

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Farrugia v. Bailey*,
2023 BCSC 774

Date: 20230509
Docket: M1810308
Registry: Vancouver

Between:

Mathew Michael Farrugia

Plaintiff

And

Andrew Brian Bailey and Aura-Lee Brigitte Bailey

Defendants

Before: The Honourable Justice Betton

Reasons for Judgment

Counsel for the Plaintiff:

T. O'Mahony

Counsel for the Defendants:

D. Graves

Place and Date of Trial/Hearing:

Vancouver, B.C.
March 30, 2023

Place and Date of Judgment:

Vancouver, B.C.
May 9, 2023

Introduction

[1] This is the defendants’ application for deductions to be made from the amount awarded to the plaintiff for damages suffered in a motor vehicle collision.

[2] Following a trial, the plaintiff was awarded damages totaling \$723,609.10, including \$80,000 for past loss of income and \$180,447.66 for costs of future care.

[3] The defendants seek deductions pursuant to s. 83 of the *Insurance Motor Vehicle Act*, totaling \$61,719.65 from the costs of future care. In addition, the defendants seek deductions of \$37,422.35 from the past income loss award.

[4] The plaintiff agrees with the deductions from the past loss of income award but disputes the amount that should be deducted from the costs of future care award.

Background

[5] The issues raised in this application were, by agreement and by necessity, left to be addressed following the decision as to the plaintiff's entitlement to damages. That decision is indexed at 2023 BCSC 81.

[6] The costs of future care awarded in that decision are summarized in the following table:

| <u>Item</u> | <u>Award</u> |
|---------------------------|---------------------|
| Heavier home cleaning | \$45,000.00 |
| Ergonomic equipment | 2,034.66 |
| Cane | 0 |
| Braces/Splint | 1,456.00 |
| Orthotics | 4,750.00 |
| Ice Pack and heating pads | 0 |
| TENS Machine | 0 |
| Home exercise equipment | 124.00 |
| Gym pass | 0 |

| | |
|-----------------------------------------------------------------------------------|------------------|
| Physiotherapy | 22,000 |
| Athletic therapy, hand therapy and occupational therapy | 0 |
| Active rehabilitation | 2,880.00 |
| Massage therapy | 15,000.00 |
| Ergonomic assessment contingency | 550.00 |
| Medical pedicures | 19,833.00 |
| Counselling | 5,802.00 |
| Injections | 300.00 |
| Vocational assessment and counselling | 9,060.00 |
| Post wrist and ankle surgery rehabilitation and cleaning contingencies - physio | 4,000.00 |
| Post wrist and ankle surgery rehabilitation and cleaning contingencies - cleaning | 10,658.00 |
| Medications | <u>37,000.00</u> |
| TOTAL: | \$180,447.66 |

[7] In support of this application, the defendants filed the Affidavit of Dave Foster, Claims Review Advisor, employed by ICBC. In that affidavit, he attests to the fact that ICBC has paid \$60,718.05 in medical/rehabilitation benefits under s. 88 of the *Regulations* as of February 21, 2023. Another \$771.75 has been paid since the trial. He confirms that a balance of \$89,281.95 remains available in Part 7 medical benefits.

[8] He states that he is authorized to confirm that "ICBC will irrevocably, unequivocally, and unconditionally agree to pay, under Part 7, as incurred and submitted to ICBC for reimbursement" certain of the amounts awarded in the trial decision. Those are presented in the table below, taken from that affidavit:

| Type of Treatment | Amount Awarded | Deduction Sought (Amount to be paid by ICBC under part 7 of the Regulation) | Amount Paid since Trial | Amount Remaining to be paid by ICBC under part 7 of the Regulation | Pursuant to Regulation provision | Subject to fee limit |
|-----------------------------------------------|----------------|--------------------------------------------------------------------------------|-------------------------|--------------------------------------------------------------------|----------------------------------|----------------------|
| Braces/Splints | \$1,456 | \$1,456 | \$0.00 | \$1,456 | 88(1)(c) | n/a |
| Orthotics | \$4,750 | \$4,750 | \$0.00 | \$4,750 | 88(1)(c) | n/a |
| Physiotherapy* | \$22,000 | \$19,452.63 | \$336 | \$19,116.63 | 88(1 Xa) | \$84/session |
| Active rehabilitation | \$2,880 | \$2,880 | \$435.75 | \$2,444.25 | 88(1)(a) | \$83/session |
| Massage therapy** | \$15,000 | \$10,200 | \$0.00 | \$10,200 | 88(1)(a) | \$85/session |
| Ergonomic assessment | \$550 | \$550 | \$0.00 | \$550 | 88(1)(b) | \$ 119/hour |
| Counselling*** | \$5,802 | \$4,912.36 | \$0.00 | \$4,912.36 | 88(1)(a) | \$127/session |
| Injections | \$300 | \$300 | \$0.00 | \$300 | 88(1)(c) | n/a |
| Post surgery rehabilitation Physiotherapy* | \$4,000 | 3,536.84 | \$0.00 | 3,536.84 | 88(1 Xa) | \$84/session |
| Lidocaine Cream | 2,000 | \$2,000 | \$0.00 | \$2,000 | 88(1 Xc) | n/a |
| Ergonomic equipment | \$2,034.66 | \$2,034.66 | | | 88(2)(1) | |
| Home exercise equipment | \$124 | \$124 | | | 88(2)(d.1) | |
| Vocational assessment and counselling | \$9,060 | \$9,060 | | | 88(2)(e) | |

[9] He also confirms that he is authorized by ICBC to confirm that ICBC will honour new rates as they are established annually based on the BC consumer price index.

Positions of the Parties

[10] As indicated, the plaintiff agrees to the deductions to be made from the award for past income loss totaling \$37,422.35. Accordingly, I make that order.

[11] The parties also agree that deductions from the award for ergonomic equipment, home exercise equipment and vocational assessment and counselling totalling \$11,218.66 are appropriate. I also make that order.

[12] In relation to the remaining deductions sought by the defendants from the award for costs of future care, the plaintiff accepts that some deductions should be made. He argues, however, that there must be reductions in the amounts of the deductions advanced by the defendants.

[13] In part, the plaintiff says that adjustments are required to account for the effect of inflation. He raises three points associated to inflation.

[14] First, he argues that the rates to be used for purposes of any deduction should be the rates in place on June 4, 2021. This is the date of the plaintiff's expert report in respect of costs of future care.. He argues that this is necessary ". . . otherwise the Defendants gain an advantage from deducting inflation adjusted numbers from an award that has not been adjusted for inflation . . .".

[15] The amounts at issue in connection with this proposition are modest. There are differences in the rates paid for physiotherapy, massage, counselling and kinesiology. The difference calculated by the plaintiff is \$984.83.

[16] Further, he notes that the legislation caps inflation adjustments at six percent annually. If inflation exceeds that cap, he says the costs of treatment will rise disproportionately resulting in a smaller portion of the actual expense that will be paid by ICBC.

[17] Finally, the plaintiff says, that while the rates paid by ICBC are adjusted annually for inflation, the cap on his entitlement under Part 7 is not. It is fixed at \$150,000. If the deductions proposed by the defendants are made and assuming no inflation, approximately \$27,000 of that \$150,000 would remain. The plaintiff says that with inflation that residual may be substantially reduced.

[18] In addition to inflation, the plaintiff notes that he remains entitled to claim other benefits from ICBC and there is a likelihood that some portion of the unallocated \$27,000 will be consumed by those claims. The result, he argues, is that the available funds will be depleted more rapidly and result in him being entitled to less treatment overall.

[19] Any excess funds that remain available cannot be presumed to be sufficient to counter the effects of inflation and provide the plaintiff access to those other benefits.

