

CANADA / JUDGMENT

Aarts-Chinyanta v. Harmony Premium Motors Ltd.

2020 BCSC 953

COURT

Supreme Court of British Columbia

DECIDED

25 June 2020

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2020 BCSC 953 Aarts-Chinyanta v. Harmony Premium Motors Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Aarts-Chinyanta v. Harmony Premium Motors Ltd.,

2020 BCSC 953

Date: 20200625

Docket: M52039

Registry: Vernon

Between:

Susan Aarts-Chinyanta

Plaintiff/Respondent

And

Harmony Premium Motors Ltd. dba Harmony Acura and

Quinn Binkley

Defendants/Applicants

- and -

Docket: M53078

Registry: Vernon

Between:

Susan Aarts-Chinyanta

Plaintiff/Respondent

And

Taranjit Hayer, Harlens Trucking Ltd., Mercedes-Benz Financial Services,

Maureen Green and Rodney Green, Insurance Corporation of British Columbia,

John Doe #1, John Doe #2 and ABC Company

Defendants/Applicants

- and -

Docket: 53786

Registry: Vernon

Between:

Susan Aarts-Chinyanta

Plaintiff/Respondent

And

Michael Charles Russell Stewart, BMW Canada Inc.,

Yellow Cab Company Ltd., and Amjad Ali Afridi

Defendants/Applicants

Corrected Judgment: The text of the judgment was corrected at paragraph 26 on May 9, 2025.

Before: The Honourable Madam Justice MacDonald

Reasons for Judgment

Counsel for the Plaintiff:

J. D. Cotter

R. D. Irving

Counsel for the Defendants:

D. M. Darman

R. L. Lagroix

Place and Date of Trial:

Kelowna, B.C.

May 15, 2020

Place and Date of Judgment:

Vernon, B.C.

June 25, 2020

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Introduction

- [1] On March 17, 2020, I awarded the respondent/plaintiff, Ms. Aarts-Chinyanta, damages as a result of three motor vehicle accidents. My reasons for judgment are indexed at 2020 BCSC 392 (the "Judgment").
- [2] The parties appeared before me on May 15, 2020 by telephone to address post-trial issues. The defendants/applicants had applied, pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [Act] and Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 [Regulation], to deduct amounts from the overall damages award. Specifically, the applicants/defendants seek the following deductions:
- a. a deduction of \$57,975.95 in Temporary Total Disability ("TTD") benefits under s. 80 and s. 86 of the Regulation;
 - b. a deduction of \$139,417.09 from the plaintiff's award for future loss of earning capacity, representing the net present value of \$164,717.52 at a discount rate of 1.5%; and
 - c. a deduction of \$106,800 from the plaintiff's award for costs of future care.
- [3] The parties agree that \$15,694 must be deducted for income tax and \$3,026 must be deducted for employment insurance. The deductions sought by the defendants, along with the deductions for income tax and employment insurance, would reduce the plaintiff's award from \$764,211 to \$441,297.96.
- [4] The plaintiff opposed the defendants' deductions on a number of grounds, articulated below.

Facts

- [5] The facts are largely not in dispute. The plaintiff was involved in three motor vehicle accidents as set out in the following chart:

Date

BCSC Action No.

ICBC Claim File No.

July 27, 2012

52039

P560117-4 ("Claim #1")

Sept. 2, 2014

53078

AC15369-6 ("Claim #2")

Oct. 14, 2014

53786

AC78001-2 ("Claim #3")

[6] In the Judgment, I awarded Ms. Aarts-Chinyanta \$764,211 consisting of:

1. non-pecuniary damages - \$132,000;
2. past wage loss - \$136,000;
3. future loss of earning capacity - \$384,000;
4. costs of future care - \$106,800; and
5. special damages - \$5,411.

[7] I broke down the costs of future care award as follows:

[214] [R]eferring to Mr. Benning's present value cost of the recommended care items, I find that Ms. Aarts-Chinyanta is entitled to \$20,000 for psychological counselling, \$800 for kinesiology expenses to review her fitness program, \$80,000 for the ongoing cost of her medications, and \$6,000 for a trial of Botox treatments.

[8] Damages were not apportioned among the three accidents because the defendants admitted liability and advised the Court that there was no need to apportion liability.

[9] The total award was initially higher but the awards for non-pecuniary losses and past and future loss of earning capacity were reduced by 20% to account for Ms. Aarts-Chinyanta's pre-existing conditions.

[10] Ms. Adele Ethier, a claims specialist at ICBC, was assigned conduct of Ms. Aarts-Chinyanta's claims from the three motor vehicle accidents. In an affidavit she undertook to pay certain benefits under Part 7. She deposed in her affidavit filed on April 30, 2020:

1. She has the authority to make decisions and representations on behalf of ICBC with respect to Part 7 issues and payments to Ms. Aarts-Chinyanta.
2. Ms. Aarts-Chinyanta has access to Part 7 benefits from three policies with approximately \$372,600 in Part 7 benefits remaining available to her.
3. To date, ICBC has paid approximately \$57,975.95 in Part 7 TTD benefits to Ms. Aarts-Chinyanta.
4. ICBC will continue to pay TTD benefits to Ms. Aarts-Chinyanta in the annual amount of \$7,487.16 until age 65.
5. ICBC accepts all of the findings of fact made by this Court as outlined in the Judgment and accepts Ms. Aarts-Chinyanta will require the following ongoing care: psychological counselling, kinesiology treatments, medications, and trial Botox treatments (the "necessary health care services") as awarded by this Court.

6. ICBC will reimburse Ms. Aarts-Chinyanta for the necessary health care services she incurs and specifically waives the requirements for continued certification under s. 88(1.01) of the Regulation.
7. ICBC waives any further medical certification or examination as a condition of reimbursement for the necessary health care services under ss. 98 or 99 of the Regulation and also waives the application of s. 90 of the Regulation.
8. She is authorized on behalf of ICBC to irrevocably, unequivocally, and unconditionally agree to pay for the health care services, as costs for the services are incurred by Ms. Aarts-Chinyanta and submitted by way of a claim for benefits under Part 7, as awarded by this Court.

Preliminary Issue

- [11] The plaintiff relied upon an affidavit sworn by Mr. James Cotter attaching a number of exhibits to which the defendants object. In particular, the defendants object to three newspaper articles commenting on ICBC's alleged dire financial situation and a notice of civil claim filed March 2, 2020 in another action.
- [12] The defendants argue that ICBC is being "punted as a political football" and these exhibits contain third party hearsay. They should not be admitted into evidence. The defendants rely upon *Elite Mortgage Corp. v. Derewenko*, 2019 BCCA 125 [Elite Mortgage], where Justice Saunders, speaking for the court, explained the problem with reliance upon such evidence:
- [30] The inherent weakness of second-hand information and its weakness in supporting a contested position is plain and it creates opportunity for an unsuccessful litigant to challenge an order. The problem with information emanating from unidentified sources is there is no way to assess its reliability.
- [13] The plaintiff relies on *Del Bianco v. Yang*, 2020 BCSC 410 [Del Bianco][1], where Justice Groves accepted newspaper articles, attached as exhibits to the plaintiff's affidavit, as admissible evidence. It appears no objection was made to the evidence. In fact, Groves J. states the evidence was "not significantly disputed": para. 16. As a result, there is no analysis regarding the appropriateness of the form of evidence.
- [14] I agree with the defendants that the exhibits attaching newspaper articles to Mr. Cotter's affidavit suffer from the same problem as the appraisal in *Elite Mortgage*. There is no way to test their reliability and they can be given no weight. I decline to admit these exhibits as evidence in this hearing.

