Claim No: SCCH No. 310757
and Claim No: SCCH No. 310758

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
AND IN THE MATTER OF A TAXATION

Cite as: Cherny v. Downie, 2009 NSSM 54

BETWEEN:

VLADIMIR N. CHERNY

Applicant (Client)

- and -

KEVIN DOWNIE and GAVIN GILES

Respondents (Solicitors)

TAXATION DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearings held at Dartmouth, Nova Scotia on October 20, 2009 and November 3, 2009

Decision rendered on November 25, 2009

APPEARANCES

For the Applicant	self-represented
For the Respondent Kevin Downie	self-represented
For the Respondent Gavin Giles	Michael Ryan, Q.C. Counsel

BY THE COURT:

[1] This is a taxation initiated by a former client of the Respondents (hereafter referred to as “the Client”).

[2] The Client retained Kevin Downie (“Downie”) in 2002 to act for him in connection with a claim that he proposed to make against a drug company, as a result of some severe side effects that he experienced taking the stop-smoking drug Zyban. The Client had developed alopecia universalis (total hair loss) which was at the time not listed as one of the possible side effects.

[3] The Client and Downie entered into a Contingency Fee Agreement that contained a commonly found provision to the effect that if the Client discharged the lawyer, the latter would be entitled to charge a fee based upon the time and effort expended, with an hourly rate set at $200.00.

[4] Gavin Giles Q.C. (“Giles”) is a partner at McInnes Cooper. His role did not commence until he and his partner Wylie Spicer Q.C. (“Spicer”) were retained as counsel in about August 2008, with a trial and other proceedings pending that Downie did not propose to handle himself. Although the Client has named Giles as the Respondent, in fact he retained McInnes Cooper and the order will reflect that the solicitor client relationship was between the Client and McInnes Cooper.

[5] Suffice it to say that the case against the drug company ultimately did not go well for the Client. The Nova Scotia Court of Appeal in June of 2009 dismissed the action, reversing the decision of a Supreme Court judge who

had declined to dismiss it on a summary judgment application brought by the drug company. It is important to note that none of the solicitors involved in this taxation were representing the Client by the time the matter came before the Court of Appeal. The last thing that the solicitors had done for the Client was successfully to resist the summary judgment application and participate in a settlement conference that, unfortunately, did not achieve resolution for the Client who, it is abundantly clear, valued his claim much higher than did the Defendant or the settlement judge.

[6] The Client says that he terminated the services of all of his lawyers who, he believed, were not acting in his interest, and says that he represented himself at the appeal, although the court decision reflects that he had a solicitor representing him. It was Giles's evidence that McInnes Cooper actually terminated the solicitor-client relationship, but nothing turns on this difference of point of view.

[7] By the time this taxation came before me, the Client's accusations against Downie had become much more ominous. Over the past number of months, he has initiated complaints against Downie to the Nova Scotia Barristers Society (which found no wrongdoing) and more recently to the RCMP for a criminal investigation. In his evidence before me, the Client explicitly accused Downie of having made a secret deal with the drug company years ago to undermine his claim, which the Client says he accomplished by handing over to the drug company the only copy of the one medical report which allegedly supported his case.

[8] There is simply not a shred of evidence that Downie did anything deliberately to sabotage the Client. Indeed, it appears that the Client and

Downie were personal friends, or at the very least on very friendly terms, for years before this retainer was entered into. The evidence also supports the view that Downie worked diligently for approximately six years to pursue a claim for this Client who, it also appears, became increasingly more unmanageable and whose expectations for recovery became frankly fantastical.

[9] The complaints against Giles and Spicer are much less personal. The Client agreed to allow Downie to retain them on his behalf, and acknowledged their skill and ability, but was suspicious that they might have a conflict of interest. It appears that the Client wanted Downie to terminate them on the eve of the Settlement Conference in October 2008, but allowed himself to be talked out of that idea. (Giles and Spicer had no idea at the time that they were in jeopardy of being dismissed). The Client was also somewhat cynical about Giles and Spicer, in the sense that he believes they had no intention of ever doing the trial for him.

[10] He also claims that Giles and Spicer should be limited to the $10,000.00 which they had quoted as their required retainer for taking on the case, or to the $14,000.00 that he has already paid them.