[20] To summarize, the plaintiff says that the combined effect of inflation and his entitlement to other benefits, will deplete the funds in such a way that a global reduction of forty percent of the deductions should be made.

[21] As to the plaintiff's first point regarding inflation, the defendants argue that the law supports using the rates payable by ICBC under the *Regulations* at the time of the award. Counsel points out that if the rates the plaintiff's expert used in preparing his report had changed, it was incumbent on the plaintiff to provide evidence of that. Further, and in any event, the defendants say the issue is the amount ICBC will pay going forward.

[22] The defendants argue the residual funds of approximately \$27,000 are sufficient to absorb the reasonably anticipated inflationary effects and any additional benefits the plaintiff may claim. The defendants say that the plaintiff's position is speculative and does not justify any reduction in the deductions proposed.

Analysis

[23] I have the benefit of two recent BC Court of Appeal decisions which review development of the law in this area and provide clarity on its current state.

[24] The intention of this process is to avoid double recovery by the plaintiff. The onus is on the defendant to establish and justify any deductions and any uncertainty must be resolved in the plaintiff's favour.

Applicable rates

[25] The proposition that the ICBC rates to be used in the calculation of any deduction should be those in place at the time of the plaintiff's expert report is, in my view, not consistent with the objectives as set out by the Court of Appeal.

[26] In the summary of the jurisprudence in *Del Bianco v. Yang*, 2021 BCCA 315, the Court referenced its earlier decision in *Fisher v. Wabischewich*, (1978) 5 B.C.L.R. 335 (C.A.) at 336 for this statement:

The purpose of the deduction is two-fold:

(1) It is to determine the sum that the plaintiff shall receive at the time of the judgment. It is not to fix the amount of the future benefits. The amount of benefits that the plaintiff will receive in the future is determined by the provisions of the Act. These may well be in excess of the amount estimated by the trial judge in his award. However, by deducting the amount that the trial judge has estimated, the amount that is immediately payable to the plaintiff is determined; and

(2) It is to prevent the plaintiff from being compensated twice. He cannot receive a lump sum in respect of future benefits and also receive the benefits

[27] The decision went on and dealt with the concern expressed by the trial judge over the fact that it was “impossible to know and predict” the rate at which ICBC would pay for massage therapy in the future (para. 51). It said “. . . the fact that it is not possible to know what the Part 7 rates for massage therapy will be in the future is not a relevant consideration” and the judge was required to “estimate” that amount (para. 52).

[28] At paragraphs 57 and 58, the Court of Appeal noted that, before it, the defence argued that the deduction should be based on the “maximum per treatment cost permitted by the *Regulation* at the time of their application.” This differed from the position that had been taken at trial and was viewed by the Court of Appeal to be “both reasonable and sensible.”

[29] Although the comments of the Court of Appeal arose in a slightly different context, it is my view that they are informative in this context as well.

[30] The issue here is the value of the benefits that the plaintiff will receive from ICBC, not what proportion of the costs of the care awarded will be paid by ICBC. In addition, I do not have any evidence of changes in the rates used by the plaintiff’s expert.

[31] The ICBC rates in place at the time of the trial decision should be used.

[32] The question of whether the consequences of inflation will impact ICBC's payment in the future by depleting the \$150,000 fund is addressed in the context of the proposed global reduction.

Global contingency reduction

[33] In *Watson v. Fatin*, 2023 BCCA 82, the Court noted at paragraph 11, in part:

[11] . . . The criterion for the reduction addressed in s. 83(5) of the *Act* is, accordingly, entitlement to a benefit for an item of care under Part 7 respecting the loss on which the claim is based, with the insured receiving the entire entitlement and no more.

