

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kim v. Basi*,
2023 BCSC 803

Date: 20230511
Docket: M185936
Registry: Vancouver

Between:

Chung Ja Kim

Plaintiff

And

Kulwinderjit Basi

Defendant

Before: The Honourable Mr. Justice N. Smith

Supplemental Reasons for Judgment

Counsel for the Plaintiff:

R.B. McNeney

Counsel for the Defendant:

D. Madani

Written Submissions of the Defendant:

March 22, 2023

Written Submissions of the Plaintiff:

April 6, 2023

Place and Date of Judgment:

Vancouver, B.C.
May 11, 2023

[1] The plaintiff was injured in a motor vehicle accident on July 26, 2016. In reasons for judgment dated October 13, 2022 and indexed at 2022 BCSC 1793 (“Trial Reasons”), I awarded damages totalling \$368,750, including \$85,000 for cost of future care.

[2] The defendant now says that up to \$60,488.46 should be deducted from the future care award because the plaintiff is entitled to have the Insurance Corporation of British Columbia (ICBC) pay for that care as benefits under Part 7 of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 (the “Regulation”). I understand ICBC has now paid the complete judgment on behalf of the defendant, with the cost of care portion held in trust by the plaintiff’s counsel.

[3] Part 7 of the Regulation outlines medical and rehabilitation benefits available on a no-fault basis to an eligible insured person who has been injured in a motor vehicle accident. The ability of a defendant to seek deduction of those benefits from an award for damages arises under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the “Act”), which reads, in part:

- (4) In an action in respect of bodily injury or death caused by a vehicle or the use or operation of a vehicle, the amount of benefits paid or provided, or to which the person referred to in subsection (2) is or would have been entitled, must not be referred to or disclosed to the court or jury until the court has assessed the award of damages.
- (5) After assessing the award of damages under subsection (4), the amount of benefits referred to in that subsection must be disclosed to the court, and taken into account, or, if the amount of benefits has not been ascertained, the court must estimate it and take the estimate into account, and the person referred to in subsection (2) is entitled to enter judgment for the balance only.

[4] Section 85 of the Act gives ICBC the right to waive any conditions to which payment of benefits may be subject. However, that waiver does not create a new form of coverage or an entitlement that did not otherwise exist: *Del Bianco v. Yang*, 2021 BCCA 315 at para 68.

[5] Section 88(1) of the Regulation establishes some categories of benefits that are mandatory.

- (1) If an insured is injured in an accident for which benefits are provided under this Part, the corporation must, subject to this section, pay as benefits all reasonable expenses incurred by the insured as a result of the injury for necessary
 - (a) health care services listed in Column A of Table 1 or Table 2, as applicable, of Schedule 3.1 and provided by the applicable health care practitioner,
 - (b) occupational therapy provided by an occupational therapist, and
 - (c) medical, surgical, dental, hospital, ambulance and professional nursing services, speech therapy, medication, prostheses and orthoses.

The services listed in the schedule referred to in paragraph (a) include counselling, kinesiology, massage therapy, physiotherapy and psychology.

[6] Although those benefits are mandatory, s. 88(1.01) of the Regulation provides that if treatments exceed a prescribed number or if they are provided more than 12 weeks after the accident, ICBC's medical advisor or the insured's physician must certify that they are necessary.

[7] ICBC's obligation to pay mandatory benefits may be limited by s. 88(6) of the Regulation, which reads:

- (6) The corporation is not liable for any expenses paid or payable to or recoverable by the insured under a medical, surgical, dental or hospital plan or law, or paid or payable by another insurer, except expenses referred to in subsection (1) (a) and (b).

[8] The effect of that provision is that ICBC is required to pay for services described in s. 88(1)(a) and (b) of the Regulation and is not liable to pay for "expenses paid or payable... by another insurer" under s. 88(1)(c): *Wheeler v. Wilson*, 2023 BCSC 246 at para. 50.

[9] In addition to paying mandatory benefits under s. 88(1) of the Regulation, ICBC has discretion under s. 88(2) to pay for other supplies and services.

- (2) Where, in the opinion of the corporation's medical advisor, provision of any one or more of the following is likely to promote the rehabilitation of

an insured who is injured in an accident for which benefits are provided under this Part, the corporation may provide any one or more of the following:

- ...
- (d. 1) reimbursement to the insured for costs incurred from time to time by the insured for the purchase of health care supplies or of health care services not referred to in subsection (1), not exceeding the amount set out in section 3 (3) of Schedule 3;
- ...
- (f) funds for any other costs the corporation in its sole discretion agrees to pay.