The allegedly missing report

[11] The main thrust of the Client's complaint against Mr. Downie concerns a handwritten note that had been written by a dermatologist, which supposedly made the causal connection between the drug and the side effect which the Client experienced. The Client testified that he obtained this note from Dr. Julius Martin because Downie had been pressing him

about the need for some medical evidence to support the claim. The Client says that he explained this need to the doctor, who took out his prescription pad and wrote a note to the effect that the Zyban had triggered an immune response leading to the Client's total hair loss.

[12] The Client testified that Downie had included this note in the documents produced to the Defendant in the litigation, but he contends that he has not been able to locate a copy of it in the file materials that he had returned to him, and he suspects that (for nefarious reasons) Downie gave the only copy to the drug company. Apart from his accusations that this represents some criminal or unethical behaviour, he also believes that this document would have clinched the lawsuit for him. Instead, his claim stands dismissed.

[13] I have read the decision of the Court of Appeal (*GlaxoSmithKline Inc. v. Cherney*[1], 2009 NSCA 68). It is clear that the court believed that there was no real support from the medical reports that would have substantiated the connection between the drug and the side effect experienced. The court stated:

> [25] The chambers judge found that it was not necessary for Mr. Cherny to present expert evidence to prove that the Zyban caused his alopecia universalis and that the jury should be able to assess the weight they are prepared to give his credibility and anecdotal evidence on the issue of causation. This was, with respect, an error in principle. Although expert evidence is not required in every case where causation is in issue, on the undisputed facts of this case, without expert evidence to support the plaintiff's claim of causation,

[1]The Client's name is misspelled in the court's decision.

there is no genuine issue for trial. Therefore the summary judgment application should have been granted.

[14] The court had earlier referred to two reports of Dr. Martin, and to the weight of other expert evidence:

> [11] It is clear from the affidavits that Mr. Cherny does not have any expert medical or scientific evidence to present at the trial that supports his theory that the Zyban caused his hair loss. When his counsel filed the notice of trial in March 2007, he said "expert evidence will be adduced on behalf of my client and any expert's report will be filed in accordance with Rule 31.08". Then at the date assignment conference in August 2007, it was noted that Mr. Cherny "anticipates filing an expert report prior to trial". Despite these statements, none has in fact been filed.
>
> [12] The medical reports from two doctors that Mr. Cherny consulted were included in the material filed by the defendants on the application for summary judgment. In the statement of claim, it is alleged that Mr. Cherny lost all of his hair within three weeks of taking Zyban in December 1999. However, Dr. Julius Martin, a dermatologist, reported on September 6, 2000 that Mr. Cherny had experienced circular patches of hair loss on his scalp "over the years", and "over the past 12 months hair loss has progressed and the patient is totally devoid of hair." Dr. Martin does not refer to Zyban in his September 2000 letter. In a July 2002 letter, Dr. Martin notes that Mr. Cherny believes that Zyban caused his hair loss.
>
> [13] Mr. Cherny was also seen twice by Dr. C. J. Gallant, another dermatologist. In his report of September 27, 2006 to Mr. Cherny's family practitioner, Dr. Gallant states that Mr. Cherny:
>
> > ... reports having had as a child patches of hair loss that would come and go into his teen years. His current problem however began in approximately December of 1999 when he had a trial of Zyban.
>
> Dr. Gallant diagnosed alopecia universalis which is "generally considered to be an idiopathic autoimmune disease."
>
> [14] In a further report dated March 28, 2007, Dr. Gallant indicated he had been asked to assess whether there was a

possible association between the alopecia and the use of Zyban. His opinion was:

> Alopecia universalis is a well documented variation of the more common and usually self-limited alopecia areata. This disease is usually considered an idiopathic auto immune disease that first presents with annular areas of non-scarring alopecia which usually regrows completely over a 6 to 9 month period often first noted in childhood. Up to 2% of the general population may be affected with only a small number going on to develop complete and permanent loss of hair. Drugs are not listed as a cause of alopecia universalis in standard texts.
>
> A preliminary review of recent literature failed to indicate an association between Zyban and alopecia universalis. Although hair loss is included as a rare complication of Zyban, the monograph and available literature do not include information on the pattern or type of hair loss noted.
>
> As I reviewed with Mr. Cherny, although he has noted a temporal association, I am unable to substantiate a direct causal association between hair loss and his medications.

