IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wheeler v. Wilson,*
2023 BCSC 246

Date: 20230217
Docket: M31757
Registry: Chilliwack

Between:

Anna-Marie Kristine Wheeler

Plaintiff

And

Zachary Wilson & Carri Barbara Ash

Defendants

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:	M. Thornton
Counsel for the Defendants:	K.R. Tonge
Place and Dates of Trial:	Chilliwack, B.C. June 23-24, 2022 August 24, 2022
Place and Date of Judgment:	Chilliwack, B.C. February 17, 2023

Introduction

[1] In reasons indexed at *Wheeler v. Wilson*, 2021 BCSC 441 (the "Trial Decision"), the plaintiff was awarded damages for personal injuries caused in two car accidents as follows:

(1) Non-pecuniary damages $100,000;

(2) loss of past earning capacity $16,500;

(3) loss of future earning capacity – $325,000;

(4) special damages $15,000;

(5) loss of housekeeping capacity – $20,000; and

(6) compensation for costs of future care – $160,000.

[2] These reasons will address issues following the Trial Decision including the plaintiff's claim for an award for management fees pertaining to damages for items 3,5, and 6 above (the "Relevant Damages") and a gross-up to account for tax that will be payable on the income generated on the Relevant Damages.

[3] The defendants seek an order under s. 83 of the *Insurance (Vehicle) Act,* R.S.B.C. 1996, c. 231 [*Act*] for a reduction in the judgment amount for costs of future care awarded based on the expanded definition of "benefits" in s. 83(1) of the *Act,* which they say results in the amounts payable by the plaintiff's extended health insurer being deductible from the award. They also say that deductions should be made based on assurances that the Insurance Corporation of British Columbia (ICBC) will pay all of the plaintiff's future care costs up to the amounts awarded.

[4] The plaintiff also contends there is a mathematical error in the calculation of the future costs of care award and due to the error, this award should be increased by $16,000.

[5] At the outset, the parties agreed to a deduction of $2450 from the award for special damages, resulting in a balance of $12,550.

Background

[6] The plaintiff was injured in a motor vehicle accident in December 2014 (the "First Accident") following which she experienced multiple symptoms including significant headaches.

[7] After almost three years post-accident, the plaintiff was assessed and treated by Dr. Gordon Robinson, a neurologist who diagnosed posttraumatic headaches, mild-to-moderate in severity but becoming incapacitating with migraine features. Dr. Robinson recommended and performs Botox treatments that ameliorate the plaintiff's headaches for approximately 12 weeks after a treatment. Over those 12 weeks the plaintiff's headaches would gradually worsen and then the treatment repeated.

[8] On June 5, 2020 the plaintiff was in another motor vehicle accident when her vehicle was struck from behind (the "Second Accident") following which the plaintiff said her headaches caused by the First Accident were aggravated. Dr. Robinson provided an opinion dated June 22, 2020 in which he confirmed that after the First Accident the plaintiff's symptoms improved intermittently following Botox treatments and then deteriorated until the next treatment. The plaintiff noticed an aggravation of her headaches at the time but there was no actual medical opinion evidence concerning any injuries she suffered from the Second Accident and more particularly no opinion about treatment of headaches caused by that accident.

[9] By agreement, the award of damages in the Trial Decision was a global award to compensate the plaintiff for the consequences of both accidents:

> [67] The defendants concede that the Court should assess the plaintiff's damages globally for both accidents and make an award without distinguishing between the two causes.

[10] In the Trial Decision, I concluded that the plaintiff required Botox treatments from 2017 because of the First Accident and on an ongoing basis. I awarded the

plaintiff $160,000 compensation for future costs of care including costs for Botox medication, Botox injection fees, other medication, massage therapy, and travel costs to receive the Botox injections.

[11] Because of the agreement made between the parties at trial, I did not make any finding concerning the discrete effects of the second accident on the plaintiff nor did the parties make any submissions on that point.

[12] The plaintiff was entitled to and received Part 7 benefits under the *Insurance (Vehicle) Regulation,* B.C. Reg. 447/83 [*Regulation*] as a result of the injuries caused in the First Accident. She also applied for and received some Part 7 benefits as a result of the Second Accident.

Issues

[13] The questions to be answered on this application include:

a) What amount if any should be deducted pursuant to s. 83 of the *Act* from the $160,000 awarded to the plaintiff as compensation for costs of future care?

b) Whether there is an error in the calculation of the future care cost award.

c) Whether the plaintiff is entitled to management fees and a tax gross-up.

Positions of the Parties

The Defendants

[14] The defendants argue that ICBC has committed to paying $159,200 under Part 7 accident benefits. Thus, after a post-judgment payment of $2,700, ICBC has committed to pay $156,500 under Part 7 and no uncertainty remains concerning those benefits. They submit that this amount must therefore be deducted from the $160,000 award for costs of future care made in the Trial Decision, leaving the defendant with tort liability for costs of future care at $2,133.33.

