conceivably wish for, and that it is clearly a matter of no concern to him that there should be in fact an election conducted with respct to the Umlazi division on 30th March. I find myself persuaded, as a result of hearing the able arguments which have been presented to me to-day, that, upon all considerations of justice, equity and convenience, I should grant the order, and I grant it in its amended form as prayed.

Applicant's Attorney: *C. H. Hills.* First Respondent's Attorneys: *Acutt & Worthington,* Dundee. Second Respondent's Attorney: *Deputy State Attorney,* Natal.

STEVENS v. PROVINCIAL INSURANCE CO. LTD.

(NATAL PROVINCIAL DIVISION.)

1966. *April* 20. CANEY, J.

Costs.—Taxation.—Review of.—Incapacity of plaintiff—No ground for converting an attorney and client charge into a party and party charge.—Report of defendant's medical witness.—Copies for each of plaintiff's medical witnesses allowable.—Instructions to subpoena witnesses.—Separate charge for each witness allowable.—Subpoenaed witness released.—Wasted costs disallowed.—Travelling expenses.—Disallowance of.—Qualifying fees.—Disallowance of in absence of consent or order of Court.—Costs of inspection in loco.—*Disallowance of.*

The incapacity of a plaintiff, due to serious brain injury, cannot convert an attorney and client charge into a party and party charge, e.g. for collecting evidence or arranging for plaintiff to be examined by a medical witness.

It is not unnecessary for the plaintiff's attorney to make a copy of the report of the defendant's medical witness for each of plaintiff's own medical witnesses to study.

A separate charge is allowed for instructions to subpoena each witness, even though it is customary for the names of up to four of them to appear on one subpoena.

Wasted costs in respect of a medical witness who, after being subpoenaed, was released, should not be allowed.

Travelling expenses of witnesses coming for consultation are properly disallowed.

Qualifying fees for medical witnesses for which the plaintiff has obtained neither an order of Court nor the consent of the defendant are properly disallowed.

Costs of an inspection *in loco* are part of the costs of preparing for trial and no separate fee should be allowed.

Review of taxation.

CANEY, J.: This is a review of taxation of a party and party bill of costs in an action in this Court. On 2nd July, 1964, the plaintiff issued summons against the defendant to recover damages for personal injuries suffered by him in a motor collision. The action was set down for trial on 8th to 11th days of March, 1965, but on 2nd March the plaintiff

gave notice of an application to increase his claim. The Court granted him leave to amend his declaration for this purpose and adjourned the trial to a date to be arranged, the plaintiff to pay the wasted costs. The action was next set for trial on 3rd to 6th days of August, 1965, but prior to that the parties came to a settlement the terms of which were recorded in a letter dated 29th July, 1965. These terms, shortly, were that the plaintiff accepted a tender made by the defendant on 22nd July, 1965,

"the defendant to pay all the plaintiff's costs up to and inclusive of the date of acceptance of the tender, including the costs of the hearing on the 8th March, 1965, and the wasted costs"

referred to above; the defendant waived its claim for the costs awarded to it at that time and agreed that the plaintiff's costs were to include the fees of two counsel.

After taxation the plaintiff objected to the disallowance of certain items from his bill of costs and the defendant objected to the allowance of certain items; hence this review under the the provisions of Rule 48 of the Uniform Rules of Court. I deal *seriatim,* firstly, with those items to which the plaintiff has objected.

1. This relates to investigations, inspections and interviews with witnesses at Greytown on 10th June, 1964, prior to the institution of action, that is to say, inspecting the scene and the vehicles, and searching for and collecting evidence. The Taxing Master has said in this regard

   "it is not the duty of an attorney to collect evidence . . . the client must furnish the attorney with all the necessary information",

   and he referred to *Thumler* v. *Weis,* 1934 E.D.L. 224, in which at p. 228 GUTSCHE, J., said:

   "Obviously the cost of collecting evidence does not *per se* fall into the party and party bill."

   For the plaintiff it is said that, because of a brain injury he suffered in the collision, he was "incapable of collecting the necessary evidence". It appears to me, however, that that consideration does not make the costs party and party costs; the attorneys were doing what their client, or someone on his behalf, ought to have done. Indeed, it seems to me that these costs were incurred largely in the process of advising whether the plaintiff had a good cause of action, essentially a matter to be charged as between attorney and client. In any event, if the costs in question were allowed, there would be a duplication, because fees are allowed for interviewing the witnesses and taking their statements for the purposes of the trial.

2. The plaintiff's attorneys copied the report of the defendant's medical witness; they made a copy for each of the plaintiff's medical witnesses. The Taxing Master disallowed the costs of these as unnecessary expenses. He has suggested that the "report could have been perused by the doctors in question in turn". He has pointed out also that counsel had "very lengthy consultations" with them and the contents of the report "could have been discussed at the consultations." Even so, it appears to me not unnecessary to make a copy of the report for each medical witness so that he might study it and give it full consideration, in order to be adequately prepared for the consultation with coun-

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sel and to give evidence. The medical evidence would have been of major importance at the trial and, further, Rules 36 and 37 (1) encourage the mutual exchange of reports and consideration of them with a view, *inter alia*, to curtailment of the proceedings in Court.