- [15] In terms of the notice of civil claim, I will admit it into evidence but only for the purpose of establishing that a class action claim has been filed and the action exists. It is not admitted for the truth of any of the allegations contained therein. This goes to the weight of the evidence but not its admissibility. The notice of civil claim is admitted into evidence for this limited purpose.

Parties' Positions

- [16] The defendants state that s. 83(5) of the Act requires that the amount of any Part 7 benefits paid, or to which the plaintiff is entitled, be disclosed to the court post-judgment and taken into account. The plaintiff is only entitled to judgment for the balance after the Part 7 benefits have been deducted.
- [17] The defendants rely on the affidavit sworn by Ms. Ethier. The defendants argue there is no need for medical certification because ICBC accepts both the factual findings in the Judgment as well as the amounts awarded under the various heads of damages.
- [18] The defendants take the position they have waived the requirement pursuant to, inter alia, s. 88(1.01) of the Regulation that ICBC's medical advisor or the plaintiff's doctor provide in writing that Ms. Aarts-Chinyanta requires the treatments set out in the Judgment.
- [19] The defendants argue that based on Ms. Ethier's affidavit, there is no uncertainty, even with respect to the discretionary benefits. ICBC will reimburse Ms. Aarts-Chinyanta for the necessary health care services. Further, Ms. Ethier has deposed that ICBC will continue to pay TTD benefits to Ms. Aarts-Chinyanta in the annual amount of \$7,487.16 until age 65.
- [20] As a result, the amounts for the past TTD benefits, the plaintiff's future loss of earning capacity, and the plaintiff's costs of future care must be deducted from the Judgment.
- [21] The plaintiff's position is summarized in her written submissions:
- a) Deductions under section 83 of the Insurance (Vehicle) Act represent an exception to the common law principles applicable to the assessment of damages in a personal injury claim. These principles include, among others, that (1) damages are awarded as a lump sum to respect the principle of finality, and (2) a plaintiff is free to do with their award what they choose.
 - b) Because s. 83 departs from the common law principles, deductions have only been granted in the clearest of cases; there is a stringent burden of proof on the defendants and any uncertainty as to the application of the sections must be resolved in favour of the plaintiff.
 - c) Further, deductions will only be granted in strict accordance with the statute. The court cannot simply adopt ICBC's assessment of benefit entitlement.

d) In this case, setting aside the deduction of income tax and EI premiums from the past wage loss award (which are consented to), the defendants have failed to prove that the plaintiff is entitled to the benefits they seek to deduct. That is because:

- The plaintiff's inability to work, both past and future, and need for future care was contributed to by two pre-existing conditions (depression and hand injury), thereby disentitling her to benefits under s. 96(f) of the Insurance (Vehicle) Regulations; and

- ICBC's financial peril casts doubt on assurances of future payments.

e) In the alternative, if deductions are applicable, the quantum sought by the defendants is wholly unsupported by the evidence.

[22] The defendants respond that the affidavit sworn by Ms. Ethier addresses uncertainties, not entitlement. They argue there is no uncertainty, even with respect to the discretionary benefits. The treatments will be paid in the future as the treatments are incurred, as deposed by Ms. Ethier. The case law is clear: affidavit evidence is accepted by this Court to address any uncertainty that benefits will be paid.

[23] The defendants note that Ms. Ethier did not address s. 96(f) because she accepted the findings of fact in the Judgment and accepts that Ms. Aarts-Chinyanta will require ongoing care and TTD benefits as awarded by this Court.

[24] The defendants argue the quantum of deductions is appropriate; the discount rate of 1.5% applied to TTD benefits is sound. In the alternative, they argue Mr. Benning's actuarial tables from the date of trial up to age 65, not the economic tables, should be used.

The Regulatory Scheme

The Act

[25] Section 83 of the Act (formerly s. 24 and then s. 25 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231) provides limited "no-fault" benefits to insured persons who have been injured in a motor vehicle accident.

[26] The former s. 83 of the Act applies to accidents which occurred before May 17, 2018.[2] This section of the Act provides for the integration of Part 7 benefits with tort damage awards. Section 83, as it read at the relevant time, provides:

(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.

- (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.
- (3) Nothing in this section precludes the insurer from demanding from the person referred to in subsection (2), as a condition precedent to payment, a release to the extent of the payment.
- (4) In an action in respect of bodily injury or death caused by a vehicle or the use or operation of a vehicle, the amount of benefits paid, or to which the person referred to in subsection (2) is or would have been entitled, must not be referred to or disclosed to the court or jury until the court has assessed the award of damages.
- (5) After assessing the award of damages under subsection (4), the amount of benefits referred to in that subsection must be disclosed to the court, and taken into account, or, if the amount of benefits has not been ascertained, the court must estimate it and take the estimate into account, and the person referred to in subsection (2) is entitled to enter judgment for the balance only.
- (6) If, for the purpose of this section or section 84, it is necessary to estimate the value of future payments that the corporation or the insurer is authorized or required to make under the plan or an optional insurance contract, the value must be estimated according to the value on the date of the estimate of a deferred benefit, calculated for the period for which the future payments are authorized or required to be made.

The Regulation

- [27] The Regulation sets out how benefits are to be paid. Part 7 benefits include: (i) disability benefits for employed persons; and (ii) medical and rehabilitative benefits. The key sections of the Regulation in this case are ss. 80, 86, 87, 88, and 96(f).
- [28] Section 88 of the Regulation provides medical rehabilitative benefits. It was recently amended. Under the transitional provisions, the previous version applies to treatments received before April 1, 2019; the new version applies to treatments received after that date.
- [29] Since April 1, 2019, s. 88 of the Regulation provides:
 - (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) dental, hospital, ambulance and professional nursing services, speech therapy, medication, prostheses and orthoses.

(1.01) For the purposes of subsection (1) (a), a treatment

- (a) that is in addition to the number of treatments listed in Column D of Table 1 of Schedule 3.1 corresponding to that health care service, or
- (b) that is provided more than 12 weeks after the date of the accident

is not a necessary health care service unless the corporation's medical advisor or the insured's physician certifies to the corporation in writing that, in the opinion of the medical advisor or physician, the treatment is necessary for the insured.