[15] The defendant made submissions concerning s. 83(2) of the *Act* suggesting that where a person has a claim for damages and is entitled to receive “benefits”

respecting a loss, the person is deemed to have released the claim (against the potential defendant) to the extent of the benefits.

[16] They contend that following the May 2018 amendments to the *Act*, where an accident occurs on or after May 17, 2018, tort defendants are entitled to deduct benefits payable under an extended health plan in relation to that accident even if not covered under Part 7 of the *Regulation*.

[17] The defendants contend that the Court's damage award in the Trial Decision was made globally without an apportionment between the First Accident and the Second Accident. They say that, based on the date of the Second Accident, the post-amendment s. 83 of the *Act* applies and any amounts payable by the plaintiff's extended health insurance are deducted from the award for costs of future care to prevent double recovery. The plaintiff's extended health insurance pays up to $500 annually for massage therapy and 90% of the cost of her Botox medication, but not the injection fee or transportation costs.

[18] They say that, through authorized representatives, ICBC has committed to cover accident benefits not covered by the plaintiff's extended health insurance and that any payments made by ICBC under s. 88(1) of the *Regulation* are deducted under s. 83(2) of the *Act*.

[19] The defendants say that the plaintiff's husband's extended health insurance policy has a subrogation clause for third-party liability, which they say includes the tort defendants in the subject action. In light of this, they are seeking a full reduction of their tort liability and say that the plaintiff is still certain to receive her benefits, as ICBC has committed to assume statutory coverage for future treatment not covered by her extended health.

[20] The defendants argue that the plaintiff made a report to ICBC concerning the second accident "allowing for deductibility of collateral benefits into the future. The deductible benefits include A Botox and other medication". They contend that it is irrelevant that "… the bulk of the Part 7 payments have been assigned to the First Accident."

[21] The defendants highlight the subrogation clause in the plaintiff's extended health plan permitting them to make a subrogated claim against the defendant. Because the plaintiff's extended health insurance policy contains a subrogation clause which affects the defendants in this action, the defendants seek a full reduction of the Part 7 benefits from tort damages.

[22] The plaintiff's insurer was not made aware of the symptoms stemming from the second accident and the subrogation clause gives the defendant a right to a reduction in the tort damage liability to the extent that ICBC has committed to assume statutory coverage for the plaintiff's treatments.

[23] Further, the defendants contend there is uncertainty concerning the plaintiff's expectation to be covered by extended health policy feeling which she may resort back to ICBC for her Part 7 benefits.

[24] The defendant contends that the entirety of the plaintiff's medication expenses awarded should be deducted because those costs are attributable to both accidents.

[25] In the alternative, 90% of the plaintiff's s. 88(1)(c) benefits should be apportioned 50 /50 to reflect a notional division of those costs under her extended health insurance plan and the payments payable by ICBC to reflect her benefits stemming from the First Accident and one-half from the Second Accident to reflect the changes in s. 88(6) of the *Regulations*.

[26] The defendants argue that the plaintiff's extended health insurer apparently does not have knowledge of the third-party liability in the Second Accident. They propose that the calculation of the deductions should include 45% of the benefits (one-half of the 90% payable by the extended health insurer) and 10% being the portion of the medication expenses the health plan does not cover. In the result, I find the defendant would be liable for costs of future care oft $50,145.10.

[27] The defendants contend that ICBC pays for all massage therapy costs pursuant to ss. 88(1)(a) and 88(6) of the *Regulation* but at a rate lower than the

service providers charge the plaintiff's. Therefore, $2133 of those claims should remain covered by the damage award and are not deductible.

[28] In summary, the defendants contend that Future Care Costs are benefits payable under Part 7. ICBC has made commitments to pay all benefits and the entire claims should be deducted from the judgment amount.

[29] In relation to the plaintiff's claim for management fees, the defendants submit that she has not proven that any fee is necessary. They say she is not unsophisticated, has a financial background and training, and there is no evidence of cognitive difficulties.

[30] Regarding the plaintiff's claim for a tax gross-up, the defendants contend that any amount awarded should only apply to the costs of future care award after deductions and will depend on any management fee awarded.

The Plaintiff

[31] The plaintiff contends that the only deductions from the costs of future care award that the defendants are entitled to are $9066 for massage therapy, $16,000 for Botox injection fees and $26,667 for travel costs for a total of $51,733.

[32] The plaintiff suggests that s. 79(1) of the *Regulation* provides that ICBC shall pay accident benefits for injuries "caused by" an accident. She contends that the Second Accident did not cause her headaches and that the Court found in the Trial Decision that her headaches were caused by the First Accident. Given the date of the First Accident, the plaintiff says that the pre-amendment s. 83 of the *Act* applies. The plaintiff argues that the definition of "benefits" in the pre-amendment s. 83(1) of the *Act* does not include monies paid or payable by an extended health insurer and the same are not deductible from the tort award.

