Citation: Banyay v. Christie and Co. et al
2001 BCSC 1165

Date: 20010809
Docket: S034530
Registry: New Westminster

2001 BCSC 1165 (CanLII)

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

GABRIEL BANYAY

PLAINTIFF

AND:

CHRISTIE and COMPANY and DUGALD E. CHRISTIE

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE BAKER

The Plaintiff	Appeared in Person
Counsel for the Defendant	Allan A. MacDonald
Date and Place of Hearing/Trial:	January 8 to 12, 15 to 19, & 22 to 24, 2001 New Westminster, BC

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[1] Mr. Christie, who is a lawyer, acted as counsel for Mr. Banyay in a lawsuit for damages for personal injuries arising out of 3 motor vehicle accidents. Mr. Banyay also retained Mr. Christie to take over conduct of several lawsuits already underway against insurance brokers and an insurance company for compensation for property damage arising out of incidents on December 5, 1990, December 18, 1990 and February 13, 1991. Mr. Banyay alleges that Mr. Christie was negligent in the manner in which he pursued these claims, or breached the solicitor and client contract. Mr. Banyay also alleges that Mr. Christie breached his fiduciary duty to account for funds received by him in the course of his representation of Mr. Banyay.

THE PERSONAL INJURY ACTION CLAIM

FACTS

[2] Gabriel Banyay was involved in three motor vehicle accidents that occurred on April 15, 1991, August 7, 1991 and June 26, 1991.

[3] Mr. Banyay's claim for damages arising out of personal injuries sustained in the three accidents was heard by Justice Braidwood, then of the British Columbia Supreme Court, in Vancouver September 6 to 9 and 12 to 16, 1994. Liability was

in issue in respect of two of the accidents, and contributory negligence was also alleged in relation to two of the accidents.

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[4] Justice Braidwood issued written Reasons for Judgment on September 28, 1994. His Reasons set out the circumstances of the three accidents as he found them to be.

[5] Justice Braidwood concluded that the defendants had negligently caused each of the accidents and that Mr. Banyay had been injured in all three accidents. He held, however, that almost all of Mr. Banyay's injuries and consequent losses were caused by the first of the three accidents.

[6] One of the major issues in the trial was whether Mr. Banyay had suffered a closed head brain injury when his head struck the windshield in the first accident. Justice Braidwood accepted the expert opinion evidence tendered on behalf of Mr. Banyay, and concluded that Mr. Banyay had suffered a brain injury.

[7] Justice Braidwood also concluded, however, that Mr. Banyay had exaggerated his symptoms during the trial. He made adverse credibility findings in relation to Mr. Banyay, including the following statement at paragraph 1 of the Reasons:

> The evidence of Mr. Banyay must be viewed with the greatest of scepticism for in many instances he has given conflicting and inaccurate evidence and, as one of the doctors has said, he was a very poor historian. I am convinced in many instances his evidence has been exaggerated.

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[8] Justice Braidwood rejected most of Mr. Banyay's claims for past loss of income said to have arisen out of the failure of two businesses. Justice Braidwood concluded that one of Mr. Banyay's businesses, a hotel and restaurant owned by a company called Barzam Management Ltd., that Mr. Banyay owned jointly with his wife, failed for reasons unrelated to Mr. Banyay's injuries.

[9] Justice Braidwood concluded that a second business – a restaurant known as the "Copper Kettle" in Cloverdale, B.C. - also failed for reasons unrelated to Mr. Banyay's motor vehicle injuries.

[10] Justice Braidwood was subsequently asked and agreed to reconsider his decision with respect to the claim for a loss arising out of the failure of the Copper Kettle. In his original Reasons Justice Braidwood had referred to a 1989 fire in premises adjacent to the Copper Kettle, when in fact the fire had occurred in 1990. Having taken into account the correction in the facts, however, he nevertheless reaffirmed

his conclusion that the loss of the Copper Kettle business was not causally related to Mr. Banyay’s injuries.

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[11] In his Supplementary Reasons, Justice Braidwood again commented adversely on Mr. Banyay’s credibility. He said:

> This business was purchased in September 1989 for approximately $79,000. It had 120 seats and before the accident it had a gross income of approximately $1000 per day.
>
> There is no doubt that the plaintiff did not have the energy and ability to concentrate and deal with problems that he had enjoyed prior to the fire but he had the assistance of his wife when the café re-opened. The plaintiff has not shown on the balance of probabilities that if his faculties had been as they were before the fire, he would have been able to salvage this operation. I reached this conclusion on the basis of the credibility of the plaintiff, his constant exaggerations as to his inabilities, my lack of confidence in his assertions, and on the evidence which leads me to conclude that after the fire his customers attended elsewhere and did not return such that immediately when the café re-opened, the income had dropped to a gross of $400 per day.

[12] On the contributory negligence aspect of the first accident, Justice Braidwood rejected Mr. Banyay’s trial testimony that he had not been wearing the shoulder restraint part of his seatbelt at the time the first accident occurred. He rejected Mr. Banyay’s testimony for several reasons, including his assessment of the expert opinion evidence, and his preference for the evidence of a defence witness.

However, one of his reasons for disbelieving Mr. Banyay's trial testimony was the fact that on Mr. Banyay's examination for discovery, the following exchange had taken place:

> Q What kind of a seatbelt was it?
>
> A I haven't got a clue.
>
> Q Was it across your lap and shoulder?
>
> A I haven't got a clue.

Justice Braidwood held Mr. Banyay to be contributorily negligent and reduced the damage award by 20%.

[13] In the result, Justice Braidwood awarded, after a deduction of 20% for contributory negligence, a total of $130,350 for non-pecuniary damages, past and future income loss, special damages and cost of future care.

CREDIBILITY

[14] Before turning to the specific allegations of negligence/breach of contract in relation to the conduct of the personal injury claims, it is necessary to comment on the issue of credibility as it relates to this proceeding.

[15] Many of the facts in this case are not in dispute. Others can be resolved by reference to Justice Braidwood's Reasons for Judgment, or the documents in evidence. However,

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there are some issues on which it is necessary to decide whether I accept the testimony of Mr. Banyay or Mr. Christie.

[16] Mr. Banyay did, Justice Braidwood concluded, suffer a brain injury. The medical opinion evidence before Justice Braidwood, and the evidence of Drs. Coen and Kastrukoff, who testified before me, indicate that the brain injury has affected Mr. Banyay's cognitive abilities, including his judgment and his memory, and may also affect his ability to control his emotions and his mood. Mr. Banyay's behaviour is sometimes erratic and his emotions are labile.

[17] In my view, Mr. Banyay is also prone to exaggeration. He has an ability to convince himself that what he wants to be true, must be true. He appeared, during trial, to have an almost obsessive fixation about certain matters, and a tendency to misinterpret or ignore information that contradicted his belief. He sometimes took positions that were logically inconsistent, without appearing to see the contradictions.

[18] Whether the traits Mr. Banyay exhibits are the result of the brain injury, or simply aspects of his underlying personality, or a combination of the two, is probably immaterial. The result is that Mr. Banyay's credibility is adversely affected.

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[19] Mr. Christie sometimes appeared frustrated and fatigued by Mr. Banyay's cross-examination. He was not inclined to go out of his way to assist Mr. Banyay or the court by searching through the documentary exhibit books to find and refer to relevant documents during his cross-examination by Mr. Banyay. Nevertheless, he remained calm and was, for the most part, responsive in the face of a lengthy, unfocused and sometimes over-zealous cross-examination. Much of Mr. Christie's testimony is corroborated by the testimony of other witnesses including Mabel Eastwood, a solicitor Mr. Banyay hired to assist him in his accounting dispute with Mr. Christie. Mr. Christie's testimony is also corroborated, to a large extent, by documents in evidence.