(1.2) Subject to subsection (1.3), the benefits paid under subsection (1) must not,

- (a) for each health care service referred to in subsection (1) (a), exceed the fee limit set out in Column B or C, as applicable, of Table 1 of Schedule 3.1 corresponding to that health care service,
 - (b) for occupational therapy, exceed the fee limit of \$112 per hour, and
 - (c) for each health care service referred to in subsection (1) (a) that is provided by a physician, exceed the fee limit set out in Column B of Table 2 of Schedule 3.1.
- (2) Where, in the opinion of the corporation's medical advisor, provision of any one or more of the following is likely to promote the rehabilitation of an insured who is injured in an accident for which benefits are provided under this Part, the corporation may provide any one or more of the following:
- (e) funds to the insured for vocational or other training that
 - (i) is consistent with the insured's pre-injury occupation and post-injury skills and abilities, and
 - (ii) may return the insured as nearly as practicable to the insured's pre-injury status or improve the post-injury earning capacity and level of independence of the insured;
 - (f) funds for any other costs the corporation in its sole discretion agrees to pay.
- (3) Before incurring an expense or obligation under subsection (2) for which the insured intends to request payment by the corporation, the insured shall obtain written approval from the corporation and the corporation may, before giving its approval, require the insured to submit such information as it considers necessary to assist it in making a decision.
- (5) The amount by which the liability of the corporation under this section is limited is the amount set out in section 3 of Schedule 3.

- (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).
- (7) The maximum amount payable by the corporation under this section for health care services, except for the health care services listed in Column A of Table 1 or Table 2 of Schedule 3.1, is the amount set out in a payment schedule for that service established by the Medical Services Commission under section 26 of the Medicare Protection Act, as that schedule is amended from time to time, for that service.
- [30] After April 1, 2019, the kinds of treatment included, and the number of sessions allowed, under Part 7 have expanded. However, the benefits are limited to the amounts prescribed. The cost for treatments is set out in s. 88(1.2) and Schedule 3.1 of the Regulation. Schedule 3.1 of the Regulation provides fee limits for an assessment visit and report as well for standard treatments. ICBC cannot pay more than the prescribed fee limit. The Schedule also sets out the number of pre-authorized treatments for acupuncture, chiropractic, counselling, kinesiology, massage therapy, physiotherapy, and psychology.

[31] Section 96 of the Regulation provides:

The corporation is not liable to pay benefits under this Part in respect of the injury or death of a person

.

- (f) whose injury or death is caused, directly or indirectly, by sickness or disease, unless the sickness or disease was contracted as a direct result of an accident for which benefits are provided under this Part.

Legal Principles

General

- [32] The modern principle of statutory interpretation requires that the words of a statute be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of Parliament: *Doukhobor Heritage Retreat Society #1999 v. Vancouver Foundation*, 2020 BCCA 80 at para. 42, citing *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 111.
- [33] The relevant legislative provisions are ss. 74, 83, 95, and 98 of the Act and ss. 78-104 and Schedules 3 and 3.1 of the Regulation. The Regulation outlines the benefits available to an eligible insured person regardless of who was at fault for the accident.
- [34] Section 80 of the Regulation provides TTD benefits to eligible insured persons. TTD benefits may be reviewed every twelve months: s. 87. These benefits may be extended to age 65: s. 86.

- [35] Section 88(1) disability benefits are mandatory. Assuming entitlement, ICBC must provide these benefits if they fall within the statutory requirements. Section 88(2) rehabilitation benefits are discretionary. They are not benefits listed in Schedule 3.1 and therefore do not fit within the categories of benefits which ICBC must provide. ICBC may provide these benefits where, in the opinion of ICBC's medical advisor, the treatment is likely to promote the rehabilitation of the insured. Further, ongoing benefits in s. 88(1.01) are discretionary: *Siverston v. Griffin*, 2020 BCSC 528 [Siverston] at para. 8.
- [36] Section 88(5) and Schedule 3, s. 3(2)(a), provide that the amount of coverage available per accident is \$150,000.
- [37] At common law, damages are to be assessed and not calculated. Judgments are final. Plaintiffs have property in their awards; they are free to do with them what they choose: *Townsend v. Kroppmanns*, 2004 SCC 10 at paras. 5-6 and 18-21 [Townsend]; *Uhrovic v. Masjhuri*, 2008 BCCA 462 at paras. 29-32 [Uhrovic CA]. The provisions of the Act and the Regulation should only vary these common law principles regarding the assessment of damages where clear language to that effect is employed: *Seven Mile Dam Contractors v. British Columbia*, (1980), 25 B.C.L.R. 183 (C.A.) at paras. 12-13.
- [38] It is important to keep this conceptual framework in mind when determining what benefits, if any, should be deducted.

Onus

- [39] The onus to establish which deductions should be made under s. 83 lies with the defendant: *Lynn v. Pearson* (1998), 55 B.C.L.R. (3d) 401 (C.A.) at para. 18 [Lynn]; *Sovani v. Jin et al*, 2005 BCSC 1285 at para. 32 [Sovani]. The defendant bears the burden of proving that Ms. Aarts-Chinyanta is entitled to the benefits under Part 7, which the defendant seeks to have deducted: *Uhrovic CA* at paras. 40 and 42.

Admissible Evidence

- [40] The law is somewhat unsettled regarding what evidence is admissible when determining benefits under Part 7. The primary issue is whether the Court is restricted to evidence before the trial judge or whether subsequent evidence from ICBC, usually by way of affidavit, may be admitted. Defendants often rely upon affidavits sworn by ICBC claims specialists to address whether the plaintiff will have access to benefits in the future.
- [41] The leading decision on what evidence should be considered to determine deductions under s. 83 of the Act is *Schmitt v. Thomson* (1996), 18 B.C.L.R. (3d) 153 (C.A.) [Schmitt], a decision of a five-judge panel of the Court of Appeal. Justice Hollinrake, speaking for the court, acknowledged that the task of estimating the amount of benefits to which a plaintiff "is or will be entitled to in the future" may be difficult. Nevertheless, this is the task of the trial judge.

- [42] In Schmitt, the court overruled a previous decision, *Jang v. Jang* (1991), 54 B.C.L.R. (2d) 121 (C.A.), which held that uncertainty over access to benefits could only be resolved by an undertaking from ICBC to provide benefits.
- [43] The court in Schmitt discussed what evidence may be relied upon when estimating future benefits under s. 24(5) [now s. 83(5)] of the Act:
- [19] Insofar as proof is concerned I think it is necessarily implicit in s.24(5) that the evidence upon which the estimate of future benefits is made is that very evidence which was before the trial judge in the tort action and upon which he or she made their assessment of those damages. The uncertainties as to the payment of future benefits which are created by the regulations cannot, in my opinion, act as a bar to the court estimating these future benefits as best it can as required by s.24(5). It may well be in any given case that the s.24(5) estimate, when measured against the findings of fact in the tort action, will be nominal by reason of the uncertainty of payment, or more correctly speaking entitlement to payment, of future benefits created by the regulations. Trial judges may be cautious in their approach to the s.24(5) estimate inasmuch as the deduction results in a lessening of the award in the tort action considered proper on the evidence by the trial judge. However, if that is the result of uncertainty created by the regulations I do not think the Corporation in all fairness can be heard to complain .
- [20] It is quite possible that in any given case when the trial judge embarks on the s.24 exercise the parties will wish to adduce evidence on the issue of the estimate alone. I see nothing to prevent the trial judge from hearing further evidence on this issue when it comes before the court.
- .
- [24] I should add here that in my opinion there is nothing to stand in the way of the Corporation waiving for a specific period of time its discretion under s.87 of the regulations to review benefits payable every 12 months under Regulations 80, 84 or 86.
- [25] In the result, and with the greatest of respect, I think that insofar as it can be said that the decision of this Court in *Jang v. Jang* requires an unequivocal undertaking on the part of the Corporation to pay future benefits before a defendant can invoke s.24 of the Act, it must be taken to be overruled.
- [Emphasis added.]
- [44] To summarize, the Court of Appeal in Schmitt held:
- a) deductions should be estimated based on the evidence at trial;
 - b) while further evidence can be adduced, the statute does not require or contemplate undertakings from ICBC to provide benefits; and
 - c) it is open to ICBC to waive compliance conditions for ongoing access to benefits.