[15] It is unclear to me whether either of the two reports of Dr. Martin was the handwritten note to which the Client refers, but assuming that they were not, the conclusion is inescapable that such a handwritten note, even if considered, would have added little to the Client's chances. The weight of the expert evidence was overwhelmingly against the Client's position. Furthermore, by this time Dr. Martin had died and he would have been unable to attend a trial to support any statement that he might have made suggesting a causal connection between the drug and the side effect. Even had the handwritten note been considered, it would inevitably have been given slight - if any - weight, given his failure to set out such an opinion in a proper medical report meeting all of the formal requirements for medical evidence, and given the much more fully formed opinions of other experts who would have presented themselves to testify.

[16] I note that Downie's evidence was that he wrote on several occasions to Dr. Martin asking him to prepare a medical report that could be of use in the litigation, but that the request was never answered.

[17] I find it very hard to believe that this handwritten medical note was deliberately, or even carelessly, lost or disregarded by Downie. I expect that it could still be found somewhere within what undoubtedly became a very large file. Even so, I believe that this note is a red herring as the Client appears to place a great deal of weight upon it, when the truth of the matter is that it would have added little or nothing to his case and his chances of success.

[18] The reason I am saying as much as I am about this medical note is that despite the Client's rather outlandish accusations, there does underlie his position a potential defence to the claim for fees that I must consider; namely, has the solicitor negligently handled the case, in which case he would not be entitled to be paid for his services as the damages suffered by the Client would exceed any claim by the solicitor.

[19] The law does recognize a cause of action against a barrister for the negligent handling of a case. Some cases are fairly straightforward, such as when the lawyer misses a limitation period. Where the complaints against the lawyer involve the way the case has been framed, or the strategies used to pursue it, such as the decision about what evidence to call, it is a much more difficult claim to establish.

[20] There was a time when barristers enjoyed total immunity from civil suits connected to their handling of a case, but this position has been departed

from both in the UK and Canada over the last 40 years. The position that now pertains was discussed in the text *Professional Liability in Canada,*[2] under the heading "Barrister's Liability:

> A barrister's exposure to civil liability claims depends on the type of services being performed by the lawyer. Even though Canadian courts have rejected a barrister's immunity to civil liability claims for the conduct at trial, there is still a reluctance to find liability against a barrister in these circumstances [*Demarco v. Ungaro* (1979), 21 O.R. (2d) 673 (H.C.); *Wechsel v. Stutz* (1980), 15 C.C.L.T. 132 (Ont. Co. Ct.)] and other circumstances which involve the exercise of judgment. [See the discussion below regarding errors in advising clients to settle actions. *Karpenko v. Paroian, Courey, Cohen & Houston* (1980), 30 O.R. (2d) 776 (H.C.)] However, there are other steps which are performed by barristers which often attract liability such as the failure to commence an action within the limitation period, the failure to diligently prosecute an action, the failure to present offers of settlement to the client and the failure to carry out a client's instructions.

[21] Here the complaints against Downie are of the type that are difficult to prove, and which rarely succeed. The Client essentially complains that Downie failed him in his tactical decisions about how the case should be prepared and presented.

[22] It was the Client's choice to bring this Taxation to court, and to raise the issues that he has raised. I am not unsympathetic to the rough ride that this man has had through the medical and legal systems, but the bottom line for this Court is that he has retained professional lawyers to assist him, and he is responsible to pay their <u>reasonable</u> fees unless he can establish that their efforts on his behalf were unauthorized or negligently performed.

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[2]J.A. Campion and D.W. Dimmer, *Professional Liability in Canada*, looseleaf (Toronto: Carswell, 1994)

The question of reasonableness is a separate inquiry, where issues of hours spent, hourly rates and other such questions arise.

Downie

[23] There has been no showing by the Client that Downie was negligent in the handling of the Client's affairs. He appears to have done all of the appropriate things that a lawyer would do, faced with the task of prosecuting an action against a large drug company. The one thing he apparently could not do was to obtain the type of medical evidence that would have turned the case into a winner.

[24] Downie was on the record with the Client early in the lawsuit, stressing the importance of having good expert evidence. When they were only able to get the very limited evidence that they did, the case was handled in a way that sought to make the best out of what they had. I realize this is armchair quarter-backing, but if Downie made any miscalculation, it would probably have been in failing to drive home to the Client at an earlier stage how weak his case actually was. This is among the hardest advice that lawyers ever have to deliver to clients, because it is at odds with the role that they inevitably prefer, which is to be the fearless advocate for the client's cause. It is also advice that this Client would likely never have accepted because he was so sure that all he had to do was tell his story to a jury, and that they would have found in his favour and awarded significant compensation. Indeed, even after having been told by the Court of Appeal that his case did not even raise an issue worthy of a trial, he still continues to believe that his case is legally solid.

