

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McMahon v. Sovdat*,  
2023 BCSC 919

Date: 20230427  
Docket: M162526  
Registry: Vancouver

Between:

**Kimberly McMahon**

Plaintiff

And

**Eleonore Sovdat**

Defendant

Before: The Honourable Justice Marzari

## **Oral Reasons for Judgment**

In Chambers

Counsel for the Plaintiff:

R.D. Nairne

Counsel for the Defendant:

D.M. De Baie

Place and Date of Hearing:

Vancouver, B.C.  
April 21, 2023

Place and Date of Judgment:

Vancouver, B.C.  
April 27, 2023

[1] **THE COURT:** There are two applications by the defendant in the motor vehicle accident case before me. The first is for s. 83 deductions pursuant to the *Insurance (Vehicle) Act*, RSBC 1996, c. 231, and the second is for costs to the defendant based on an offer that exceeded the amount of the jury award.

### **Background**

[2] The trial related to a car accident in April of 2015. Liability was admitted, but damages, and in particular past and future income loss, were strongly contested. The trial was before a jury commencing November 14, 2022 for three weeks, including deliberations.

[3] The jury's award was \$500,330, with the following breakdown by heads of damages:

- non-pecuniary damages of \$50,000;
- past income loss of \$220,000;
- future income loss of \$40,000;
- costs of future care of \$132,000; and
- special damages of \$58,330.

### **Section 83 Expenses and Special Damages Deductions**

[4] The defendant seeks the deduction of \$65,775.50 for the future care award pursuant to s. 83 of the *Insurance (Vehicle) Act*, on the undertaking of ICBC to pay those amounts as incurred by the plaintiff, pursuant to Part 7 of the Regulations.

[5] The defendant also seeks a deduction of \$16,752.93 from the special costs awarded.

### Special Damages

[6] At trial, the jury was instructed to consider the plaintiff's special damages without reference to what had already been paid pursuant to Part 7 of the Act, or paid by the defendant generally.

[7] The parties are agreed that these amounts are \$16,752.93. I therefore order these amounts to be deducted from the jury's award of special damages, such that the special damages awarded to Ms. McMahon, rounded up to the nearest dollar, is **\$41,578**.

### Section 83 Deductions

[8] The defendant seeks a deduction of \$65,775.50 from the awards for the costs of future care. ICBC has provided an affidavit unconditionally agreeing that the plaintiff is entitled to these amounts pursuant to Part 7 of the Regulations, including \$35,000 for rehabilitation and health-related costs generally (which amount includes kinesiology, occupational therapy and psychological counselling), \$2,000 for medications, \$90 for ergonomic knives – all of which the jury was instructed that the parties had agreed to. In addition, ICBC, through its representative, accepts that the plaintiff is entitled to reimbursement from Part 7 benefits for up to \$37,000 in massage-related costs, based on an assumption that the jury awarded the average of the range provided to the jury for this claim.

[9] At the hearing, the defendant reduced the amount sought to be deducted from the psychological counselling benefits to \$23,323, which is 50% of the amount contemplated in the plaintiff's economist's report for this expense. The defendant agreed that the plaintiff suffered a psychological injury as a result of the accident, although at the trial they argued the plaintiff's pre-existing psychological injuries were already disabling in terms of her ability to earn income.

[10] Ms. McMahon opposes any reductions in her cost of future care award in this case, or at most she says that a nominal reduction of \$1,000 would be appropriate. She says that the estimate the Court is required to make under the Act and

Regulations is more difficult, and sometimes even impossible, with a jury. She says this is one of those impossible cases.

[11] In particular, the plaintiff notes that the cost of future care award was not broken down by type of care, including between the type of rehabilitation services provided under Part 7 and her claims for household maintenance and care expenses. The latter are not covered by Part 7, and not deductible pursuant to s. 83.

[12] Because the plaintiff made claims for damages that are not Part 7 benefits, those claims could have been, says the plaintiff, the basis for the jury's entire award. Furthermore, the jury was specifically instructed that they did not have to be unanimous on what their own breakdown was for this head of damages, only the total award. Ms. McMahon says I cannot assume or find that any of the award was for damages reimbursable under Part 7.

