

CANADA / JUDGMENT

Carmody v. Druex

2022 BCSC 1751

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1751 Carmody v. Druex

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Carmody v. Druex,

2022 BCSC 1751

Date: 20221007

Docket: M186505

Registry: Vancouver

Between:

Ashley Jeannette Carmody

Plaintiff

And

Virginie Druex and A Piece of Cake Enterprises

Defendants

Before: The Honourable Justice Branch

Reasons for Judgment

Counsel for the Plaintiff

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Written Submissions Received:

June 30, July 27, 2022

and August 15, 2022

Place and Date of Hearing:

Vancouver, B.C.

August 31, 2022

Place and Date of Judgment:

Vancouver, B.C.

October 7, 2022

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I. INTRODUCTION

[1] In this action, the plaintiff sought compensation for injuries sustained in a motor vehicle accident on December 12, 2016 (the "Accident"). Liability was admitted. I issued reasons reported at *Carmody v Druex*, 2022 BCSC 891 (the "Reasons"). In this supplemental judgment, I address the issues of costs, as well as the deductions required pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231. I adopt the facts set out in the Reasons and will use the same defined terms.

II. REQUEST FOR A STAY

- [2] The defendants effectively put all their eggs in one basket in relation to these supplementary issues. The defendants simply asked that the Court not rule on these issues until their appeal of the order flowing from the Reasons was considered.
- [3] After receiving this limited submission in writing, the court summoned counsel for a further in-person hearing to ensure that the defendants were truly not intending to provide anything further in the way of substantive submissions. Defendants' counsel confirmed that they indeed had no instructions to provide anything further.

- [4] There is no proper basis upon which to grant the requested stay.
- [5] There is no automatic stay of the consideration of these types of supplementary issues simply because the defendants have launched an appeal: Court of Appeal Act, R.S.B.C. 1996, c. 77, s.17. As the court recently stated in *Njoroge v. Canadian Union of Public Employees, Local 15*, 2022 BCSC 88:
- [31] Mr. Njoroge refers to the decision in *Roeder v. Lang Michener Lawrence & Shaw et al.*, 2004 BCSC 80, in which the court considered s. 17, noting at para. 17:

The cases that interpret s. 17 primarily deal with a Supreme Court judge seized with a matter who is asked to consider some aspect of the proceedings while the substantive outcome is under appeal.

- [32] As an example of such a case, the court refers to the decision in *Dyk v. Protek Automotive Repairs Ltd.* (1999), 41 C.P.C (4th) 317 (B.C.S.C.) in which Justice Burnyeat (as he then was) was asked to make a determination as to costs while the substance of the case was under appeal. As noted in at para. 19 of *Roeder*, in that case:
- [19] Justice Burnyeat held at p. 322 "it is clear that this section does not provide an iron clad rule leaving this Court with no jurisdiction to hear further applications". He continued that s. 17:

gives jurisdiction to the Court of Appeal regarding matters under appeal only and not to matters which were not dealt with by the trial judge. In any event, I'm satisfied that the trial judge always maintains a discretion to deal with matters arising out of the trial

Since there had been no determination of costs as related to I.C.B.C. , that issue could not be the subject of an appeal. Thus, Burnyeat J. reasoned that s. 17 should not be so strictly interpreted as to prevent the trial judge from adjudicating matters that flow directly from the original proceeding while an appeal on other grounds is pending.

- [36] In any event, s. 17 of the Court of Appeal Act does not confer upon a Supreme Court judge the jurisdiction to stay proceedings pending appeal. Rather, that jurisdiction is conferred under limited circumstances by the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules], none of which apply in this case, or by its inherent jurisdiction, confirmed by s. 8 of the Law and Equity Act, R.S.B.C. 1996, c. 253: *Roeder* at paras. 25 - 26. However, such jurisdiction will be "rarely exercised": *Watt v. Health Sciences Association*, 2015 BCSC 2468 at para. 15.
- [37] At para. 29 of the *Watt* decision, the court adopted the relevant principles to be applied when considering a request for a stay pending appeal as set out in *Roe, McNeill & Co. v. McNeill* (1994), 49 B.C.A.C. 247, 1994 CanLII 2105 (B.C.C.A.). They are summarized, with citations omitted, as follows:
- a) A successful plaintiff should not be deprived of its judgement unless the interests of justice require that it be withheld until the appeal is decided;

- b) The court's power to grant the stay is discretionary and should be exercised only where it is necessary to preserve the subject matter of the litigation, to prevent irreparable damage or where there are other special circumstances;
- c) In the exercise of its discretion, the court may weigh the interests of the parties the balance of convenience and any prejudice that may arise; and
- d) A first step to consider on a motion for a stay is to determine whether an appeal is without merit or has no reasonable prospect of success.