[33] The plaintiff contends that the cost of Botox medications covered by her extended health care plan are excluded benefits under s. 88(6) of the *Regulation*, meaning ICBC is not liable for them. As such, the defendants are not entitled to

deduct the cost of those medical services from the future care award: *Purewal v. Uriarte,* 2021 BCSC 1935, at para. 56.

[34] The plaintiff submits that there was a mathematical error in the Trial Decision regarding the plaintiff's annual cost for Botox treatment resulting in the costs of future care award being $16,000 lower than it should have been.

[35] The plaintiff contends that an award in the range of $75,000 would be fair for management fees. She submits that if a management fee is awarded, it would likely cancel out the need for a tax gross-up.

Analysis

1. What amount if any should be deducted pursuant to s. 83 of the *Act*

[36] The first issue I address is what amount if any should be deducted pursuant to s. 83 of the *Act* from the $160,000 awarded to the plaintiff as compensation for costs of future care. Pursuant to the below analysis, I conclude that the only amount deductible from the plaintiff's damage award for Botox medications pursuant to the applicable, pre-amendment s. 83(2) of the *Act* is the 10% not covered by her extended health insurance and thus payable by ICBC pursuant to ss. 88(1)(c) and 88(6) of the *Regulation*. The plaintiff concedes that additional amounts are deductible from the costs of future care award for massage, Botox injection fees, and travel costs.

Legal Framework Regarding Part 7 Benefits

[37] Madam Justice MacDonald provided a thorough summary of the relevant regulatory scheme at paras. 25–31 of *Aarts-Chinyanta v. Harmony Premium Motors Ltd.,* 2020 BCSC 953. I will not repeat the Court's analysis, but merely highlight the provisions directly relevant to my analysis in the case before me.

[38] Section 45 of the *Act* provides that the Lieutenant Governor in Council may make regulations under Part 1 of the *Act* "(d.1) respecting the benefits…payable to…insured persons". As noted in *Aarts* and *Purewal*, s. 79 of the *Regulation*

establishes ICBC's obligation to pay limited benefits in respect of death or injury caused by an accident:

> Coverage and benefits
>
> 79 (1) Subject to subsection (2)
> and sections80 to 88, 90, 92, 100, 101 and 104, the corporation shall pay benefits to an insured in respect of death or injury caused by an accident that occurs in Canada or the United States of America or on a vessel travelling between Canada and the United States of America.

[39] The *Regulation* outlines the benefits available to an eligible insured person regardless of who was at fault for the accident: *Rix v. Koch,* 2021 BCSC 1526 at para. 12. Under s. 88(1) of the *Regulation,* ICBC must pay benefits for all reasonable medical or rehabilitation expenses incurred by the insured as a result of the accident falling under the following three categories:

> (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.

[40] Section 83 of the *Act* "provides for the integration of Part 7 benefits with tort damage awards": *Rix* at para. 7. It creates a scheme whereby certain amounts payable to the insured person respecting the loss on which their claim for damages is based are deductible from the damages award and reduce the tortfeasor's liability. According to the Court in *Purewal* at para. 9:

> The purpose of s. 83 of the *Act* has consistently been described as preventing double recovery: *Aarts-Chinyanta* at para. 52; *Tench v. Van Bugnum,* 2021 BCSC 501 at para. 16; *D'Arcy v. Salimi,* 2021 BCSC 1610 at para. 10.

[41] The Court also stated at para. 71 of *Aarts* that "[t]he legislative scheme is designed to remove the burden of future care from the tortfeasor and place it on the insurance provider, ICBC. To achieve this, it is important to keep the statutory objectives in mind.

[42] Justice Fleming in *Tench v. Van Bugnum,* 2021 BCSC 501 summarized principles articulated in previous cases regarding this scheme as it existed prior to amendments to the *Act* in 2018 and to the *Regulation* in 2019:

> [38] *Aarts-Chinyanta* and *Luck v. Shack*, 2020 BCSC 1074, include particularly helpful discussions of the legal principles arising from the legislative framework, and the cases including cases that have addressed post-trial representations/waiver evidence, which I summarize as follows:
>
> 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.
>
> [Emphasis in original.]

[43] In this case it is important to recognize that s. 83 of the *Act* was amended in May 2018 changing, among other things, the definition of “benefits”. The former s. 83(1) applies to accidents which occurred before May 17, 2018 (*Aarts-Chinyanta* at para. 26), which includes the First Accident, and reads as follows:

> Liability Reduced
>
> 83(1) In this section and in section 84, "benefits" means benefits
>
> (a) within the definition of section 1.1, or
>
> (b) that are similar to those within the definition of section 1.1, provided under vehicle insurance wherever issued and in effect,
>
> but does not include a payment made pursuant to third party liability insurance coverage.

