

CANADA / JUDGMENT

Boparai v. Dhami

2020 BCSC 1813

COURT

Supreme Court of British Columbia

DECIDED

25 November 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1813 Boparai v. Dhami

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Boparai v. Dhami,

2020 BCSC 1813

Date: 20201125

Docket: M173218

Registry: Vancouver

Between:

Amandeep Kaur Boparai

Plaintiff

And

Amritpal Dhami, Rajvinder Kaur Dhami

and Lauren Jane Martinez

Defendants

- and -

Docket: M188806

Registry: Vancouver

Between:

Amandeep Kaur Boparai

Plaintiff

And

Ralph Michael Plastino and

Kendra Shayla Cardinal

Defendants

Before: The Honourable Mr. Justice Davies

Reasons for Judgment

Counsel for the Plaintiff:

M. Laity

Counsel for the Defendants:

R. Fister

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 25, 2020

INTRODUCTION

- [1] The plaintiff, Amandeep Boparai was injured in three motor vehicle collisions. The defendants admitted liability for the three collisions and the two actions commenced by Ms. Boparai as a consequence of the three collisions were joined for trial.
- [2] That trial was heard by a jury over fourteen days commencing on January 20, 2020. The jury delivered its verdict on the evening of February 6, 2020.
- [3] Among the awards made by the jury in favor of Ms. Boparai was a cost of future care award in the amount of \$39,000.
- [4] The defendants now apply under s. 83(5) of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [the Act] for an order that the entire amount of the \$39,000 future care award be deducted from the jury's total award in favor of Ms. Boparai because that amount is available to her under Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 (the Regulation).

ISSUE

- [5] The sole issue to be decided is whether benefits to which the Plaintiff is entitled as accident benefits under Part 7 of the Regulation should be deducted from the cost of future care award made by the jury.

BACKGROUND

- [6] Ms. Boparai's future care claim is multifaceted.
- [7] It includes amounts claimed for her future care based upon her needs for: physiotherapy or intramuscular stimulation; myofacial trigger point injections; massage therapy; work with a personal trainer or kinesiologist; ongoing participation in yoga; goal focussed multidisciplinary active rehabilitation therapy; psychological intervention including counselling; ergonomic assessment and assistance for her work; gym and pool memberships; and, various types of prescription medication.
- [8] Her claims at trial were also complex in that they addressed her need for such care not only for a specific period of time but for flare ups in her symptoms that could occur over a period of many years. Her claims also included the need for future referrals to medical professionals to address her ongoing needs including referrals to a pain clinic and a dietician as well as for a functional capacity evaluation.
- [9] All of those future care needs were supported by expert medical evidence, adduced by her including that of Dr. Lisa Cailier, Dr. Soma Ganesan, and Dr. Sandeep Sharma.
- [10] The defendants adduced the expert evidence of Dr. Amarjit Arneja who offered some suggestions concerning Ms. Boparai's future care needs.
- [11] Neither Ms. Boparai nor the defendants asked the jury to particularize the components of a cost of future care award. Also, neither party adduced a comprehensive cost of future care report.
- [12] Although the defendants did not admit responsibility to pay any specific amount for Ms. Boparai's future care before the jury made its award the position now advanced by the defendants and the Insurance Corporation of British Columbia (ICBC) under s. 83(5) of the Act is that the jury's entire award of \$39,000 should be replaced by Ms. Boparai's entitlement to Part 7 benefits.
- [13] In doing so, the defendants have now filed the affidavit of an ICBC adjuster, Cole Andersen in support of their s. 83(5) and Part 7 application.
- [14] Given the position now advanced by the defendants and ICBC it is necessary to address Ms. Boparai's status as a litigant in the tort claim in respect of which the jury award was made and as an "insured" person under Part 7 of the Regulation as well as the way in which Ms. Boparai's respective tort and Part 7 benefits claims have previously been addressed by ICBC.

