

CANADA / JUDGMENT

Chawla v. Gebert

2025 BCSC 2263

COURT

Supreme Court of British Columbia

DECIDED

21 November 2025

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2025 BCSC 2263 Chawla v. Gebert

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chawla v. Gebert,

2025 BCSC 2263

Date: 20251121

Docket: M200898

Registry: New Westminster

Between:

Rina Chawla

Plaintiff

And

Kevin Leonard Gebert

Defendant

- and -

Docket: M237443

Registry: New Westminster

Between:

Rina Chawla

Plaintiff

And

Lorenzo Joseph Cavasinni and Cierra Judith Harris

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

Counsel for the Plaintiff:

J. Malik

Counsel for the Defendants and Third Party:

E. Haupt

Place and Dates of Hearing:

New Westminster, B.C.

June 30 and September 29, 2025

Place and Date of Judgment:

New Westminster, B.C.

November 21, 2025

Table of Contents

I. Introduction.. 4

II. Background Facts. 5

A. The Accidents, Trial and Jury's Verdict 5

B. ICBC's Disclosure Application. 7

III. DISCUSSION.. 8

A. Deduction of Benefits from the Trial Award. 8

1. Does the Pre-Amendment Act or the Post-Amendment Act Apply?. 8
2. What, if Any, Deductions Should be Made to the Trial Award under s. 83 of the Pre-Amendment Act?. 11

- a) Governing Legal Principles. 11
- b) ICBC's Claim for Part 7 Deductions. 14
- i. Special Damages. 16
- ii. Loss of Homemaking Capacity. 17
- iii. Cost of Future Care Award Deduction \$67,546.55. 22
- iv. Loss of Future Income Capacity. 28
- 3. Conclusion - Deductions from the Trial Award. 30
- B. Plaintiff's Application to Examine Jennifer Brown. 30
- C. Plaintiff's Application to Examine Mr. Mandair 33
- D. Plaintiff's Application for Special Costs. 34
- IV. Order.. 34
- V. Costs of this Application.. 35

I. Introduction

- [1] The plaintiff, Rina Chawla, was involved in two motor vehicle accidents. The first accident occurred on June 2, 2016 (the "First Accident") and the second on May 19, 2019 (the "Second Accident"). The plaintiff filed claims against the personal defendants as well as the third-party defendant, ICBC. Given that ICBC represented the third-party defendants in the actions, I will refer to all the defendants collectively as ICBC in these reasons.
- [2] The trial of both actions was heard together before a jury commencing January 15, 2024. Final submissions were made on January 29, 2024, and the instructions to the jury (the "Jury Instructions") were on January 30, 2024. On January 30, 2024, the jury awarded the plaintiff damages (the "Trial Award").
- [3] Despite the trial concluding almost two years ago, ICBC has not yet paid the full amount of the Trial Award to the plaintiff. Issues remain regarding the amount that should be paid to the plaintiff based on deductions ICBC asserts should be made to the Trial Award pursuant to the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [Act] and Part 7 of the Insurance (Vehicle) Regulation, BC Reg 447/83 [Regulation].
- [4] There are four substantive matters now before the Court. The first is what, if any, deductions should be made to the Trial Award pursuant to the Act and the Regulation. As referenced above, the First Accident occurred on June 2, 2016, and the Second Accident occurred on May 19, 2019. The significance of the accident dates is that they straddle May 17, 2018; the date that British Columbia's Insurance (Vehicle) Amendment Act, 2018, S.B.C. 2018, c. 19, took effect, amending the Act. For clarity, I will refer to the Insurance (Vehicle) Act prior to the amendment as the "Pre-Amendment Act" and the legislation in its current form as the

"Post-Amendment Act". Given the timing of the accidents being before and after the amendment, and the fact that the jury found the injuries indivisible, the parties disagree as to which version of the Act should apply.

- [5] The second issue relates to an order sought by the plaintiff to compel Jennifer Brown, an adjuster employed by ICBC, who affirmed the affidavit justifying the deductions to the Trial Award, to be examined in respect of the contents of her affidavit. The plaintiff acknowledges that the Court could determine the issues of the deductions without additional evidence from Ms. Brown but seeks the examination of Ms. Brown on the basis that it may be of assistance to the Court in understanding why ICBC believes certain deductions are justified.
- [6] The third issue before the Court is the plaintiff's request for an order compelling an investigator for ICBC, Jaspreet Mandair, to submit to an examination for discovery. The plaintiff asserts that an examination is required to determine if Mr. Mandair acted in bad faith by contacting the plaintiff's ex-husband during the plaintiff's cross examination at trial. The plaintiff alleges that contacting her ex-husband was designed to rattle her on cross-examination for a strategic advantage. The plaintiff seeks the evidence on examination for discovery to make a claim for special costs.
- [7] The fourth issue is the plaintiff's claim for special costs for the trial. However, given the plaintiff's desire to first cross-examine Mr. Mandair to obtain information for its claim that special costs are warranted, the application for special costs was not argued before me with any specificity.
- [8] In these reasons for judgment, I will set out some background facts for context and then turn to my analysis and determination.

II. Background Facts

A. The Accidents, Trial and Jury's Verdict

- [9] The First Accident occurred on June 2, 2016, at 82 Avenue and 120 Street, in Surrey, BC. The plaintiff was rear-ended by Mr. Gebert.
- [10] The Second Accident occurred on May 19, 2019, at Jones Creek Forest Service Road, in Chilliwack, BC. A motor vehicle driven by Mr. Cavasinni and owned by the defendant Ms. Harris, rear ended a motor vehicle in which the plaintiff was a passenger.
- [11] ICBC is the third party defending both actions. Liability was admitted for both accidents.
- [12] After final submissions and before commencing deliberations, the Court provided the jury with the Jury Instructions. The Court also provided the jury with a document titled "Questions for the Jury" that set out categories of types of losses that the plaintiff had claimed with empty spaces beside each for the jury to populate the dollar amount it awarded to the plaintiff (the "Verdict Sheet"). The Verdict Sheet asked the jury if the plaintiff's injuries from the First Accident resolved prior to the Second Accident. The jury answered "no". The Verdict Sheet then instructed the jury, if it found that the plaintiff's injuries did not resolve

after the First Accident and before the Second Accident that the assessment of damages would be in respect of "Indivisible injuries."

[13] On the Verdict Sheet the jury awarded the plaintiff the following amount of money under the following categories related to injuries from the First and Second Accident:

1.

Non-pecuniary Loss

Pecuniary Losses

\$10,000.00

2.

a.

Special Damages

\$16,000.00

b.

Past Loss of Income

\$28,000.00

c.

Loss of Future Income Capacity

\$107,000.00

d.

Loss of Homemaking Capacity

\$70,000.00

e.

Cost of Future Care

i.

Pain Management

\$1,300.00

ii.

Homemaking Assistive Devices

\$1,500.00

iii.

Homemaking Assistance

(seasonal assistance only)

\$9,000.00

iv.