[10] Rehabilitation is defined in s.1(1) of the Act as:

... the restoration, in the shortest time practicable, of an injured person to the highest level of gainful employment or self-sufficiency that, allowing for the permanent effects of the injured person's injuries, is, with medical and vocational assistance, reasonably achievable by the injured person;

[11] In the Regulations, s. 90 permits ICBC to make continued payment of benefits subject to the insured undergoing further medical treatment, s. 98 allows ICBC to demand further medical information from treating practitioners and s. 99 allows ICBC to require that the insured be examined by a health care practitioner of ICBC's choosing.

[12] The approach the court must take in considering an application to deduct benefits was summarized *Tench v. Van Bugnum*, 2021 BCSC 501 at para. 38:

- a) The defendant bears the burden of proving that the plaintiff is entitled to the Part 7 benefits which they seek to deduct.
- b) Entitlement refers to conditions precedent to receiving benefits not the discretionary granting of benefits by ICBC once entitlement is established.
- c) Strict compliance with the statute is required in determining what deductions, if any, should be made.
- d) Despite the principle of strict compliance, a precise matching between the heads of damage in the tort award and the categories under the benefit recovery scheme is not required.
- e) When statutory entitlement is established based on the award and the legislation, the question becomes: are the Part 7 benefits mandatory or discretionary?

- f) If the benefits are mandatory, the court must deduct. No further evidence is required.
- g) If the benefits are discretionary, meaning, ICBC *may* pay the benefits or they are subject to ongoing medical certification, they are too uncertain and the court should decline to deduct the benefit amount from the award, or alternatively deduct a nominal amount to reflect the uncertainty that the plaintiff will receive the benefit(s).
- h) An exception arises where ICBC, through affidavit evidence, undertakes or promises to pay discretionary benefits going forward.
- i) The court must be satisfied by the affidavit evidence that the undertaking or promise is sufficient to overcome the uncertainty that benefits will be paid.
- j) If satisfied, the court should deduct the benefits from the damages award.
- k) However, the court must be cautious when assessing the amount to deduct from a cost of care award. Examples of uncertainties to be considered include: how long the plaintiff will need the service and the possibility of legislative changes that may take away or alter a plaintiff's eligibility for Part 7 benefits.
- l) Further, ICBC cannot undertake to do more than it is empowered to do under the legislative scheme, including broadening entitlement or paying more than the prescribed fee limits.

[13] In making the award for cost of future care in this case, I accepted the evidence of Jennifer Lane, an occupational therapist who conducted a functional capacity evaluation of the plaintiff. Ms. Lane made recommendations for ongoing treatment and therapies, including occupational therapy, physiotherapy, massage therapy, psychological counseling and kinesiology. The present value of Ms. Lane's recommendations was found to be \$105,573. The award of \$85,000 reflected a deduction for contingencies.

[14] The deduction ICBC now seeks is based on the present value of amounts set out in Ms. Lane's report for specific supplies and services. David Forster, a claims review advisor for ICBC, has specifically identified each item in Ms. Lane's report and its cost that he says is payable as a benefit under Part 7 of the Regulation.

[15] The plaintiff suggests that the composition of the future care award is uncertain because the judgment does not break down what the future care award is comprised of, and that uncertainty must be resolved against the defendant. I do not accept that submission.

[16] It is true that the components of the future care award are not specifically itemized in the reasons for judgment. However, Ms. Lane's report sets out her recommendations in detail, and I accepted and adopted her recommendations, subject only to a deduction for contingencies. I stated at para. 57:

[57] The evidence is clear that Ms. Kim's pain is likely to be permanent. Most of Ms. Lane's recommendations do not purport to offer any cure, but are aimed at whatever relief is possible and helping Ms. Kim manage and adapt to her pain. I find that to be a necessary goal, although it is impossible to predict how successful those efforts will be.

[17] At para. 60 of the Trial Reasons, referring to the evidence of a defence expert who was critical of Ms. Lane's methodology, I said:

If Mr. Gregson had performed his own functional capacity evaluation using his own methodology, he may or may not have obtained different results and arrived at different recommendations that the Court could consider. In the absence of such an evaluation, I do not find his opinion to be helpful and accept the evidence of Ms. Lane.

[Emphasis added.]

[18] I therefore find that the defendant has appropriately identified the care costs, as found at trial, and the potentially applicable deductions.

[19] Mr. Forster says in his affidavit that he is authorized to swear the affidavit on behalf of ICBC, and that he has "authority to make decisions and representations on behalf of ICBC and, in particular, with respect to Part 7 issues and payments to the [p]laintiff."

[20] Based on Ms. Lane's report, Mr. Forster identifies recommended items that are payable as compulsory benefits under s. 88(1) of the Regulation. These are psychology, physiotherapy, massage therapy, kinesiology and a home assessment by an occupational therapist. He says ICBC will "irrevocably, unequivocally, and

unconditionally” agree to pay for those treatments or services as costs are submitted for reimbursement. In relation to psychology and massage therapy, the maximum fees ICBC is permitted to pay under the Regulation is less than what is contained in Ms. Lane’s report. In those cases, the deduction sought is less than the amount identified by Ms. Lane.