- [15] ICBC has concluded that Ms. Boparai was at the time of the three collisions that were the subject of the jury's award, and is still now, an "insured" under s. 78 of the Regulation for the purposes of receiving benefits, including Part 7 benefits under the Regulation.
- [16] ICBC has a separate accident benefit claim open for Ms. Boparai for each of the three collisions and has paid a total of \$20,080.27 in accidents benefits to Ms. Boparai and to service providers under Part 7. Of that amount \$8,568.75 was for medical and rehabilitation benefits paid over the five years in which the claims were outstanding before trial.
- [17] ICBC did not, however, compensate Ms. Boparai for all aspects of her pre-trial care needs submitted by her. ICBC refused reimbursement or payment for: yoga fees; a full (as opposed to a refresher) active rehabilitation program; a sit/stand work station; medical marijuana; and anti-nausea medication. ICBC also refused to pay the cost of chiropractic and psychiatric treatments received by Ms. Boparai after April 2019.
- [18] The evidence also establishes that of those care costs submitted by Ms. Boparai ICBC often reimbursed significantly less than that which had been paid by Ms. Boparai for the services rendered. No evidentiary explanation for that discrepancy was given by Mr. Andersen.
- [19] During the trial the defendants acknowledged that Ms. Boparai should be paid special damages arising from their negligence in the amount of \$27,238.55.
- [20] Analysis of that special damages award establishes that a very significant portion of the award is comprised of medical costs incurred by Ms. Boparai that were far in excess of the amounts paid to her by ICBC as benefits under Part 7.
- [21] The position now advanced by ICBC is contained in the affidavit filed by Mr. Andersen who had deposed that:
12. I have reviewed the reports of Dr. Caillier, Dr. Ameja, Dr. Sharma, and Dr. Ganesan, contained in Exhibit 4, and believe their recommendations for treatment can be summarized as follows:
- a. assessment or treatment by a psychologist or psychiatrist, including cognitive behavioural therapy;
 - b. medication:
 - i. Oral analgesics;
 - ii. Anti-inflammatory medication;
 - iii. Tricyclic antidepressant medications, such as Nortriptyline or Escitalopram;
 - iv. Monamine Oxidase inhibitor medications like Nortriptyline or Amitriptyline;
 - v. Topical anti-inflammatory, such as topical Diclofenac;
 - vi. Gabapentin or Lyrica;

- c. myofascial trigger point injections using Lidocaine;
 - d. sessions with a personal trainer;
 - e. sessions with a kinesiologist;
 - f. a gym or pool pass;
 - g. fees for yoga;
 - h. physiotherapy or intramuscular stimulation (IMS);
 - i. massage therapy; -
 - j. an ergonomic assessment;
 - k. referral to a dietician;
 - l. assessment by a physical medicine specialist;
 - m. MRI of the shoulder;
 - n. assessment by an orthopaedic specialist;
 - o. dry needling or local Lidocaine injection;
 - p. referral to a physiatrist or pain clinic;
 - q. active rehabilitation;
 - r. referral to a functional capacity evaluation.
13. I am authorized on behalf of ICBC to accept the recommendations of the experts who provided opinions on future care, Dr. Caillier, Dr. Ameja, Dr. Sharma, and Dr. Ganesan, on causation and reasonableness in the place of the opinion of ICBC's medical advisor for the purposes of Part 7 benefits up to the amount awarded by the jury of \$39,000.00. And in particular, in place of ICBC's right to rely upon the opinion of the Corporation's medical advisor pursuant to sections 87 and 90 of the Insurance (Vehicle) Regulation.
14. ICBC does not dispute that the care recommendations of Dr. Caillier, Dr. Ameja, Dr. Sharma, and Dr. Ganesan are necessary and that the associated expenses are reasonable and therefore payable under section 88(1) of the Regulation. It also does not dispute that these future care treatments are likely to promote the Plaintiffs rehabilitation and may return the plaintiff as nearly as practicable to her pre injury status or improve her post injury capacity and level of independence and therefore is payable under section 88(2) of the Regulation.
15. I am authorized on behalf of ICBC to waive the need for continued certification under section 88(1.01) and section 88(2) of the Regulation up to the amount awarded by the jury of \$39,000.00. This means that the Plaintiff does not need to obtain from ICBC's medical advisor, or her medical practitioner, a certificate that the treatment is necessary.