[13] Ms. McMahon says that because the jury was generally instructed that they are not bound by counsel's submissions or agreements by counsel, I should not find that they accepted these concessions in their closing submissions, or agreements stated in the jury charge.

[14] The plaintiff also says there is no basis for me to simply pick an average in the range of those damages, i.e., for the massage damage costs.

[15] She also argues that before any reduction to the award can be made, entitlement to the benefits under Part 7 must be established, and Ms. McMahon has no entitlement to psychological counselling services because of her pre-existing condition pursuant to s. 96(f) of the Regulations.

**Determination on s. 83 Deductions Issue**

[16] The applicable principles are laid out in a number of cases, and both parties rely on the following summary from *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953, which I also respectfully adopt:

[38] It is important to keep this conceptual framework in mind when determining what benefits, if any, should be deducted.

[17] I will address the entitlement issue first as it relates to psychological counselling in this case.

***Entitlement***

[18] ICBC accepts before me that the jury must have found that the accident caused or at least exacerbated the plaintiff's mental injuries. Therefore, some amount of the plaintiff's current disabling psychological injuries was not solely attributable to her pre-existing mental health conditions.

[19] Both parties point to the case of *Kozhikhov v. Insurance Corporation of British Columbia*, 2015 BCCA 515, as setting out entitlement under Part 7 benefits for mental injuries in relation to the possible contribution of pre-existing mental health conditions.

[20] As I read the *Kozhikhov* case, it asks the question about entitlement when there has not been a trial on the issue of causation, and applies the "but for" test similar to the legal test for causation to determine if a pre-existing disease is the cause of the need for treatment.

[21] However, the question for the purposes of this case is somewhat different than it was in *Kozhikhov*. Here, there has been a trial on the issue of causation, and though the trial was not concerned with s. 96(f) in particular, it did consider causation in the legal sense of whether the accident caused Ms. McMahon's psychological injuries or some portion of them.

[22] I find that it is apparent from the jury's verdict that the jury found that the accident did cause some amount of psychological injury to Ms. McMahon beyond what was caused by her pre-existing condition: i.e., this is not just a question of whether the pre-existing injury caused the mental injury, but there is a finding of causation that has been implicitly made by the jury that there was a mental injury that was a direct result of the accident independent from the pre-existing mental condition, which is required to be compensated by the defendant.

[23] Furthermore, ICBC concedes that the accident caused these losses and has agreed that they were proven for purposes of s. 96(f). ICBC cannot resile from this concession and has agreed to pay those costs.

[24] I find that in this context, where causation has been judicially (or by jury) determined and its extent determined, s. 96(f) must be interpreted to give rise to entitlement to accident-related psychological treatment. ICBC has conceded that in this case. I recognize that this finding goes beyond the decision in *Kozhikhov* because that case did not have the benefit of a causation determination by the court before entitlement was considered, but I consider that the conclusion is consistent with that decision.

[25] Counselling is therefore an entitlement in this case to the extent that the jury awarded costs for that.

[26] Other than counselling, it is conceded that all of the categories claimed by ICBC for s. 83 reductions are mandatory reductions with the exception of the \$90 for ergonomic knives, which is a discretionary expense. It is agreed by the parties, and I also agree, that the commitments to pay for the knives or knife bring this expense within s. 83.

### ***Amounts***

[27] I turn, then, to the determination of the amounts, if any, that must be deducted from the cost of future care award for the services ICBC has committed to providing under Part 7.

[28] I agree with the plaintiff that the law requires the defendant to make out the basis for this deduction, and I also agree that ambiguity in this regard should generally be resolved in favour of the plaintiff where that burden has not been made out.

[29] The nature of the jury award in this case presents additional challenges to this assessment, but I still need to make an effort to estimate these amounts on the

evidence at trial and the submissions of counsel to the jury. In this case, this includes the parties' submissions, where they made a number of concessions during their closing submissions with respect to costs of future care. It also includes the concessions that were summarized and further articulated in the charge itself, in consultation with counsel just before the jury was charged.

