

CANADA / JUDGMENT

Cook v. Kang

2022 BCSC 408

COURT

Supreme Court of British Columbia

DECIDED

14 March 2022

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2022 BCSC 408 Cook v. Kang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cook v. Kang,

2022 BCSC 408

Date: 20220314

Docket: M084033

Registry: Vancouver

Between:

Daryl Edward Cook

Plaintiff

And

Yung Sun Kang and

Kim Young Hee

Defendants

- and -

Docket: M113954

Registry: Vancouver

Between:

Daryl Edward Cook

Plaintiff

And

John Doe and/or Jane Doe and

The Insurance Corporation of British Columbia

Defendants

- and -

Docket: M185826

Registry: New Westminster

Between:

Daryl Edward Cook

Plaintiff

And

Thi Truc Le and

Anh Tuan Huynh

Defendants

- and -

Docket: M188858

Registry: New Westminster

Between:

Daryl Edward Cook

Plaintiff

And

Bailey Dempster

Defendant

Corrected Judgment: The text of the judgment was corrected at paragraphs 43 and 47 on March 22, 2022.

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Defendants in all actions:

R.C. Brun, Q.C.

N. Aram

The Plaintiff, appearing in person:

D.E. Cook

Place and Date of Application:

New Westminster, B.C.

October 30, 2020

May 25, 2021

November 10, 2021

February 15, 2022

Port Coquitlam, B.C.

November 10, 2021

Place and Date of Judgment:

New Westminster, B.C.

March 14, 2022

Introduction

[1] In reasons for judgment indexed as *Cook v. Kang*, 2020 BCSC 526, I awarded damages totalling \$199,292.92 to the plaintiff Mr. Cook in respect of three of four separate actions arising out of motor vehicle collisions. The defendant in the most recent collision, Ms. Dempster, now applies for deduction under s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [Act] of amounts from Mr. Cook's award of damages. In particular, the defendant seeks an order deducting (i) \$17,841.18 from Mr. Cook's award of special damages on account of benefits that have already been paid to Mr. Cook under Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 [Regulation], and (ii) \$92,607.00 from Mr. Cook's award for costs of future care, on account of future Part 7 benefits Mr. Cook will be entitled to receive under the Regulation.

Legal Principles

[2] The application is governed by s. 83 of the Act and Part 7 of the Regulation. I will briefly summarize the legal effect of each.

- [3] Under s. 83 of the Act, liability is reduced by amounts that the plaintiff has received or is entitled to receive as benefits under the Regulation. Section 83(4) provides that these entitlements are not to be referred to or disclosed to the court until damages have been assessed. Section 83(5) then provides that after the damages have been assessed, the amount of benefits the plaintiff has received or is entitled to receive "must be disclosed to the court", and the plaintiff is ultimately entitled to judgment for the balance only.
- [4] Part 1 of the Regulation, specifically s. 1.1, provides for universal compulsory coverage under Parts 6, 7 and 10. Part 7 deals with coverage for accident benefits. The most relevant provision for present purposes is s. 88 of the Regulation.
- [5] Section 88(1) deals with what are sometimes referred to in the case law as "non-discretionary" benefits. It provides that ICBC must pay as benefits all reasonable expenses incurred by an insured as a result of an injury for various health care or medical services as provided for in paras. (a) through (c), subject to the prescribed amounts or limits set out in Schedule 3.1 of the Regulation. Also, for treatments received after 1 April 2019, there are additional limits as set out in s. 88(1.01) of the Regulation.
- [6] Section 88(2) deals with what are sometimes referred to in the case law as "discretionary" benefits. It provides for certain categories of benefits that, "in the opinion of [ICBC's] medical advisor", are "likely to promote the rehabilitation of an insured who [was] injured in an accident". Section 88(2)(d.1) is in effect a catch-all for health care supplies or services not otherwise provided for in s. 88(1) or s. 88(2)(a) to (f). These discretionary benefits are also subject to certain limits as prescribed in Schedule 3 of the Regulation.
- [7] The overall purpose of the legislative scheme is to remove the burden of future care from the tortfeasor and place it on the insurance provider, at least so far as no fault benefits are concerned: *Del Bianco v. Yang*, 2021 BCCA 315 [Del Bianco] at para. 55. The two specific purposes of what is now s. 83(5) of the Act are to determine the amount of damages that should be immediately payable to the plaintiff by the defendant, and to prevent double recovery or double compensation on the part of the plaintiff in actions arising from motor vehicle collisions: *Del Bianco* at paras. 29-30.
- [8] There is a significant body of jurisprudence in relation to applications of this sort. I am not going to review the applicable legal principles in any detail, beyond noting that in deciding the issues raised in this application I have considered and taken into account the principles discussed in *Del Bianco* and in other cases cited to me, including *Luck v. Shack*, 2020 BCSC 1074 [Luck], *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953 [Aarts-Chinyanta], and *Sangha v. Inverter Technologies Ltd.*, 2019 BCSC 1174 [Sangha].