Ergonomics

\$1,800.00

v.

Rehabilitation/Health Related Costs

1.

Pain Program

\$12,500.00

2.

Fitness Pass, Adult

no award

3.

Fitness Pass, Senior

no award

4.

Fitness Pass, 70+

no award

5.

Kinesiology

no award

6.

Massage Therapy

\$23,000.00

7.

Acupuncture

(in place of physiotherapy)

\$23,000.00

8.

Chiropractic Treatment

no award

9.

Psychologist, initial 12 sessions

\$3,000.00

10.

Occupational Therapy

\$3,000.00

vi.

Medication Related Costs

no award

[14] The total damages amounted to \$309,100.00.

[15] In respect of the issue of indivisibility of injuries, the jury was provided with the following information in the Jury Instructions before they commenced their deliberations:

As I understand the defendants' theory of the case, they argue that Ms. Chawla, if she were injured at all in the first accident, had fully recovered from those injuries by January 2017. As such, they are asking you to divide Ms. Chawla's injuries between the first and second accidents. To determine whether the injuries are divisible or indivisible, you should consider whether you can sensibly determine which aspects of the injuries can be attributed to each event and divide them accordingly. For example, if you think either Mr. Gebert or Mr. Cavasinni can rightly point to some aspect of the injuries and say "I had nothing to do with that", then the injuries are divisible. An obvious example might be where the first event results in a broken leg, while the second event results in a broken arm.

[16] To reiterate, the jury did not distinguish the plaintiff's injuries between the First and Second Accident and found them to be indivisible.

B. ICBC's Disclosure Application

- [17] ICBC brought an application for disclosure before me on May 21, 2024. At that application, ICBC submitted it was entitled to know the amounts that the plaintiff's private insurers have, or will, pay since the Second Accident so that those amounts can be deducted from the Trial Award, or at least so ICBC can argue that the amounts should be deducted from the Trial Award at a s. 83 hearing. At the disclosure application, ICBC asserted that without the disclosure, it was deprived of the opportunity to make complete submissions on the proper deductions from the Trial Award pertaining to s. 83 of the Act.
- [18] On August 15, 2024, in reasons indexed as *Chawla v. Gebert*, 2024 BCSC 1502 (the "Disclosure Decision"), I ordered that the plaintiff should produce the documents. I understand from the plaintiff's submissions that the disclosure led to only minor changes to ICBC's position on deductions from the Trial Award.

III. DISCUSSION

- [19] I will first address ICBC's argument that it should be entitled to deduct amounts from the Trial Award.

A. Deduction of Benefits from the Trial Award

1. Does the Pre-Amendment Act or the Post-Amendment Act Apply?
- [20] The parties take opposing positions on whether, when assessing ICBC's claim for a deduction of benefits, the Court should apply the pre or post amendment version of s. 83.
- [21] The plaintiff asserts that because the jury determined that the plaintiff's injuries were indivisible between the First Accident and the Second Accident, the Pre-Amendment Act should apply as it was operative during the time that the plaintiff suffered the injuries from the First Accident.
- [22] ICBC asserts that because the injuries are indivisible the Court should utilize the Post-Amendment Act to determine which benefits are applicable. ICBC largely bases its argument on the fact that it believes that the plaintiff will be doubly compensated if she is paid benefits from the Trial Award that will not be claimed through a subrogated claim by a third-party insurer.
- [23] As I will describe below, the amendments included changes to s. 83 of the Pre-Amendment Act. The amended version of s. 83 eliminates the private insurer/employer subrogation rights by making formerly non-deductible collateral benefits deductible. Further, the scope of deductions was expanded considerably in the amendments which made changes for accidents occurring after May 17, 2018. After the amendments, the "benefits" to be deducted include amounts paid or payable "under insurance, wherever issued and in effect". Other provisions eliminate the right of subrogation by other insurers: *Tomanik v. Brunet*, 2024 BCSC 1669 at para. 4.

- [24] In my view, the answer to the question of whether the Pre-Amendment Act or the Post-Amendment Act applies is found in the language of s. 31 of the Insurance (Vehicle) Amendment Act, S.B.C. 2018, c. 19. Section 31 is a transitional provision providing that the amended legislation is to "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". [Emphasis added]
- [25] The jury's answer on the Verdict Sheet is unequivocal. The jury found that the plaintiff's injuries had not resolved after the First Accident and before the Second Accident. Further, the jury clearly indicated that the plaintiff's injuries were "indivisible".
- [26] While one cannot know what was in the minds of the jury, it is clear from the Verdict Sheet they concluded that the plaintiff's injuries from the First Accident had not resolved by the Second Accident. Accordingly, I conclude that the plaintiff's injuries should not be considered to be "in relation to a bodily injury caused by a vehicle on or after [May 17, 2018]". The plaintiff suffered injuries before May 17, 2018, that had not resolved by the Second Accident. While I accept that it is possible that the jury determined that the plaintiff's injuries were aggravated by the Second Accident, it would be improper and illogical in my view, to conclude that the plaintiff's injuries were "caused" by the Second Accident that occurred later in time than the First Accident.
- [27] To support this conclusion, I find that the analysis of Justice Horsman (as she then was) of assistance in the discussion of the concept of indivisibility in *Sharma v. Day*, 2020 BCSC 1365. Our Court of Appeal in *Alragheb v. Francis*, 2021 BCCA 457 at para. 64 adopted a passage of *Sharma* regarding indivisibility as follows:
- [90] An indivisible injury cannot, by definition, be divided into distinct parts. Defendants are jointly liable to the plaintiff because it is impossible to divide the injury up into constituent causes or points in time: *Bradley v. Groves*, 2010 BCCA 361 at para. 34 [Bradley]. Where damages for a single, indivisible injury are apportioned between tortfeasors pursuant to the Negligence Act, the inquiry is into fault, rather than causation, with "fault" meaning blameworthiness.
- [28] When a court attempts to apportion an indivisible injury, it may do so based on blameworthiness between the tortfeasors, not the causation of the injury. The difficulty of attempting to divide an indivisible injury based on causation was referenced in *Alragheb* at para. 80:
- [80] David Cheifetz notes in *Apportionment of Fault in Tort* (Aurora: Canada Law Book Ltd., 1981) at 100: "[The] departure from the standard of reasonable conduct determines the 'blameworthiness' or 'culpability' of each person and the court is to compare this culpability on the part of each of the persons in order to determine the degree of fault or negligence to be attributed to each". Citing *Chapman "Apportionment of Liability Between Tortfeasors"*, 64 L.Q. Rev. 26 (1948), at 101 Cheifetz observes, "Causation itself is difficult enough; degrees of causation would be a nightmare".