[21] Mr. Forster also says that, on behalf of ICBC, he waives the need for continued certification under ss. 88(1.01) and 98 of the Regulation, along with the power to require treatment under s. 90 and the power to require a medical examination under s. 99.

[22] Once entitlement is established, ICBC can reduce or eliminate any contingencies associated with its exercise of discretion. Post-trial affidavit evidence is admissible for this purpose: *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953 at para. 81.

[23] The filing of the affidavit of an adjuster authorized to “irrevocably, unequivocally and unconditionally” agree to pay for any treatment referenced in the reports of the medical experts who testified at trial, up to the amount awarded by the court, may fully resolve uncertainty as to whether a benefit will be paid as Part 7 benefits: *Skinner v. Dhillon*, 2021 BCSC 1992 at para. 16(5).

[24] The assurances given by Mr. Forster in his affidavit and the assertion that he has the authority to make them are similar to the assurances that were accepted in both *Aarts-Chinyanta* at para. 10 and *Tench* at para. 11. I see no basis on which to question them in this case and find that, to the extent the plaintiff is entitled to benefits, there is no uncertainty about her receiving them.

[25] I accordingly find that ICBC is required to and will pay benefits for psychology, physiotherapy, massage therapy, kinesiology and a home assessment by an occupational therapist as set out in Mr. Forster’s affidavit, and those amounts must be deducted.

[26] The deduction sought by the defendant also includes a total of \$2,874.32 for various medications recommended by Ms. Lane. Medication is also a compulsory benefit, but is subject to the presence of other insurance under s. 88(6) of the Regulation.

[27] The plaintiff's son, Apollos Kim, has filed an affidavit stating that his parents have now purchased a health and dental insurance policy, with coverage beginning April 1, 2022. The benefits payable under the insurance policy include a minimum of 70 percent of the cost of prescription medication (or 90 percent if the prescription is filled at a designated pharmacy). I find that the plaintiff's entitlement to Part 7 benefits for prescription medication is limited to the difference between her insurance coverage and the actual cost of the medication, which may be up to 30 percent of the cost.

[28] The evidence on medications is not specific as to which of the five medications referred to in Ms. Lane's report require prescriptions and which do not. Resolving that uncertainty against the defendant, I find that the deduction for medication must be limited to 30 percent of the total cost, or \$862.30.

[29] The defendant also seeks a deduction totalling \$8,511.84 for benefits that are discretionary under s. 88(2) of the Regulation. These are home safety equipment, a gym pass, hearing aids and a neuropsychological assessment.

[30] Mr. Forster says that he accepts, on behalf of ICBC, that these expenditures are likely to support rehabilitation and waives the need for an opinion to that effect from the corporation's medical advisor.

[31] ICBC's waiver of authority under s. 88(2) of the Regulation is limited to the requirement for a medical opinion. It does not have the authority to waive the requirement that the discretionary benefits are likely to promote rehabilitation. Where ICBC waives the requirement for the opinion of its medical advisor, the rehabilitative purpose can be established by the court's findings and ICBC's other evidence: *Tench* at paras. 56 and 59.

[32] In *Tench*, Justice Fleming said that some of the future care items she had awarded were for the purpose of managing the plaintiff's current condition and maintaining a status quo, not to rehabilitate her (para. 60). In the absence of any other evidence establishing a rehabilitative purpose, Fleming J. declined to make deductions for the discretionary items at issue there (para. 63).

[33] There are many cases where items similar to those at issue here were found to meet the definition of rehabilitation set out in the Regulation: see, for example, *Skinner* at para. 37. But whether a particular intervention will meet that definition for an individual plaintiff depends on its intended purpose and possible outcome. In this case, the question must be considered in the context of my findings at trial, the medical evidence, and the fact that the plaintiff is now 79 years old.

[34] As said above, I found that the interventions recommended by Ms. Lane had the potential effect of allowing her to manage and adapt to her pain rather than providing any cure. I also referred at para. 23 of the Trial Reasons to the opinion of Dr. Masri, an orthopedic surgeon, that the role of treatment will be to "improve her coping skills and potentially lessen the pain," but the plaintiff's symptoms are permanent.

[35] I find the facts of this case to be comparable to those in the *Tench*. The home safety equipment, gym pass, hearing aids and neuropsychological assessment are intended to manage the plaintiff's condition and are neither intended nor likely to serve any rehabilitative purpose as defined in s. 1(1) of the Act. The plaintiff therefore has no entitlement to those benefits, and the defendant cannot claim a deduction for them.

[36] The total deduction required under s. 83 of the Act is therefore \$49,964.60, and I order that amount be deducted from the award for cost of future care.

"N. Smith J."