

CANADA / JUDGMENT

Chan v. Hogan

2024 BCSC 328

COURT

Supreme Court of British Columbia

DECIDED

1 February 2024

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2024 BCSC 328 Chan v. Hogan IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Chan v. Hogan, 2024 BCSC 328 Date: 20240201 Docket: M200819 Registry: Vancouver Between: Ki Yu Chan, also known as Kitty Chan Plaintiff And: Michael Donal Hogan, Coast Mountain Bus Company Ltd. and South Coast British Columbia Transportation Authority, doing business as TransLink Defendants Before: Associate Judge Muir Oral Reasons for Judgment In Chambers Counsel for the Plaintiff: T.R. O'Mahony Counsel for the Defendants: J.D. James Place and Date of Hearing: Vancouver, B.C. February 1, 2024 Place and Date of Judgment: Vancouver, B.C. February 1, 2024

- [1] THE COURT: This is an application by the plaintiff for an order under ss. 5(6) of the Disbursements and Expert Evidence Regulation, B.C. Reg. 210/2020 and amendments thereto [Regulation] for exclusion of the following disbursements:
- a) psychiatry report, expert preparation, and trial attendance fees;
 - b) functional capacity evaluation and cost of future care report, expert preparation, and trial attendance fees;
 - c) flight tickets and accommodations for the plaintiff to attend these independent medical examinations ("IMEs"); and
 - d) mediation fees.
- [2] The evidence indicates that the plaintiff was injured in a motor vehicle accident that occurred on May 23, 2018, where she was attempting to board a city bus (the "accident"). The door closed and caused her to fall back into the street, I gather, and she alleges that she sustained multiple injuries to her back, neck, shoulders, left arm, right hand, hips, tailbone, soft tissue injuries, lacerations, abrasions, et cetera.
- [3] Plaintiff's counsel referred me to medical evidence indicating that the plaintiff has got ongoing chronic back issues, arguably as a result of this accident, although the defendants allege that causation is in issue and submit that the ongoing chronic back injuries could be a result of the plaintiff's two pregnancies.

- [4] At the time of the accident, the plaintiff was 35, and she will be 40 at the time of trial, which is coming up in July 2024. The 84-day deadline for expert reports is April 26, 2024.
- [5] At the time of the accident, the plaintiff was employed 15 to 20 hours a week and doing courses for a degree at Vancouver Community College. She was pregnant at the time. She ceased work after the accident and moved to Australia. She has since had another child and attempted a return to work after being a stay-at-home mother for some time.
- [6] I am looking at an affidavit sworn January 18, 2024 by Mr. Goodman, a lawyer with the firm that is counsel for the plaintiff, that notes the plaintiff in 2023 started working as a childhood educator two days a week, earning approximately Australian \$20 an hour. She worked there for about a month from February to March 2023, then quit the job when it was too much for her symptoms. She then took a part-time job as a casual dental assistant from April 5, 2023 for three days a week, earning Australian \$33.81 an hour, and then a second part-time job from mid-November 2023 for two days a week at an hourly rate of Australian \$30. She is now earning roughly an hourly rate of \$30 and change, working five days a week. That is in Australian dollars.
- [7] The evidence supports that the plaintiff continues to be limited from her pre-accident activities, and Mr. Goodman deposes that, based on experts he has hired for other motor vehicle claims, a physiatry expert report ranges from \$5,000 to \$7,000 and a functional capacity evaluation and cost of future care report also ranges from \$5,000 to \$7,000. He believes, given the severity and nature of the plaintiff's injuries, that the report of a physiatrist and a functional capacity evaluation expert are necessary to enable the court to determine causation and assess damages.
- [8] Mr. Goodman deposes in his affidavit that he estimates that the cost of flight tickets from Australia and accommodations for the purpose of attending the IMEs to cost approximately \$8,000 to \$9,000. He estimates that if the matter goes to trial, another \$5,000 to \$7,000 in disbursements would be incurred for each of the experts for preparation and trial attendance fees. He then deposes that it is his practice to require mediation in all of his claims, and that he would expect to incur \$1,500 to \$2,000 in mediation fees, half of which would be borne by the defendants.
- [9] Mr. Goodman says in his affidavit that there had been \$1,800 in disbursements incurred to that date. He estimates that exclusive of any expert or mediation fees, there will be an additional \$2,000 in incidental disbursements between now and the trial. He then says that he estimates the value of the plaintiff's claim to be \$100,000 to \$500,000 and that there is a reasonable risk that the total amount of disbursements that the plaintiff needs to incur to resolve her claim will exceed the disbursement limit. I point out that the disbursement limit for a recovery of \$100,000 would be \$6,000, and for \$500,000 would be \$30,000.