[30] I find that in this case, I do have evidence, submissions, and agreements provided to the jury to assist with this estimate, such that this is not a case where the awards are too ambiguous to make any determination of Part 7 costs, or where only a nominal award is appropriate.

[31] However, I am not convinced that simply taking the average of a range of costs provided to the jury is an appropriate way to determine these amounts, where ranges were provided.

[32] I consider that the strongest basis to make this estimate is the parties' own submissions and concessions as to what Ms. McMahon was entitled to, as summarized in the jury charge in consultation with counsel.

[33] Despite later comments in the charge itself that counsel's submissions are not determinative, and that they need to make their own assessment of damages, I find that the jury most likely did make the awards that I advised counsel agreed to during the charge.

[34] Those submissions and agreements included a number of awards that are not covered by Part 7, and would not be deductible in that they are in relation to household expenses. In that regard, the jury was advised (by the plaintiff and in the charge) that the plaintiff was not pursuing the landscaping claim, and that the parties were agreed that the plaintiff was entitled to lawn-mowing costs in the range of \$4,800 to \$6,300. Other than that, they were instructed that the defendant agreed to some entitlement to household maintenance and repairs, and the multiplier for those, but not the amounts. The plaintiff's economist's table was relied upon for these calculations.

[35] With respect to the future care award elements that are compensable under Part 7, the jury was also instructed that the parties were agreed on the following entitlements:

- \$90 for an ergonomic knife;
- \$2,000 for medications;
- that the range for non-chronological pain management like massage was in the range of \$12,000 to \$62,000;
- and for kinesiology and occupational therapy, \$35,000 had been agreed to.

[36] Unfortunately, the \$35,000 amount was provided to the jury in error. The parties had actually agreed to \$3,500 for this amount shortly before the charge was prepared, and this error was not caught by myself or counsel as we reviewed the charge immediately before, during, or after the charge was delivered. I have reviewed the recordings, and I can confirm that the jury was instructed that the agreement was in the amount of \$35,000 for these items.

[37] With respect to this error, the defendant takes the position that the deductible amount should be based on the evidence of what the plaintiff sought in this regard – \$3,500 – so she is not seeking the full \$35,000 to be deducted on that basis. The plaintiff says it would be unfair to deduct the \$35,000 amount from her entitlement because it is possible the jury did not rely on this instruction and instead relied on the economist tables provided.

[38] The plaintiff says that I can find on that evidence (the tables) that in making the award of \$132,000, it is possible, and I should infer, that this award was in relation to household maintenance items only, without reference to any Part 7 care items. They say that the submission, charge and evidence and the ultimate award are too ambiguous for me to come to a different conclusion on this point.

[39] Taking the plaintiff's case at its best, I have reviewed the amounts claimed by reference to Mr. Pivnenko's high and low recovery amounts for the plaintiff's costs of future care. Where the parties agreed to a range, I have assumed the plaintiff was awarded the highest amount available in the non-Part 7 category (for example, \$6,200 for lawn-mowing). I have removed the landscaping as agreed.

[40] By my calculations, the plaintiff's claim before the jury under these non-Part 7 damages on the economist's high end of the range table was approximately \$85,000 (including a claimed but unspecified nominal amount for household repairs), and that is without the lower multiplier to age 75 instead of to death, which also was agreed to by the plaintiff in her submissions and put to the jury in the charge.

[41] I find that on the plaintiff's best position and evidence, this leaves at least \$47,000 of the jury's \$132,000 award that must have been related to her claimed rehabilitation (Part 7 recoverable) costs.

[42] I find that it was likely more, especially when taking into account the lower multiplier for household expenses, and the much larger relative amounts claimed in relation to rehabilitation/health-related costs by the plaintiff.

[43] Relying solely on this analysis, giving as much to the plaintiff as possible for household expenses, I find that the lowest amount of the jury's award that related to care that is required to be deducted was \$50,000.