- [29] Respectfully, in the case at bar, it seems that ICBC is attempting to divide the damages on the basis of the causation of the injuries by apportioning some of the injuries and treatments to the First Accident and some to the Second Accident. This runs counter to the jury's finding of indivisibility. In other words, trying to assess what injuries were caused by each accident and what treatments relate to each accident, given the jury's finding of indivisibility, would result in the "nightmare" described in the passage above quoting Mr. Cheifetz.
- [30] While there may be some cases where it would be clear on the evidence that a certain treatment is related to an injury specifically caused by a specific accident, I do not find this is such a case based on the evidence presented at trial. Moreover, given this was a jury trial, it cannot be known with certainty how the jury determined the awards or whether they related to an injury from the First or Second Accident. In any event, such an exercise runs counter to the jury's unequivocal finding that the plaintiff's injuries from the First Accident did not resolve when the Second Accident occurred and are indivisible.
- [31] ICBC bears the onus of proving that the plaintiff is entitled to the benefits which they seek to deduct under the Act and Regulation: *Sangha v. Inverter Technologies Ltd.*, 2019 BCSC 1174 at para. 8. As such, if I am not persuaded on a balance that some or all of the injuries arise from the Second Accident, ICBC has not met its burden.
- [32] Given the foregoing, I conclude that it is not possible to divide the causation of the plaintiff's injuries as between the First Accident and the Second Accident given the jury's finding that the causation was indivisible. I am satisfied that it is most appropriate to consider that the plaintiff's injuries resulted from the First Accident and thus considered under s. 83 of the Pre-Amendment Act.
- [33] As such, I conclude that s. 83 of the Pre-Amendment Act should apply to ICBC's application to deduct benefits from the Trial Award.
- [34] I will now turn to that analysis.
2. What, if Any, Deductions Should be Made to the Trial Award under s. 83 of the Pre-Amendment Act?
- a) Governing Legal Principles
- [35] Under s. 83 of the Pre-Amendment Act, a defendant may apply to deduct amounts that the plaintiff, as an insured, is entitled to receive as "no fault" benefits under the Regulation. Part 7 of the Regulation outlines the no fault benefits available to an eligible insured person injured in a motor vehicle accident.
- [36] Section 88 of the Regulation establishes the regulatory scheme for medical and rehabilitation benefits that include mandatory benefits under s. 88(1) and discretionary benefits under ss. 88(1.01) and 88(2) of the Regulation. Section 84 and 86 of the Regulation provides that benefits will be provided to an insured to perform household tasks.

- [37] Table 1 of Schedule 3.1 of the Regulation, referred to in s. 88(1.01), sets out fee limits and the number of pre-authorized treatments for certain treatments. The maximum payable will change from year to year.
- [38] Section 83 of the Pre-Amendment Act provides as follows:
- 83 (1) In this section and in section 84, "benefits" means benefits
- (a) within the definition of section 1.1, or
 - (b) that are similar to those within the definition of section 1.1, provided under vehicle insurance wherever issued and in effect,
- but does not include a payment made pursuant to third party liability insurance coverage.
- (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 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.
- [39] In *Boparai v. Dhami*, 2020 BCSC 1813 at para. 30, Justice Davies summarized the salient principles a court should consider when determining if it is appropriate to make deductions under s. 83:
- [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
- 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. McCliggot, 2020 BCSC 1129 [Elliot] at para. 13.

[Emphasis added in Boparai.]

- [40] A court must be satisfied that there is statutory entitlement to the benefits. If there is no statutory entitlement, there can be no deduction because an ICBC specialist cannot authorize deductions beyond what the statute permits: Schmitt v. Thomson (1996), 18 B.C.L.R. (3d) 153, 1996 CanLII 2323 (B.C.C.A.). If a statutory entitlement is established, the question is whether the Part 7 benefits are mandatory or discretionary. If the benefits are mandatory, the court must deduct those amounts from the trial award, and no further evidence is required.
- [41] However, if the benefits are discretionary, in that ICBC may pay the benefits or they are subject to ongoing medical certification then 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.
- [42] Finally, 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 that 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.
- b) ICBC's Claim for Part 7 Deductions
- [43] On June 12, 2025, ICBC representative, Jennifer Brown, affirmed in an affidavit, among other things, that ICBC:
- a) accepts that the items awarded under Cost of Future Care by the Honourable Justice Gibb-Carsley in the Jury Verdict were/are medically necessary and reasonable benefits pursuant to Part 7 of the Regulation;
 - b) waives the power to require an insured to undergo treatment under s. 90 of the Regulation, the need for continued certification under s. 98 of the Regulation, and the power to require an insured to submit to a medical examination under s. 99 of the Regulation;
 - c) waives the requirement pursuant to s. 88(1.01) of the Regulation for ongoing certification from ICBC's medical advisor or the plaintiff's doctor for the plaintiff's pain program, registered massage therapy, acupuncture, and psychologist;

- d) waives the need for the opinion of its medical advisor as required in s. 88(2) of the Regulation for homemaking assistive devices and ergonomic equipment and has accepted that these items are likely to promote the rehabilitation of the plaintiff;
- e) will irrevocably, unequivocally, and unconditionally agree to pay the plaintiff, under Part 7 of the Regulation for the items awarded by the Court in the Cost of Future Care section in the Verdict pursuant to s. 88 of the Regulation, as incurred and submitted to ICBC by the plaintiff for reimbursement, up to the amounts indicated for each item awarded in the Judgment; and
- f) agrees that the plaintiff qualifies for homemaking benefits pursuant to ss. 84 and 86 of the Regulation and will irrevocably, unequivocally, and unconditionally agree to pay the plaintiff, under Part 7 of the Regulation, for homemaking benefits up to \$280 per week up to the plaintiff's 65th birthday up to the \$70,000 as awarded.

[44] Based on Ms. Brown's affidavit, ICBC asserts that pursuant to s. 83 of the Act (I note that ICBC bases its claim to withhold benefits on the Post-Amendment Act) in respect of benefits paid or payable under Part 7 of the Regulation, the following amounts be deducted from the Trial Award:

- a) \$67,546.55 from the award for Cost of Future Care;
- b) \$10,192.53 from the award for Special Damages paid by ICBC on account of special damages covered by Part 7;
- c) \$1,769.20 from the award for Special Damages on account of deductible third-party benefits paid to the plaintiff;
- d) \$70,000 on account of homemaking benefits for the plaintiff; and
- e) \$4,859.56 from the award for Loss of Future Income Capacity on account of deductible third-party benefits paid to the plaintiff.

[45] The total of these deductions sought to be applied by ICBC is \$154,367.84 of the \$309,100.00 amount of the Trial Award.

[46] I will deal with each of ICBC's claims for deductions.

i. Special Damages

[47] The jury awarded the plaintiff \$16,000 for special damages. ICBC seeks to deduct \$11,961.85 for special damages from the Trial Award.

[48] As set out in Ms. Brown's affidavit, on March 21, 2024, ICBC paid the plaintiff \$7,337.08 under Part 7 to reimburse her for out-of-pocket expenses. This included cost of prescription medications, mileage and treatments from Panorama Village, Synergy Rehab, Panorama Physiotherapy, Panorama RMT, Get Well Physio, Elite Health and Wellness, Pulse Physio, Mountainview Wellness and Healthland Clinic.