- [10] Mr. Goodman further says in his affidavit that he is concerned that the plaintiff will not be able to pay the disbursements; that she will suffer prejudice; that she will be prevented from having her losses remedied; and that she will not be made whole by an award at trial. He says that she might well choose to compromise her claim by taking less money than she is entitled to in order to avoid the consequence of depleting her award by un-excluded disbursements.
- [11] I have gone through the evidence in some detail because part of the defendants' submission was that there was no evidence upon which I could base the conclusion that I am required to come to under ss. 5-9(b) of the Regulation. The defendants referred me to the decision of Associate Judge Hughes in *Garcia v. Gill*, 2024 BCSC 108. I think that this case is quite distinguishable from that case. In that case, at para. 13, Associate Judge Hughes said:
- [13] The plaintiff invites this court to take judicial notice that the cost of a typical medical report exceeds \$5,000, and that expert medical evidence including trial attendance exceeds \$7,000. []
- [12] Associate Judge Hughes then goes on to look at the test for judicial notice, and in para. 15 says:
- [15] I am not satisfied that it is appropriate for the court to take judicial notice of the typical cost of an expert report [...]
- [13] This is quite different. I am not being asked to take judicial notice of anything. I am being given counsel's opinion as to the anticipated costs based on counsel's experience in similar litigation. Pursuant to ss. 5-8(a) of the Regulation, the application has to be made before the disbursements are incurred, and thus it has to be uncertain, but, obviously, cases are going to vary, as counsel submitted, as to the extent, for example, of documents, medical records, and other things that the expert is being asked to look at prior to the actual medical evaluation and the costs will vary accordingly.
- [14] Subsection 5-9(b) of the Regulation requires evidence, first of all, that there is a reasonable risk that the total amount of disbursements the party intends to incur to resolve the vehicle-injury proceeding will exceed the disbursement limit. Here, as I said, if we look at the \$100,000 estimate, \$6,000 is clearly going to be exceeded--perhaps even absent any expert reports at all--the status of disbursements being \$1,800 to date and another \$2,000 anticipated; that is \$3,800 without any experts. Even at a \$30,000 limit, the anticipated disbursements exceed the disbursement limit.
- [15] Secondly, there must be evidence that the disbursements that are the subject of the application are necessary to justly resolve the vehicle-injury proceeding, in light of the complexity of the vehicle-injury proceeding or the importance of the issues in dispute. Here, there is evidence that the plaintiff has ongoing chronic back injuries, and the evidence of Mr. Goodman is that the expert opinion of a physiatrist and a functional capacity and future care expert is required. That, in my view, satisfies the requirement under ss. 5(2) of the

Regulation.

[16] Subsection 5(9)(b)(iii) of the Regulation provides: evidence that the party would be unable, without undue hardship, to incur the disbursements that are the subject of the application were those disbursements not excluded.

[17] Here, the plaintiff's annual income--assuming she is able to continue in the two part-time jobs that she is presently involved in--is about Australian \$67,000. As the estimates of the disbursements are about \$30,000, and as Australian dollars are presently valued less than Canadian dollars, that is likely more than half of her annual income, I am satisfied that that constitutes undue hardship.

[18] As the plaintiff noted, the onus is on her to prove her claim, and she must advance evidence of her injuries, causation, and her lack of ability to do more lucrative employment or other employment, and these disbursements are necessary.

[19] The disbursements that I have concerns about are the costs of flights for the plaintiff to fly back and forth from Australia in order to attend the IMEs. Although I appreciate that these disbursements will be large, I am also cognizant of the fact that, first of all, we have no real numbers--as it was a global estimate by counsel for the plaintiff and I have no idea what it was based on. More importantly, it was the plaintiff's decision to move to Australia in the face of having this claim. In my mind, given the purpose of the Regulation--that is, keeping the costs of litigation down--having chosen to move outside of the jurisdiction while the court action was pending is incumbent on the plaintiff to bear the costs or the increased costs of that rather than have those excluded from the impact of the 6 percent limit in the Regulation.

[20] Accordingly, I make the following orders:

1. Paragraphs 1(a) and (b) of the plaintiff's notice of application concerning the disbursements for the psychiatry report, expert preparation and trial attendance fees, the functional capacity evaluation and cost of future care report, expert preparation and trial attendance fees are allowed;
2. Paragraph 1(c) concerning flight tickets and accommodation to attend IMEs is dismissed;
3. Paragraph 1(d) concerning mediation fees is allowed; and
4. Paragraph 2 concerning disbursements incurred by the plaintiff for this application are excluded of s. 5(2) of the Regulation is allowed. [SUBMISSIONS ON COSTS]

[21] THE COURT: Costs will be in the cause. "Associate Judge Muir"

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