[44] Prior to its repeal, effective May 1, 2021, s. 1.1 defined “benefits” meaning “the prescribed benefits”.

[45] The amendments to s. 83(1) apply to accidents which occurred on or after May 17, 2018, including the Second Accident, and following further amendment effective May 1, 2021, reads as follows:

> 83 (1) In this section, **"benefits"** means amounts paid or payable, or things or services provided or to be provided in kind, directly or indirectly and whether or not as a result of a right of indemnity,
>
> (a) as benefits under Part 1,
>
> (b) as follows, for a loss or expense similar to a loss or expense covered by benefits under Part 1:
>
> (i) under insurance, wherever issued and in effect;
>
> (ii)under the *Workers Compensation Act* or a similar law of a jurisdiction other than British Columbia;
>
> (iii) under the *Employment Insurance Act* (Canada);
>
> (iv) by the government of a province or territory of Canada, Canada or another jurisdiction;
>
> (v) under terms or conditions of employment or an agreement for collective bargaining, and
>
> (c) in prescribed circumstances, for a loss or expense similar to a loss or expense covered by benefits under Part 1,
>
> but does not include
>
> (d) a payment made under third party liability insurance coverage,
>
> (e) health care services as defined in section 1 of the *Health Care Costs Recovery Act*, or
>
> (f) in prescribed circumstances, an amount paid or payable, or a thing or service provided or to be provided in kind, directly or indirectly and whether or not as a result of a right of indemnity, under paragraph (b).
>
> [Emphasis added.]

[46] The result of the 2018 amendment to s. 83(1) of the *Act* is that for accidents which occurred on or after May 17, 2018, the meaning of “benefits” is expanded to include “amounts paid or payable, for loss or expense covered by benefits under Parti 1” including “under insurance, wherever issued and in effect”. In this case, the change to the definition of “benefits” is relevant due to the application of s. 83(2) of the *Act*, which was not changed by the 2018 amendments, and reads as follows:

> (2) A person who has a claim for damages and who receives or is entitled to receive benefits respecting the loss on which the claim is based, is deemed to have released the claim to the extent of the benefits.

[47] The effect of this scheme, after the 2018amendment, is that amounts paid or payable under an injured person's private or extended health insurance plan "for a loss or expenses similar to a loss or expense covered by benefits under Part 1" are considered "benefits" and the injured person is deemed to have released their claim to the extent of those benefits: *Act, s.* 83(1)(b)(i) and (2).

[48] The deemed release provision in s. 83(2) applies to persons who have claims for damages and receive or are entitled to receive "benefits". Under s. 83(5), after the plaintiff's damages have been assessed, the amount of any "benefits" paid or payable must be disclosed to the Court and deducted from the damage award. Most importantly, for accidents that occurred before May 2018, the release mechanism in ss. (2) will include the benefits payable by extended health usurers.

[49] Section 88 of the *Regulation* was also amended on April 1, 2019, thereby changing ICBC's liability for expenses paid or payable to the injured person under another plan or policy. The post-amendment s. 88 of the *Regulation* applies in relation to medical or rehabilitative benefits payable under s. 88 for expenses incurred on or after April 1, 2019 regardless of the date of the accident: *Regulation*, *s.* 104.2. The relevant subsections of s. 88 of the *Regulation* read as follows:

> Medical or rehabilitation benefits
>
> …
>
> (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.
>
> …
>
> (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).
>
> [Emphasis added.]

[50] The result of this amendment is that for expenses incurred on or after April 1, 2019, regardless of the date of the accident, ICBC is required to pay for services described in s. 88(1)(a) and (b) of the *Regulatio*n and is not liable to pay for "expenses paid or payable… by another insurer" under s. 88(c): *Regulation,* s. 88(6); *Rix* at para. 42.

Discussion

[51] The plaintiff is an insured person entitled to receive benefits under the *Act* and the *Regulation*.

[52] First, I will consider whether any deductions for Botox medication costs are appropriate in this case taking into account the plaintiff's extended health insurance coverage. As discussed, 2018 changes to s. 83 of the *Act* involved a revised definition of the term "benefit" which now includes amounts payable by an injured party's extended health insurer. However, this change applies only to accidents happening on or after May 17, 2018. Given that the plaintiff's First Accident occurred in 2014, this broader definition of "benefit" does not apply when considering the effect of the deemed release under s. 83(2) of the *Act*.