[20] In general, where the evidence of Mr. Banyay conflicts with that of Mr. Christie, I prefer the evidence of Mr. Christie.

THE ALLEGATIONS OF NEGLIGENCE/BREACH OF CONTRACT IN THE CONDUCT OF THE PERSONAL INJURY LAWSUIT

[21] I do not intend, in these Reasons, to deal with every complaint Mr. Banyay has about Mr. Christie's conduct of his personal injury claims. Several of them, even if proved, could not have caused a loss, and would result in no award of damages. For example, Mr. Banyay complains that Mr. Christie

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tried to secure funding through the Legal Services Society without Mr. Banyay's authority. Mr. Christie did send a letter to the Legal Services Society asking if the Society could assist Mr. Banyay by funding disbursements for his personal injury and property damage lawsuits. He notified Mr. Banyay that he had done so. Even if Mr. Christie acted without Mr. Banyay's specific authority in making this request, he had good intentions, and no loss to Mr. Banyay could or has resulted.

[22] The following list includes the primary allegations of negligence and/or breach of contract raised by Mr. Banyay in his pleadings, in his testimony, in his cross-examination of Mr. Christie, in his letters to Mr. Christie, or in his submissions at this trial:

1. Mr. Christie should have obtained a trial by judge and jury.
2. Mr. Christie should not have allowed Mr. Banyay to testify at his trial.
3. Mr. Christie should have got expert medical advice about how to handle Mr. Banyay.
4. Mr. Christie presented too much expert evidence.
5. Mr. Christie should have called Mr. Kenneth Simon, who was Mr. Banyay's accountant, to testify and should not have retained Mr. Teasley as an expert accounting witness.

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6. Mr. Christie should have stopped the defendants from putting the clinical records of Mr. Banyay's doctor, Dr. Lorenzo into evidence without requiring Dr. Lorenzo to testify.

7. Mr. Christie should have lead more evidence about special damages.

8. Mr. Christie should have presented more evidence about loss of future income.

9. Mr. Christie should have given Justice Braidwood Mr. Banyay's August 24, 1994 summary of damages.

10. Mr. Christie neglected to apply for benefits for Mr. Banyay under Part 7 of the ***Motor Vehicle (Insurance) Act***.

11. Mr. Christie should not have discontinued the action to recover Part 7 benefits after Justice Braidwood's judgment was issued.

12. Mr. Christie should not have settled the issue of costs for less than the full amount of solicitor and own client costs.

13. Mr. Christie did not follow Mr. Banyay's instructions to argue the wage loss component of the trial decision on appeal.

I shall deal briefly with each of these allegations in my Reasons, although I have responded to some of the related issues in combination.

THE LAW

[23] I begin with a brief review of relevant authorities. In ***Central Trust Co. v. Rafuse***, (1986) 31 D.L.R. (4th) 481 (S.C.C.), at 523, the court said:

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> A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken…The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor…

At p. 525, the court said:

> While the solicitor's duty of care has generally been stated, for obvious reasons, in the context of contractual liability as arising from an implied term of the contract or retainer, the same duty arises as a matter of common law from the relationship of proximity created by the retainer. In the absence of special terms in the contract determining the nature and scope of the duty of care in a particular case, the duties of care in contract and in tort are the same…

[24] In ***Brenner v. Gregory*** [1973] 1. O.R. 252, 30 D.L.R. (3d) 672, at p. 677 of the latter report, Justice Brenner said:

> In an action against the solicitor for negligence it is not enough to say that he has made an error of judgment or shown ignorance of some particular part of the law, but he will be liable in damages if his error or ignorance was such that an ordinarily competent solicitor would not have made or shown it…

To the same effect, see ***Graybriar Industries Ltd. v. Davis & Co.*** (1990), 46 B.C.L.R. (2d) 164 (S.C.).

[25] In ***Karpenko v. Paroian, Courey, Cohen & Houston***, (1980), 117 D.L.R. (3d) 383, (Ont. High Ct.), Justice Anderson held that a lawyer conducting a civil case is not immune from an

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action in negligence. He also held, however, that the lawyer will not be held responsible for mere errors in judgment, and that an error must be egregious before a court will conclude that it is negligence. In particular, he held that a decision by a lawyer to settle a case will be found to be negligence only in the case of some egregious error. He said this was so because:

> What is relevant and material to the public interest in that an industrious and competent practitioner should not be unduly inhibited in making a decision to settle a case by the apprehension that some Judge, viewing the matter subsequently, with all the acuity of vision given by hindsight, and from the calm security of the Bench, may tell him that he should have done otherwise…I can think of few areas where the difficult question of what constitutes negligence, which gives rise to liability, and what constitutes at worst an error in judgment, which does not, is harder to answer. P.10.

[26] I note here that neither party presented expert opinion evidence concerning the standard of care of the reasonably prudent lawyer engaged in the conduct of a personal injury claim, or a property damage insurance claim.

THE ALLEGATIONS

ALLOWING MR. BANYAY TO TESTIFY

[27] Paragraph 21 of the Amended Statement of Claim says:

> The Defendant failed his professional responsibility by allowing the Plaintiff to give evidence while the Plaintiff was under heavy medication, overwhelming medical tests and treatment from so many physicians and medical practitioners.

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[28] I am satisfied that there was no reasonable alternative to allowing Mr. Banyay to testify at the trial of his motor vehicle accident actions. Had he not testified, it is more probable than not that adverse inferences would have been drawn by reason of his failure to testify and to make himself available for cross-examination. Justice Braidwood did draw an adverse inference as a result of Mr. Banyay's failure to cooperate with an assessment by one of the defendant's medical experts.

[29] It was essential that Mr. Banyay testify about the symptoms he had experienced as a result of the various accident injuries. Without Mr. Banyay's testimony, the reports of his medical experts would have had to be disregarded or significantly discounted for lack of an evidentiary basis to support the opinions.

[30] The evidence before me does not establish that Mr. Banyay was incompetent to testify at trial, or that he was impaired at trial by the medications he was taking. Mr. Banyay had testified on examination for discovery. In the months before

trial, he had been interviewed by many doctors and other health care professionals and was apparently considered capable of providing historical information on which the physicians based their opinions.

[31] None of the medical experts' opinions about Mr. Banyay's brain injury would have justified a decision by Mr. Banyay to refuse to testify at trial. Dr. Coen, a psychologist who testified on behalf of Mr. Banyay, described Mr. Banyay's brain injury as "mild to moderate".

[32] Dr. Kastrukoff testified at this trial that in his opinion Mr. Banyay's brain injury likely does affect Mr. Banyay's ability to testify. However, he quite properly pointed out that he can't give a definitive opinion as to whether the impairment affects Mr. Banyay's legal position in relation to testifying. Dr. Kastrukoff did not say that he had advised against Mr. Banyay being a witness at the trial in September 1994. Dr. Kastrukoff wrote a letter "to whom it may concern" in January 1995 suggesting that further litigation should be postponed for six months, but that was many months after the trial before Justice Braidwood.

[33] Dr. Coen testified at this trial about the effects of a brain injury. However, in his opinion, the brain injury Mr.

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Banyay suffered does not affect Mr. Banyay's ability to tell the truth.