- [9] In Aarts-Chinyanta at para. 53, Madam Justice MacDonald described a two-step test for determining whether deductions should be made under s. 83(5) of the Act. First, the court should determine "whether the plaintiff has received or is entitled to benefits" under Part 7 of the Regulation. Second, once entitlement is established, the court should "estimate the amount of the deduction".

Evidence Presented on the Application

- [10] The defendant relies on the reasons for judgment and on the subsequent affidavit of John Arthurs, a claims specialist with the ICBC Litigation Centre in Surrey, sworn on 9 June 2020. Mr. Cook was given the opportunity to cross-examine Mr. Arthurs on his affidavit.
- [11] Mr. Cook filed his own affidavit in response to the application, sworn on 29 October 2021. It refers to various document disclosure skirmishes he had had with ICBC going back over a number of years. Mr. Cook's affidavit also refers to problems he has encountered, post-trial and post-judgment, in obtaining reimbursement from ICBC for various treatments he has paid for out of pocket.
- [12] On the last day of the hearing, 15 February 2022, Mr. Cook sought to tender a second affidavit, sworn 20 December 2021. I refused to accept this affidavit on the basis that it was not filed and served on the opposing party in a timely way under Rule 8-1(9) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules]. The defendant's application and supporting materials were filed more than one year earlier, on 9 July 2020. Defendant's counsel had already completed his submissions on the application, and Mr. Cook had already completed his cross-examination of Mr. Arthurs on his affidavit. Nothing Mr. Cook said in submissions on 15 February 2022 convinced me that I should exercise my discretion to admit his new affidavit despite his non-compliance with the Rules. Moreover, the prejudice to the defendant in doing so would have been significant, considering that the application has been before the court for more than 18 months.
- [13] With respect to the material that is properly before the court, I have taken both the affidavit evidence and the cross-examination into account. Despite Mr. Cook's vigorous attack on the credibility of Mr. Arthurs, I am satisfied that Mr. Arthurs was honest and forthright both in his sworn affidavit and in his affirmed testimony under cross-examination.
- [14] Mr. Arthurs conceded in cross-examination that he did not draft his own affidavit. It was drafted by counsel and then presented to him for his review. Nevertheless, I accept Mr. Arthurs' assertion that he reviewed the contents of the affidavit before swearing it, that he has direct knowledge of the facts deposed in it, and that it represents an honest description of his involvement in the plaintiff's claims for benefits in respect of the collisions that are the subject of these actions. At the time of the cross-examination Mr. Arthurs had in fact retired, but that does not change the state of his knowledge or his ability to speak authoritatively on behalf of ICBC at the time that he swore his affidavit.

- [15] I will say that the plaintiff's cross-examination was successful in demonstrating that Mr. Arthurs did not have a perfect recollection of the particulars of the plaintiff's claims, and the precise terms of the Regulation governing the various categories of benefits that are in issue in the plaintiff's case. At least some of Mr. Arthurs' confusion may have come from the fact that Mr. Cook's use of the terms "non-discretionary benefits" and "discretionary benefits" was dependant upon his own interpretation of the requirements in the Regulation. With those limitations in mind, I accept that the affidavit evidence of Mr. Arthurs is both credible and reliable. It is noteworthy that the specific dollar amounts of the benefits referred to in the body of the affidavit are taken from contemporaneous documents and correspondence attached as exhibits to the Arthurs affidavit.

