the circumstances of this case and in particular the relatively short period of time between the issuance of the notice of trial and the trial, I do not think that the failure to make an application to take the matter out of Rule 66 should persuade me to exercise my discretion against the plaintiff. I note that if I were to rely on the failure to make an application to remove the case from Rule 66, I would be inviting parties to make a formal application to have cases removed from Rule 66 whenever they were concerned about the effect that the failure to make such an application might have on a subsequent award of costs pursuant to Rule 37.

> [36] In my view, that comment demonstrates the need for predictable consequences in the conduct of litigation. I am unable to agree with the trial judge that applications for removal from R. 66 in such circumstances are undesirable. Here, if the plaintiff was concerned that R. 66 was no longer appropriate, the proper response was to apply for removal from fast track litigation. If she chose not to take that step, she should have no basis for complaint that her costs are limited by R. 66(29).

[12] The position of the defence is that applying the decision in *Majewska* to the facts in the instant case restricts the plaintiff's costs to those permitted by the Rule.

[13] The main premise for this contention is that it was the plaintiff who chose to proceed under the Rule, that he secured the benefits of the Rule and made no attempt at any point in the process to remove the action from the Rule, yet now wishes to avoid the cost implications flowing from the Rule.

[14] The plaintiff's position is that defence counsel's aggressive cross-examination of the plaintiff on his credibility, the fact that the trial spilled over two days and that the defence appreciated the cost implications of a Rule 37 offer were all circumstances that empowered the court to depart from the Rule 66 provision on costs.

[15] In my opinion, this is not a case which should be determined with guidance from the result in *Majewska*. It is clear to me, that although no formal application was made by the plaintiff to remove the action from the Rule, the court's disposition of the circumstances faced by the parties on the opening day of trial was tantamount to an order that the action be removed from the Rule. In my opinion, to find otherwise would permit the defence to take advantage of an outcome with which the defence not only agreed, but in fact jointly sought from the court.

[16] On the opening day of trial, plaintiff's counsel raised the fact that the action was commenced pursuant to the Rule, explaining that late in the day counsel exchanged their time estimates of the direct and cross-examinations of the witnesses. Counsel explained further that based on these time estimates the parties would require 16 to 17 hours of court time to complete the case which translated into a three or four day trial. He also explained that the parties' preference was to proceed for two days and then continue with the balance of the trial at a date to be set for the continuation of the evidence.

[17] In my view, it is very significant to note that defence counsel did "echo" plaintiff's counsel's comments and went on to express the strong preference of the defence to proceed for two days and then continue at a later date to be set. Defence counsel went

on to explain some of the background regarding witness issues which underpinned his strong preference, and then concluded with the following submission:

> The -- I think on balance -- of course, my friend's quite right; this is subject to your discretion. But on balance, the parties have prepared for trial to start today, so it wouldn't be helpful to either party, in my submission, for the trial not to start today. And there's always a wane of interest in that respect. But I think we are ready to proceed today. We may as well so we'll avoid unnecessary costs of having to duplicate trial preparation efforts at some future point if the case simply adjourned generally. ...

[18] Based on counsels' submissions about the length of time required for completion of the evidence, I said that I was content to get underway with the trial which had by this time, by consent in my view, expanded from being a two day to an estimated three or four day trial. This fact was clearly known to both sides and there was no opposition from the defence regarding the fact that the action had been commenced pursuant to the Rule, nor a submission to continue the action under the Rule.

[19] In my opinion, this case can be distinguished from the facts in *Majewska* where prior to trial the plaintiff had asked the defendant to consent to a removal of the action from the Rule, to which the defendant refused, after which the plaintiff did not pursue the matter, even at the outset of the trial, when it appeared certain that the trial would last more than two days. Here, while prior to the trial the parties did not make a formal application or file a consent order to remove the action from the Rule, it is my view that the position taken by the parties at the opening of the trial can fairly be characterized as a consent application by them to remove the action from the Rule.

[20] Thus, in all of the circumstances, I find that the Rule does not apply to the action.