[34] A failure by Mr. Banyay to testify at the personal injury trial would likely have been fatal on the contributory negligence/seatbelt defence issue, given his earlier testimony on examination for discovery. Without Mr. Banyay's evidence at trial, it is probable that he would also have been found contributorily negligent in respect of the August 7, 1991 accident.

[35] Mr. Banyay submitted to this court that Justice Braidwood incorrectly concluded that Mr. Banyay was exaggerating the impact of his injuries. He submitted that any past or present tendency to exaggerate, and any inaccuracies in his testimony are due solely to his brain injury. I am unable to accept this submission. Justice Braidwood was well aware, as a result of the medical evidence presented at the trial, of the nature of Mr. Banyay's brain injury and its effect on him. It is clear that Justice Braidwood concluded that Mr. Banyay was intentionally, and not involuntarily, misrepresenting the nature and extent of his injuries and their impact on his life and his ability to earn income.

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EXPERT EVIDENCE ON "HANDLING" MR. BANYAY

[36] Mr. Banyay also complains that Mr. Christie did not get expert advice about how to "handle" Mr. Banyay as a witness. No evidence has been presented to support the suggestion that some unique method of eliciting Mr. Banyay's evidence in chief existed, or would have altered the outcome of the trial. Mr. Christie was familiar with the opinions and findings of Drs. Coen and Kastrukoff about Mr. Banyay's brain injury and its apparent effect on his memory and emotional liability. There was no way, in any event, to shelter Mr. Banyay from cross-examination.

[37] I accept the evidence of Mr. Christie that he spent time with Mr. Banyay, when Mr. Banyay made himself available, preparing Mr. Banyay to testify at trial. I accept that he made efforts to diplomatically rein in Mr. Banyay's tendency to exaggeration and self-aggrandisement. At times, Mr. Banyay wrote rude, almost abusive letters to Mr. Christie. Many counsel would have terminated their retainer on receipt of only one of those letters. Mr. Christie tried to be understanding and soldiered on.

[38] At one point, Mr. Christie became concerned that Mr. Banyay might have been abusing alcohol. He warned Mr. Banyay

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that he could not obtain instructions from him when he had been drinking.

[39] In November 1994, Mr. Christie became concerned that Mr. Banyay was acting irrationally. He suggested, to Mr. Banyay and to Mrs. Banyay, that perhaps Mr. Banyay was incapable of managing his own affairs. Both Mr. and Mrs. Banyay reacted extremely negatively to this suggestion, viewing it as a threat to have Mr. Banyay involuntarily committed to a mental health facility. Mr. Christie withdrew the suggestion and apologized for having made it.

[40] Mr. Christie tried to persuade Mr. Banyay to advance reasonable and supportable claims, and not to try Justice Braidwood's credulity and patience. Mr. Banyay resisted Mr. Christie's efforts. Having seen firsthand the tenacity with which Mr. Banyay, having once formed an opinion, clings to it despite any and all evidence to the contrary, I can see little more that Mr. Christie could have done to attempt to control his client's behaviour at trial.

[41] Mr. Banyay has failed to prove, on a balance of probabilities, that Mr. Christie was negligent or in breach of contract in allowing Mr. Banyay to testify at the trial of the motor vehicle accidents.

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EVIDENCE PRESENTED OR NOT PRESENTED AT TRIAL OF PERSONAL INJURY ACTION

[42] Mr. Banyay has a number of complaints about decisions he says Mr. Christie made in relation to the presentation of evidence at trial. Mr. Banyay complains that Mr. Christie made the trial too complicated by calling too many witnesses. He also claims, however, that Mr. Christie should have required Dr. Lorenzo to testify and should have required Kenneth Simon, an accountant who had done work for Mr. Banyay, to testify.

[43] Mr. Banyay argues that he was forced to see too many doctors and other specialists. When asked to list those he objected to, however, he mostly named the defendants' experts. I can see no way in which Mr. Christie could have prevented the defendants from requiring Mr. Banyay to attend for independent medical examinations by the defendants' experts. The brain injury issue was particularly difficult and complex, and it was necessary for Mr. Banyay to see specialists from several disciplines to attempt to fully explore this issue.

[44] Mr. Banyay submits that Mr. Christie should not have permitted defendants' counsel to put Dr. Lorenzo's clinical records in evidence. Dr. Lorenzo had been Mr. Banyay's family physician following the first accident. I can think of no

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valid grounds on which Mr. Christie could have maintained an objection to the admission of Dr. Lorenzo's records about Mr. Banyay's condition when first examined after the accident. Had he succeeded in doing so, an adverse inference would probably have been drawn.

[45] At the same time, Mr. Banyay submits that Dr. Lorenzo should have been required to come to trial to explain the entries in his clinical records. Mr. Banyay submits that Dr. Lorenzo would have been able to prove that Mr. Banyay was wearing the shoulder portion of his seatbelt at the time of the first accident. Dr. Lorenzo's notes of Mr. Banyay's first visit contain the statement "Wearing seatbelt". This statement, coming from Dr. Lorenzo, would, of course, be hearsay evidence. To the extent that the fact of the statement having been made to Dr. Lorenzo could be used to rebut any defence suggestion that Mr. Banyay's claim of seatbelt use was a "recent fabrication", the evidence of the note in the clinical records was sufficient.

[46] Mr. Banyay suggests that Dr. Lorenzo would have been able to testify that Mr. Banyay had bruising across his shoulder and chest caused by the seatbelt retracting on impact. Mr. Banyay refers to notes made by Dr. Lorenzo:

> Tender trapezius - both cervical paraspinal muscles

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These are, however, the muscles usually implicated in a "whiplash" type injury, which was Dr. Lorenzo's diagnosis. There is no reference in Dr. Lorenzo's clinical records to bruising to Mr. Banyay's chest, or the front of his shoulder, which we would expect to see if there was injury caused by the retraction of the shoulder portion of the seatbelt. Dr. Lorenzo was not called to testify at the trial before me, and there is no evidence that Dr. Lorenzo's testimony would have supported Mr. Banyay's claim that he was wearing the shoulder portion of the seatbelt.

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[47] It appears from the documents that Mr. Christie had arranged for Dr. Lorenzo to be available to testify. However, on August 25, 1994, he wrote to Dr. Lorenzo advising him that his attendance at trial was no longer required. Mr. Christie testified that he had several reasons for deciding not to call evidence from Dr. Lorenzo. He believed that Dr. Lorenzo would be out of town, perhaps even out of the country at the time of trial, and did not wish to incur the expense of bringing him back for trial. He had also had conversations with Dr. Lorenzo that led him to believe that Dr. Lorenzo was not favourably disposed to Mr. Banyay's position and that his testimony would not be helpful to Mr. Banyay. In particular,

Dr. Lorenzo indicated to Mr. Christie that he thought Mr. Banyay was exaggerating his symptoms.

[48] There was a reference in Dr. Lorenzo's notes to "Smells of alcohol" made during one of Mr. Banyay's visits to Dr. Lorenzo's office. Mr. Christie says he wanted as little attention as possible drawn to this entry. Mr. and Mrs. Banyay testified in this trial that Mr. Banyay had not been drinking before the visit to Dr. Lorenzo's office - that Mr. Banyay may have smelled of alcohol because they were using it as a disinfectant on an open wound. Dr. Lorenzo was not called at this trial to explain his note. Neither Mr. nor Mrs. Banyay can testify as to the state of Dr. Lorenzo's mind when he made the note in his clinical record. It seems doubtful that Dr. Lorenzo would make a notation "Smells of alcohol" if the alcohol had been applied externally for medical purposes, and there's no reference to Mr. Banyay having an open wound in any of Dr. Lorenzo's notes.