[53] Because the Second Accident occurred after May 17, 2018, amounts payable under the plaintiff's extended health coverage in relation to injuries flowing from that accident are included in the meaning of "benefits" under the amended s. 83(1) and would be included in the deemed release in s. 83(2) of the *Act.*

[54] In the Trial Decision, I formed the view that the plaintiff's injury necessitating Botox treatments was caused by the First Accident. To the extent that the plaintiff experienced some headaches shortly after the Second Accident, the evidence did not satisfy me that the Second Accident was more than an aggravation of her pre-existing pattern of headaches that had been ongoing since the First Accident. Treatment for those headaches began in 2017 and continued every three months;

her headaches would stop for a period of time but worsen towards the end of the interval after the last treatment. These headaches continued at a significant level before Botox treatments and there was simply no opinion evidence that the Second Accident caused an injury. The global assessment of damages including both accidents did not involve any finding concerning the impact of the second accident on the plaintiff's headaches; her need for intermittent Botox treatments was well established on the evidence concerning her medical condition well before the Second Accident. It is more likely than not that these headaches exacerbated temporarily by the Second Accident but were not the cause of the injury necessitating the Botox treatments.

[55] As such, I find that s. 83 of the *Act* as it stood at the time of the First Accident applies to the issue to be resolved at this stage. In this case the benefits paid or payable by the plaintiff's extended health insurer are not "benefits" under s. 83(1) and the plaintiff is not deemed to have released her claim against the defendants to the extent of amounts paid or payable under her extended health benefits. Neither the Botox medication coverage nor the plaintiff's coverage for her other medications under her extended health insurance plan are deductible.

[56] Second, I will consider whether any deductions are appropriate in this case for Botox medication costs based on the plaintiff's entitlement to Part 7 benefits. Section 88(6) of the *Regulation* directs ICBC is to pay for those benefits obtained by the plaintiff described in s. 88(1)(a) and (b) but not for payments under s. 88(1)(c): *Rix* at para. 42. In this case, I find that Botox medication is covered as a mandatory benefit under s. 88(1)(c) of the *Regulation* as it is a "medication" and ICBC is not liable for any of those expenses.

[57] Here, the plaintiff's insurance policy provides 90% coverage for prescription drugs including Botox injections and 90% of those medication costs are payable by her extended health insurer through her husband's employment. Under s. 88(1)(c) ICBC is not liable to pay for expenses, paid or payable to the plaintiff. By her extended health insurer and her entitlement to Part 7 benefits for Botox medication

and other medication arises only after her health insurance coverage is exhausted or if she were to lose access to that coverage in the future: *Rix* at paras. 40–46.

[58] On the basis of *Rix*, *Tench* and *Luck* I reject the defendants' claim for the deduction from the damages award for Botox medications covered by the plaintiff's extended health insurer. Botox medication falls within benefits under s. 88(1)(c), and ICBC is only liable under s. 88(6) for the 10% of the costs of Botox medication not payable under her extended health care plan. Thus, the 10% is deductible as a "benefit" deemed to be released by the plaintiff from her claim against the defendants under s. 83(2) of the *Act*.

[59] Justice Baker in *Purewal* summarized the correct approach as follows where she said:

> [54] Accordingly, benefits payable under ss. 88(1)(a) and (b) of the *Regulation*, but currently paid for under an extended health plan, are fully deductible under s. 83 of the *Act*. The mere fact that the benefits are currently paid for under an extended plan does not undermine the insured persons existing entitlement under Part 7.
>
> [55] Therefore, ICBC remains liable to pay for psychological interventions, occupational therapy, and physical rehabilitation even if those are covered by other insurance available to the plaintiff, and ICBC is entitled to deduct the amounts it claims in respect of these services from the future care award.
>
> [56] Medical services (i.e., the Botox injections) and medications are covered by the plaintiff's extended health plan, but are excluded from the application of s. 88(6) of the *Regulation*. As such, ICBC is not entitled to deduct medical services (Botox injections) and medication costs from the future care award.

[60] In their alternative argument, the defendants contend that the plaintiff continues to access Part 7 benefits stemming from both accidents and that there should be a 50/50 apportionment of the Botox medication costs between the First Accident and Second Accident. They contend that the 50% attributed to the Second Accident should be deducted from the damages award under s. 83(2) of the *Act* because of the 2018 amendment to the definition of "benefit" in s. 83(1) of the *Act*.

[61] The defendants also argue that uncertainty concerning the plaintiff's prospects of continuing to receive extended health care benefits demands a

reduction on the basis that if those insurance benefits end, ICBC will be required to fund payments. The defendant did not adduce any evidence concerning the risks faced by the plaintiff that extended health benefits would not be available. While anything is possible, I cannot make a finding that the future care award should be reduced without persuasive evidence on this point.

[62] I reject the proposition that uncertainty in the plaintiff's entitlement to extended health care benefits demands a reduction in the damages award.