- [49] ICBC had previously made payments totalling \$2,855.45 under Part 7 Accident Benefits for treatments at Pulse Physio, Synergy Rehab and Elite Health and Wellness - all of which are included in the plaintiff's claim for special damages.
- [50] To date, ICBC has paid to the plaintiff and her providers \$10,192.53 in Part 7 benefits.
- [51] I accept that these amounts are properly deducted from the Trial Award for special damages.
- [52] ICBC also claims that the following amounts claimed as special damages were paid by the plaintiff's Pacific Blue Cross Extended Health Benefits Plan after the Second Accident and are, therefore, recovery barred due to the changes to the Act which occurred on May 17, 2018:
- a. Synergy Rehab: \$393.40;
 - b. Panorama Physiotherapy: \$100.80; and
 - c. Healthland Clinic Ltd.: \$1,275.00;
- and must be deducted from that claim.
- [53] Given that I have found that the jury's finding of the indivisibility of injuries requires that the Pre-Amendment Act applies, I will not deduct the amounts just listed which total \$1,769.20, from the special damages award.
- [54] While there is a risk that the plaintiff will be over compensated because her Pacific Blue Cross Extended Health Benefits Plan will pay for these amounts and it will not be able to recover the amounts through subrogation, I find that the Pre-Amendment Act does not provide that deductions can be made for payments made by other health care providers. As such, I will not order that these amounts be deducted from the Trial Award.
- ii. Loss of Homemaking Capacity
- [55] I acknowledge the plaintiff's observation and concern that ICBC, throughout its submissions, refers to the jury's award for the homemaking capacity as the "Home Making Benefit" as opposed to what was clearly indicated on the Verdict Sheet as an award for Homemaking Capacity. Specifically, the jury awarded the plaintiff \$70,000 under the heading "Pecuniary Losses" for "Loss of Homemaking Capacity". Despite the using of different language to describe the category, my review of the authorities indicates that there is some interchangeability between homemaking and housekeeping as well as describing either of these as a benefit or loss of capacity. As I will describe in a moment, it is the specific loss that the court, or in this case the jury, attempts to replace for the plaintiff, as much as a monetary award can do, that is important to the analysis.
- [56] ICBC asserts that homemaker benefits under Part 7 are payable to the plaintiff. In her affidavit, Ms. Brown deposes that the plaintiff fulfills the definition of "homemaker" found in s. 78 of the Regulation. Further, she affirms that to the date of her affidavit (June 12, 2025) ICBC has paid the plaintiff \$75,204.71 in homemaking benefits pursuant to ss. 84 and 86 of

the Regulation which includes \$22,318.80 paid from the end of trial to June 12, 2025. As such, there remains \$47,681.20 before the \$70,000 awarded by the jury is met. Ms. Brown confirms that ICBC will pay the amounts for homemaking benefits of up to \$280 per week based on what is incurred and submitted by the plaintiff for the remaining amounts up to \$70,000. Accordingly, ICBC seeks to deduct the entire amount of the \$70,000 award from the Trial Award. ICBC argues that to not deduct this amount would be to overcompensate the plaintiff for her loss of being able to complete homemaking tasks.

- [57] The plaintiff contends that when determining if a deduction should be made against the jury's award of the loss of homemaking capacity the court must accept that the award is related to the loss of the plaintiff's capacity to perform housekeeping functions and is not reliant on whether the plaintiff will actually incur the costs of replacement homemaking services. The plaintiff points to the case of *Kim v. Lin*, 2018 BCCA 77, in which our Court of Appeal explained the difference between a true loss of capacity and the cost of replacing those tasks the plaintiff is no longer able to perform:
- [31] This distinction is consistent with this Court's decision in *O'Connell v. Yung*, 2012 BCCA 57, where Kirkpatrick J.A. clarified that loss of housekeeping capacity was just that, a loss of capacity, or the loss of an asset that should be compensated as a pecuniary loss regardless of whether the replacement services which are used to value the loss and determine the quantum of the award are actually purchased
- [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.
- [Emphasis added.]
- [58] To reiterate, the category of damage for the "Loss of Home Making Capacity" on the Jury Sheet was listed as a pecuniary loss, not part of the non-pecuniary category of damages.
- [59] The Jury Instructions provided the following instructions to the jury regarding the plaintiff's claim for homemaking capacity:
- [184] In addition to the claim for cost of future care, Ms. Chawla is making a separate claim for lost weekly homemaking capacity of between \$416,000 to \$694,000. The range of the weekly homemaking assistance is based on the present value of 12 hours per week (\$416,000) 20 hours per week (\$694,295) of assistance that Ms. Chawla says she needs. In his report at Exhibit 2, tab 4, Mr. Turnbull sets out the net present value of weekly homemaking for 4 hours per week until Ms. Chawla turns 80. Ms. Chawla argues that the average Canadian female spends 2.0 hours per day on household chores or approximately 20 hours per week. On the basis that Ms. Chawla is unable to complete these tasks, she asks that she be

provided with damages to pay for her housekeeping for between 12 hours to 20 hours per week. Mr. Turnbull's report provides the net present value of 4 hours of homemaking services per week to age 80 at \$138,859. The plaintiff has multiplied this number by 3 and 5 respectively to arrive at the net present value for homemaking services for 12 and 20 hours per week.

[Emphasis added.]

[60] In *Prasad v. Ross-Smith*, 2023 BCSC 513 at para. 129, Justice Basran provided a summary of the principles which apply to the loss of housekeeping capacity:

[129] The principles applicable to the loss of housekeeping capacity are:

- Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.
- A plaintiff who has suffered an injury that would make a reasonable person in the same circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.
- Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, a non-pecuniary damages award may instead compensate the loss.
- As the award is intended to reflect the loss of a capacity, the plaintiff is entitled to compensation whether or not replacement services are actually purchased.
- Evidence of the loss of housekeeping capacity is provided by the work being performed by others, even if done gratuitously.
- Evidence of a plaintiff's incapacity resulting in actual expenditures, or of family members or friends routinely undertaking functions that would otherwise have to be paid for, supports a separate award of pecuniary damages.
- "[] pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities."

See: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63; *Kim v. Lin*, 2018 BCCA 77 at paras. 28-34; *Riley v. Ritsco*, 2018 BCCA 366 at para. 98; *McKee v. Hicks*, 2023 BCCA 109 at para. 112.

[61] Recently, in *Malhi v. De Claro*, 2025 BCSC 2136, the Court made the following comments:

[99] Housekeeping services are appropriately awarded in situations where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work: *Kim v. Lin*, 2018 BCCA 77 at paras. 33-34 [Kim].