[49] In any event, Mr. Banyay agreed, as a matter of contract, that Mr. Christie would have the right to decide what witnesses should be called. The retainer agreement signed by Mr. Banyay and Mr. Christie, which is dated June 16, 1993, but was probably signed later in that month, includes a clause providing that:

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> Discretion is granted to Mr. Christie in the matter of which witnesses to call.

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[50] The discretion would have to be exercised reasonably, and I am satisfied that it was. I am not persuaded that the decision not to call Dr. Lorenzo as a witness was a mistake, let alone a breach of the standard of care. Decisions about which witnesses to call, and how much evidence to present, are matters of judgment. As the authorities referred to earlier indicate, the courts should not readily second-guess decisions of counsel about the presentation of evidence at trial.

[51] Mr. Banyay also submitted that Mr. Christie should have retained Kenneth Simon, an accountant who had done work for Mr. Banyay’s businesses, instead of retaining accountant Howard Teasley to prepare and give expert opinion evidence on the issues of past and future loss of income.

[52] It is not clear when Mr. Banyay told Mr. Christie that he wanted Mr. Simon to be involved in the lawsuit. Certainly he was not always of the view that Mr. Simon was a necessary witness. On January 24, 1994, Irene Banyay, Mr. Banyay’s wife, sent a facsimile message to Mr. Christie advising him that Mr. Banyay did not agree to the involvement of Kenneth Simon.

[53] Mr. Christie testified that he did recall discussing with Mr. Banyay the possibility of having Kenneth Simon testify at trial. Mr. Christie spoke with Mr. Simon. However, he considered it preferable to retain an accounting expert who was also an actuary and could cover off several issues. In addition, Mr. Teasley had previous experience preparing reports for insurance claims, and had previously testified as an expert witness. Mr. Christie told Mr. Banyay his reasons for retaining Mr. Teasley. Mr. Christie's recollection is that Mr. Banyay did not insist on Mr. Simon.

[54] Having read Justice Braidwood's Reasons, I am not persuaded that a different manner of presenting the evidence about the financial situation of Mr. Banyay's businesses would have altered the outcome. Although Justice Braidwood did not accept some of Mr. Teasley's opinions about Mr. Banyay's losses, there is no evidence indicating that Mr. Teasley did not do a competent and creditable job of presenting the loss of income claims in the most favourable light possible.

[55] No witness could explain away Mr. Banyay's own personal tax returns, or the financial statements of the businesses, which Mr. Simon had prepared. The statements showed that the Fort St. James hotel/restaurant had been profitable. However, as noted above, the holder of the agreement for sale cancelled

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the agreement because Mr. Banyay did not pay the balance owing when due.

[56] Mr. Banyay suggests that Mr. Simon could somehow have explained the financial statements he had prepared in a way that would make the apparently bleak financial picture of the Copper Kettle restaurant (it lost $24,000 in its first year of operation) look more promising. Mr. Simon did not testify at this trial, so I don't know what evidence he could or would have given at the trial before Justice Braidwood. There is no evidence before me that supports Mr. Banyay's claim that Mr. Simon's evidence would have persuaded Justice Braidwood to come to a different conclusion about past or future loss of income or the opportunity to earn income. Based on the financial statements Mr. Simon did prepare, there is no reason to believe he would have supported Mr. Banyay's calculation that he had lost income of $1.5 million as a result of his injuries.

MR. BANYAY'S SUMMARY OF DAMAGES

[57] Mr. Banyay submits that Mr. Christie was negligent, or in breach of his retainer agreement, in failing to present to Justice Braidwood a "Summary of Damages" Mr. Banyay had prepared and presented to Mr. Christie.

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[58] Mr. Banyay wrote a letter to Mr. Christie dated August 24, 1994, which he delivered to Mr. Christie either during or just before the personal injury trial began. In the letter, Mr. Banyay set out the damages he wanted Mr. Christie to ask for at trial. Mr. Christie did not present this letter, or its contents, to Justice Braidwood. He prepared his own written summary, which he provided to the court during submissions. Mr. Banyay wrote to Mr. Christie after the trial, strenuously complaining about Mr. Christie's refusal to present Mr. Banyay's summary of damages to Justice Braidwood. Mr. Banyay says that his measure of damages in this trial, on this aspect of the lawsuit, should be the difference between the $1.5 million Mr. Christie should have obtained for him, and the amount actually awarded by Justice Braidwood.

[59] Mr. Banyay's August 24, 1994 letter reveals that Mr. Banyay had grandiose and entirely unrealistic expectations of the possible, let alone likely, outcome of his personal injury litigation. I am satisfied that Mr. Banyay persisted in those expectations despite the information and advice he got from Mr. Christie. I am satisfied that Mr. Christie had, before August 24, 1994, and throughout the time he conducted the personal injury lawsuit, made valiant efforts to convince Mr.

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Banyay that there was no reasonable likelihood of recovery of damages in the quantum Mr. Banyay had in mind.

[60] In Mr. Banyay's Summary of Damages, under the heading "Pain and Suffering", Mr. Banyay was seeking an award of $375,000, made up $75,000 for pain and suffering in the first year after the accident; $100,000 for the second year, and $200,000 for the third year. This sum approximates or even exceeds the maximum award for non-pecuniary loss available to only the most severely affected plaintiffs. Mr. Banyay's injuries did not, even on the evidence of his own expert medical witnesses, place him in that category.

[61] Mr. Banyay wanted Mr. Christie to claim "Expenses out of pocket" of $15,317.60. Evidence at this trial has confirmed that most of the expenses Mr. Banyay wanted Mr. Christie to claim had never been incurred. For example, Mr. Banyay included a claim for $4200 for a housekeeper he had never employed. He was claiming $1000 for depreciation on a "scooter" he claimed to have borrowed from his mother. Depreciation is not an "out of pocket expense". More significantly, there was no medical evidence indicating Mr. Banyay required the use of a scooter as a result of his accident injuries, or at all.

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[62] Mr. Banyay valued his past and future business loss at $1,736,498, from which he was prepared to deduct $135,000 for the “mortgage” on the Barzam Management Ltd. hotel/restaurant business in Fort St. James, and $37,000 described as “outstanding litigation for Copper Kettle”.

[63] I have already referred to Justice Braidwood’s findings concerning the fact that these enterprises, if they had ever been profitable, were, by the time of the first motor vehicle accident, already in financial jeopardy for reasons unrelated to the effects of Mr. Banyay’s injuries.

[64] Justice Braidwood found that the Fort St. James hotel and restaurant had been purchased in 1987 with no downpayment. Barzam Management Ltd. took over a pre-existing agreement for purchase and sale, and the vendor financed the rest of the sale price. When the amount owing under the agreement for purchase and sale came due, Barzam could not pay. After several months had passed, an action for cancellation was brought. The Petition alleged not only that there had been default of payments under the agreement for purchase and sale, but that property taxes were also outstanding and utilities had not been paid. Eventually a compromise was negotiated, but Barzam’s failure to make a payment of $5000 owing to the vendor resulted in the loss of the settlement and, eventually,

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the loss of the property. No evidence was led in this trial to suggest that Mr. Christie had any tools at his disposal to refute this evidence.

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[65] Relying largely on Mr. Banyay's own tax returns and unaudited financial statements prepared by Kenneth Simon, Justice Braidwood concluded that the Copper Kettle restaurant had never been profitable.