[63] I am satisfied that when the parties agreed to a global assessment of damages stemming from both accidents, they did not turn their minds to the deduction issue now before the Court. On the evidence tendered at trial, I find that it is unlikely the plaintiff suffered new headaches caused in the Second Accident. The defendants did not prove the nature or extent of the plaintiff's discrete injuries arising from the Second Accident nor whether her headaches after the Second Accident were simply a temporary exacerbation of injuries from the First Accident or caused by the Second Accident: see s. 79 of the *Regulations.*

[64] To reiterate, the only Botox medication expense that is deductible in this case is the 10% not covered by the plaintiff's extended health insurance, as it is payable by ICBC pursuant to ss. 88(1)(c) and (6) of the *Regulation* and therefore deductible as a "benefit" under the pre-amendment s. 83(2) of the *Act*. In the Trial Decision, I accepted that costs for Botox medication per session were awarded $800 but did not award the full present value of that sum.

[65] For reasons given below I have not accepted there was an error in my assessment of future care costs at $160,000. Thus, extrapolating from the costs of Botox medications as a proportion of the award, the award for these medications is $ 76,507. After taking into account the deductions for massage at $9066, injection fees $13,810, transportation costs $26,667 (as conceded by the plaintiff) and 10% of the medication costs payable by ICBC $7605, the deduction becomes $63,983. Massage therapy costs payable by ICBC are only $9066; ICBC will not be paying $2133 for massage therapy treatments due to the fee limits Last, after these findings

and since judgment the plaintiff was paid a further $1762.80 which should be deducted from the judgment amount.

[66] If the parties have concerns regarding the calculations set out above, they have liberty to make further submissions to clarify the calculations is granted.

2. Whether there is an error in the calculation of the future care cost award

[67] The plaintiff also contends there is a mathematical error in the Trial Decision at paras. 221–23. In estimating the plaintiff's entitlement to future care costs including Botox (medication, injection fee and transportation) I concluded $4280 per year reflects the plaintiff's costs. For other medications and massage therapy, I accepted that together these would cost $1770 per year. I made an award of $6000 per year to compensate the plaintiff for these specific needs, rounding down by $50.

[68] Plaintiff's counsel pointed out that my estimate of $4280 per year for Botox services was $520 below the costs set out in para. 221. Rounded down to $500 per year, the alleged error resulted in a difference of $16,000 over the life of her award.

[69] The plaintiff asks the Court to revisit these conclusions based on the differences between the estimates referred to and the amount awarded. Overall, as noted in para. 223, determining the appropriate measure of future care costs is an assessment and not easily calculable with mathematical precision.

[70] I have reviewed the analysis reflected in the Trial Decision which "represents an overall finding on all of the evidence and subject to positive and negative contingencies." I awarded $160,000 for future care costs subject to usual gross-up calculations. I am not persuaded that the amount of $160,000 was in error mostly for the reason that the award was not a mathematical calculation but an assessment based on the contingencies, both positive and negative, that emerged from the evidence.

3. Whether the plaintiff is entitled to management fees and a tax gross-up

Legal Framework

[71] The Supreme Court of Canada in *Townsend v. Kroppmanns,* 2004 SCC 10 stated:

> 6 The same underlying rationale guides the attribution of management fees and tax gross-up. The law aims at ensuring that the value of the amounts awarded to victims is maintained over time. In tort law, victims of personal injuries are awarded management fees when their ability to manage the amount they receive is impaired as a result of the tortious conduct. The purpose of this segment of the award is to ensure that amounts related to future needs are not exhausted prematurely due to the inability of the victims to manage their affairs. Depending on the needs of the victims, more or less extensive help is required. The assessment is made on a case-by-case basis: *Mandzuk v. Insurance Corporation of British Columbia*, [1988] 2 S.C.R. 650. In the same vein, since the earnings on the capital awarded are subject to income tax, an amount called tax gross-up is awarded to ensure that the amount will not be eroded by the tax liability.

[72] The plaintiff contends that an award for a management fee is warranted based on the legal principles set out in *Day v. Doerksen*, 2016 BCSC 2145 at paras. 4–10, 21. A management fee "is intended to compensate for the cost to the plaintiff of management and investment of the lump sum damage award for future care and loss of future earnings": *Lines v. Gordon,* 2009 BCCA 106 at para. 108. A party seeking to recover a management fee must provide evidence of the necessity for the service and of the management services required to provide a rate of return equal to the discount rate: *Lines* at para. 109.

[73] According to *Day*, the *Report on Standardized Assumptions* recommends the following four level classification of management fees which is frequently referred to:

> Level 1 — The plaintiff requires only a single session of investment advice and the preparation of an investment plan at the beginning of the period the award is to cover.
>
> Level 2 — The plaintiff will require an initial investment plan and a review of the investment plan approximately every five years throughout the duration of the award.
>
> Level 3 — The plaintiff will need management services in relation to custody of the fund and accounting for investments on a continuous basis.

> Level 4 — The plaintiff will require full investment management services on a continuous basis, including custody of the fund, accounting, and discretionary responsibility for making and carrying out investment decisions. Such a plaintiff is $ 109,000 likely to be mentally incapacitated or otherwise incapable of managing personal financial affairs.