The Taxing Master has drawn attention to Rule 70 (6) (*b*), aimed at disallowance of fees for copying any document not used at the hearing, unless the Court otherwise directs. As there was no hearing, this Rule appears to me to have no application; if it did, it would exclude the costs of the copy required by Rule 36 (8) (*b*) to be made by a party. I conclude that the Taxing Master should have allowed the costs in question in this item.

3. The plaintiff's attorneys made charges in respect of a separate subpoena on each witness, but, as the Taxing Master has pointed out (and the attorneys now agree) generally four witnesses should be incorporated into one subpoena. In this instance there were six witnesses to be subpoenaed, and so the Taxing Master allowed for two subpoenas with two sets of instructions and attendances to issue and on the Deputy Sheriff. The only question remaining on this item is whether a separate charge is allowable for instructions to subpoena each witness or whether one such charge covers all the witnesses whose names appear on one subpoena. I consider a separate charge is allowable for instructions in respect of each witness; the time occupied in taking those instructions, even if all given on one occasion, and making the necessary notes is lengthened by the number of witnesses the client instructs are to be subpoenaed. I consider that the fee for instructions in respect of each witness should be restored.

4. One month before the date of trial the plaintiff's attorneys released one of the medical witnesses from attendance under his subpoena. The Taxing Master disallowed all fees and disbursements in respect of that witness. The attorneys have emphasised that he was an important witness to the severity of the plaintiff's brain injury, but he "pleaded to be released on account of important medical business" and they acceded to his request. It appears to me that the costs incurred in relation to this witness were wasted and I can see no ground upon which the defendant should be required to pay them.

5. The plaintiff's attorneys have made charges for arranging for him to be examined by his medical witnesses, but the Taxing Master has taken the view that he should have made his own arrangements in this regard. His attorneys point to his incapacity, because of his injury, but, apart from the fact that someone of his family could have made the arrangments, his own incapacity cannot convert an attorney and client charge into a party and party charge.

6. The Taxing Master disallowed the travelling expenses of witnesses coming for consultation and I consider he rightly did so. Van Zyl, *Judicial Practice*, vol. 2, 3rd ed., p. 943, supports this view. The alternative is for the litigant to employ an attorney

to interview each witness and take his statements at the place where he is to be found, and it does not appear unreasonable for a country witness to come to the seat of the Court a day before the trial for consultation with counsel. *Van Zyl, ibid.*

7. The Taxing Master disallowed qualifying fees for the plaintiff's medical witnesses and an actuary on the grounds that the plaintiff had not obtained either an order of Court or the defendant's agreement for these. In this he is supported by the decision in *Breetzke* v. *Union Government*, 1911 E.D.L. 394; *Gerber* v. *Union Government*, 1911 C.P.D. 855; *Roos* v. *Morkel and Somerset West Municipality*, 1915 C.P.D. 201. These cases decided that the Taxing Master, when taxing a party and party bill of costs, can tax only those costs which do not require to be expressly allowed by the Court, unless the opposing litigant has agreed to pay them; and an agreement to pay costs as part of the settlement does not embrace qualifying fees.

The plaintiff's attorneys have made the submission that the provisions of Rule 70 (3) supersede the practice as it formerly was. This Rule contemplates a full indemnity for all costs reasonably incurred by the party who has been awarded costs and directs the Taxing Master in wide terms in relation to the allowance of costs. But "special charges and expenses to witnesses" are expressly excluded by the terms of the sub-rule. I am satisfied, consequently, that I should not accede to the attorneys' request that this item be referred back to the Taxing Master to determine whether the expenses "were in fact incurred, were necessary and were reasonable." The matter is outside the Taxing Master's competence. Whether, in the light of the second of the cases mentioned above, and perhaps other authority, it is open to the plaintiff now to apply to the Court for an order for qualifying fees I need not consider.

8. The applicants' attorneys have withdrawn the review of this item.

9. The Taxing Master disallowed costs of an inspection *in loco* with counsel shortly before the date for the trial. He had already allowed a fee to the attorneys for an inspection and for taking photographs and measurements. The attorneys have said that counsel felt it advisable to inspect the scene in order to prepare for cross-examination of the defendant's witness who was the driver of the vehicle involved in the collision with the plaintiff. I consider that is part of the work of preparing for trial and is covered by counsel's fee on brief, just as much as is counsel's inspection of plans and photographs of the scene. So far as concerns the attorney's fee for this inspection, to allow it would duplicate the fee, for the Taxing Master has already allowed such a fee to the attorney.

10. The Taxing Master disallowed fees and disbursements relating to the witnesses Miss Thomas and Mr. Atkinson, respectively the fiancé of the plaintiff and the owner of the boarding house in which he lived. He appears to have been under the impression