[66] Justice Braidwood referred in his Reasons to the evidence that Mr. Banyay had reported income from all sources of only $14,332 in 1990; he had reported no income in the three previous years. Nevertheless, Justice Braidwood made an award of $40,000 on the basis that Mr. Banyay should be compensated for loss of the opportunity to earn income from the date of the first accident to the date of trial.

[67] Although never pleaded, Mr. Banyay also wanted Mr. Christie to pursue aggravated, exemplary and punitive damages. In the Summary of Damages, Mr. Banyay set out the following as "Reasons" for an award of punitive damages:

> Denial of treatment by I.C.B.C. to pay the bill
> Loss of self respect
> Loss of self worth
> Loss of dignity
> Loss of memory
> Loss of living standard
> Loss of family accumulated wealth
> Loss of drive

Loss of family unity
Loss of sexual enjoyment
Loss of patient with others
Loss of tolerance
Loss of direction for family
Loss of direction in the work place
Loss of tolerance
Loss of ability to guide family or business
Loss of ability to return to the work force in
former capacity

I see no grounds on which such claims, had they been pleaded, could have succeeded.

[68] Mr. Christie testified before me that it became clear to him during the course of the personal injury trial that Justice Braidwood was not impressed with Mr. Banyay. He decided that in light of the adverse credibility rulings he was expecting, he should not press his client's luck by asking for damages he was not going to get, a decision I consider justified.

[69] Mr. Christie prepared his own "Summary of Damages" and a written submission, dated September 14, 1994 and September 15, 1994, which he presented to Justice Braidwood during submissions at the end of the trial of the motor vehicle accident claims. In the Summary of Damages, Mr. Christie included a claim for $398,200 for past and future loss of income; $5,300 for special damages and $70,000 for non-

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pecuniary damages, all related to the first motor vehicle accident. He also sought awards of $4000 for the second accident, and $1500 for the third, for a total of $479,000.

[70] I have already referred to Justice Braidwood's award. In my view, Mr. Christie was entirely correct in refusing to put Mr. Banyay's summary of damages before Justice Braidwood. There was no possibility that Justice Braidwood would have given Mr. Banyay the damages he has outlined in his summary and reading the summary would probably only have confirmed Justice Braidwood's view that Mr. Banyay was exaggerating his claim.

MORE EVIDENCE ABOUT SPECIAL DAMAGES

[71] Mr. Banyay submits that Mr. Christie was negligent in not presenting more evidence about special damages, but Mr. Banyay has not proved that there was more evidence available to be presented. Most of the claims included in Mr. Banyay's summary of damages were purely fictional.

[72] In evidence is a letter dated September 20, 1994, from Mr. Christie to Mr. and Mrs. Banyay, apparently sent in response to a fax from the Banyays dated September 14, 1994. With respect to special damages, the letter says:

> You have given me various notes as to your damages, including various special damages, which notes were

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> received after all the evidence was in. As explained to you, I cannot submit the claim unless it is substantiated, and, accordingly, we could only claim for those items for which we had firm evidence.

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[73] I am not persuaded that Mr. Christie ignored or failed to introduce into evidence any proof of special damages that was available to him. I am not persuaded that Mr. Banyay suffered more special damages than he proved at the trial before Justice Braidwood.

PART VII BENEFITS

[74] The Amended Statement of Claim alleges that Mr. Christie failed to pursue no-fault benefits for Mr. Banyay, but the evidence establishes that Mr. Christie did commence an action for Part 7 benefits. That action was discontinued some time after Justice Braidwood's decision was issued.

[75] It's not entirely clear that no no-fault benefits were provided to Mr. Banyay. He testified that someone had paid for some treatments that he had received. Correspondence to Mr. Banyay from his previous counsel, Lyle Harris, refers to interim payments having been made to Mr. Banyay by I.C.B.C.

[76] It is unlikely, however, that Mr. Christie or any other counsel could have persuaded the Corporation to pay more. The position of counsel for the personal injury defendants,

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outlined at the start of the trial before Justice Braidwood, was that Mr. Banyay had suffered only soft tissue injuries to his neck and back. Their position was that he did not have a brain injury, or that if he did, it was not caused by the accidents. They also took the position he had suffered no income loss.

[77] Following the accidents, Mr. Banyay had received medical treatment for his injuries, through the medical services plan. The first reference to forms of therapy that might not be covered under the medical insurance plan appears in Dr. Coen's report dated June 24, 1994, which was less than three months before trial. Dr. Coen recommended that Mr. Banyay receive psychotherapy, including individual and group treatment, for up to two years, and suggested the names of qualified service providers.

[78] Dr. King suggested in his June 29, 1994 report that Mr. Banyay would benefit from a supervised physical exercise rehabilitation program. However, he also noted that Mr. Banyay had failed to engage in such a program when it had earlier been recommended to him.

[79] Mr. Christie agreed to discontinue the Part 7 action some time after Justice Braidwood's decision was delivered. It was not unreasonable for him to have done so, since the issues

that would arise in that action had already been decided by Justice Braidwood and could not be re-litigated in any subsequent action.

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FAILURE TO CLAIM MORE FOR COST OF FUTURE CARE

[80] There is no reference to a claim for future care costs in the written summary of damages Mr. Christie submitted to Justice Braidwood at trial. In Mr. Banyay's own Summary of Damages, dated August 24, 1994, which he submits Mr. Christie should have put before Justice Braidwood, there is also no claim for the cost of future care. I am not persuaded that Mr. Banyay specifically instructed Mr. Christie to pursue this claim in his submissions at trial.

[81] At most, Mr. Christie's decision to emphasize other heads of damages may have been an error in judgment, but I am not persuaded that it was an error amounting to negligence.

[82] Dr. Coen's and Dr. King's future treatment recommendations were in evidence before Justice Braidwood and he did make an award for the cost of future care. In the "Summary" at the conclusion of his Reasons, Justice Braidwood said:

> With respect to his claims for past income lost, loss of earning capacity, non-pecuniary damages, out-of-pocket expenses <u>and future care</u>, I award him a total of $154,500. (underlining added)

[83] Justice Braidwood's order, entered on November 15, 1994, specified an award for cost of future care in the amount of $2000. Mr. Banyay has not proved that he was entitled to more.

NO JURY TRIAL

[84] Mr. Banyay alleged in the Amended Statement of Claim that Mr. Christie failed to have the trial heard by a jury. In his testimony he said that Mr. Christie originally suggested trial by jury, before the claim became more complex, and that he was disappointed later to learn that the trial would be by judge alone. It's not clear that Mr. Banyay actually instructed Mr. Christie to file a jury notice. And, in any event, I am not persuaded that a jury would have been any more generous to Mr. Banyay. Indeed, Mr. Banyay's tendency to exaggerate his symptoms and his losses might have been received even less well by a jury. Mr. Banyay has failed to prove any loss arising out of the fact that his trial was not before a jury.

THE APPEAL

[85] Mr. Banyay alleged that Mr. Christie "coerced" him into appealing Justice Braidwood's decision. At the same time, he alleges that Mr. Christie should have appealed more aspects of Justice Braidwood's decision – in particular, he submits that

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Mr. Christie should have appealed the wage loss aspects of the case, and also Justice Braidwood's credibility findings.

[86] In cross-examination of Mr. Banyay it emerged that the "coercion" by Mr. Christie consisted of his advice to Mr. Banyay that he thought that Justice Braidwood had erred in certain aspects of his decision and that an appeal could be successful. That is the expression of an opinion, not coercion.