- [45] Since Schmitt, a number of decisions have accepted affidavit evidence from ICBC. In *Norris v. Burgess*, 2016 BCSC 1452 [Norris], Justice Funt admitted post-trial evidence. He reasoned that as an agent of the government, this Court is to presume the future conduct of ICBC will be honourable: para. 35. See also *Stanikzai v. Bola*, 2012 BCSC 1904; *Wiebe v. Wiebe*, 2018 BCSC 1062.
- [46] Justice Riley recently agreed such evidence is admissible since a commitment by ICBC to pay certain benefits carries considerable weight: *Sangha v. Inverter Technologies Ltd.*, 2019 BCSC 1174 at para. 15 [Sangha]. However, Riley J. cautioned that the court must independently analyze the evidence and make its own findings concerning the Part 7 benefits: para. 16. This is especially the case where the "affidavit evidence addresses a discretionary benefit and is equivocal": *Sangha* at para. 13, citing *Dennstedt v. Lepine*, 2018 BCSC 220 at para 86.
- [47] Despite Schmitt and the subsequent jurisprudence, there is confusion regarding what type or category of ICBC representations are admissible:
- a) Is it only evidence regarding whether conditions of ongoing access to discretionary benefits can be waived (i.e., evidence regarding compliance conditions, also referred to as conditions subsequent)?
 - b) Or does it include evidence that speaks to whether the plaintiff is entitled to statutory benefits at the outset (i.e., evidence of entitlement, also referred to as conditions precedent)?
- [48] The plaintiff submits the correct approach is the former, as set out in the decisions of *Andrews v. Roffel*, [1998] B.C.J. 631 (S.C.) [Andrews], and *Lee v. Fritzke*, 1998 CanLII 6308 (B.C.S.C.) [Lee].
- [49] In *Andrews*, an ICBC representative gave an undertaking in which ICBC "irrevocably, unequivocally, and unconditionally" promised to pay certain benefits under Part 7. ICBC undertook to pay TTD benefits to age 65 despite the fact that the trial judge did not find the plaintiff's disability to be permanent. ICBC also waived requirements such as ongoing medical certifications and pre-approval of expenses. Following Schmitt, Justice McEwan commented as follows regarding these undertakings:
- [24] The plaintiff further points out that in *Schmitt v. Thomson* (supra), it appears that one of the submissions made by counsel for the Insurance Corporation of British Columbia respecting the undertaking required by *Jang v. Jang* (supra) was that the Corporation could not undertake anything more than what it was empowered to do by statute. As noted above, however, the court in *Schmitt v. Thomson* did suggest that it could see nothing "in the way" of the Corporation waiving at least a review under s. 87.
- [25] Whether the Corporation can do what it has tried to do here is a question I do not think it necessary to decide on what is before me. Whatever the Insurance Corporation of British Columbia is prepared to do in order to reduce the contingencies associated with its exercises

of discretion under the Act or the Regulations, the "Undertaking" is of no assistance as a definitional tool. As I have noted already, the benefits I must estimate are those to which the plaintiff is "entitled", not those which the defendants' insurer is prepared to pay regardless of entitlement. While it may be that, in the context of an established entitlement, the Corporation may waive its discretion to seek a review under s. 87 for a specific period of time as suggested by Mr. Justice Hollinrake, I do not see how it can, by an instrument such as the "Undertaking", re-define the plaintiff's disability as permanent and total in the face of findings at trial that do not go so far.

- [30] Because I must again estimate on the basis of probable entitlement, I do not think the "Undertaking To Pay And Waiver" is of assistance in connection with these benefits either. It simply cannot re-define "entitlement".

[Emphasis added.]

- [50] In *Lee*, ICBC tendered an affidavit sworn by its rehabilitation coordinator. In the affidavit the rehabilitation coordinator promised home attendant care beyond what was provided for in the legislation. Citing *Andrews*, Justice Koenigsberg held that such evidence should not be considered when determining entitlement under s. 25 [now s. 83] of the Act: paras. 10-12.

Entitlement

- [51] Section 83(2) of the Act provides that a person who has a claim for damages is deemed to have released the claim to the extent they have received the Part 7 benefits, or to the extent they are entitled to receive benefits, from ICBC.
- [52] The purpose of the deduction is to prevent double recovery by the plaintiff of both Part 7 benefits and tort damages arising from the same loss. It is "not to fix the amount of future benefits": *Fisher v. Wabischewich* (1978), 5 B.C.L.R. 335 (C.A.) [Fisher] at para. 4; *Gurniak v. Nordquist*, 2003 SCC 59 [Gurniak] at para. 48.
- [53] Justice Silverman articulated the test for determining whether deductions are appropriate in *Jurczak v. Mauro*, 2013 BCSC 1370 [Jurczak] at para. 16. When faced with a s. 83 application to deduct benefits, the court should follow a two-step approach. First, the court should determine whether the plaintiff has received or is entitled to receive Part 7 benefits as defined in the Act. Second, once entitlement is established, the court should estimate the amount of the deduction.
- [54] At the first stage of the test, the defendants must establish the plaintiff has a claim for which they are entitled to a corresponding benefit under Part 7: *Siverston* at para. 14. This is based on the principle that there must be strict compliance with the statute when determining what deductions, if any, should be made: *Siverston*, at para. 12, citing *Lynn* at para. 18.

- [55] Despite the principle of strict compliance, there need not be a precise match between the heads of damages in the tort award and the categories of damages under the benefit recovery scheme: Gurniak at paras. 45-47.
- [56] Entitlement refers to conditions precedent to receiving benefits, not the discretionary granting of benefits by ICBC once entitlement is established. When determining entitlement, the court should not concern itself with disputes between the plaintiff and ICBC: Sovani at paras. 36-40. When estimating an amount of benefits that has not yet been determined, the court is not to consider the likelihood the benefits will be unfairly adjusted in the future: Ayles v. Talastasi, 2000 BCCA 87 at para. 33 [Ayles].[3] The prior conduct of the insurer in denying benefits should not preclude a deduction from an award: Sovani at para. 46.
- [57] With respect to interpretation, any "uncertainty as to whether a Part 7 benefit will be paid must be resolved in favour of the plaintiff": Li v. Newson, 2012 BCSC 675 at para. 14(c), varied on other grounds 2013 BCCA 29 [Li]; Uhrovic v. Masjhuri, 2007 BCSC 1096 at para. 10, aff'd Uhrovic CA. Any uncertainty created by the Regulation "may lead the court to conclude that only a nominal deduction is appropriate": Li at para. 14(i).