- [100] This is to be distinguished from circumstances where a plaintiff is able to perform housekeeping tasks with some difficulty or decides they need not be done because performing the work causes discomfort. This type of loss is more properly compensated as part of non-pecuniary damages: Kim at para. 33.
- [62] I agree that a trier of fact can award damages for loss of homemaking capacity either as a non-pecuniary or pecuniary loss. However, in this case, the jury clearly awarded a pecuniary loss of homemaking capacity. The Verdict Sheet is unambiguous that the claim for this head of damage is set out as a pecuniary loss. The plaintiff's summary of its position which was provided to the Court by plaintiff's counsel to be included in the Jury Instructions further establishes that the plaintiff was unable to do housekeeping chores - not "that she could perform usual and necessary household work, but with some difficulty or frustration in doing so": Prasad at para. 129. The plaintiff summarized her position as was included in the Jury Instructions as follows:

The Plaintiff was taken though her medical records from 2021, 2022, and 2023 and she complains primarily of her right leg pain and her inability to do housekeeping chores due to the right leg pain.

[Emphasis added.]

- [63] The plaintiff's request for compensation for her loss is based on her claim that she is unable to do housekeeping chores. Based on her submissions made to the jury, she was unable to perform housekeeping chores and thus required replacement services. In my view, the plaintiff asked the jury for an award of this nature, not, in this category, for the plaintiff's pain and suffering for the loss of enjoyment for being able to complete these chores. As per the Jury Verdict Sheet, this is to be compensated as a pecuniary loss, regardless of whether or not replacement housekeeping services are used. That being said, it is acceptable to use labour information regarding the value of replacement services as guidance in determining the appropriate quantum: Kim at para. 31; Liu v. Bains, 2016 BCCA 374 at para. 28.
- [64] In the expert report relied upon by the plaintiff at trial, the housekeeping claims were calculated based upon a "range of the weekly homemaking assistance based on the present value of 12 hours per week (\$416,000) and 20 hours per week (\$694,295)" of assistance that Ms. Chawla says "she needs". This also demonstrates that housekeeping capacity is being considered and assessed by the jury to compensate the plaintiff for replacement costs. This is consistent with the language of the Verdict Sheet that sets out that if the jury awarded an amount of "Home Making Assistance (Seasonal Assistance only)" it should not include that amount in both the Loss of Homemaking Capacity and the latter category. This is some evidence that the jury sought to provide an award to the plaintiff to allow her to fund various homemaking activities that she claimed she is unable to do herself by providing her with funds to hire someone to complete those tasks - either in regular homemaking activities or seasonally.

- [65] The manner in which the plaintiff framed her claim for loss of housekeeping capacity supports that the jury's finding related to a pecuniary damage award, not a non-pecuniary award as argued by the plaintiff. In my view, these are precisely the housekeeping services that must and will be paid by ICBC into the future as described in Ms. Brown's affidavit and provided under s. 84(1) (up to 104 consecutive weeks) and s. 86 (beyond 104 consecutive weeks to age 65) of the Regulation.
- [66] As set out in the Jury Instructions I referenced above, the plaintiff asked the jury that, "she be provided with damages to pay for her housekeeping for between 12 hours to 20 hours per week." I accept that there is sufficient certainty that compensating the plaintiff for the replacement of housekeeping is what the jury intended, by awarding the plaintiff, \$70,000 for loss of homemaking capacity. I note that there does not need to be a precise match between the heads of damages in the tort award and the categories of damages under the benefit recovery scheme in order to order a deduction: *Purewal v. Uriarte*, 2021 BCSC 1935 at paras. 58 - 60 citing, *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953 at para. 55.
- [67] I am satisfied that the plaintiff has established her entitlement to this benefit under the Act and Regulation. Further, I am satisfied that given ICBC's commitment to reimburse the plaintiff for homemaking expenses, which is, in my view, substantiated by the fact ICBC has already paid over \$70,000 to the plaintiff under s. 84(1) of the Regulation since the date of the First Accident which includes \$22,318.80 paid to the plaintiff since the date of trial and its commitment to pay an additional \$47,681.20. Further, Ms. Brown sets out that ICBC waives the necessity for any review and power to terminate payments on the advice of ICBC's medical advisor regarding the homemaking benefits. Ms. Brown also affirms that the plaintiff is not precluded from claiming benefits under the Regulation beyond what is set out in the affidavit, as long as the claims are made in compliance with the Regulation.
- [68] Given the foregoing, I conclude that ICBC has met its burden so as to be entitled to deduct \$70,000 from the Trial Award in respect of homemaking capacity. To do otherwise would be to overcompensate the plaintiff based on what she was specifically awarded by the jury for her pecuniary loss of homemaking capacity.

iii. Cost of Future Care Award Deduction \$67,546.55

- [69] ICBC asserts that it is entitled to deduct \$67,546.55 from the Trial Award in respect of the award for cost of future care. ICBC arrives at this amount based on the following categories of damages awarded by the jury:
- a) Pain management: The plaintiff was awarded \$1,300 by the jury for this item. Pain management is referred to in the expert report of Russell McNeil, Occupational Therapist, dated April 18, 2023, and the expert report of Kevin Turnbull, Economist. According to both expert reports, "pain management" refers to a body pillow and contoured pillow every two years, a heat vest every three years, and a TENS machine every five years. Pursuant to s. 88(2) (f) of the Regulation, ICBC will pay for the entirety of the pain management category of the

Cost of Future Care Award, subject to the maximum payment of \$1,300 and so is deductible;

- b) **Homemaking Assistive Devices:** The plaintiff was awarded \$1,500 by the jury for this item. Homemaking assistive devices are referred to in the expert report of Russell McNeil, and the expert report of Kevin Turnbull. According to both expert reports, "homemaking assistive devices" refers to an electric floor scrubber and a cordless electric bathroom scrubber - each of which is to be replaced every five years. ICBC say this item is fully deductible under s. 88(2)(f) of the Regulation;
- c) **Ergonomics:** The plaintiff was awarded \$1,800 by the jury for this item. ICBC says this item is fully deductible under s. 88(2)(f) of the Regulation;
- d) **Pain Program:** The plaintiff was awarded \$12,500 by the jury for this item. This program is noted in the plaintiff's FCE/COFC report to be a multidisciplinary pain program with a team of healthcare providers that includes a pain physician, psychiatrist, psychologist, physiotherapist, OT, kinesiology, pharmacist, and/or other healthcare providers as needed. ICBC pays under s. 88(1) Part 7 for psychologist, physiotherapist, kinesiology and OT. Furthermore, Pain programs and Chronic Pain programs are covered under s. 88(1) of the Regulation as and when incurred. ICBC says this item is fully deductible;
- e) **Massage Therapy:** The plaintiff was awarded \$23,000 by the jury for this item. ICBC say this item is deductible under s. 88(1)(a) of the Regulation, which is for medical or rehabilitation benefits. ICBC submits the following calculations to be consistent with plaintiff counsel's submissions at trial: $\$110 \text{ per session} \times 12 \text{ sessions} \times 16.795 \text{ (multiplier to age 77)} = 22,169.40 + 1,108.47 \text{ (tax)} = \$23,277.87$, rounded down to \$23,000. ICBC RMT rate is \$105 per session; $(\$105/\$110) \times \$23,000 = \$21,954.55$;
- f) **Acupuncture:** The plaintiff was awarded \$23,000 by the jury for this item. ICBC says this item is deductible under s. 88(1)(a) of the Regulation. ICBC considers the following calculations to be consistent with the plaintiff's counsel's submissions at trial: $\$115 \text{ per session} \times 12 \text{ sessions} \times 16.795 = \$23,177$, rounded down to \$23,000 for the jury Award. The Regulation allows for \$113 per session of acupuncture; $(\$113/\$115) \times \$23,000 = \$22,600$;
- g) **Psychologist:** The plaintiff was awarded \$3,000 by the jury for this item. ICBC considers the following calculations to be consistent with the plaintiff counsel's submissions at trial: Part 7 allows for \$241 per session of psychological counselling $\times 12 \text{ sessions} = \$2,892$, which sum is deductible; and
- h) **Occupational Therapist:** The plaintiff was awarded \$3,000 by the jury for this item. The plaintiff's COFC report calculates this item at \$115 per session and \$116/hour. ICBC OT rate is currently \$145 per hour, which exceeds the figure in the COFC report. ICBC says this item is fully deductible under s. 88(1)(a) of the Regulation.