16. I am authorized on behalf of ICBC to advise that ICBC irrevocably, unequivocally and unconditionally agrees to pay under Part 7, for any treatment referenced in the reports of Dr. Caillier, Dr. Ameja, Dr. Sharma, and Dr. Ganesan, up to the amount awarded by the jury of \$39,000.00.
17. I affirm this Affidavit in support of the Defendants application for deduction of Part 7 benefits pursuant to section 83 of the Insurance (Vehicle) Act.
- [22] The questions that now must be answered are whether Mr. Andersen's analysis of the medical evidence at trial should be accepted as a basis for determining Ms. Boparai's entitlement to Part 7 benefits and whether the concessions he has now been authorized to make should result in the making of the order now sought by the defendants.

DISCUSSION

[23] Sections 83(2) (4) (5) and (5.1) of the Act provide:

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

[24] Sections 87 and 90 of Part 7 of the Regulation referred to by Mr. Andersen in para. 13 of his affidavit provide:

Review of benefits

87 Any benefits payable under section 80, 84 or 86 may be reviewed every 12 months and terminated by the corporation on the advice of the corporation's medical advisor.

Power to terminate benefits for refusal to undergo treatment or training

90 (1) Where, in the opinion of the corporation's medical advisor or vocational advisor and in the opinion of the medical practitioner attending an insured who is receiving benefits under section 80, 84, 86 or 88,

(a) any medical, surgical or other similar treatment is likely to relieve in whole or part the disability of the insured, or

(b) a retraining or educational program is likely to assist in the rehabilitation of the insured,

the corporation may require the insured, at the expense of the corporation, to undergo treatment or complete the program.

(2) Subject to subsection (3), where an insured refuses to comply with a requirement under this section, the corporation may, after giving the insured at least 60 days' notice in writing, by registered mail, postage prepaid, addressed to the insured at his last address according to the corporation's records, terminate payment of benefits under section 80, 84, 86 or 88.

(3) The insured may, within the period of 60 days mentioned in subsection (2), apply to a judge of the Supreme Court for an injunction against terminating the benefits on grounds that

(a) the treatment the insured is required to undergo

(i) is unlikely to relieve the insured's disability, or

(ii) may injuriously affect the balance of the health of the insured, or

(b) the program the insured is required to complete is not likely to assist in the rehabilitation of the insured.

[25] Sections 88(1) and 88(2) of Part 7 of the Regulation referred to by Mr. Andersen in para. 14 of his affidavit provide:

88

(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.

- (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:
- (a) funds to the insured once during the lifetime of the insured for the acquisition by the insured of one motor vehicle equipped as necessary and appropriate to its use or operation by the insured, the choice of make or model of vehicle to be in the sole discretion of the corporation;
 - (b) funds to the insured once during the lifetime of the insured for alterations to the insured's residence that are necessary to make the residence accessible to and usable by the insured, the style and cost of the alterations to be in the sole discretion of the corporation and the alterations to be limited to necessary ramps, a necessary lift, necessary bathroom alterations and, where the insured is a homemaker or a person who lives alone, necessary kitchen alterations;
 - (c) reimbursement to the insured for the costs of attendant care, other than care provided by a member of the insured's family, where the insured has returned to and is residing in the community but is not capable of performing some or all of the tasks necessary to sustain an independent lifestyle, the amount of the reimbursement to be limited to the lesser of
 - (i) the monthly cost of a group residence, including a long term care facility, that would be appropriate to the care needs of the insured as determined by the rehabilitation team, and
 - (ii) the monthly cost of attendant care required by the insured as a result of injuries from the accident, the level and type of which will be determined by the rehabilitation team based on the level of care provided by Home Community Care services under the Continuing Care Act;
 - (d) reimbursement to the insured for costs incurred from time to time by the insured for the purchase and reasonable repair, adjustment or replacement of one or more of the following items:
 - (i) a wheelchair;
 - (ii) a medically prescribed bed for other than hospital use;
 - (iii) bowel and bladder equipment;
 - (iv) aids for communication, dressing, eating, grooming and hygiene;
 - (v) transfer equipment;
 - (vi) a ventilator;
 - (d.1) reimbursement to the insured for costs incurred from time to time by the insured for the purchase of health care supplies or of health care services not referred to in subsection (1), not exceeding the amount set out in section 3 (3) of Schedule 3;