Section 96(f)

- [58] Section 96(f) of the Regulation provides that ICBC is not liable to pay benefits under Part 7 to a plaintiff "whose injury or death is caused, directly or indirectly, by an underlying medical condition unless the underlying condition was contracted as a direct result of the motor vehicle accident for which [the Part 7] benefits are provided".
- [59] The issue here is how this language is to be interpreted.
- [60] Justice Gropper considered s. 96(f) in Harvey v. Yanko, 2008 BCSC 1535 [Harvey]. In Harvey, the defendant sought a deduction from the future care award, primarily for the cost of medications, arguing this was a mandatory benefit under s. 88 of the Regulation. The plaintiff argued that because the trial judge found she had pre-existing conditions that were triggered by the accident, this would make it difficult to relate her ongoing medication expenses to the motor vehicle accident. Justice Gropper summarized the law regarding s. 96(f) as it stood in 2008:
- [18] In Mawji, the court concluded that because the plaintiff's continuing injurious condition was caused in part and indirectly by her pre-existing underlining disease, the defendant was entitled to invoke the exemption from liability contained in Regulation 96(f). The plaintiff was precluded from claiming Part 7 benefits and thus was to rely on the tortfeasor to provide the benefit. The court found that the benefits claimed by the plaintiff related to consequences going beyond the injury directly caused by the accident. The court concluded that in the context of Part 7, "injury" refers to the "continuing injurious condition of the claimant one that is caused indirectly by her underlying disease" (at ¶13).

- [19] Many of the decisions referred to find that the payments under s. 88(1) are obligatory despite a pre-existing condition. However, in *Kibsey v. Wielki*, 2008 BCSC 880 at ¶15, following *Mawji*, the court held that the plaintiff's "current and ongoing disability" was caused "in part and indirectly, even to some extent directly," by his pre-existing condition. The court concluded "the chance of his obtaining Part 7 benefits to cover any of the future care costs is very unlikely." Accordingly, the court made no deduction from the jury's award for the cost of future care.
- [20] Even though the payment under s. 88(1) is mandatory, the court in *Kibsey* recognizes that s. 88(1) requires that the expenses to be reimbursed must be incurred by the insured "as a result of the injury". Section 88 does not necessarily address those injuries that exacerbated a pre-existing condition.
- [61] At para. 20, *Gropper J.* held s. 88 "does not necessarily" address injuries that exacerbate a pre-existing condition. Given the uncertainty with respect to entitlement, she declined to deduct any amount for the cost of future care from the judgment. She concluded:
- [22] In this case, I am persuaded that there is an issue about whether the plaintiff's medication is covered by Part 7 at all, given that it not only provides benefits incurred by the insured as a result of the injury but also from conditions exacerbated by the accident.
- [62] Section 96(f) was more recently addressed in *Kozhikhov v. Insurance Corporation of British Columbia*, 2015 BCCA 515 [*Kozhikhov CA*]. This case involved an appeal of a decision of this Court (*Kozhikhov v. Insurance Corporation of British Columbia*, 2014 BCSC 1476 [*Kozhikhov SC*]) regarding ICBC's denial of Part 7 benefits on the basis of s. 96(f).
- [63] In *Kozhikhov SC*, there were no factual findings by a trial judge because the parties settled the tort claim prior to the Part 7 dispute. Based on expert evidence that the plaintiff had a pre-existing condition, and relying upon s. 96(f), ICBC argued it need not pay Part 7 benefits because the injuries were not caused directly by the accident. Justice N. Smith rejected this argument. Relying on *Wafler v. Insurance Corporation of British Columbia*, 2008 BCSC 1387, and *Cai v. Insurance Corporation of British Columbia*, 2013 BCSC 2213, Smith J. found ICBC is required to provide compensation for treatments under Part 7 unless it could establish that "but for" a pre-existing condition, the specific treatments for which the plaintiff claimed would have been unnecessary: *Kozhikhov SC* at para. 42.
- [64] Justice MacKenzie, writing for the court, accepted Smith J.'s interpretation of s. 96(f). MacKenzie J.A. stated:
- [59] In my view, ICBC's interpretation overlooks the larger perspective of *Driedger's* "one principle or approach" to statutory interpretation and does not accord with the purpose of Part 7, which is to allow a person injured in a motor vehicle accident summary and inexpensive access to the benefits described. I do not consider the Legislature intended to disqualify an injured party from Part 7 benefits due to minor pre-existing conditions. Apt is the conclusion of *Meiklem J.* in *Wafler*:

12 there is some force to the argument that the approach applied in *Mawji*, taken to its logical extreme, would deny coverage to any claimant with a pre-existing condition of sickness or disease that contributed in any way whatsoever, no matter how minor the contribution, to a continuing injurious condition following a motor vehicle accident. I agree that such an extreme interpretation would defeat the clear insuring intent set out in s. 80 (1) of the Regulation to provide wage-loss benefits to insured persons who are totally disabled as a result of injuries sustained in motor vehicle accidents.

27 *Mawji* is not a first instance decision; it cannot be said that its interpretive analysis is incorrect, because the court did not engage in any detailed statutory interpretation analysis; rather, it followed the *Polykandriotis* interpretation of the predecessor section in the Regulations and the aforementioned decisions dating as far back as 1954 that had interpreted analogous exclusions in other private accident insurance policies. The drastic consequence that the present plaintiff suggests, of exclusion from coverage for anyone suffering any degree of degenerative condition that is rendered symptomatic by an accident, is avoided so long as it is understood that a pre-existing disease which is aggravated must meet the "but for" test in respect of the total disability in order to bring it within the s. 96(f) exclusion.

[Emphasis added.]

[60] ICBC advanced no persuasive reason why the test for causation under s. 96(f) that limits ICBC's liability to pay Part 7 claims should be any different from the test for causation in tort claims as set down in *Resurface* and *Clements*. The language of s. 96(f) does not suggest otherwise. While this case involves a contract of insurance, rather than a tort action, it is a contract with terms created by statute. Adopting the reasoning in the recent jurisprudence, including *Wafler* and *Cai*, which relied on the settled approach to statutory interpretation, I conclude the test for causation under s. 96(f) is the "but for" test as developed by the Supreme Court of Canada in tort cases.

[61] I would state the test in the following way. To be excluded under s. 96(f) from liability for Part 7 benefits, ICBC must prove, on a balance of probabilities, that the plaintiff would not have suffered the injury but for his or her pre-existing sickness or disease. (It is settled that the burden of proof respecting an exclusion clause in a contract of insurance is on the insurer: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33 at para. 51.)

[65] The court in *Kozhikhov CA distinguished Canevada Country Communities Inc. v. GAN Canada Insurance Co.*, 1999 BCCA 339 [*Canevada*], which was a contractual case regarding a private insurance policy. Justice MacKenzie held that s. 96(f) must be given meaning through statutory, not contractual, interpretation. Unlike the private insurance in *Canevada*, the legislation is intended to provide a summary, quick, and inexpensive determination of Part 7 benefits: para. 62. The court interpreted s. 96(f) to require ICBC to provide compensation unless it can establish that treatments for the plaintiff would have been unnecessary "but for" his or her pre-existing condition(s): para. 60.