[Emphasis added.]

[6] Applying these factors to the present fact pattern:

- a) The plaintiff confirmed at the hearing that the defendants have paid nothing to date on account of the judgment, notwithstanding the absence of any stay.
- b) There is no issue about preserving the subject matter of the litigation. Any damage is likely to be suffered by the plaintiff who will not receive her required care supports unless the judgment is paid.
- c) In balancing the convenience of the parties, it would be easier for the insured defendants to pay the judgment and costs (as adjusted to account for the findings on the supplementary issues) than for the plaintiff to be deprived of the fruits of her judgment: Njoroge at para. 42.
- d) I am, perhaps not surprisingly, unable to identify any obvious errors in my judgment.
- e) To date, the defendants have taken no steps in the appeal, other than the filing of the Notice of Appeal: Njoroge at para. 40. Ideally, any s. 83 issues would be addressed as part of a final Order on which the appeal would proceed: Rab v. Prescott, 2021 BCSC 1206 at para. 43.
- f) There are no other obvious special circumstances supporting a stay.

[7] As such, I find no basis for the court to decline to address the supplementary issues at this time.

III. COSTS

[8] The plaintiff seeks an order for costs up to the date of her final offer to settle, and double costs thereafter.

[9] The relevant history in respect of the exchange of offers is as follows.

[10] The plaintiff attended examinations for discovery on January 31, 2020 and June 1, 2021. Medical treatment and employment documents were produced. The plaintiff also attended three medical examinations. Expert reports were exchanged and served.

[11] By letter dated March 11, 2022, the defendants delivered a Formal Offer to Settle in the amount of \$230,000, plus costs.

- [12] By letter dated March 15, 2022, the plaintiff delivered a Formal Offer to Settle (the "Final Offer") in the amount of \$575,000, plus costs and disbursements.
- [13] Certain limited document production continued thereafter.
- [14] A mediation took place on November 9, 2021. No settlement was reached.
- [15] The trial took place beginning on March 21, 2022.
- [16] Pursuant to the judgment issued on May 30, 2022, the plaintiff was awarded \$587,576.95, an amount in excess of the \$575,000 Final Offer.
- [17] However, the consideration of any entitlement to double costs pursuant to Rule 9-1 must first factor in any deductions required by s. 83 of the Insurance (Vehicle) Act, and s. 88 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 [Regulation]: Rab at para. 43; Sidhu v. Alton, 2021 BCSC 265; Enns v. Corbett, 2021 BCSC 2 at para. 2; Wepryk v. Juraschka, 2013 BCSC 804 at para. 8; Singh v De Santis, 2022 BCSC 1137 at para. 56.
- [18] As will be seen below, I have determined that there must be a \$18,376.61 deduction from the award pursuant to s. 83. This deduction means that the plaintiff's Final Offer was actually higher than the plaintiff's net award of \$569,200.34. Given that reality, I find no circumstances justifying an award of double costs. However, the plaintiff is entitled to the usual award of costs.

IV. SECTION 83 DEDUCTIONS

- [19] The defendants' submissions did not provide any detailed analysis of the deductions required pursuant to s. 83 of the Insurance (Vehicle) Act, and the Regulations. As noted above, rather than making formal submissions, the defendants relied on their assertion that their filing of a Notice of Appeal should cause this court to decline to consider the s. 83 issues at this time. I have already rejected that request.
- [20] The defendants prepared a 3-page memorandum sent to the plaintiff that briefly outlines the defendants' views on s. 83, which they attached to an affidavit of a legal administrative assistant. With respect, this is not the proper manner by which to put a legal submission before the court.
- [21] The defendants also failed to put forward the type of supporting affidavit evidence normally required to support such deductions. Evidence by way of an affidavit from the handling adjuster at ICBC is generally necessary as, absent such evidence confirming ICBC's intentions and positions, there will often be uncertainty as to whether the no-fault accident benefits will in fact be paid, and at what level. In Luck v Shack, 2020 BCSC 1074, Justice MacDonald stated:
- [58] The deficiencies in the evidence create uncertainties regarding the future payment of benefits. Any uncertainties must be resolved in favour of Ms. Luck In Del Bianco v Yang, 2020 BCSC 410, even despite an affidavit having been prepared by the handling adjuster,

Justice Groves found that, given the history of the dealings between the plaintiff and the adjuster, the defendant had failed to provide the court with sufficient confidence that if money was deducted from the tort award for Part 7 scheduled benefits, benefits would actually be paid: see paras. 18 and 19. Although the defendants sought to deduct the award by \$56,648, only a nominal deduction of \$1,750 was made.