- (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.
- [26] Section 81.01 of Part 7 of the Regulation referred to by Mr. Andersen in para. 15 of his affidavit provides:

Requirement for receipts

88.01 (1) If an accident occurs for which benefits are provided under section 88, the insured must provide to the corporation a receipt for the expenses incurred that will be compensated as benefits under that section no later than 60 days from the date that those expenses are incurred.

- [27] Since the amendment of the Act on May 17, 2018 to include s. 83(5.1) (that precludes consideration of the likelihood that benefits to which an insured is entitled will be paid or provided) many cases have considered the purpose, effect and application of s. 83 of the Act and Part 7 of the Regulations.
- [28] In many of those cases ICBC adjusters also filed affidavits similar or identical to the affidavit of Mr. Andersen to support applications for the deduction of Part 7 benefits from cost of future care awards made by judges or juries.
- [29] Many, if not all of the reported decisions of this Court since May 17, 2018 (as well as some earlier cases decided by this Court and the Court of Appeal) were referred to by the parties on this application.
- [30] Although the facts of those cases and the awards made were different than those now before me, my review of the legislation and consideration of applicable jurisprudence leads me to conclude that the following principles govern the determination of whether, and if so to what extent, awards for the cost of future care made in tort proceedings should be deducted under s. 83 of the Act and Part 7 of the Regulation:
- 1) Two purposes are served by the deductibility of benefits that a plaintiff in a tort action is entitled to receive from ICBC. The first determines the sum that the plaintiff receives when her tort claims are adjudicated. The second is to prevent the plaintiff from being compensated twice. See: *Quigley v. Jonsen*, 2020 BCSC 216 [Quigley] at para. 3; *Luck v. Shack*, 2020 BCSC 1074 at para. 19 [Luck].
 - 2) A defendant who seeks a deduction under s. 83 of the Act has the burden of establishing that a deduction should be made. See: *Lynn v. Pearson*, (1998), 55 B.C.L.R. (3d) 401 (C.A.) at para. 18.

- 3) There must be strict compliance with the statute in determining what deductions, if any, should be made. Any "uncertainty as to whether a Part 7 benefit will be paid must be resolved in favor of the plaintiff". Any uncertainty created by the Regulation may lead the court to conclude that only a nominal deduction is appropriate: See: *Li. v. Newson*, 2012 BCSC 675 at paras. 14(c) and (i); *Luck* at para. 28.
- 4) Although there are substantive differences in ICBC's obligations to provide non-discretionary benefits under s. 88(1) of the Regulation and discretionary benefits under s. (2) both are liable to deduction from a tort award. See: *Quigley* at para. 10 citing *Ayles v. Talastasi*, 2000 BCCA 87 at para. 32; *Luck* at para. 29.
- 5) The filing of the affidavit of an adjuster authorized to "irrevocably, unequivocally and unconditionally" agree to pay for any treatment referenced in the reports of the medical experts who testified at trial up to the amount awarded by the jury may fully resolve uncertainty as to whether a benefit will be paid as Part 7 benefits. See: *Wark v. Kang*, 2020 BCSC 196 at para. 44; *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953 at paras. 80 and 81 [my emphasis.].
- 6) Although the filing of such an affidavit may carry considerable weight it does not, however, relieve the court of its obligation to independently analyse the evidence and then determine to the extent that it is able to do so the Part 7 benefits which the plaintiff is likely to receive in the future: See: *Sangha v. Inverter Technologies Ltd.*, 2019 BCSC 1174 [Sangha] at paras. 15 and 16.
- 7) Judges must be cautious when assessing a suitable amount to deduct from a cost of care award. Examples of uncertainties a judge should consider includes: how long the plaintiff will need the service; and, the possibility of legislative changes that may take away (or alter) a plaintiff's eligibility for Part 7 benefits. See: *Cikojevic v. Timm*, 2012 BCSC 574 at para. 14; *Sangha* at para. 9.
- 8) Deductibility under s. 83(5) of the Act of entitlement to Part 7 benefits is not to be determined based upon a plaintiff 'making' or 'advancing' a claim. Section 83(5) only reduces a defendant's liability to the amount of the Part 7 benefits to which a plaintiff is entitled that correlate to the claim as determined and assessed by the court. The defendants have the burden of establishing such correlation as to both the claim and the quantum of the award made. See: *Siverston v. Griffin*, 2020 BCSC 528 [Siverston] at paras. 46 and 47.
- 9) Although such correlation may be readily ascertainable by factual findings when liability for and the quantum of entitlement for cost of future care are reduced to judgment by a trial judge sitting without a jury, when a lump sum award is made by a jury determining correlation of the award to the services and treatments available under Part 7 and the degree of correlation may not be possible. See: *Siverston* at para. 48 and 49; *Elliot v. McCligot*, 2020 BCSC 1129 [Elliot] at para. 13.