Analysis

General

- [66] Ms. Aarts-Chinyanta is an insured person. She is entitled to receive defined benefits under the Act and the Regulation to the extent that she meets certain requirements. The defendants argue that Ms. Aarts-Chinyanta is entitled to Part 7 TTD benefits under s. 80 and s. 86 of the Regulation, and Part 7 benefits for her costs of future care under s. 88. The plaintiff argues the defendants have failed to establish entitlement to any Part 7 benefits.
- [67] The purpose of this post-trial hearing is to determine the appropriate deductions, if any, from the Judgment. This hearing is not to conclusively determine the legal obligations between Ms. Aarts-Chinyanta and ICBC.
- [68] Section 83 of the Act, which is applicable to accidents occurring before May 1, 2018, applies to Ms. Aarts-Chinyanta.
- [69] The Regulation was amended relatively recently. Treatments received before April 1, 2019 are dealt with under the old version of s. 88 of the Regulation; treatments received on or after April 1, 2019 are governed by the new Regulation. The new Regulation set limits on the number of sessions that are covered under Part 7 and further conditions on treatments provided more than 12 weeks after the date of the motor vehicle accident. To be eligible for treatments after 12 weeks, the insured individual requires written certification from a specified medical practitioner stating the health care service is necessary.
- [70] ICBC is not a party to this application. It is the tort defendants, not ICBC, who seek these deductions.
- [71] The 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 of the no-fault benefits in mind. The statutory objectives are to prevent double recovery by the plaintiff and to permit the amount of benefits payable to the plaintiff in the future to be determined by provisions of the Act: Fisher at para. 4.

Onus

- [72] The defendants bear the onus of establishing the plaintiff is entitled to the Part 7 benefits which they seek to have deducted.

Admissible Evidence and Entitlement

- [73] The plaintiff takes the position this Court cannot rely on post-trial undertakings or affidavit evidence containing representations from ICBC regarding entitlement. The plaintiff concedes that I may take ICBC representations into account when considering discretionary benefits.

- [74] The plaintiff argues some judges have incorrectly relied on affidavits from ICBC adjusters to circumvent any uncertainty in entitlement, rather than with continuing access to discretionary benefits. For example, in *Sangha* at para. 26, the Court accepted ICBC's position regarding entitlement to benefits as an appropriate source of evidence.
- [75] As stated earlier, the case law has been less than clear regarding for what purpose post-trial representations are being admitted into evidence. The following explanation in *Schmitt* is helpful:
- [20] It is quite possible that in any given case when the trial judge embarks on the s.24 [now s. 83] exercise the parties will wish to adduce evidence on the issue of the estimate alone. I see nothing to prevent the trial judge from hearing further evidence on this issue when it comes before the court.
- [Emphasis added.]
- [76] I interpret "estimate" to refer to the amount of benefits, not underlying entitlement. This is consistent with the two step approach articulated in *Jurczak*.
- [77] I am bound by the Court of Appeal decision in *Schmitt*, which was applied in *Andrews and Lee*. I agree with the analysis in *Andrews and Lee*. An ICBC specialist cannot bind ICBC beyond the provisions of the Act and Regulation.
- [78] As I understand the principles flowing from *Schmitt* and subsequent jurisprudence, if there is no statutory entitlement to benefits, there can be no deduction because an ICBC specialist cannot authorize deductions beyond what the statute permits. Once statutory entitlement is established, based on the award and the legislation, the question is whether the Part 7 benefits are mandatory or discretionary. If the benefits are mandatory, the court must deduct. No further evidence is required. If the benefits are discretionary, in that ICBC may pay the benefits or they are subject to ongoing medical certification, they are too uncertain and the court should decline to deduct the benefit amount from the award. Alternatively, the court may deduct a nominal amount to reflect the uncertainty of the plaintiff receiving the future benefits.
- [79] There is an exception to the general rule regarding discretionary benefits. The exception is where ICBC, through affidavit evidence, undertakes or promises to pay discretionary benefits going forward. Once presented with such evidence, the court must be satisfied the undertaking or promise is sufficient in that there is no significant uncertainty the benefits will be paid: *Sangha*. If the court is satisfied with the undertaking or promise, the court should deduct the benefits from the damages award because the uncertainty has been removed.

- [80] ICBC can therefore make post-trial representations regarding ongoing access to benefits to which entitlement is already established. In addition to the findings of fact and award of damages at trial, this Court may consider representations from ICBC specialists regarding whether the conditions subsequent to ongoing entitlement (e.g., 12 month reviews) will be waived or enforced. ICBC can provide assurances with respect to discretionary conditions which ICBC controls.
- [81] In summary, ICBC cannot undertake to do more than it was empowered to do under the legislative scheme, consistent with the findings at trial. ICBC representations cannot broaden entitlement at the outset: Andrews at para. 25. However once entitlement is established, ICBC can reduce or eliminate any contingencies associated with its exercise of discretion. Post-trial affidavit evidence is admissible for this purpose.

Section 96(f)

- [82] The finding that Ms. Aarts-Chinyanta had pre-existing conditions has become a central issue in this post-trial dispute.
- [83] Relying on s. 96(f) of the Regulation, the plaintiff argues that Ms. Aarts-Chinyanta's inability to work and her need for future care was contributed to by two pre-existing conditions, thereby disentitling her to benefits. The plaintiff argues the conditions set out in s. 96(f) are conditions precedent: because Ms. Aarts-Chinyanta's injuries were caused directly or indirectly by her pre-existing conditions, she has not established entitlement under the first step of the test. At minimum, there is uncertainty as to whether the plaintiff's injuries were solely caused by the accidents: Harvey; Day.[4]
- [84] Pursuant to s. 96(f), Part 7 benefits are not payable to an insured in certain circumstances. If the injuries suffered by a plaintiff are caused "directly or indirectly" by an underlying "sickness or disease", ICBC is not liable to pay benefits. The issue I must decide is whether Ms. Aarts-Chinyanta's injuries were caused, directly or indirectly, by her pre-existing conditions.
- [85] In the Judgment, I stated:
- [192] I do not accept that Ms. Aarts-Chinyanta is capable of working, even as a greeter at Walmart. Based on the medical reports, I do not accept that Ms. Aarts-Chinyanta has residual earning capacity.
- [86] Finding Ms. Aarts-Chinyanta had pre-existing medical conditions which were rendered symptomatic by the motor vehicle accidents, and that she had no residual earning capacity, I continued:

- [196] [T]he evidence established that Ms. Aarts-Chinyanta had a history of working full-time and she had a good work ethic. There is nothing to suggest she would not have continued to work full-time into the future, but for the accidents. She likely would have had some time off work due to the pre-existing injuries but I assume these absences would have been sporadic.
- [87] In Kozhikhov CA, MacKenzie J.A. was concerned about the resulting consequences if a plaintiff was denied Part 7 coverage as a result of any degenerative condition, regardless of how minor, that was rendered symptomatic by an accident. To avoid these consequences, she agreed with the trial judge's conclusion that a pre-existing disease which is aggravated by an accident must meet the "but for" test with respect to the disability in order to bring it within the s. 96(f) exclusion.
- [88] I am bound by the judgment of the Court of Appeal in Kozhikhov CA.
- [89] Consistent with Kozhihov CA, I find the medical evidence overall does not establish that Ms. Aarts-Chinyanta's treatments and TTD benefits would be unnecessary without her pre-existing conditions. The evidence was that Ms. Aarts-Chinyanta had some pre-existing conditions that likely would have continued to cause her problems. However, I found the likelihood that she would have been off work indefinitely as a result of her pre-existing conditions to be unlikely. On a balance of probabilities, she would have only missed work sporadically.
- [90] It was the accidents, not her pre-existing conditions, which resulted in Ms. Aarts-Chinyanta requiring the kinds of treatments outlined in the Judgment. As I stated in the Judgment:
- [164] The contingencies that Ms. Aarts-Chinyanta would suffer from mental health issues in the future, and her continued pain and dysfunction in her right hand, must be given weight according to their relative likelihood: TWNA at para. 48. The goal is to put Ms. Aarts-Chinyanta in the position she would have been in if the accidents had not occurred. Therefore, Ms. Aarts-Chinyanta's award should be reduced by 15% for her pre-existing psychological conditions and 5% for her pre-existing hand injury.
- [91] I found there was a 5% contingency that Ms. Aarts-Chinyanta would continue to have problems with her right hand and a 15% contingency that she would suffer from mental health issues in the future in ways that would affect her employability and need for treatments. While Ms. Aarts-Chinyanta's pre-existing conditions were aggravated, the motor vehicle accidents were responsible for the majority of Ms. Aarts-Chinyanta's injuries. On a balance of probabilities, but for the accidents she would not be permanently disabled or need the treatments outlined in the Judgment.

- [92] I also note that if the alternate interpretation was correct--if there is any pre-existing condition a plaintiff is not entitled to Part 7 benefits--the plaintiff would be forced to prove their injuries at trial to receive any compensation following an accident. This is contrary to the objectives of the legislation to allow a person injured in a motor vehicle accident summary and inexpensive access to the benefits: Kozhihov CA at para. 62. Such an interpretation appears to be contrary to the public policy objectives of the legislation.
- [93] While s. 96(f) may apply in another case, the plaintiff has failed to establish that but for the pre-existing conditions, Ms. Aarts-Chinyanta would not need the TTD payments, the treatments, and the medications which she was awarded in the Judgment. The plaintiff has not established that Ms. Aarts-Chinyanta has no entitlement to Part 7 benefits.

Is there Uncertainty that ICBC will Pay for Future Benefits?

- [94] I am tasked with establishing the value of future benefit payments. Estimating the value is difficult when there are many uncertainties that may affect payments in the future: Sovani at paras. 58 and 60. Estimates are particularly difficult when a jury does not delineate which benefits the damage award targets. This is not an issue here.
- [95] Ms. Ethier, the claims specialist with conduct of Ms. Aarts-Chinyanta's file, swore an affidavit on behalf of ICBC. In that affidavit Ms. Ethier deposed that she reviewed the reasons for Judgment and ICBC accepts this Court's Judgment regarding Ms. Aarts-Chinyanta's treatment needs following the motor vehicle accidents. She stated ICBC will reimburse the plaintiff for the necessary health care services she incurs. She specifically waived the requirements for continued medical certification under s. 88(1.01) of the Regulation. Further, she waived any further medical certification or examination as a condition of reimbursement for the necessary health care services under ss. 98 or 99 of the Regulation. Lastly, she waived the application of s. 90 of the Regulation.
- [96] I am entitled to take ICBC's position regarding the plaintiff's eligibility for benefits under Part 7 into account: Schmitt; Norris at paras. 34-37. As recently stated by Justice Forth in Wark v. Kang, 2020 BCSC 196 [Wark]:
- [44] While any uncertainty as to whether a benefit will be paid must be resolved in favour of the plaintiff, this is not a case in which there is uncertainty about whether the Part 7 benefits will be paid as the amounts listed by the defendants are either mandatory benefits or ICBC has unequivocally and irrevocably promised to pay them. I am satisfied that these benefits should be deducted from the jury award to prevent double recovery.
- .
- [46] Based on the current state of the law, the evidence of Ms. Kunzer, and my review of the coverage for the future care benefits under Part 7, I do not see any appreciable risk that the plaintiff will be denied any of the benefits that are set out at para. 16.

- [97] I am also mindful that in *Quigley v. Jonsen*, 2020 BCSC 216, Justice Thompson deducted discretionary benefits based on affidavit evidence they would be paid.
- [98] The psychological counselling, kinesiology treatments, and medications are mandatory benefits pursuant to s. 88(1) of the Regulation. They were held by this Court to be reasonable and medically necessary. However, treatments received beyond those listed in Table 1, Schedule 3.1 are not covered unless ICBC is provided with written certification from either ICBC's medical advisor or the insured's medical practitioner. The same is true for treatments which occur more than 12 weeks after the motor vehicle accident. As set out in s. 88:
- (1.01) For the purposes of subsection (1) (a), a treatment
- (a) that is in addition to the number of treatments listed in Column D of Table 1 of Schedule 3.1 corresponding to that health care service, or
- (b) that is provided more than 12 weeks after the date of the accident
- is not a necessary health care service unless the corporation's medical advisor or the insured's physician certifies to the corporation in writing that, in the opinion of the medical advisor or physician, the treatment is necessary for the insured.
- [99] ICBC accepts the above treatments as properly falling within the ambit of s. 88(1) and has waived the need for ongoing medical authorization under s. 88(1.01). I am satisfied the amounts for these benefits must be deducted from the award to prevent double recovery: Act, s. 83(5).
- [100] Discretionary benefits are set out in s 88(2) of the Regulation. They are those benefits for which ICBC has residual discretion regarding ongoing access to the benefits.
- [101] The Botox treatments were held by this Court to be reasonable and medically necessary. However, the Botox treatments are discretionary benefits under the Regulation. ICBC may provide these benefits where, in the opinion of ICBC's medical advisor, the treatment is likely to promote the rehabilitation of Ms. Aarts-Chinyanta.
- [102] As a discretionary benefit, presumptively I should not deduct the benefits because, based on the regulatory scheme, it is uncertain whether Ms. Aarts-Chinyanta will receive these benefits into the future. If she does not, she will not receive the benefit of the Judgment. As stated above, this presumption may be overcome with appropriate and relevant post-trial evidence. To answer whether there is satisfactory evidence, I must again turn to the sworn affidavit of the ICBC claims specialist. If there is uncertainty with respect to the benefits, I should decline to deduct the benefits or I should deduct only a nominal amount from the Judgment.
- [103] While s. 88(2) benefits are only paid if ICBC's medical advisor is of the opinion the treatments are likely to promote the rehabilitation of the insured, Ms. Ethier deposed that ICBC "irrevocably, unequivocally and unconditionally agreed to pay, under Part 7" the cost of the discretionary future care amounts specified in the Judgment. Based on the reasoning

articulated in the above cases, Ms. Ethier's commitment overcomes the conditions which render benefits discretionary. Ms. Ethier's commitment removes the uncertainty in s. 88(2) of the Regulation.