[44] I would also make the same estimate of Part 7 covered future costs of care amounts on the basis of the jury instructions as they were provided, including that it is likely that the jury accepted that the costs of occupational therapy and kinesiology would be \$35,000 on the basis of the charge provided to them. As I read the affidavit provided by ICBC, this amount is committed to by ICBC as available under Part 7 for all generally required rehabilitation and health-related costs incurred by Ms. McMahon, including not only occupational therapy and kinesiology, but also psychological counselling or additional massage or other passive therapies, and I consider that to be appropriate.

[45] To that amount, \$35,000, I would add:

- the \$2,000 agreed for medication;
- \$90 for ergonomic knives;
- massage of at least \$12,000, which is the lowest end of the range of that Part 7 benefit agreed to by the defendant; and
- a nominal \$1,000 amount for psychological counselling.

[46] The deductible amount on that basis would also be just over \$50,000 which also supports this amount as an appropriate deduction.

[47] I have also considered that it is the present value of these amounts being deducted, despite the fact that they will be taken out pursuant to Part 7 over time. The tables I have used are discounted for present value, but they are also higher than what was conceded by the plaintiff as the multipliers go to death, rather than to age 75. I consider the plaintiff already has a significant advantage there, and I do not think any further adjustment is necessary.

[48] I consider that ICBC's affidavit supports Ms. McMahon's entitlement to these amounts under Part 7. This means that I understand and require that ICBC accept receipts from Ms. McMahon for reimbursement for any of the rehabilitation services she claimed, including further massage, other passive therapies, psychological counselling, occupational therapy, and kinesiology in amounts up to \$35,000 in addition to the \$12,000 for massage and \$1,000 for psychological counselling addressed above.

[49] Overall, I reduce the plaintiff's award for future costs of care to **\$82,000** on this basis.

### **Costs**

[50] Turning now to the costs application of the defendant. The defendant seeks a costs award pursuant to the costs rules, on the basis of an offer to settle made

ten days before trial in the amount of \$576,500 plus Scale B costs and disbursements to date.

[51] The plaintiff rejected that offer.

[52] As noted above, the jury's award was lower than the defendant's offer by approximately \$76,000, or about 13%. With the adjustment for special damages, the difference is closer to 18%, and would be higher if one included the Part 7 benefits as well.

[53] The defendant seeks her costs and disbursements from the date of the offer of November 4 to the end of trial, with the plaintiff entitled to costs and disbursements up to November 4.

[54] The plaintiff seeks costs and disbursements throughout on the basis of her overall success at the trial. Practically speaking, an award of costs against the plaintiff would reduce her award substantially, and the plaintiff seeks to have me consider that factor as well.

### **Law and Purpose of the Rule**

[55] The parties are largely agreed upon the leading cases, although they emphasize different aspects of them.

[56] The underlying purpose of the offer to settle rule was set out in *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25, and includes encouraging settlement, and "require[ing] litigants to make a careful assessment of the strength or lack thereof of their cases ... throughout the course of litigation".

[57] This is an important consideration, and I appreciate the defendant did this in preparing her offer to settle and that she made an offer that was within reasonable possibility, represented some compromise to her litigation position, and in the end exceeded the jury's award.

[58] However, that is not the end of the inquiry.

[59] In determining whether the defendant should be able to rely on the rules relating to an offer to settle, I am directed by the rules and the case law to consider a number of factors, including:

- whether the offer was one that ought reasonably to have been accepted, either when it was made or on a later date;
- the relationship between the term of the offer and the final judgment; and
- the relative financial circumstances of the parties.

[60] I will deal with these in reverse order.

**Imbalance of Resources**

[61] With respect to the relative resources of the parties, the plaintiff says that an award of costs to the defendant, when the plaintiff was, in fact, successful in her claim, would amount to a \$100,000 loss to her in place of a \$100,000 recovery of her own costs for the costs of trial. She says that this is a significant swing in the result if she is denied her costs, and the defendant is awarded costs of the trial, and is punitive to her.

[62] She says that because she is the plaintiff, and because she has suffered significant losses as a result of the accident and can only fund this one case, her risk in considering the offer was much higher than that of ICBC, who can make offers without as much concern for the result or any significant costs repercussions to them. Her resources are much more limited, and her losses are real.