Plaintiff's Arguments

- [16] Mr. Cook's principal argument is that strict compliance with the Regulation is required, and that the defendant has failed to satisfy her burden under s. 83(5) of the Act to prove that the plaintiff is entitled to the benefits which the defendant seeks to deduct, as contemplated in the case law. There is ample legal authority for these propositions: Del Bianco at para. 40; Luck at para. 27; Aarts-Chinyanta at para. 39; Sangha at para. 8. And although there is no requirement that there be a "precise match" between the heads of damage in the tort award and the categories of coverage under the benefit recovery scheme, as discussed in Luck at para. 26 and Sangha at para. 8, in Del Bianco at para 40 the Court endorsed the view that any uncertainty as to correspondence between the heads of damages in the tort award and the categories of coverage under Part 7 must be resolved in favour of the plaintiff.
- [17] That brings me to the specific arguments advanced by Mr. Cook in support of his attack on the evidence of Mr. Arthurs. In addition to concerns about the credibility and reliability of the evidence of Mr. Arthurs as discussed above, Mr. Cook advanced three specific arguments that he says, taken individually or altogether, weigh against the defendant's position.
- [18] First, Mr. Cook says I should be skeptical of Mr. Arthurs' assertion that ICBC will actually reimburse him for medical treatments when they have allegedly failed to do so in a timely way in the past. That submission is not borne out by the evidence. I accept the evidence of Mr. Arthurs that ICBC has always promptly addressed and paid out the plaintiff's benefit claims. I find that any delay in payment of benefits has been a function of lack of communication between Mr. Cook and his lawyer, Mr. Cook's failure to submit claims in a timely way, and Mr. Cook's refusal to correspond with ICBC since the date of the judgment. I also accept the evidence of Mr. Arthurs, elicited on cross-examination, that ICBC now has arrangements for treatment providers to bill ICBC directly for approved treatments, and that Mr. Cook might well be able to avail himself of this streamlined billing process if he made the necessary arrangements with his treatment providers.
- [19] Second, Mr. Cook submits that the defendant has failed to prove that he was an "insured" person within the meaning of Part 7 of the Regulation. In cross-examination, Mr. Cook put to Mr. Arthurs a photocopy of his driver's license issued on 26 February 2001, with an expiry

date of 26 February 2006, on the basis of which Mr. Cook suggested that he may not have been an insured driver as of the first collision on 24 September 2006. Not surprisingly, Mr. Arthurs was unable to comment on the significance of this photocopied document. It was not part of ICBC's insurance file relating to Mr. Cook's Part 7 benefits. There is simply no way of knowing from the evidence presented either at trial or on this application whether Mr. Cook had renewed or failed to renew his license between the date of its expiry on 26 February 2006 and the date of the first collision on 24 September 2006.

- [20] I should note that while Mr. Cook points out that the expiry date on the license attached to his affidavit was 26 February 2006, he does not actually say in his affidavit that he failed to renew it prior to the first collision on 24 September 2006. Moreover, Mr. Cook does not state in his affidavit that he was not "insured" at the time of the collisions. Mr. Cook's position, as I understand it, is that the defendant has failed to discharge her burden by proving that Mr. Cook is an insured for the purposes of the Regulation.
- [21] Returning to the evidence of Mr. Arthurs, he admitted in cross-examination that he did not view any document adduced at trial in this matter showing that Mr. Cook had a valid driver's license. However, Mr. Arthurs went on to explain that ICBC confirms the insured status of the driver as part of the claims process, and that the driver's status as an insured is reflected in an ICBC internal document called a CL75. Mr. Arthurs appears to have relied on an ICBC database to ascertain that Mr. Cook was insured.
- [22] It is not clear to me that Mr. Cook's status as an insured person was ever a material fact in dispute in this case. In her response to civil claim, the defendant Ms. Dempster expressly plead that Mr. Cook was an insured person and had received benefits. It does not appear that this allegation was ever denied or put in issue by Mr. Cook. Thus, it is not clear to me that this was a material fact in dispute in the action. In fact, in the course of the trial, plaintiff's counsel actually sought to read in discovery evidence from an ICBC representative about Part 7 benefits previously paid to Mr. Cook. Counsel for the defendants objected, on the basis that evidence of this sort is barred at trial under s. 83(4) of the Act. I admitted evidence for a limited purpose to address some of the issues raised at trial, but I did not allow evidence as to the amounts of coverage.
- [23] Subsequent to the trial, I have been presented with uncontroverted evidence that ICBC has paid Mr. Cook thousands of dollars, which ICBC characterizes as reimbursement for expenditures relating to Part 7 benefits in connection with the collisions which were the subject matter of his court actions. Moreover, Mr. Cook's assertion that he is not an insured person flies in the face of his contention that ICBC has mistreated him by failing to repay him on a timely basis for past expenditures on items that would constitute Part 7 benefits. In all of these circumstances, even if one were to accept that Mr. Cook's status as an "insured" is a material fact in dispute, I am prepared to infer from everything I have just reviewed that Mr. Cook is in fact an "insured" within the meaning of the Regulation.