Chronology of Events

[21] There is a lengthy and somewhat tortuous history to this litigation, much of which has a direct bearing on the issue of costs. The following is a chronology of the events surrounding the production of documents in relation to the plaintiff's claim for past income loss:

> 1. The plaintiff sustained injuries in a motor vehicle accident which took place on March 25, 2005.
>
> 2. In July 2006 the plaintiff submitted an income loss to ICBC claiming a loss of $7,461. This claim was part of a settlement proposal made by the plaintiff at a point in time when he was unrepresented by counsel.
>
> 3. The plaintiff retained counsel in December 2006.
>
> 4. The plaintiff commenced his Rule 66 action in January 2007, claiming *inter alia* loss of earnings.

5. As required by the Rule, plaintiff's counsel prepared a list of documents. The list did not include identification of the plaintiff's business or financial records. In Part II of the list, the plaintiff stated that he was not aware of the existence of any other documents relating to the matters in issue in the action which then or earlier had been in his possession.

6. At trial, plaintiff's counsel informed the court that he had prepared the list of documents. In re-examination, the plaintiff testified that he played no role in the preparation of the list.

7. The plaintiff agreed that he had his calendars in his possession and control when the list was prepared. He confirmed that even though these documents were in his possession and control at the time, they were not listed and he did not produce them. Similarly invoices, tax returns for 2005 onwards and bank synoptics were not listed.

8. Plaintiff's counsel did not request the plaintiff's business records until after the plaintiff's examination for discovery in January 2008.

9. The defence prepared a demand for discovery and notice to produce documents dated April 19, 2007. On April 27, 2007 defence counsel wrote to plaintiff's counsel and stated as follows:

> We enclose here with the following documents:
>
> ...
>
> 2. Demand for Discovery of Documents and Notice to Produce
>
> ...
>
> In addition, we will require strict compliance with Rule 26 and Rule 66(11) and expect the plaintiff to produce all documents in his possession or control (or which have been) which bear on the issues in the action, being your client's alleged injuries and their effect on the plaintiff, including but not limited to personal documents, letters, photographs, videotapes, notes as well as the usual medical and employment related documents. ...
>
> ...
>
> To be very clear, it is not enough for you to make disclosure of only those documents that happen to be in your file. Rather, your client has a positive obligation to search his records and produce all relevant documents in his possession and control and disclose those which have been.
>
> ...

10. The plaintiff was cross-examined about the above letter. He could not recall if he was made aware in the spring of 2007 that the defence had made the requests outlined in the letter. When he was asked if he produced any documents in the spring of 2007 he replied, "When I was asked to produce documents, I did".

11. By letter dated May 18, 2007, defence counsel wrote to plaintiff's counsel, as follows:

> ...Your client has made very limited disclosure of business and financial records. We require compliance with Rule 26 and 66 (11). Specifically, we require that your client make disclosure of his appointment calendar for the period January 1, 2005 to June 30, 2005. Furthermore, we require your client's billings and source documents for same for the period of January 1, 2005 to June 30, 2005.
>
> We ask for your cooperation in obtaining the following documents: Records of Dr. Sidhu for the period of December 12 2006, to the present and the Medical Services Plan print-out for the period of November 30, 2006. We ask that you

obtain these records on our behalf and agree to reimburse you for your costs obtaining the same. Please confirm that you will cooperate in this regard.

12. The plaintiff was asked in cross-examination about this letter and testified:

Q: ....Were you aware of that request made by the defence, May 18th, 2007?

A: I can't recall on May 18th that request was made.

Q: Did you make any effort to produce what was asked for, the appointment calendar and the billings, at that time in the spring of 2007?

A: I can't recall going back that far.

13. Defence counsel again wrote to plaintiff's counsel about disclosure of business records on July 10, 2007, requested the plaintiff's business records for the period of his disability and for 6 months on either side. In cross-examination the plaintiff could not recall being made aware of this request and could not recall making any effort to produce documents during the summer of 2007.