[63] While the plaintiff concedes that the insured defendant did not abuse its superiority of resources in this regard, that superiority of resources, she says, did allow for it to make an offer that would put her in this jeopardy, which she argues is ultimately an unfair one.

[64] While I sympathize with the plaintiff in this regard, the primary consideration under this factor is whether the superior resources of one party were improperly

used to a financial advantage in the litigation. I find there is no evidence of that, and I find that this is a neutral consideration.

### Differential

[65] I turn, then, to the relationship between the terms of the offer and the final judgment.

[66] Practically, had the defendant's offer not exceeded the jury award, there would be no application before me.

[67] I agree with the defendant that her offer was meaningful, and not a nominal one, and exceeded the jury award, even before the special damages and s. 83 deductions. The Court appreciates it when serious offers are made that reflect a compromise of the defendant's position.

[68] The plaintiff points to quite a body of case law that says a 13% difference between the offer and the final award is not substantial, and that a plaintiff should not be deprived of their ability to make their claim to court for costs when they fail to "guess" what the jury will award.

[69] She notes that jury awards are less predictable in this regard, and that the jury's award in this case, she says, was unpredictably low. She notes in particular that the non-pecuniary damages award made by the jury was particularly unpredictable, and particularly low as measured against what would be typically awarded in judge alone trials given Ms. McMahon's significant and admitted physical and mental injuries caused by the accident.

[70] She points to a number of cases where a larger differential still did not result in the plaintiff being deprived of their costs, including *Gatti v. Savin*, 2022 BCSC 1306, and *Talwerdi v. Green*, 2019 BCSC 1891.

**Determination**

[71] I consider that the differential in this case was sufficient to merit a consideration of costs consequences to the plaintiff, and that it reflects a serious offer by the defendant.

[72] The offer to settle rule is properly engaged because of this differential, and I consider that on its face at least, this factor weighs in favour of costs consequences to the plaintiff, but not as strongly as it would if the offer was a stronger one.

[73] Ultimately, however, I find that this factor is offset by the final consideration that I am going to turn to, where I have considered a number of factors, including the unpredictability of jury awards in these types of cases, and in particular the unpredictability of non-pecuniary damage award assessments by juries.

**Ought the offer to have reasonably been accepted?**

[74] The question at this first stage is not whether the defendant's offer was within a reasonable range, but whether it was unreasonable for the plaintiff to reject it, and there I am referring to *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26, and *Kobetitch v. Belski*, 2018 BCSC 2247.

**Was it unreasonable for the plaintiff to refuse the offer?**

[75] The defendant argues her offer was a reasonable compromise, and included income loss, despite her litigation position that no income loss was supported on the evidence.

[76] The defendant says that her offer was supported by the expert evidence available at the time before trial and was supplemented with the benefit of argument in the form of a mediation brief provided earlier in the litigation. The defendant says that the plaintiff should have critically considered her case and not just assumed she would be found credible and successful in her claims.

[77] The plaintiff argues that jury awards are unpredictable and put the plaintiff in a difficult position of trying to "guess" what the final award would be. She says that she

could not reasonably have predicted such a low award, or been reasonably expected to accept such a low offer.

[78] In particular, she points to the award for non-pecuniary damages at \$50,000 and argues that she could not have expected such a low award under this head of damages, particularly in the face of the concession that the accident caused Ms. McMahon to have to undergo multiple surgeries, and at the very least, caused new psychological injuries and at least exacerbated pre-existing PTSD and depression. She says she could have expected a non-pecuniary award of at least \$150,000, and potentially much more.

[79] The plaintiff says that the defendant has not established that it was unreasonable for her not to accept this offer, given the amounts involved, and that the plaintiff was entitled to consider her own knowledge of her case and her future plans before the accident, and her own assessment of her losses as she perceived and believed them to be.

### ***Determination***

[80] Both parties in this case have made strong arguments, but ultimately I cannot say it was unreasonable for the plaintiff to refuse the offer of \$576,000. In other words, I cannot say that the offer ought reasonably to have been accepted, with the knowledge that the plaintiff had in the ten days before her trial.