Anna-Marie Kristine Wheeler

[74] The plaintiff contends that she will need a combination of Level 2 and 3 support. She estimates the cost at 1% per year of the sum invested amounts to $110,000 to $115,000 based on a future care award of $160,000 (now reduced to $109,000) . She submits that the award is an assessment, not a calculation, and that $75,000 would fairly compensate her for the cost of ensuring the capital sum will meet her needs.

[75] The plaintiff testified on this application. Although she has some work, she has not returned to full-time employment and assists her husband on a part-time basis in his photography business. She has had some training in bookkeeping and has managed staff in one of her previous jobs. She is capable of doing profit and loss calculations for her small business.

[76] Ms. Wheeler said she has no experience in investing nor does she know anything about the workings of the bond market. She can read a profit and loss statement and does prepare income tax returns using a program called Turbo Tax.

[77] She has no family experience in the practice of managing money.

[78] She has spoken with Nathan Jansen, financial advisor, and is comfortable working with him. Mr. Jansen charges 1% of the total size of funds to be invested. Currently, some of her money is invested in long-term investments and other portions are in short-term investments. She plans to meet with Mr. Jansen on a yearly basis to assess her needs for cash withdrawals from her investments for the upcoming year.

[79] She is aware that her bank provides investment advice; she was not comfortable relying on that institution. She is aware that there are other investment

services available but has not made any efforts to inform herself on those options nor on issues concerning investment decisions. She is satisfied to rely on Mr. Jansen's advice.

Mark Szekely

[80] Mark Szekely is an economist who testified for the defendants on the questions of management fees and tax gross-ups related to the Relevant Damages.

[81] He framed the initial question in this way: would the plaintiff be able to generate a return equal to 2% per year above the inflation rate without using professional fund management services. He reviewed the historical returns on Government of Canada bonds over the previous 10 to 20 years in the range of 1.1% to 3.7% for bonds and 6% to 7.2% for equities. He estimated that a balanced portfolio consisting of 60% in bonds and 40% in equities would have returned an average of 3.6% above the inflation rate over 10 years and 4.6% over 20 years. He said that to attain these rates, an ordinary retail investor would incur costs in the form of trading commissions, management expense ratios or investment management fees. Nonetheless, he forecasted that the returns on investment at 3.6% over the inflation rate would likely off-set any costs associated with managing those funds.

[82] Mr. Szekely rejected the BC Law Reform Commission report. He concluded that equities are not inherently more risky than fixed income investments. He noted:

> …however, these risks are imperfectly correlated. Regardless of size, a properly diversified portfolio would be expected to reduce long-term risks relative to a portfolio contained entirely of bonds.

[83] He acknowledged that most people needing to draw down investments over time would rely on investment services or financial advisors for recommendations concerning the drawdown from the capital.

[84] He believes that some investing agencies will provide advice without cost or with much reduced cost. He referred to a Questwealth Portfolios document that suggests that investment fees could be obtained for as little as 0.21% to 2.35%. He

assumed that additional administrative fees would be modest and had no knowledge of the actual trading fees charged by Questwealth. He said it was more likely the plaintiff would pay $4650 per year for those services; on a declining balance, this amount would more likely be in the range of $2500 per year.

[85] He was questioned about the higher inflation rates existing at this time; he observed that the plaintiff will have no taxable income until 2024 and the future of inflation rates is unknown. He speculated that by the end of 2023, inflation could be as low as 2.2%.

Peter Sheldon

[86] Mr. Sheldon provided a report and testified on the plaintiff's application for fund management fees and tax gross-up calculations. His opinion was based on instructions from plaintiff's counsel that she would have annual income of $30,000 per year commencing in 2024 or 2025. He was asked to assume management fees would be charged at 1% per year applied to the balance of funds to be invested.

[87] Mr. Sheldon said that a tax gross-up on the plaintiff's cost of future care award would be in the range of $5400 assuming inflation is set at 2% per year to 2029 and 2.5% per year thereafter.

[88] In his view, an investor in bonds would usually be engaged in buying and selling those investments to obtain returns. He did not use the four-stage program described in the BC Law Reform Commission report. Rather, he was requested to assume a 1% investment fee and used that in his assessment.

[89] Mr. Sheldon agreed that Mr. Jansen's fee for regular oversight corresponds with the level 2-3 service the plaintiff says she requires in the Law Commission Report.

[90] Mr. Sheldon's calculations for tax gross-up and management fees did not consider the deductibility of future care expenses from taxable income. He did not believe the reduction to the required management fee would eliminate fees entirely

but conceded it would be reduced. Further, Mr. Sheldon said that the plaintiff could not obtain a return of 2% over inflation was not based on evidence; he simply relied on instructions from counsel. Overall, he recognized that the plaintiff would want to maintain capital and but he did not form an opinion that she could not achieve a return of 2% over inflation on her own without management help.