[34] Noting that evidence of a waiver by ICBC does not end the reduction question, the Court also confirmed that a global reduction can be appropriate. At para. 19 of *Watson* it said this:

....It remains for the judge to determine the amount of the reduction that will be applied taking into account the value of the benefits the insured is certain to receive. Factors that will erode the certainty required include the benefit room available considering the presumptive ceiling of \$150,000 and the likelihood that the tariff for the benefit is less than the cost to the insured for the item. *Halliday v. Sanrud* (1979), 15 B.C.L.R. 4 (C.A.) at 15–18 is an example of the former; *Del Bianco* at para. 58 is an example of the latter. In such circumstances, it will not be established that the Part 7 benefits will pay for all of the award for the corresponding care. On some occasions, diminution of the reduction may be handled by applying a percentage contingency discount to the value of the benefit to account for uncertainty.

[35] In *Watson*, the Court reversed the decision of the trial judge applying a twenty percent contingency deduction noting that the evidence did not establish the “required realistic risk that the insured will not be fully compensated for future care in the event the award is reduced by the present value of the identified Part 7 care items” (para. 29).

[36] Here, the plaintiff says the required level of certainty to justify making the deductions is eroded by the likely effects of inflation and his ongoing entitlement to access the Part 7 benefits for care other than that which is included in the future care award. He argues that uncertainty justifies the proposed forty percent reduction.

[37] The plaintiff notes that inflation in BC in 2022 based on the consumer price index was 6.9%. He included in his materials tables setting out that and historical consumer price index changes for Canada, British Columbia, Vancouver and Victoria going back as far as 1961.

[38] It is impossible to predict what inflation rates will be in the future. I take judicial notice of the fact that the Bank of Canada aims to keep inflation at the two percent midpoint of an inflation-control target range of one to three percent. From the data presented by the plaintiff, the average change in the index in BC between 2000 and 2022 was 1.9%. It would not be appropriate to assume over the extended period that the plaintiff is likely to be accessing benefits that inflation would remain anywhere close to the 6.9% level in 2022.

[39] In relation to the prospect of the plaintiff using the residual approximately \$27,000 of benefits, the plaintiff offers these specific comments in argument:

12. There is substantial evidence that the Plaintiff will likely use all the benefits provided by ICBC to the policy limits even if inflation was not decreasing the value of, the excess amount available to him year over year. For example, the award for injections indicated that frequency was not identified, and so could be more than the amount awarded. The contingency for surgery therapies was cut down and so could be more. If the surgeries have a poor outcome the therapies could be significantly more. There is clearly evidence beyond speculation of the potential for the Plaintiff to exhaust the policy before getting the value of the proposed deductions (*Watson v. Fatin*, 2023 BCSC 82 at paras 19, 24, 28-29).

[40] It must be recognized that the future care award was the Court's decision based on the evidence regarding the appropriate services level. The argument is, at least in part, based on the proposition that the decision was in error. That is, of course, a possibility but the order represents the Court's best effort to assimilate all of the evidence and apply the law on the subject.

[41] The trial decision awarding costs of future care is based on the plaintiff's expert report and considered the prospect of the plaintiff's future surgeries.

[42] The plaintiff and defence agree that with the estimation that, at current rates, approximately \$27,000 of the Part 7 benefits would remain unused subject to the arguments being considered here. The defendant argues that this is a sufficient “buffer” to protect against the effects of inflation and any additional benefits that the plaintiff might be entitled to under Part 7.

[43] To put that \$27,000 in context, it must be recognized that the total deduction sought by the defendants for care items is \$61,719,65. In other words the “buffer” represents approximately forty-three percent of the proposed deduction amount. In relative terms, that is a substantial amount.

[44] Having regard to all of the above, can it be said the “required realistic risk that the insured will not be fully compensated for future care in the event the award is reduced by the present value of the identified Part 7 care items” is established such that a global reduction is required? In my view, the answer is no.

Conclusions

[45] The rates to be applied for purposes of the deductions are those in place at the time of the decision.

[46] There will be no global reduction from the deductions on account of inflation risks or the prospect of the plaintiff accessing ICBC benefits not included in the future care award.

[47] If there is any issue that I have failed to address or that requires clarification, counsel should jointly advise Trial Scheduling within 30 days of the release of these reasons.

“Betton J.”