[70] One aspect of the plaintiff's argument against deducting amounts appears based upon her not wanting to have ICBC's oversight into her treatments in the future. In her counsel's written submissions, the concern was articulated as follows:

The Defendant seeks to have ICBC retain a "big brother-like control" over a plaintiff's future care by tying them to Part 7 benefits. What this also means, is that ICBC is stripping the ability of injured claimants to determine when, and how, they spend on treatment.

Under this arrangement, innocent victims are forced into a lifelong relationship with ICBC in having to ask for or seek reimbursement every time they want funding for future treatment. While the courts have allowed this to some degree, we must be vigilant in considering the extent to which it is allowed.

[71] In this regard, the plaintiff asks the Court to consider the overarching principle articulated by the Supreme Court in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 247:

The plaintiff is free to do with that sum of money as he likes. Financial advice is readily available. He has the flexibility to plan his life and to plan for contingencies. The preference of our law to date has been to leave this flexibility in the plaintiff's hands.

[72] While I accept that the plaintiff would rather have the money from the Trial Award in a lump sum to do with as she wishes, in my view, that somewhat misses the overarching purpose of s. 83 of the Act. Specifically, that deductions are necessary so that a plaintiff is not overcompensated. If the deductions are not made, the plaintiff would be awarded the amounts from the Trial Award as a windfall because she could also recover amounts to which she is entitled under Part 7. The concern expressed by the Supreme Court in *Andrews* - to allow the plaintiff flexibility - must be understood in the context of the fundamental principle of tort law that an award for damages is to put a plaintiff back to a position, as best as money can do, had the injurious behaviour not occurred, but not overcompensate the plaintiff: *Ashcroft v. Dhaliwal*, 2008 BCCA 352, leave to appeal to SCC ref'd, 32889 (February 19, 2009).

[73] The plaintiff also asserts that the items listed above are for pain management rather than rehabilitation and thus are not deductible. As support for that position the plaintiff cites *Lundgren v. Taylor*, 2023 BCSC 2256 at para. 37. In my view, the comments made in *Lundgren* specifically relate to the facts of that case and do not stand for a general principle that certain treatments that treat pain may also be rehabilitative. It is settled that rehabilitation includes treatments that are remedial or preservative, even if not curative: *Skinner v. Dhillon*, 2021 BCSC 1992 at para. 37.

- [74] I accept that pursuant to s. 85(3) of the Act, the court has an obligation to independently analyze the evidence and then determine, to the extent that it is able to do so, the Part 7 benefits which the plaintiff has received or is likely to receive in the future: Sangha at para. 16. Since trial, the plaintiff has claimed and received benefits from ICBC. I am satisfied that based on Ms. Brown's affidavit ICBC will continue to pay the plaintiff for the treatments that the jury viewed were required.
- [75] I am satisfied that plaintiff is entitled to receive mandatory Part 7 benefits in relation to the items set out on the Verdict Sheet under the heading of the Cost of Future Care for the following: acupuncture, massage therapy, occupational therapy and psychological counselling. I am satisfied that the plaintiff is entitled to receive Part 7 benefits based on the evidence before me in the affidavit of Ms. Brown and my review of the legislation. Further, I am satisfied that the evidence establishes that there is no uncertainty that the benefits will be paid, thus the deductions should be made: *Tench v. Van Bugnum*, 2021 BCSC 501 at para. 40.
- [76] Given the foregoing, the items for acupuncture, massage therapy, occupational therapy and psychological counselling in the aggregate amount of \$50,446.55 shall be deducted from the Trial Award (\$21,954.55 + 22,600 + \$2,892 + \$3,000).
- [77] However, I am not satisfied that the uncertainty has been removed that ICBC will pay the items it says it will pay as discretionary items under to s. 88(2)(f) of the Regulation. These include the \$1,300 of pain management, \$1,500 for homemaking assistance devices and \$1,800 for ergonomics.
- [78] Given that it is the jury who determined why the amounts were awarded and therefore it is not possible to know the specific reasons for which these amounts were awarded, I do not have sufficient confidence to leave the discretion to pay these amounts to the plaintiff in the future by ICBC. For example, as set out in Ms. Brown's affidavit, ICBC assumes that the homemaking assistance devices refers to an "electric bathroom scrubber and electric floor scrubber to be replaced every five years." While this may be the rationale for the jury awarding these amounts, I am not satisfied that leaving the discretion to ICBC to pay for amounts that it deems warranted or awarded by the jury will ensure that the plaintiff is fairly compensated. If there any uncertainty that a plaintiff will receive a Part 7 benefit it must be decided in favour of the plaintiff: *Aarts-Chinyanta* at para. 57.
- [79] Given the foregoing, I will not order that the \$4,600 for homemaking assistance devices, ergonomics, or pain management be deducted from the Trial Award.
- [80] For a similar reason I find that the amount sought to be deducted by ICBC for the Pain Program of \$12,500 should not be deducted. While the pain programs referenced at trial included reference to a team of healthcare providers that includes a pain physician, psychiatrist, psychologist, physiotherapist, OT, kinesiology, pharmacist, and/or other healthcare providers as needed my concern is that it may be that the plaintiff determines that some other form of pain program is better suited to her needs. Again, while I cannot

surmise what was in the jury's mind when it awarded damages for a pain program, in my view, the plaintiff should have flexibility in determining pain programming she will find useful and not be held to account to ICBC to pay for programming that it, at its own discretion, believes appropriate. While ICBC says it will cover "Pain programs and Chronic Pain Programs" under s. 88(1) of the Regulation, I find that it is too restrictive and discretionary to remove uncertainty that the plaintiff will be provided with funds to pursue pain program treatments selected by the plaintiff. Accordingly, I will not order that the amount of \$12,500 be deducted from the Trial Award.