14. On January 8, 2008, defence counsel wrote again to the plaintiff's counsel requesting particulars of past income loss, special damages and all relevant business records. In cross-examination the plaintiff could not recall if he received notice of this request. The defence submits that it delivered a Notice to Admit on January 20, 2008, seeking admissions as to no past or future income loss but the plaintiff refused to make such admissions although on the first day of trial the plaintiff abandoned his claim for future income loss.

15. At the plaintiff's discovery on January 24, 2008, defence counsel requested that the plaintiff produce certain business and tax records. These requests were summarized and emailed to plaintiff's counsel immediately following the discovery. In re-examination, the plaintiff testified that his counsel's request for production of documents occurred after his discovery.

16. The defence brought a motion in late January 2008 for disclosure of documents which triggered some disclosure by the plaintiff which he considered had satisfied his disclosure requirements. The defence disagreed, and on February 12, 2008, the defence obtained an order for disclosure as well as costs of the motion. The plaintiff testified in cross-examination that he was not made aware that the defendant had attended in court to secure an order for the plaintiff to produce records that the defence had been seeking for almost a year.

17. The defence submits that on the same day as being granted the order, defence counsel emailed plaintiff's counsel about the order of Master Young. The plaintiff testified that he could not recall if he had complied with the order.

18. The defendant submits that he brought another motion for an order for production of documents and delivered the motion to plaintiff's counsel on March 10, 2008. The plaintiff then disclosed certain tax records by letter dated March 13, 2008 and again on March 14, 2008. The plaintiff sought an adjournment of the motion but the defendant declined to consent. On March 17, 2008, the plaintiff made some further disclosure but the defence did not consider the disclosure sufficient.

19. In an affidavit sworn March 18, 2008, plaintiff's counsel's assistant, Ms. Sona Ircha, deposed, on information and belief from plaintiff's counsel, that the plaintiff had provided his counsel with all business records in his possession and control pursuant to the February 2008 order and that the documents were provided to the defence by the plaintiff's counsel's letter dated March 17, 2008.

20. In re-examination, the plaintiff testified that the "first time" his counsel requested documents from him was in March 2008 and when requested he produced them.

21. Defence counsel attended in court on March 19, 2008 for dismissal of the plaintiff's claim or enforcement of the February 2008 order. Plaintiff's counsel attended as well. The defendant obtained an order for compliance with the February order and further production as well as costs of the motion.

22. In cross-examination, the plaintiff had no recollection of this order and could not recall if he complied with it or not.

23. On March 26, 2008, plaintiff's counsel informed defendant's counsel that the Supplemental List of Documents was in the process of being finalized. On the same date plaintiff's counsel swore in an affidavit that the plaintiff's list was an accurate reflection of the documents the plaintiff had given his counsel.

24. On March 26, 2008, plaintiff's counsel delivered two boxes of documents. On April 8, 2008, defence counsel wrote to plaintiff's counsel requesting the plaintiff's journal entries. These were not produced by the plaintiff; rather the defence counsel obtained these records directly from the plaintiff's accountant.

25. In addition to the letter of April 8, 2008, defence counsel wrote again on April 11 and May 16, 2008. In his letter of May 16th, defence counsel requested documents, including source documents in respect of the plaintiff's business records and an affidavit verifying his business records. On May 22, 2008 defence counsel wrote again to plaintiff's counsel requesting the plaintiff's affidavit and setting down a motion for hearing on May 27, 2008. The plaintiff asserted that by May 27th the defence had agreed that the plaintiff had fully complied with the order of Silverman J. and was abandoning its motion relating to production of business records. The defendant disputes this assertion. His counsel takes the position that the motion was apparently on the hearing list but some unknown individual contacted the registry to have the motion taken off the list. Defence counsel asserted that no one at his office called the registry to this effect. In any event, plaintiff's counsel and a lawyer from defence counsel's office addressed the Court.

26. The plaintiff's Delta clinic records were again requested by the defence on May 27, 2008. Further requests were made on June 6 and 11, 2008. The defence wrote directly to Dr. D. Banwait, with whom the plaintiff shared a clinical practice, on July 2 and 4, 2008, but according to her the calendars were not in her possession but were in the possession of plaintiff's counsel.