DECISION

[31] I have concluded that the defendants have not established that the award of \$39,000 made by the jury for Ms. Boparai for the cost of her future care must be deducted in whole or in part under s. 83 of the Act.

[32] I have reached that conclusion because:

- 1) Mr. Andersen does not provide evidence as to what ICBC is agreeing to pay per item under Part 7 so that any corresponding burden upon Ms. Boparai to pay any remaining portion is uncertain. That concern is exacerbated by the historical basis upon which ICBC paid her Part 7 claims, as evidenced by the quantum of Part 7 benefits paid in comparison to the agreed upon special damages award, the vast majority of which related to the same services and treatments incurred before trial and prior to the determination of liability and quantum by the jury.
- 2) Mr. Andersen's summary of the medical evidence upon which he bases his assurances of irrevocable payment is not comprehensive and is somewhat inaccurate.
- 3) More specifically: Dr. Callier recommended life long access to a gym and a pool not to a gym or a pool; Dr. Callier recommended that Ms. Boparai try a trial of Nortriptyline but to switch to Tranzadone or Rremeron if Nortriptyline disturbs her sleep; Dr. Callier opined that Ms. Boparai will need an ergonomic set up of her workstation into the future to manage her headaches for the long term; Dr. Ganesan recommended that Ms. Boparai consult a dietician regarding weight management because of the side effects of medication as well as subsequent monitoring; and, Dr. Arneja's recommendations included a goal focused interdisciplinary team to work alongside active rehabilitation and also recommended the use of hot and cold packs.
- 4) In his summary at para. 12 of his affidavit Mr. Andersen noted that the medical experts at trial had recommended referrals to: a dietician, a physiatrist or pain clinic; and, a functional capacity evaluation. He did not, however, specifically address what the consequences of any such referral might be in respect of Ms. Boparai's entitlement to Part 7 benefits if the referral were to result in a determination that further treatment or services are necessary.
- 5) In result, while ICBC has authorized Mr. Andersen to commit ICBC to pay for the services identified by the medical experts at trial there remains ambiguity about what will be paid for under Part 7 giving rise to interpretive concerns and uncertainty.
- 6) As was the case in *Silverton* and *Elliot* in respect of lump sum jury awards it is impossible in this case to determine what aspects of Ms. Boparai's multi-faceted claims for the cost of her future care were accepted by the jury.

CONCLUSION

[33] The defendants' application under s. 83 of the Act to reduce the jury's cost of future care award in the amount of \$39,000 is dismissed.

[34] Ms. Boparai is entitled to her costs of the defendants' application.

"Davies, J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/18/2020BCSC1813.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/boparai-v-dhami-2020>

Prepared on 29 October 2026 · Esheria