- [81] Despite the affidavit evidence provided by Ms. Brown, I am not persuaded that ICBC would pay the amount owed to the plaintiff because there appear to be specific conditions that ICBC has placed upon those benefits. My concern is that if the plaintiff determines that a similar but not identical manner best assists her, ICBC might deny her reimbursement.
- [82] I find this presents a risk that the plaintiff will be "short-changed". Mr. Justice Blok in Tomanik discussed this concern referencing our Court of Appeal as follows at para. 13:
- [7] As noted in *Watson v. Fatin*, 2023 BCCA 82, there is also a converse risk. When payment of a benefit is uncertain, the plaintiff is at risk of being short-changed if a deduction is made for benefits that are never received. In *Watson*, this court observed:
- [11] ... Where it is uncertain that the benefit will be received, deducting an amount from the judgment runs the risk of short-changing the insured; non-payment of a benefit where it has been deducted from the award denies the full measure of damages assessed by the judge. The criterion for the reduction addressed in s. 83(5) of the Act is, accordingly, entitlement to a benefit for an item of care under Part 7 respecting the loss on which the claim is based, with the insured receiving the entire entitlement and no more.
- [12] But it is not always possible to be certain that a particular benefit will be paid in the future as circumstances change. This uncertainty is to be resolved in favour of the insured, and a court may conclude that only a nominal deduction is appropriate, or make no deduction for the uncertain amount. These principles are discussed in the cases relied on by the judge: *Boparai v. Dhami*, 2020 BCSC 1813 at para. 30; *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953 at paras. 78-81.
- [83] In summary, ICBC may deduct \$50,446.55 from the Trial Award for the award of Cost of Future Care (\$67,546.55 - \$17,100).

iv. Loss of Future Income Capacity

- [84] The jury awarded the plaintiff \$107,000 for her loss of future income capacity. ICBC seeks a deduction of \$4,859.56 to this award because the plaintiff received funds from a Salary Indemnity Plan (SIP) from the B.C. Teachers' Federation. She received these benefits between February 5, 2024, to June 30, 2024.

- [85] ICBC's argument to deduct these amounts is based on the Post-Amendment Act that allows ICBC to deduct benefits paid by third party insurers because the payor no longer has the subrogation rights to claim against the plaintiff. Given my conclusion that it is the Pre-Amendment Act that applies in this case, I conclude that ICBC cannot withhold the payment for amounts paid to the plaintiff from the B.C. Teachers' Federation.
- [86] While I acknowledge that this could be seen as a potential for double compensation for the plaintiff, in terms of the damages awarded to her by the jury and the compensation she received for missed days of work, I am not persuaded on a balance that the jury's award should be considered only in respect of days the plaintiff will miss from work as forming her loss of earning capacity. In the Jury Charge, I provided the following instruction to the jury regarding considerations of awarding damages for future loss of earning capacity:
- [161] You must ask yourselves whether the plaintiff's earning capacity has been impaired to any degree by her injuries. If so, considering all the evidence, what amount should be awarded for the impairment? You must consider the impact of the impairment on this particular plaintiff, given her skills, education, and abilities. If you conclude that Ms. Chawla has lost the capacity to pursue full time teaching that she was pursuing at the time of the accident, you must also consider what her prospects are now and what they may be in the future. The plaintiff is entitled to compensation for the present value of the amount by which you think her earning capacity has been reduced. I will explain what is meant by "present value" shortly.
- [162] When assessing the amount of this loss, you should also consider the contingencies of life. For example, in the future, Ms. Chawla might acquire some other illness or disability unrelated to her present complaints that will keep her from working. On the other hand, had the accidents not occurred, she might have stayed in the teaching profession, as she says, she would until she was 70. You will recall that Mr. Turnbull gave evidence that the average age that teachers retire is 61. You also heard Ms. Chawla testify that the teachers usually retire after 30 years of service. Based on the evidence you heard, you will need to decide whether there is a real and substantial possibility that supports a determination of when Ms. Chawla will retire. All of these contingencies, both positive and negative, should factor into your assessment.
- [163] Again, the most important question is whether, in all the circumstances, the award is fair and adequate. If you are satisfied that Ms. Chawla has shown a real and substantial possibility of a future income loss, then she is entitled to an amount that compensates her fairly for that loss.
- [164] You should keep in mind that the quantification of damages for loss of future earning capacity is not intended to be a mathematical calculation but rather an assessment based on all of the evidence.

[87] I conclude that reimbursement for specific days missed by the plaintiff should not be offset against her earning capacity award. I am not persuaded that there is a direct correlation between the payments made by SIP and the damages awarded by the jury such that a deduction should be made. Further, as set out above, given the Pre-Amendment Act applies due to the jury's finding of the indivisibility of the plaintiff's injuries, I find that, in these circumstances, ICBC has no legislative basis to make the deduction it seeks on the basis that another insurer has made the payment.

[88] Accordingly, I will not allow the deduction sought by ICBC against the future loss of earning capacity award set out in the Trial Award.

3. Conclusion - Deductions from the Trial Award

[89] Given the foregoing, I conclude that ICBC is entitled to deduct \$130,639.08 from the Trial Award under the following categories:

- a) \$70,000 - home making capacity;
- b) \$50,446.55 - cost of future care; and
- c) \$10,192.53 - special expenses.

[90] I will now turn to the plaintiff's request to cross examine Ms. Brown and Mr. Mandair.

B. Plaintiff's Application to Examine Jennifer Brown

[91] I am satisfied that I had the facts before me to determine what deductions were appropriate under the Act and the Regulation. I am not persuaded that cross-examination of Ms. Brown would provide clarification of issues material to my decision.

[92] The plaintiff provides the following reasons to cross-examine Ms. Brown on her affidavit:

- a) Ms. Brown is identified as a Claims Specialist. What level of authority does this allow her?
- b) Ms. Brown is on this file for the first time to swear Affidavit #1. Why was she chosen?
- c) The adjuster who had been on the plaintiff's file did not swear the affidavit. Why not?
- d) The amounts of housekeeping benefits were not allowed to be put in evidence during trial. It should not be a factor in the deductions. Does Ms. Brown know about the oral reasons during trial?
- e) Ms. Brown's affidavit contains boiler plate language that does not deviate from other adjuster affidavits in regard to section 83 deductions. Who came up with the language?
- f) Ms. Brown conflates homemaking benefits with housekeeping capacity. What does she know about benefits vs. capacity? In particular, can homemaking benefits be paid directly to an insured-even if there do not retain a housekeeper?