- [104] There is little risk that ICBC will dishonour its commitment. In any event, citing *Hollingrake J.A. in Schmitt*, the court in *Reilly v. Lynn*, 2001 BCSC 709, rev'd on other grounds 2003 BCCA 49, held that it is open to the plaintiff to bring a claim against ICBC if benefits are wrongly terminated: para. 9.
- [105] A question arose regarding which insurance policies are available to Ms. Aarts-Chinyanta for the purposes of accessing Part 7 benefits. The plaintiff argued in the absence of findings of fact by this Court with respect to apportionment, it is uncertain whether Ms. Aarts-Chinyanta is entitled to ongoing benefits from the second and third accidents. Therefore, pursuant to s. 88(5) and (6) of the Regulation, there is only \$150,000 available in Part 7 benefits from the first accident. As a result, this Court should conclude that only \$150,000 in benefits under Claim #1 are available for Ms. Aarts-Chinyanta. Approximately half of this amount has already been expended.
- [106] Ms. Ethier, on behalf of ICBC, deposed that Ms. Aarts-Chinyanta has access to Part 7 benefits from three policies with approximately \$372,600 remaining in Part 7 benefits available to her. The defendants argue there is no evidence to suggest that only one insurance policy applies.
- [107] There is nothing in the Act or Regulation that there must be an apportionment of damages to allow recovery under each policy. This Court found that Ms. Aarts-Chinyanta suffered injuries in all three accidents. Moreover, I was not taken to any authority suggesting I should find that only one policy is available to Ms. Aarts-Chinyanta. ICBC has paid benefits to Ms. Aarts-Chinyanta from all three policies, albeit most of the claims have been administered through the policy from the first accident.
- [108] I find there are Part 7 benefits available to Ms. Aarts-Chinyanta from all three insurance policies.
- [109] Lastly, the plaintiff argues ICBC's financial "peril" casts doubt on assurances of future payments. Further, there is no guarantee regarding what rates ICBC will pay for treatments in the future: *Del Bianco*. In terms of ICBC's financial viability and future payments, I adopt the reasoning of *Forth J. in Wark*:
- [45] I also give little weight to the plaintiff's concern that the legislation could change and adversely impact the plaintiff. It does appear that the government has recently announced some sweeping changes to the structure of the auto insurance scheme in British Columbia, I do not view that those changes will adversely impact this plaintiff since it appears there may be more funding available for rehabilitation expenses in the future. This argument is too speculative and, since most of the expenses will be incurred in the near future, there is little risk of a change in legislation that will adversely impact this plaintiff.

[110] Without a proper evidentiary foundation, I am unable to conclude ICBC's financial forecast results in plaintiff's benefits being uncertain. As stated by Donald J.A. in Ayles at para. 34, "a change in the regulations adverse to the plaintiff is too speculative to affect the result."

Are the Deductions Too High?

[111] The Act mandates that any deduction of future benefits must be present valued: s. 83(6). Discount rates are used to reflect the present value of future lost earnings and future care costs. Discount rates are applied because the court assumes the amount paid to the plaintiff will be invested and will earn interest over time. As stated in Townsend:

[5] In British Columbia, to avoid courts' having to hear expert evidence in every case in order to determine the appropriate discount rate, s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253, which was added in 1981 (S.B.C. 1981, c. 10, s. 30), authorizes the Chief Justice of the British Columbia Supreme Court to set the discount rate

[112] The Law and Equity Regulation, B.C. Reg. 352/81, currently sets a discount rate of 1.5% for loss of future earnings and 2% for the cost of future care: s. 1. The defendants have used a 1.5% discount rate to calculate the present value of the TTD benefits.

[113] The plaintiff argues that if I make deductions, I should use the same multiplier capacity to estimate the present value of the TTD benefits that was used to estimate Ms. Aarts-Chinyanta's damages for loss of future earning capacity. In the Judgment, I used the economic multiplier provided by Mr. Benning, an expert economist. The plaintiff did not take me to any authority to support using the economic multiplier. Economic multipliers include contingencies for labour market participation, unemployment, and part-time work in addition to the normal adjustments for survival rates. Only the survival rate contingency is relevant here. I am not persuaded the 1.5% discount rate, as required by statute, is inappropriate to calculate the present value of the benefit.

[114] The plaintiff argues the government sets fee limits for standard treatments by which ICBC is bound. Further, Ms. Aarts-Chinyanta will access some treatments in the short term so that the discount rate will not reflect treatments being used slowly over her lifetime. I accept that Schedule 3.1 of the Regulation provides fee limits for an assessment visit and report, as well for standard treatments. ICBC cannot pay more than the prescribed fee limit: s. 88(1.2). Some uncertainty regarding these future payments remains and consequently Ms. Aarts-Chinyanta may not get the full benefit of the Judgment.

[115] In terms of the future costs of care, the plaintiff argues the Part 7 expenses are not being used only for future care items. For example, ICBC is making Medical Services Plan ("MSP") payments and other payments for benefits not articulated in the Judgment but which are being attributed to Ms. Aarts-Chinyanta's Part 7 fund. I was taken to exhibits of printouts of payments to Ms. Aarts-Chinyanta or to her treatment providers. There were payments to her general practitioner and to MSP, as well as for taxi services, and so forth.

- [116] I accept the plaintiff's submission that some payments coming from Ms. Aarts-Chinyanta's Part 7 benefit pool are being used for MSP payments and other various expenses. Lastly, because Ms. Aarts-Chinyanta will likely benefit from some treatments shortly after trial (e.g., counselling), there should be a slight reduction to the deduction amount to offset the discount rate. The discount rate assumes benefits over Ms. Aarts-Chinyanta's lifetime.
- [117] I reduce the future care cost deduction amount by 25% to take into account these contingencies: Del Bianco; Norris. Accordingly, the deduction will be \$80,100 for the cost of future care.

Disposition

- [118] Based on the above reasoning the following should be deducted from Ms. Aarts-Chinyanta's Judgment:
1. by consent, \$15,694 for income tax;
 2. by consent, \$3,036 for employment insurance;
 3. \$57,976 for past TTD benefits;
 4. \$139,417 for future TTD benefits; and
 5. \$80,100 for costs of future care.
- [119] The parties have leave to speak to costs and prejudgment interest, assuming these issues are raised within a reasonable period of time.

"D. MacDonald J."

- [1] This decision is under appeal: CA46798 notice of appeal filed April 9, 2020.
- [2] Section 31 of the Insurance (Vehicle) Amendment Act, 2018, S.B.C. 2018, c. 19, provides these changes "apply in relation to a bodily injury or death caused by a vehicle or the user or operation of a vehicle on or after the date this Act receives Royal Assent." The Insurance (Vehicle) Amendment Act, 2018 received Royal Assent on May 17, 2018.
- [3] This principle in Ayles is now codified in s. 83(5.1) of the Act which applies to accidents after May 17, 2018. Subsection 5.1 provides that when the court estimates the amount of benefits it "may not consider the likelihood that the benefits will be paid or provided." This section does not apply in this case.
- [4] The plaintiff relied on Day v. Doerksen, 2016 BCSC 2145, where Justice Loo came to a similar conclusion to that of Gropper, J. in Harvey. Justice Loo held the defendants had failed to prove the plaintiff was entitled to benefits and therefore declined to order deductions. However, although the plaintiff relied on s. 96(f), there was no discussion regarding its meaning or whether it prevented payment of Part 7 benefits due to pre-existing conditions. I did not find this case to be of assistance.

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