27. Further requests were made of the plaintiff's counsel on October 20 and 22, 2008 for the Delta clinic calendars which were provided to defence counsel on October 22nd.

[22] In light of the above, I turn to the issue of whether the plaintiff is entitled to special or double costs.

Special Costs

[23] The plaintiff's claim for special costs is based essentially on his position that the tone of defence counsel's cross-examination of him was inappropriate, and that defence counsel alleged the plaintiff had tailored documents and falsely reported his expenses on income tax returns, none of which assertions had been pleaded. The plaintiff submitted that the cross-examination attacked his integrity, as opposed to simply attacking the reliability or weight to be given to his testimony.

[24] The plaintiff cited the decisions in *Garcia v. Crestbrook Forest Industries Ltd*., 1994 CanLII 2570 (BCCA); *Paz v. Hardouin*, 1996 CanLII 1439 (BCCA); *Pacific Hunter Resources v. Moss Management Inc.,* 2009 BCSC 1049; *O'Connell Electric Ltd. v. British Columbia Hydro and Power Authority*, 2006 BCSC 1632; *Pocuca v. Gutiu*, 2007 BCSC 490, to support his contention of entitlement to an order for special costs for the following reasons:

1. The defendant's approach at trial was akin to the "milder forms of misconduct which could simply be said to be deserving of reproof or rebuke" and form the basis of an award of special costs;
2. The defendant's allegations of dishonest conduct can attract a special costs order as if fraud had been pleaded;
3. The defendant made unfounded allegations of fraud against a practicing professional which can attract special costs; and,
4. The evidence with respect to the allegations consumed a substantial amount of time.

[25] I agree with the defence that none of the authorities cited by the plaintiff support the relief he seeks, as the ratio they stand for is that pleading and maintaining unfounded allegations of fraud or other serious misconduct is reprehensible conduct that can attract special costs. In the instant case, there was no such plea and challenging the credibility of the plaintiff does not rise to allegations of fraud or serious misconduct.

[26] I have reviewed the transcript references relating to the complaints made by the plaintiff about the tone and intent of the cross-examination. In my opinion, the cross-examination of the plaintiff, when considered in the context of his evidence, satisfies me that the questioning was neither improper, inappropriate or unnecessarily aggressive. While the court chose not to accept the invitation of defence counsel to make a finding of a lack of credibility in relation to the plaintiff's evidence in support of his past loss of income claim, the questions and answers which gave rise to the invitation cannot serve as a foundation for a finding of an improper attack on the plaintiff's credibility. Simply put, the court assessed the plaintiff's evidence as a whole and at the end of the day reached the conclusion that although the plaintiff was not an incredible witness, his evidence on certain points relating to his past loss of income claim was less than reliable.

[27] Thus, I find that the plaintiff has failed to establish grounds for an order of special costs.

Double costs

[28] The plaintiff sought, in the alternative, costs on the usual tariff to May 20, 2008, and double costs thereafter.

[29] As earlier outlined, the defendant delivered an offer to settle in the amount of $19,000 to the plaintiff on November 22, 2007 pursuant to Rule 37. On May 12, 2008, the plaintiff sent the defendant a settlement proposal following the completion of the plaintiff's examination for discovery and receipt of a medical report from the plaintiff's family doctor.

[30] The defendant did not respond to the settlement proposal and on May 20, 2008, the plaintiff delivered an offer to settle to the defendant pursuant to Rule 37 in the amount of $22,499. Defence counsel advised plaintiff's counsel that the defendant was unwilling to negotiate beyond the defendant's offer to settle. This offer, claimed the plaintiff, would result in a significant set-off in costs and disbursements against the plaintiff if the offer were accepted prior to the trial.

[31] The former Rule 37(23) provided, as follows:

> If the plaintiff has made an offer to settle a claim for money, and it has not expired or been withdrawn or been accepted, and if the plaintiff obtains a judgment for the amount of money specified in the offer or a greater amount, the plaintiff is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.