- g) Ms. Brown doesn't address the legislation pre or post amended due to the divisible vs. indivisible issue. Does she know about the jury's decision regarding the same?
 - h) Ms. Brown does not address the plaintiff having benefits with Pacific Blue Cross. Does she know the plaintiff had benefits?
 - i) Ms. Brown does not address that the items that have been marked for rehabilitation are actually for pain management. The legislation is clearly for rehabilitation purposes.
- [93] In *Cowichan Valley v. Cobble Hill*, 2015 BCSC 1995, Justice Pearlman articulated the factors in which a court should exercise its discretion to allow cross-examination on affidavits:
- [26] Under Rule 22(1-4), the court has a discretion to order cross-examination, which must be exercised on proper principles. Normally, where the affidavit on which cross-examination is sought includes facts that are in issue, the deponent will be ordered to attend for cross-examination: *Associated Respiratory Services Inc. v. Universal Medical Services Inc. et al*, [1993] CanLII 2070 (BCSC) at para. 5; *Brown v. Garrison* (1967), 1967 CanLII 849 (BC CA), 63 W.W.R. 248 (BCCA); *Balla v. Fitch Research Corp.*, 2000 BCCA 448 at para. 25.
- [27] Factors to be considered in the exercise of the court's discretion include whether there are material facts in issue; whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application; and whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue: *Equustek Solutions Inc. v. Jack*, 2013 BCSC 882 at para. 6; *0371984 B.C. Ltd. v. Alpha Aviation Inc.*, 2014 BCSC 1815 at para. 23.
- [94] I will not exercise my discretion to order that Ms. Brown be cross-examined on her affidavit. I conclude that I have the material facts before me to make a determination on the merits of ICBC's claim to withhold benefits. The plaintiff's grounds for cross-examining Ms. Brown are focused upon irrelevant issues such as the level of Ms. Brown's authority or why she was added to the file and swore the affidavit as opposed to the initial adjuster. Ms. Brown affirms on behalf of ICBC that ICBC has made certain payments and commits to making further payments to the plaintiff. I find the other grounds upon which the plaintiff seeks to cross-examine her are irrelevant or ask Ms. Brown to provide evidence on legal interpretations which is not within her purview.
- [95] For example, to question Ms. Brown regarding her view of issues of the application of a finding that the plaintiff's injuries were indivisible or whether it impacts the application of pre or post amendment legislation, requests her to opine on questions of law that must be determined by the court. Seeking to ask Ms. Brown if she knew the jury's decision on the indivisibility of the plaintiff's injuries is irrelevant to the matter and does not warrant exploration through cross-examination because the answer would not assist in my determination on this application.

- [96] Finally, whether the plaintiff had coverage with Pacific Blue Cross or other benefits appears to be another question that would be irrelevant to the duties of Ms. Brown which would be to gather and describe what payments have been made to the plaintiff and what, under the categories of damages assessed at trial, would be paid or payable by ICBC under the Act and the Regulation.
- [97] I dismiss the plaintiff's application to cross-examine Ms. Brown.

C. Plaintiff's Application to Examine Mr. Mandair

- [98] The plaintiff seeks an order to examine Mr. Mandair. The plaintiff asserts that it was known to ICBC that there was an acrimonious relationship between the plaintiff and her ex-husband. As such, the plaintiff contends that having Mr. Mandair contact the plaintiff's ex-husband while the plaintiff was in cross-examination at trial would be known to cause her stress. The plaintiff argues that this step was taken in bad faith and was abusive. The plaintiff seeks to examine Mr. Mandair to determine if the contact with the plaintiff's ex-husband was taken for a legitimate purpose or aimed at upsetting the plaintiff during trial to obtain a strategic benefit for ICBC.
- [99] The plaintiff's position underpinning her request for cross-examination requires the Court to accept that Mr. Mandair was motivated to undermine the plaintiff during her testimony before the jury. It further requires the Court to assume that ICBC knew that the plaintiff's ex-husband would contact the plaintiff directly or indirectly after being contacted by Mr. Mandair. I find there is no air of reality to the claim that ICBC was motivated by bad faith in contacting the plaintiff's ex-husband.
- [100] In my view, it is not unusual for a party to contact other individuals or obtain information to confirm or refute evidence given by a witness in court. I see nothing inappropriate with a party contacting an individual to confirm or refute evidence given by another individual in court. The purpose could be to uncover information that might impeach the witness. Further, the Rule in *Browne v. Dunn* (1893), 6 R. 67 (H. L.) provides that in fairness to a witness, if the other party is going to put contradictory evidence before the court later in the trial, the witness who will be contradicted should have the opportunity to respond, explain or qualify the alleged contradiction. As such, in the circumstances of this case, if ICBC had contacted the plaintiff's ex-husband and discovered evidence it believed contradicted the plaintiff's testimony and planned to subpoena the ex-husband to testify about that contradiction, in fairness to the plaintiff, she should have the opportunity to respond to that alleged contradiction during her cross-examination.

[101] Of course, this is speculation as to the reasons why Mr. Mandair contacted the plaintiff. However, the plaintiff also speculates that the reasons were motivated by bad faith and illegitimate purposes. I am not satisfied that the plaintiff has raised an air of reality that Mr. Mandair or ICBC's motives were ill-founded such that I should order examination of Mr. Mandair, especially so because there is, as I have described above a legitimate motive for ICBC to contact Mr. Mandair to confirm or contradict the plaintiff's testimony.

[102] Further, even if Mr. Mandair were examined, I would expect that any communications he had with ICBC may be protected by privilege and thus not something that is properly disclosed to the plaintiff. This adds a complicating factor to the plaintiff's request and is an additional, although not primary reason, that examination of Mr. Mandair should not be permitted.

[103] I dismiss the plaintiff's application to examine Mr. Mandair.

D. Plaintiff's Application for Special Costs

[104] The plaintiff has also applied for special costs for the trial. As set out above, one purpose of the application to examine Mr. Mandair was to attempt to obtain information in support of the plaintiff's views that ICBC's conduct during the litigation trial warrants the sanction of an award of special costs.

[105] I will adjourn the plaintiff's application for special costs. If it is still pursued, arrangements may be made before me for that purpose. To be clear, I have not prejudged the issue of special costs and will hear an application based on evidence brought by the plaintiff if such a hearing is scheduled. If the plaintiff does not bring its application for special costs, it should be awarded its costs of the trial, subject to any other issues of which I am unaware, at Scale B.

IV. Order

[106] In summary, I make the following orders:

- a) ICBC may deduct \$130,639.08 from the Trial Award (subject to any adjustments to the amount owing remaining on the Trial Award based on amounts already paid by ICBC to the plaintiff);
- b) The plaintiff's application to cross-examine Jennifer Brown in respect of the contents of her affidavit is dismissed;
- c) The plaintiff's application to examine Mr. Mandair is dismissed; and
- d) The plaintiff's application for special costs of the trial is adjourned generally.

V. Costs of this Application

[107] I find that ICBC has been substantially successful in this application. Accordingly, it is entitled to costs of this application at Scale B.

[108] I thank counsel for their submissions on this application.

"Gibb-Carsley J."

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