[25] In the result, I find that Downie represented the Client faithfully, competently and with great dedication. His sense of disappointment both in the result achieved, and in the way he has been treated by this Client over the past year, was palpable.

[26] Because the Client terminated Downie's services prior to a final resolution of his case, Downie became entitled to reasonable compensation for his efforts.

McInnes Cooper

[27] There is no suggestion that Giles or Spicer were negligent; indeed, the Client was mostly complimentary of them. His main complaints concerned whether they were in a conflict of interest, whether they had any intention of taking his case to trial, and (he claims) they were bound by their initial fee estimate.

[28] The issue of conflict of interest was put to rest early on. Like all large firms, McInnes Cooper has a process for determining whether there might be a conflict of interest in taking on a particular case. Giles eventually determined that at some point more than ten years ago, someone in a New Brunswick office of the firm had advised a predecessor company of GlaxoSmithKline in an employment related matter. By any modern measure, this would not have placed the firm in a conflict of interest. For reasons unclear to me, the Client continued to harbour suspicions about the firm's and Giles and Spicer's loyalty to him.

[29] As for their willingness to take the matter to trial, my sense is that the Client is confused about what occurred in the aftermath of the summary judgment application which, it will be recalled, was successfully resisted by Giles and Spicer. GlaxoSmithKline made it known that it intended to appeal that ruling, and it would have been clear to all concerned that the original trial dates in December of 2008 would be lost because the appeal had precedence. There is not a shred of evidence that suggests that Giles and Spicer would not have taken the trial, if properly retained, whenever that trial might have been rescheduled.

[30] As for the argument that they are bound by their supposed estimate, the evidence supports a finding that the deal was this: the Client agreed to provide a $10,000.00 retainer immediately and another $25,000.00 before a trial. Giles and Spicer set their respective hourly rates at $330.00 and $360.00, both of which were discounted from their usual rates. It was also agreed that the lawyers would bill monthly. The Client actually provided some additional funds to Downie, $4,000.00 of which went to McInnes Cooper.

[31] I do not accept that the lawyers were agreeing to cap their pretrial fees at $10,000.00, or at $14,000.00. Retainers are deposits to secure fees; they are not (unless stated to be) flat fees. It is notoriously difficult for lawyers to know what will be involved when they take on a case, and very few lawyers would set a flat fee in taking on a complex piece of litigation.

[32] As such, the fees charged by Giles and Spicer are to be judged by their reasonableness, in all of the circumstances.

The Quantum of the Accounts

[33] McInnes Cooper submitted two accounts to the Client:

account dated November 6, 2008	$13,921.60
account dated November 28, 2008	$ 9,233.00

[34] Within those accounts were fees totalling $20,070.00, the balance being some disbursements and HST. Those fee accounts were discounted not only in the hourly rate initially quoted, but also in the number of hours charged. It is quite clear that Giles and Spicer deeply discounted their time, in recognition of the hardship that the Client was facing.

[35] By any measure, the fees charged to the Client were reasonable. There is not a single cogent reason for disallowing them or discounting them further.

[36] The Client paid McInnes Cooper $14,000.00, which slightly more than covered the first account in full. The balance remaining is $9,154.60. I find that this amount is owing by the Client.

[37] Downie charged the Client a total of $25,267.15, made up of 122.5 hours of time which was charged at slightly less than the agreed upon hourly rate of $200.00, for a total of $22,000.00 in fees. The balance represented disbursements and HST.

[38] There is no doubt in my mind that the Client discharged Mr. Downie, thus entitling him to bill for services on an hourly basis. The amounts charged are reasonable. The time was clearly spent; indeed, I expect that there

were many hours not docketed or charged. The rate was less than agreed upon some years earlier. Mr. Downie is an experienced lawyer and his rate is probably less than most of his contemporaries would charge.

[39] Downie had $1,009.94 of the Client's money in trust, which was applied against the bill, leaving the amount of $24,257.21 owing to Mr. Downie.

CONCLUSIONS

[40] Although all of the accounts being taxed reserved a right to claim interest on outstanding balances, there was no claim for interest advanced and in my discretion I do not propose to allow any.

[41] Because the taxation was initiated by the Client, the lawyers do not have any allowable costs, and accordingly the judgments shall be for the amounts of $9,154.60 to McInnes Cooper and $24,257.21 to Mr. Downie.

Eric K. Slone, Adjudicator