[32] On July 1, 2008, Rule 37 was repealed, and was replaced by Rule 37B which provided, in relevant part, as follows:

> Rule 37B(1)
>
> In this rule, "offer to settle" means
>
> (a) an offer to settle made and delivered before July 2, 2008 under Rule 37, as that rule read on the date of the offer to settle and in relation to which no order was made under that rule ...

[33] The plaintiff submitted that his offer fell within the definition of Rule 37B(1)(a). He cited the decision in *Abma v. Paul*, 2009 BCSC 60 where the court interpreted Rule 37B, as follows:

> Rule 37B
>
> [10] On July 1, 2008, Rule 37B was enacted, *Supreme Court Rules,* B.C. Reg. 221/90, as am. by B.C. Reg. 130/2008; it replaced Rules 37 and 37A. The relevant sections of Rule 37B are:
>
> Offer may be considered in relation to costs

(4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.

Cost options

(5) In a proceeding in which an offer to settle has been made, the court may do one or both of the following:

(a) deprive a party, in whole or in part, of costs to which the party would otherwise be entitled in respect of the steps taken in the proceeding after the date of delivery of the offer to settle;

(b) award double costs of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle.

Considerations of court

(6) In making an order under subrule (5), the court may consider the following:

(a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date;

(b) the relationship between the terms of settlement offered and the final judgment of the court;

(c) the relative financial circumstances of the parties;

(d) any other factor the court considers appropriate.

[11] Unlike Rule 37, Rule 37B gives the court a wide discretion concerning the costs order it should make in circumstances where an offer to settle has been made.

[34] The plaintiff submitted that his offer to settle delivered to the defendant on May 20, 2008 was reasonable and ought to have been accepted by the defendant given that it was made following the examinations for discovery of the parties, enabling the parties to assess risk on liability, and following receipt of the plaintiff's family doctor's medical legal report enabling the parties to assess quantum. The plaintiff also noted that the defendant had eight days before the trial to consider the plaintiff's offer. He referred to the decision in *Radke v. Parry,* 2008 BCSC 1397 at para. 38, where Boyd J. said, as follows:

> [38] ...The goal has been and remains to encourage the early settlement of disputes "... by rewarding the party who makes an early and reasonable settlement offer, and by penalizing the party who declines to accept such an offer". ...

[35] I agree with the defence analysis that the plaintiff's offer ought not to have been accepted both because of the lateness of the offer, and the fact that acceptance of the offer would have meant that costs previously earned by the defence would be unjustly lost – two interrelated factors.

[36] The accident occurred in March 2005. While the plaintiff was apparently ready to settle with the defendant in July 2006, his claim did not settle at that time. The plaintiff

retained counsel in December 2006, but no offer to settle was made by the plaintiff until May 2008. As the defence pointed out, and I find, proper disclosure of documents was not forthcoming when the defence nonetheless made an effort to settle the action in November 2007 in the amount of $19,000. In the absence of a response to the offer, the defence continued to incur litigation expense – examinations for discovery were conducted, there was an independent medical examination and several applications to the court before the plaintiff made his offer to settle in May 2008, an offer for an amount marginally above the earlier offer of the defendant.

[37] In my opinion, the defence has correctly analyzed the principles of the authorities dealing with the awarding of costs, and I accept the defence contention that the plaintiff has failed to establish any justification for his delay in making his offer to settle. As the defence stated, "A litigant should not be punished for failing to accept an opponent's eleventh hour [offer] when that litigant made bona fide efforts to resolve the matter at a much earlier date and had since incurred otherwise unnecessary costs, some of which were ordered to be paid by the plaintiff in any event [of the cause]".