[87] I consider it more probable than not that Mr. Banyay would have instructed Mr. Christie to appeal no matter what advice Mr. Christie gave. Mr. Banyay was very dissatisfied with Justice Braidwood's decision. He was particularly unhappy about the adverse credibility findings. Mr. Christie testified that he advised Mr. Banyay that an appeal from Justice Braidwood's assessment of credibility was unlikely to succeed, and in my opinion, his advice was correct.

[88] Mr. Banyay instructed Mr. Christie to order transcripts. Mrs. Eastwood advised Mr. Banyay to get a second opinion about whether to appeal and he did so. The opinion of the lawyer he consulted did not differ significantly from that of Mr. Christie. Mr. Banyay decided to proceed with the appeal. He instructed Mrs. Eastwood to pay for the appeal books.

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[89] The Appeal on behalf of Mr. Banyay was heard in two stages. Some of the defendants cross-appealed, but eventually abandoned the cross-appeals. The Court of Appeal first heard submissions about three procedural matters on November 15, 1995. They issued Reasons disposing of those issues on January 10, 1995. Two of these, Mr. Christie argued, should result in an order for a new trial.

[90] On behalf of Mr. Banyay, Mr. Christie suggested that there was apprehension of bias on the part of Justice Braidwood because Justice Braidwood was acquainted with the parents of one of the defendant's counsel, and defendant's counsel had once been in Justice Braidwood's home. The Court of Appeal allowed fresh evidence on this issue, but dismissed the appeal.

[91] The Court of Appeal also dealt with the issue of the claim for lost income related to the Copper Kettle restaurant. They acknowledged the error in the facts found by Justice Braidwood in his original Reasons concerning the timing of the fire. However, the Court of Appeal held that there was ample evidence to support the decision of Justice Braidwood about the lack of financial viability of the Copper Kettle business, and they refused to order a new trial on that issue. The Court of Appeal did, however, agree with Mr. Christie's

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submission that on the hearing of the appeal on its merits, Justice Braidwood's Supplementary Reasons on the point would not be considered.

[92] Ultimately, only one aspect of Justice Braidwood's decision was heard on the further appeal – the ruling on contributory negligence arising out of the seatbelt defence. The Court of Appeal heard the appeal of that issue on May 17, 1996 and delivered their judgment on July 4, 1996. They held that it was open to Justice Braidwood to come to the conclusion he had on the evidence before him.

[93] Mr. Christie explained his reasons for limiting the grounds of appeal, and I'm not persuaded that he was negligent in not challenging other aspects of Justice Braidwood's decision. In any event, Mr. Banyay had earlier agreed to allow Mr. Christie to decide the issues to be argued on appeal.

[94] On April 22, 1995, Mr. Christie and Mr. Banyay settled all disputes then outstanding between them on terms set out in a letter of that date, signed by Mr. Christie and by Mabel Eastwood, who was by then acting on behalf of Mr. Banyay and Barzam Management Ltd.

[95] One of the terms of the agreement included the following:

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> The contingent agreement of June 16, 1993 (with all necessary changes to comply with this letter) will apply to all three matters (the remaining items under the MVA trial file, the Zurich et al file and the Appeal. It is further agreed that on all three matters I have discretion (to be exercised professionally) as to manner and issues upon which your appeal and claims are advanced. (underlining added, the reference to "I" is a reference to Mr. Christie).

[96] Mrs. Eastwood testified that she entered into this agreement on behalf of Mr. Banyay and his company after having explained the agreement to Mr. Banyay, and with his full authorization. Mr. Banyay did not contradict Mrs. Eastwood's evidence.

[97] Mr. Banyay is bound by this agreement.

FAILURE TO RECOVER MORE COSTS AND DISBURSEMENTS

[98] Mr. Banyay complains that Mr. Christie settled the quantum of party and party costs awarded to Mr. Banyay against the personal injury defendants for less than the amount Mr. Christie was entitled to be paid by Mr. Banyay under the retainer agreement. He also complains that he should not have had to pay for any disbursements that the defendants did not have to pay as taxable costs.

[99] Under the terms of the retainer agreement between Mr. Banyay and Mr. Christie, Mr. Christie agreed to work on a

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contingency fee arrangement. Disbursements were to be paid by Mr. Banyay directly, or if paid by Mr. Christie, he was to be reimbursed by Mr. Banyay.

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[100] After Justice Braidwood's decision was issued, Mr. Christie prepared party and party bills of cost and delivered them to defendants' counsel. Following discussions among counsel, the tariff items to be included, and the number of units under the tariff, were agreed. The amount paid for party and party costs was less than the amount Mr. Christie was entitled to receive from Mr. Banyay under the terms of the retainer agreement.

[101] Mr. Christie and defendants' counsel also agreed on most of the disbursements claimed on behalf of Mr. Banyay. The items on which they could not agree were taken before Master Patterson, sitting as a registrar. Master Patterson declined to award some of the disbursements Mr. Christie was claiming on behalf of Mr. Banyay. Mr. Banyay alleges that because the Master declined to award these items as party and party disbursements, he should not have had to pay them, or reimburse Mr. Christie for them.

[102] This aspect of Mr. Banyay's claim is based on his refusal to accept that party and party costs rarely, if ever, provide a full indemnity for costs incurred on a solicitor and

own client basis. In this case, Mr. Banyay had been found 20% liable for his losses, so any award of party and party costs would be reduced proportionately. Having reviewed the evidence about the settlement of the party and party costs, I am not persuaded that Mr. Christie would have succeeded in recovering a greater sum had he proceeded to a taxation of the bills of cost.

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[103] On the taxation of the disbursements involved in the personal injury trial, there were six items in issue. Master Patterson awarded the full cost of a report by Vocational Pacific Ltd. over the objections of counsel for the defendants. He disallowed a charge for a computer search of authorities, based on an earlier decision that it is unnecessary for a defendant to pay for work that is normally done by counsel.

[104] Master Patterson considered the defendants' submission that the whole of the cost of Mr. Teasley's report should be disallowed on the basis that he had been given inaccurate information. Master Patterson noted that Mr. Teasley had already agreed to reduce his bill. Master Patterson discounted this disbursement somewhat. One of the items he reduced was for time that Mr. Teasley had spent with Mr. Banyay.

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[105] Master Patterson allowed Dr. Coen’s bill less $500 on the basis that Dr. Coen had spent more time preparing his report than the Master considered necessary. Master Patterson rejected the defendants’ submission that all of Dr. King’s charges should be disallowed. He allowed one-half of the account.

[106] Finally, Master Patterson disallowed a charge for the account of Dr. Limbert, a person with medical training who acted in an advisory capacity to Mr. Christie on the medical records and medical opinion evidence. With respect to the disbursement for Dr. Limbert’s services, Master Patterson said:

> Mr. Christie, on behalf of the plaintiffs said that it was essential in complicated medical matters to have an expert at your elbow. I don’t disagree with that and again it is my view that this is quite likely a very appropriate disbursement as between the solicitor and his own client but it is an inappropriate disbursement on a party and party bill of costs and need not be paid by the defendants and consequently that bill is allowed at zero.

[107] Mr. Banyay has many complaints about the disbursements incurred by Mr. Christie on his behalf. As he did in reference to fees, he regards the Master’s disallowance of any disbursement on the party-party bill of costs as conclusive evidence that Mr. Christie ought not to have

incurred the expense. As Master Patterson pointed out, however, there are expenses properly incurred by counsel, and properly payable by their clients, that are not proper disbursements on a party and party bill of costs.