- [22] In the present case, there is in fact no need to evaluate the quality of an adjuster affidavit. Rather there is simply no affidavit at all. In such circumstances, there is no proper basis to make any deductions that are potentially dependent on the exercise of ICBC's own assessment processes or discretion, particularly given that the defendants bear the onus of proving that the plaintiff is entitled to the Part 7 benefits which the defendants seek to deduct: *Safdari v Buckland*, 2020 BCSC 2019 at para. 17.
- [23] That said, there are certain benefits that are mandatory for which no affidavit evidence from ICBC may be necessary. The case law instructs that, in order to discharge its function under s. 83(5) of the Act, the court has an obligation to independently analyze the evidence and then determine, to the extent that it is able, the Part 7 benefits which the plaintiff has received or is likely to receive in the future: *Sangha v Inverter Technologies Ltd.*, 2019 BCSC 1174 at para 16. In *Aarts-Chinyanta v Harmony Premium Motors Ltd.*, 2020 BCSC 953, the court stated:
- [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.

[Emphasis added.]

[24] I find that the relevant mandatory benefits in this case are as follows:

- a) **Chiropractic Treatment:** Certain costs for this type of treatment are compensable without a medical certificate satisfactory to ICBC. It is only after either 12 weeks or the maximum number of pre-authorized treatments that ICBC must be satisfied with a medical certificate. Even absent an ICBC affidavit, I am able to conclude that the mandatory benefits for these initial sessions should be deducted. This would include a maximum of 25 initial sessions which do not require medical certification pursuant to s. 88 and Schedule 3.1 of the Regulation. This equates to 25 sessions at \$53 per session, or \$1,325.
- b) **Active Rehabilitation/Kinesiology Treatment:** On the same analysis, I find that the mandatory nature of the benefits supports a deduction for 12 sessions at \$78 per session, or \$936.

- c) Psychological Treatment: On the same basis, there should be a deduction for 12 sessions at \$195 per session, or \$2,340.
 - d) Occupational Therapy: This type of treatment is not subject to the requirement for a medical certificate after 12 weeks. Given ICBC's limited ability to contest the payment of such benefits under the Regulations, I find that the entire \$3,354.64 awarded at trial for this treatment should be deducted.
 - e) Medication: The same analysis applies to this category of expense. As such, I would deduct \$10,420.97 representing the cost of medications for which the plaintiff was awarded compensation at trial. I note that the plaintiff did not argue or establish that she has other coverage available for such medications which could have the effect of avoiding any deduction: Singh at paras. 21, 39-44. Note as well that I have not treated my award for Botox as a medication item that must be deducted under s.83. In *Fatin v Watson*, 2021 BCSC 1210, at paras 31-34, the court did make a deduction for Botox as a mandatory benefit. But in that case, an ICBC insurance adjuster had deposed that Botox would be treated by ICBC as a mandatory item under s.88(1)(c) of the Regulations. Similar adjuster evidence, or ICBC agreement, was present in other cases where Botox has been treated as a deductible mandatory benefit: Singh at paras. 20, 37; *Purewal v Uriarte*, 2021 BCSC 1935 at paras 7, 38-44; *Plensky v. Di Biase*, 2010 BCSC 1649 at para.16. In this case, the court does not have the benefit of such confirmation and certainty. Furthermore, ICBC, in failing to engage directly on this point, has failed to establish that the Botox award is not more properly treated as a discretionary rehabilitative award under s.88(2). Botox treatments have been treated as a discretionary benefit in several cases: *Aarts-Chinyanta* at para 101; *McColl v Sullivan*, 2020 BCSC 2041 at para. 15. In cases involving discretionary payments, affidavit evidence from ICBC is be even more essential in order to support the deduction.
- [25] Other than for these limited mandatory amounts, in the absence of an affidavit from ICBC, it is unclear whether ICBC is prepared to concede that any prerequisites to payment would be satisfied or waived: *Zhang v 328633 B.C. Ltd.*, 2021 BCSC 650 at para. 52. As such, I make no further deductions.

[26] The total deduction is hence \$18,376.61.

V. CONCLUSION

- [27] Costs of the action are payable to the plaintiff. A deduction of \$18,376.61 from the award shall be made pursuant to s. 83 of the Insurance (Vehicle) Act.

"The Honourable Mr. Justice Branch"

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