- [24] The third submission advanced by Mr. Cook is a suggestion that payments made to him by ICBC since the most recent amendment of the Regulation on 1 April 2019 have not adhered to the requirements in the Regulation. In respect of what I would characterize as non-discretionary benefits, Mr. Cook says ICBC failed to comply with the following three requirements in the Regulation:
- (a) Where the number of treatments for a particular form of health care service exceed the prescribed limits in Schedule 3.1, ICBC's medical advisor or the insured's physician must certify that the treatment is necessary (per s. 88(1.01)(a));
 - (b) Where treatment is provided more than 12 weeks after the collision, again ICBC's medical advisor or the insured's physician must certify that the treatment is necessary (per s. 88(1.01)(b)); and
 - (c) The optional authority to require an insured to submit to an examination by a health care practitioner selected by ICBC, and to refuse benefits where the insured refuses to do so (per s. 99).
- [25] Mr. Cook further submits that there is a fourth requirement in respect of his claim for reimbursement of gym membership fees, which at best is a discretionary benefit under s. 88(2) of the Regulation. For this item, there is an additional requirement for ICBC to obtain an opinion from ICBC's medical advisor that this service is "likely to promote the rehabilitation" of the insured.
- [26] In an email that Mr. Arthurs sent to Mr. Cook's counsel on 3 September 2019, Mr. Arthurs provided a rationale or justification for ICBC's decision to reimburse certain expenses incurred by Mr. Cook for "[P]art 7 coverage". For each of the expenditures in question--physiotherapy, gym membership fees, and prescriptions--Mr. Arthurs referred to information available from Mr. Cook's treatment providers as to the necessity of the treatment. With regard to gym membership fees and prescriptions, the Arthurs email refers to information from which it can be inferred that these items were recommended or prescribed by Mr. Cook's physicians. With regard to physiotherapy, the Arthurs email indicates that while there were no "notes on file" from a "treating physician prescribing physiotherapy", there are some "consult reports" that could be interpreted to indicate that this service might be "beneficial". After setting out his rationale in the email, Mr. Arthurs approved reimbursement of certain expenditures by Mr. Cook for physiotherapy, gym membership fees, and prescription medications.
- [27] What I take from the Arthurs affidavit, the attached email, and the evidence elicited on cross-examination, is that Mr. Arthurs actually turned his mind to the requirement for medical certification of coverage beyond the number of treatments provided for in the Regulation, and treatment obtained more than 12 weeks after the collision, as required under ss. 88(1.01)(a) and (b) respectively. At the time, Mr. Arthurs was the ICBC employee responsible for administering Mr. Cook's Part 7 benefit claims and as such he had authority to waive strict compliance with the requirements. Having turned his mind to the requirement for medical

certification, and having then considered the "information in file", Mr. Arthurs made an informed decision to waive strict compliance with the Regulation. There is some irony in Mr. Cook's submission that allowance of his past claim for Part 7 benefits should cause the court to infer that ICBC will disregard its obligations and commitments to pay Part 7 benefits in the future. In any event, I do not accept Mr. Cook's submission that the prior payments were made without regard to the requirements in the Regulation. Mr. Arthurs turned his mind to the requirement for medical certification, but was ultimately prepared to forgo strict compliance. The fact that Mr. Arthurs did not insist on strict compliance in the past (to the benefit of Mr. Cook), does not lead me to conclude that ICBC will fail to abide by the Regulation or its commitments under the Regulation in the future (to the detriment of Mr. Cook).

[28] As to the ability of ICBC to require Mr. Cook to submit to an examination under s. 99 of the Regulation, I do not view this as a pre-condition to the reimbursement of previously-incurred Part 7 benefits. Clearly, ICBC had the authority under s. 99 to require Mr. Cook to submit for a medical examination. The fact that Mr. Arthurs did not exercise that authority in Mr. Cook's case is not evidence of non-compliance with or disregard for the Regulation. Insofar as the deductibility of potential future benefits are concerned, I will address the effect of s. 99 of the Regulation later in these reasons.

[29] I turn then to the particular amounts that the defendant seeks to deduct from the award of damages in my reasons for judgment.

(1) Deductions for Part 7 Benefits Previously Paid

[30] I awarded the plaintiff \$39,995.00 in special damages, including: (a) \$6,789.22 for specific medications related to his treatment of collision-related symptoms, (b) \$30,135 for physiotherapy costs, and (c) \$812.45 for gym membership fees. Items (a) and (b) are non-discretionary benefits contemplated in s. 88(1) of the Regulation, and item (c) is a discretionary benefit contemplated in s. 88(2) of the Regulation. On the basis of my findings at trial, and the scope of Part 7 benefits available under the Regulation, I find that Mr. Cook is entitled to reimbursement of his past expenditures for medication, physiotherapy costs, and gym membership fees.