[38] I also agree with the defence, and find, that the chronology of events establishes that there was a significant and entirely unjustified non-disclosure of documents by the plaintiff forcing the defendant to attend in chambers on numerous occasions to apply for disclosure of first party business records that should have been produced in a timely fashion without the need for the defendant to incur this expense. Moreover, had the defendant accepted the plaintiff's offer made under Rule 37, he would have been precluded from receiving costs already ordered payable to him by the plaintiff: see *Tomkin v. Tingey,* 2000 BCSC 1133 and *Icecorp v. Nicolaus,* 2006 BCSC 25. In *Tomkin* at para. 11, the court said, as follows:

> [11] Can the defendants tax their costs for the two pre-offer motions in which it was ordered that they were entitled to costs in any event of the cause? I think not. The wording of Rule 37(22)(b) is clear. It makes no mention of pre-offer costs being recovered by the defendants. The defendants made the offer knowing the interlocutory history of the case and the wording of the rule. It was implicit in the fact of their offer under R. 37 that they were foregoing costs on those interlocutory matters for which rulings on costs had been made in their favour. It is also arguable that no event of the cause has occurred to give rise to those costs being taxable by the defendants.

[39] In the instant case, the plaintiff's offer to settle was not made to reflect the defendant's entitlement to costs ordered prior to the offer. As the defendant asked, rhetorically, "Why should the defendant have accepted such an offer? Why should the court punish the defendant for refusing to accept such an offer? Is suggesting that the

defendant should have accepted the offer and thereby foregone previous court orders for costs consistent with the clear intention of those previous court orders of sanctioning the plaintiff for his unreasonable conduct?"

[40] I accept the contention of the defence, and find that given the background to the plaintiff's conduct of the litigation, the plaintiff's offer was not given in the context of encouraging the early settlement of the litigation and the defendant should not be penalized for declining to accept the plaintiff's offer, particularly given that the plaintiff has fallen far short of satisfying the onus to demonstrate that his offer to settle ought to have been accepted by the defendant. As aptly stated by the defendant, "Would awarding double costs to the plaintiff for his ongoing and sustained failure to produce documents, refusal to entertain an early, reasonable settlement in the fall of 2007 and delivery of a late offer 8 days before trial encourage the orderly conduct of litigation and the policy of early, reasonable offers to settle?" The answer is that given by the defence: "… the time and expense of both the trial and several months of litigation could have been avoided had the plaintiff accepted the defence offer which was only a few thousand dollars less, or, alternatively, countered at that time with the plaintiff's offer which would have been accepted as per the affidavit of Maria Gahan [the ICBC adjuster]".

[41] Thus, for the reasons expressed above, I find that an award of double costs to the plaintiff is not appropriate.

Apportionment of Costs

[42] I find that the defendant is entitled to an order for an apportionment of costs.

[43] The test for whether or not an apportionment of costs should occur is set out in *Sutherland v. The Attorney General of Canada*, 2008 BCCA 27:

> [31] The test for the apportionment of costs under Rule 57(15) can be set out as follows:
>
> (1) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
>
> (2) there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;
>
> (3) it must be shown that apportionment would effect a just result.

[44] First, I am satisfied that the issue of past income loss is a discrete issue. I am further satisfied that an apportionment of costs of 70% to the plaintiff and 30% to the defendant, as submitted by the defendant, is fair in the circumstances of this case, given the amount for past income loss awarded to the plaintiff, when compared with his claimed amount; the fact that the plaintiff abandoned his claim for future income loss at the commencement of the trial; and, the inordinate amount of time which had to be spent by the defence prior to the trial to secure proper disclosure of the plaintiff's business records. There is no doubt from the chronology of the events preceding the trial that the plaintiff's failure to provide full and timely document production of his business records had a large impact on the conduct of the proceedings leading up to and during the trial.

Costs of the Costs Proceedings

[45] Finally, with respect to the issue of the costs of the costs litigation, I am satisfied upon a review of the chronology of events surrounding this phase of the litigation that the defendant is entitled to an order for party and party costs payable by the plaintiff, in any event of the cause.

Summary

[46] In summary, I make the following orders:

(1) Rule 66 does not apply to the action;

(2) The plaintiff is not entitled to an order for special or double costs;

(3) The party and party costs of the action are apportioned 70% to the plaintiff, and 30% to the defendant; and,

(4) The party and party costs of the costs proceedings are awarded to the defendant, payable by the plaintiff, in any event of the cause.

"B.I. Cohen J."
The Honourable Mr. Justice B.I. Cohen