[108] Counsel in the conduct of litigation have to make difficult decisions about which experts, and how many, to retain. In complicated cases, involving medical evidence and conflicting medical opinions, counsel may well be entitled to charge their clients for the cost of advice from medically-trained persons, whether or not those persons are licensed to practice in British Columbia.

[109] However, it is not necessary for me to deal with the contested disbursements, because the dispute over these charges was settled in the April 22, 1995 agreement referred to earlier. Mr. Christie and Mr. Banyay, with Mrs. Eastwood's assistance, negotiated and agreed to a resolution of the disagreements over Mr. Christie's fees and the disbursements in the personal injury lawsuit. Mr. Christie was able to obtain a reduction in some of the accounts rendered by some of the experts and he agreed to bear some of the disbursements himself. Mr. Christie has kept to the bargain he made and Mr. Banyay must do the same.

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THE ACCOUNTING

[110] Mr. Banyay has failed to prove, on a balance of probabilities, that Mr. Christie has failed to account to him for the full amount of funds received from the defendants in the personal injury action, or paid to Mr. Christie by Mr. Banyay. Mr. Banyay has had the accounting claim exhaustively investigated, first by Mrs. Eastwood, acting on his behalf, and also by the Law Society, to whom Mr. Banyay complained about Mr. Christie. Mrs. Eastwood and Mr. Christie prepared a summary of the accounting, which Mrs. Eastwood explained to Mr. Banyay. I have reviewed the summary and the underlying documents supporting it.

[111] Like Mrs. Eastwood and the Law Society, I am satisfied that Mr. Banyay has received all of the monies owed to him, and has received a full explanation of the charges incurred and the disbursements paid, on his behalf. Mr. Christie has received no more than the fees to which he was entitled for his representation of Mr. Banyay.

[112] The funds not yet disbursed are part of the proceeds of the settlement of the property damage insurance claims. As earlier agreed, Mrs. Eastwood is holding these funds in trust pending a resolution of the dispute over Mr. Christie's fees and disbursements in the property damage insurance matters.

The only issue that remains in relation to those trust monies is whether they will ultimately be paid to Mr. Christie following the taxing of his accounts, or whether some or all of the funds will be returned to Mr. Banyay.

THE CLAIM FOR FEES PAID TO MRS. EASTWOOD

[113] Mr. Banyay seeks to recover from Mr. Christie the sum of $4500 that he testified he paid to Mrs. Eastwood to assist him in obtaining the accounting from Mr. Christie. While I am satisfied that Mrs. Eastwood performed a valuable function for Mr. Banyay, and that her intervention also proved helpful to Mr. Christie, I am not persuaded that Mr. Christie should be ordered to pay her fees.

[114] In my opinion, Mr. Banyay acted prematurely and unnecessarily in retaining Mrs. Eastwood. Mr. Christie was in the process of obtaining the judgment proceeds and settling the disbursements owed to experts and others who had agreed to wait to be paid until after trial. I am satisfied that Mrs. Eastwood's involvement helped to reduce the level of conflict and resulted in an earlier resolution of the dispute over fees and disbursements. However, I am not persuaded that but for her involvement, Mr. Christie would have failed or refused to account to Mr. Banyay for the monies he had received on his behalf. Mr. Christie having committed no wrongful act, it

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would not be just to burden him with the cost of Mrs. Eastwood's services.

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THE REVENUE CANADA REQUIREMENT TO PAY

[115] Mr. Banyay has alleged that Mr. Christie's failure to pay or to dispute a Revenue Canada Requirement to Pay, issued in respect of taxes owing by Mr. Banyay, resulted in penalties being assessed against Mr. Banyay in the amount of $221.67.

[116] This allegation is unfounded. Mr. Banyay expressly instructed Mr. Christie not to pay in response to the Requirement to Pay. It is true that he wanted Mr. Christie to dispute the Requirement to Pay. However, he did not retain Mr. Christie to act on his behalf and Mr. Christie, quite understandably, was not prepared to embroil himself in any more disputes on behalf of Mr. Banyay without assurances he would be paid for his efforts. Furthermore, Mr. Christie considered that he lacked expertise in tax matters. A Requirement to Pay was also served on one of the defendants' counsel, who eventually paid the money out of the proceeds of the personal injury award owing to Mr. Banyay.

THE PROPERTY DAMAGE INSURANCE CLAIMS

[117] On June 9, 1993, Mr. Banyay retained Mr. Christie to assist him with several actions already commenced against an

insurance company and several insurance brokers arising out of three property damage insurance claims. The letter agreement dated June 9, 1993 sets out the original terms of the contract between Mr. Banyay and Mr. Christie.

[118] Mr. Banyay had had more than one previous counsel representing him on some of these claims, although it appears that he may have commenced some of the actions himself. Mr. Banyay had actually received payments from the insurers in respect of some of his property damage claims, but he considered the amounts paid to be too low.

[119] Mr. Banyay's previous counsel on the property damage claims and the personal injury claims had been Lyle Harris of the firm Harris, Atkinson, Brun. Mr. Harris had terminated the solicitor-client relationship with Mr. Banyay on March 25, 1992. In a letter of that date sent to Mr. Banyay, Mr. Harris pointed out that Mr. Banyay had missed several appointments, had failed to produce medical receipts, had not obtained necessary documents being held by Mr. Banyay's previous lawyers on a solicitors' lien, had made unreasonable demands, and had failed to execute releases in a timely fashion.

[120] Mr. Banyay attempted to persuade Mr. Harris to reconsider, but he declined to continue to act for Mr. Banyay. Between March 1992 and June 1993, Mr. Banyay was self-

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represented. He then retained Mr. Christie to act on his behalf.

[121] Mr. Christie proposed an amendment to the June 9, 1993 retainer agreement in September 1993, largely because Mr. and Mrs. Banyay had failed to pay the monthly instalment fee called for by the earlier agreement. In Mr. Christie's letter, dated September 14, 1993, setting out the terms he proposed for an amended retainer agreement, he pointed out the difficulties inherent in the property damage claims:

> I have cautioned you that these claims have not, in my opinion, been properly prosecuted and there are a number of problems – any one of which could prove fatal. Some of these problems are as follows:
>
> (a) No writ was issued, naming the February 13, 1991 loss;
>
> (b) there may be a question as to whether Proofs of Loss were filed appropriately or within time;
>
> (c) there are other obligations upon the insured to provide information, etc. and through misunderstandings it may well be that these requirements were not met.
>
> You should know that the claims are difficult ones and there is the possibility that you would be entitled to no more than a nominal sum or even that you lose the case. While that is possible, it would seem to me that the likely total figure for all three claims would be approximately $40,000. While I know that you do not like me to take such a view of your claims, I think it only right to advise you of my opinion in writing prior to confirming arrangements with you.