[81] First, I agree with the plaintiff that the award of \$50,000 in non-pecuniary damages could not have been predicted in relation to what is ordinarily awarded in cases of chronic pain, multiple surgeries, and new and aggravated serious psychological injuries. This is a difficult and truly unpredictable element that enters into play when a jury is charged with making this award, in the absence of any submissions from counsel or guidance as to precedent.

[82] We often see awards under this head of damage that significantly exceed the cap, and sometimes, as was the case here, we see awards that, while they may

seem significant to members of the jury, are substantially lower than precedent would normally provide for.

[83] The defendant concedes that this award of damages was low under this head, though she would not have suggested it could be as much as \$150,000 (she suggested perhaps closer to \$125,000).

[84] In my view, this head of damages had the real potential to exceed \$125,000, and even \$150,000 in this case, whether before a judge or a jury. Had the award for non-pecuniary damages been in that range or above, the offer would not have bettered the award.

[85] While the plaintiff needs to consider such a possibility with a jury, it is not one that I consider ought reasonably lead to an acceptance of an offer on that basis.

[86] Nor do the other aspects of the jury's award suggest an offset of this lower end of damages on one head with higher awards on other heads. While clearly finding that the accident caused Ms. McMahon loss in almost every damage category (with the exception of the in-trust claim), the awards were on the conservative end overall.

[87] With respect to the award as a whole, Ms. McMahon's credibility and reliability was a significant issue in this damages-only trial, and one that was particularly hard to predict given her extensive and admitted pre-existing psychological injuries, and the very substantial body of expert opinion presented for the jury to review.

[88] Overall, while I agree that a careful review of one's case is necessary before rejecting an offer, and the plaintiff was required to consider potential significant weaknesses in her case, including, for example, her work history and its consistency, this is not a case where I find that the plaintiff ought reasonably to have anticipated the extent to which her evidence would be rejected.

[89] I have considered the observations of Justice Horsman in *Talwerdi v. Green*, 2019 BCSC 1891 at paras. 26 to 28 regarding credibility assessments in these types of cases to be pertinent. I would also adopt the observations of Justice Humphries in *Lumanlan v. Sadler*, 2009 BCSC 142, that a court should be cautious, with the advantage of hindsight, in equating having failed to guess the value of a claim in relation to unpredictable aspects of a damages award, with having been unreasonable in rejecting an offer. This particularly is true where the plaintiff still receives a substantial award at trial.

[90] Overall, in my view it was not unreasonable for the plaintiff to have rejected the defendant's offers to settle.

[91] I consider this factor to be a significant one, and I would not award the defendant her costs of the trial after November 4 on this basis.

#### **Other Costs Consequences**

[92] The defendant argues that even when a plaintiff is found to have reasonably rejected a defendant's offer to settle, some costs consequences are appropriate, for example, depriving a plaintiff of their costs going forward after the offer.

[93] I have seriously considered this option, but in the end I do not consider that result to be appropriate in this case.

[94] In this case, the defendant opted to proceed by jury, and ultimately the defendant benefited, at least to some extent, from the lack of guidance that juries receive with respect to non-pecuniary damages. This was to the plaintiff's detriment, and I think it is unnecessary to provide further costs consequences to the plaintiff for failing to accept an offer that I have found she need not have reasonably accepted.

#### **Determination on Application for Defendant's Costs after November 4**

[95] Overall, I conclude that in the circumstances of this case, the defendant's offer of November 4 (and obviously the earlier lower offer) is not a sufficient basis to depart from the usual rule that the successful plaintiff is entitled to costs.

**Conclusion**

[96] In conclusion, I grant the defendant’s application for s. 83 deductions and special damages deductions.

[97] The special damages deduction, by consent, is \$16,752, and the s. 83 deductions from the jury’s cost of future care award shall be \$50,000, with these funds being available to the plaintiff from a different source; that is, ICBC’s Part 7 benefits.

[98] I dismiss the defendant’s application for costs of the trial. The plaintiff will be entitled to her ordinary costs and disbursements.

[99] I consider that the parties have had mixed success on these two applications, and I direct them to bear their own costs of these combined applications.

“Marzari, J”