Discussion

[91] The plaintiff has had training and experience in some aspects of business including bookkeeping, management, basic financial transactions and profit calculations for her small business. Notwithstanding, the plaintiff has relied on a financial advisor to assist managing the money already received from the judgment.

[92] The accidents did not affect the plaintiff's cognitive abilities but impaired her ability to perform her work and business demands.

[93] The plaintiff is obliged to prove the necessity for financial management services to achieve a rate of return equal to the discount rate, which in this case would require a return of 2% above the inflation rate.

[94] After the deductions made to her future care cost award, she will receive $160,000 less $51,733 and $16,000 representing the 10% not covered by the extended health plan; the total amount being $92,267.

[95] The plaintiff has struggled with a wide range of symptoms including chronic pain which have impacted her ability to function. She worked hard to overcome these effects but will not be able to return to her pre-accident functioning.

[96] In my view, the plaintiff is not incapable of making some financial decisions about her future but with financial advice and the assistance of professionals will be able to make necessary decisions to ensure that the funds available will generate sufficient income to meet her needs.

[97] There is support in the evidence for her need for advice and assistance based in part on the opinion of Mr. Szekely who discussed the tension between equity

investment and bond investment necessary to achieve a return of 2% above inflation.

[98] Mr. Szekely also discussed the implications of off-setting taxes against income. Most importantly, he said:

> Regardless of size, a properly diversified portfolio would be expected to reduce long-term risks relative to a portfolio contained entirely of bonds. I take Mr. Szekely's opinion that a portfolio of the magnitude in the net amount she will receive would need to be "properly diversified" to reduce long-term risks relative to portfolios that might be entirely in bonds. Based on these comments, I infer that investments intended to achieve a return above the inflation rate require some level of professional help beyond the means of the plaintiff in this case.

[99] Mr. Szekely also said that there was little basis for allocating returns as set out in the BC Law Reform Commission report because of some faulty notions. The Law Reform Commission study recommended investment portfolios with interest earning assets should represent 60% of the required income required for awards over $800,000 and up to 100% of income from capital awards for awards over $200,000. Mr. Szekely assumed the plaintiff's investment returns would be comprised of 60% interest, 20% dividends and 20% capital gains. This breakdown presupposes the investor, absent professional advice, would have the skill and ability to make decisions regarding investment and equities, sale of equities and evaluating dividends.

[100] Taking into account the necessity to achieve a 2% real return and the importance of generating income to fund future care costs and future income loss, I conclude the evidence establishes a need for some financial advice. I do not accept the plaintiff's suggestion that this amount should be equal to 1% of the claim for future income loss and future care costs.

[101] Mr. Szekely provided a wide range of alternatives involving management fees between 0% and 0.5%. As mentioned by the plaintiff, this process involves an assessment and not a calculation of the amount required. Mr. Szekely's calculation

at 0.5% plus GST assuming cost of future care at $105,996 is $37,900 and at .25% is $18,437.

[102] I accept that the plaintiff will require some assistance in making financial decisions about her future but has no history, experience or acumen for making investment decisions including choices between bonds and equities. In my view, making those decisions is more likely than not beyond the plaintiff's capacity acting alone.

[103] Taking into account the plaintiff's testimony and Mr. Szekely's report and testimony I conclude the plaintiff is entitled to a more modest award for a management fee than requested. I conclude that the plaintiff's requirements for advice and assistance should be met with fees in the range of 0.25% to 0.5%. The evidence was not sufficient to perform a more detailed assessment; bearing in mind that this is an assessment and not a calculation, I award the plaintiff $25,000.

[104] Finally, the plaintiff seeks an award for a tax gross-up. Mr. Sheldon considered a range of income tax gross-ups of $5400 to $8800. Mr. Szekely suggested a tax gross-up between $0 and $5078. These differences are accounted for by differences in the value of future care costs deducted and the rate payable for management fees. Considering that the costs of future care award after deductions is $98,041.40 and I have awarded $25,000 for management fees, I award the plaintiff $5500 as a tax gross-up on her award.

Conclusion

[105] The defendants are entitled to a deduction of $64,983 from the award of $160,000 for future care costs, leaving the defendants with tort liability for costs of future care at $95,017, based on the following deductions:

- $9066 for massage, as conceded by the plaintiff;
- $16,000 for Botox injection fees, as conceded by the plaintiff;

- $26,667 for travel costs associated with Botox treatment, as conceded by the plaintiff; and

- $7,650 for the 10% of the Botox medication for which ICBC is liable.

[106] The defendants are entitled to a deduction of $2450 from the award for special damages, as agreed upon by the parties and a further $1762.80 for payments made since judgment was issued.

[107] The plaintiff is entitled to the sum of $25,000 for management fees.

[108] The plaintiff is entitled to the sum of $5500 as a tax gross-up on her award.

"Armstrong J."