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[122] Mr. Christie and Mr. Banyay concluded a further agreement on December 6, 1993. This retainer agreement was eventually subsumed by the April 22, 1995 agreement, which contained, among other terms, the following:

> 4. Account Review No. J950156 (Claim against Zurich for three losses): My account is to be allowed less the sum of $500 ($7996.60) of which $5000.00 will be paid from the monies now available.
>
> 5. Insurance Claims henceforth: I will act on a 19% contingent fee. Mr. Banyay irrevocably agrees to settle for the sum of $40,000 all inclusive for all three insurance claims and any excess will be applied towards the balance of the current insurance account (namely $2,996.00) so that is $42,296.00 is paid the first $2,996.00 will be paid to myself for the outstanding Zurich bill and the balance will be applied to disbursements and the remaining balance will be divided 19% to myself and 81% to Mr. Banyay and his company.
>
> 6. On all Continuing Matters: The contingent agreement of June 16, 1993 (with all necessary changes to comply with this letter) will apply to all matters (the remaining items under the MVA trial file, the Zurich et all file and the Appeal). It is further agreed that on all three matters I have discretion (to be exercised professionally as to manner and issues upon which your appeal and claims are advanced…
>
> Also implicit in our agreement is that any ongoing disbursements will continue to be paid…

[123] This agreement was reached the day before Mr. Christie had scheduled appointments for the taxation of several of his accounts, including accounts rendered in

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accordance with the retainer agreement on the property damage insurance claims.

[124] After this agreement was concluded, Mr. Christie continued to represent Mr. Banyay in the conduct of several actions against the insurers and brokers.

[125] Mr. Banyay's major complaint in relation to Mr. Christie's handling of the property damage insurance claims is delay. Mr. Christie reported to Mr. Banyay early in 1994 that he had reserved a trial date for the property damage claims to be heard commencing December 5, 1994. It appears that this date was merely tentative. Mr. Christie did not file a trial certificate or a trial record, and the date was never confirmed. It could not have been confirmed because the pleadings had never been closed, and no application had been made for an order to have the actions heard at the same time, or consolidated.

[126] However, Mr. Christie had decided, in any event, that it would be preferable to proceed with the personal injury suit trial first. The action for damages arising out of the February 13, 1991 loss was likely, through no fault of Mr. Christie's, brought out of time. Mr. Christie hoped that if it was determined at the trial of the personal injury claims that Mr. Banyay had a brain injury, that finding could

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be used to postpone the running of time under the ***Limitation Act***.

[127] It was not until the late fall of 1994, however, that Mr. Christie informed Mr. Banyay that the trial of the property damage insurance claims would not be proceeding in December, and that he proposed to attempt to mediate the claims instead.

[128] Mr. Banyay was furious and demanded that Mr. Christie "reinstate" the December 5, 1994 trial date. It was impossible to do so. Mr. Christie reserved a trial date for November 1995, and Mr. Christie and opposing counsel discussed arrangements for mediation.

[129] At about this time the dispute over Mr. Christie's conduct of the personal injury appeal, and the accounting for the personal injury judgment monies, escalated. Mr. Banyay was not paying Mr. Christie's bills, and Mr. Christie refused to carry on as counsel in the property damage insurance actions. Mr. Banyay filed notices of intention to act in person. Little progress was made until the April 22, 1995 agreement was reached. Mr. Christie resumed conduct of the property damage insurance actions, and negotiations with the defendants also resumed.

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[130] Following an all-day meeting at the offices of one of the defendants' lawyers, the defendants offered to pay Mr. Banyay $25,000 including costs for an immediate settlement of the property damage lawsuits. Mr. Banyay declined. He offered to settle for $28,000 plus costs.

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[131] However, on January 22, 1996, Mr. Banyay agreed to accept a payment of $26,000 including costs. Almost immediately, defendants' counsel sent Mr. Christie a cheque for $26,000, together with releases for signature by Mr. Banyay.

[132] In the meantime, however, Mr. Banyay informed Mr. Christie that he was terminating his retainer and intended to finalize the settlement himself without any further involvement by Mr. Christie. He filed notices of intention to act in person. He contacted defendants' counsel and asked defendants' counsel to get the funds back from Mr. Christie and to pay them directly to Mr. Banyay instead.

[133] Defendants' counsel was uncomfortable with what he saw as an attempt by Mr. Banyay to avoid paying Mr. Christie's fees. However, he asked Mr. Christie to return the settlement funds to him and told Mr. Banyay that he and Mrs. Banyay, as officers of Barzam Management Ltd., would have to come to his offices to sign the releases and other documents.

[134] Mr. Christie returned the funds as requested, but put defendants' counsel on notice that he was claiming a lien over the funds to the extent of his unpaid fees and disbursements.

[135] On February 13, 1996, Mr. and Mrs. Banyay went to the offices of defendants' counsel, executed the releases and were given a cheque for $16,396.40. The remaining $9,603.60 was held back to secure Mr. Christie's claim for a solicitor's lien. This is the sum, together with interest, that is being held in trust by Mrs. Eastwood.

[136] Mr. Banyay has failed to prove that Mr. Christie breached the terms of the retainer agreement, as amended, in relation to his conduct of the property damage insurance claims. While Mr. Christie could have dealt with those claims more quickly than he did, I am not satisfied that the delay amounted to a breach of the standard of care. I am unable to conclude that Mr. Banyay suffered any loss as a result of Mr. Christie's decision to focus on the personal injury lawsuit in hopes of finding a way to get around the limitations defence on the February 13, 1991 property damage claim.

[137] Ultimately, Mr. Banyay agreed to settle the property damage insurance claims, and he completed the settlement himself. He has not demonstrated that he was forced to do so

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by reason of anything done, or not done, by Mr. Christie, and he has not proved that he would or could have recovered more than he did but for Mr. Christie's actions. Accordingly, his claim for damages in respect of the property damage insurance claims must also be dismissed.

[138] Mr. Christie eventually took out appointments to tax his accounts for fees and disbursements arising out of his representation of Mr. Banyay on the property damage insurance claims. Mr. Banyay then commenced this lawsuit. Mr. Christie attempted to proceed with the taxation before the Registrar, but the Registrar declined to deal with the taxation until this lawsuit had been heard and decided.

[139] While it would have been more efficient, in my view, to have the assessment of Mr. Christie's outstanding bills dealt with at this trial, counsel for Mr. Christie asked that the taxation be left to the Registrar in the ordinary course. Mr. Banyay did not object to that suggestion. Accordingly, I refer the assessment of Mr. Christie's bills for fees and disbursements to the Registrar.

Summary:

[140] Mr. Banyay has not proved that Mr. Christie breached the terms of the contract by which he was retained to

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represent Mr. Banyay in the conduct of his personal injury lawsuit. Mr. Banyay has not proved that Mr. Christie breached the standard of care owed by a reasonably competent lawyer in the conduct of that litigation.

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[141] Mr. Banyay has not proved that Mr. Christie breached the terms of the contract by which he was retained to represent Mr. Banyay and Mr. Banyay's company in the conduct of several lawsuits involving property damage insurance claims. Mr. Banyay has not proved that Mr. Christie breached the standard of care owed by a reasonably competent lawyer in the conduct of that litigation.

[142] Mr. Banyay has failed to establish that Mr. Christie owed Mr. Banyay a duty to pay Revenue Canada in response to the Requirement to Pay served upon him.

[143] Mr. Banyay has failed to prove that Mr. Christie breached any fiduciary duty owed to Mr. Banyay, that he has retained any funds belonging to Mr. Banyay, or that he wrongfully refused to account to Mr. Banyay for funds held in trust and disbursed on his behalf. Mr. Christie has fully accounted to Mr. Banyay for monies paid to him by, or on behalf of, Mr. Banyay.

[144] Mr. Banyay’s claims against Mr. Christie are dismissed.

COSTS

[145] Counsel for Mr. Christie asked to defer submissions on costs until these Reasons for Judgment had been issued. Mr. Banyay and Mr. MacDonald may make submissions about costs in writing, or arrange with the trial coordinator to appear before me to make oral submissions on a date convenient to them and to the court.

“W.G. Baker, J.”
The Honourable Madam Justice W.G. Baker

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