[31] I have reviewed the correspondence attached to the Arthurs affidavit indicating that between 3 November 2016 and 4 September 2019, ICBC paid Mr. Cook \$16,847.04 to reimburse him for expenditures under these three headings, medication, physiotherapy, and gym membership fees. The defendant has discharged the burden of establishing that Mr. Cook has received these amounts for payment of past benefits under Part 7 of the Regulation. I conclude that \$16,847.04 should be deducted from the damages award under s. 83(5) of the Act.

- [32] Mr. Cook complains that ICBC has not reimbursed him for taxes on the medications, physiotherapy costs, and gym memberships, and that he has been left to pay the taxes "out of pocket". Accepting this is true, it does not work any injustice to Mr. Cook, because I am only dealing here with deductions from the damages award for amounts already paid to him. The balance of any of his out of pocket expenditures for past treatment of his collision-related symptoms is actually covered by the damages award itself.
- [33] In his affidavit, Mr. Arthurs goes on to explain that there were a further \$967.14 of prior expenditures made by Mr. Cook in relation to medications, physiotherapy costs, and gym membership fees that have not already been paid by ICBC. Mr. Arthurs says in his affidavit that he is authorized by ICBC to irrevocably, unequivocally, and unconditionally pay this further \$967.14 to Mr. Cook as benefits under Part 7 of the Regulation. While Mr. Arthurs says he is authorized to pay the amounts, they have apparently not been paid. I conclude that the reason these further amounts have not been paid is attributable to a breakdown in communications between ICBC and Mr. Cook, who is now self-represented. ICBC may be prepared to pay this amount, but it has never been paid. Accordingly, I find that the defendant is not entitled to a deduction for this amount under s. 83(5) of the Act. Since ICBC has not actually paid out this amount, there is no real risk of double recovery.

(2) Deductions on Account of Entitlement to Future Part 7 Benefits

- [34] Turning to future entitlements, these fall into a number of categories, specifically (a) medication, (b) physiotherapy, (c) kinesiology, and (d) gym membership fees. In keeping with the framework outlined by MacDonald J. in Aarts-Chinyanta at para. 53, I will conduct the analysis in two steps. I will first consider whether the defendant has proven that Mr. Cook is entitled to Part 7 benefits that should be deducted from the damages awarded in respect of future costs for medication, physiotherapy, gym membership fees, and kinesiology. Second, to the extent that entitlement is proven, I will go on to estimate the amounts that should be deducted from Mr. Cook's award of damages for costs of future care.

(2)(a) Proof of Entitlement to Future Benefits

- [35] In my reasons for judgment, I awarded Mr. Cook damages for future costs of care including:
- (a) Specific medications, namely Cyclobenzaprine, extra strength Tylenol, Rabeprazole, and Zopiclone, for an indefinite period. Medications are a non-discretionary benefit under s. 88(1)(c) of the Regulation. Subject to other limitations in the Regulation, Mr. Cook would be entitled to all reasonable and necessary expenses incurred for medications for treatment of his collision-related injuries.
 - (b) A total of 48 physiotherapy treatments per year, for an indefinite period. Physiotherapy is a non-discretionary benefit provided for under s. 88(1)(a) and Schedule 3.1 of the Regulation. Thus, Mr. Cook would be entitled to coverage for all reasonable and necessary physiotherapy costs incurred for treatment of his collision-related injuries, subject to the coverage limits set out in s. 88(1.01) and the other restrictions in the Regulation.

- (c) A total of six kinesiology sessions. Kinesiology is a non-discretionary benefit as provided for in s. 88(1)(a) and Schedule 3.1 of the Regulation. Thus, Mr. Cook would be entitled to coverage for all reasonable and necessary kinesiology costs incurred for treatment of his collision-related injuries, again subject to the coverage limits in s. 88(1.01) and the other restrictions in the Regulation.
- (d) The costs of an annual gym membership, for an indefinite period. Gym membership fees are a potential non-discretionary benefit under s. 88(2)(d.1). Mr. Cook would be entitled to coverage for gym membership fees where, in the opinion of ICBC's medical advisor, it is "likely to promote [Mr. Cook's] rehabilitation", and the coverage does not exceed the amounts prescribed in Schedule 3, again subject to any other restrictions in the Regulation.
- [36] Dealing specifically with coverage for medications, physiotherapy, and kinesiology treatments as non-discretionary benefits under s. 88(1), for Mr. Cook to be entitled to coverage, ICBC would have to be satisfied that the treatments are "reasonable and necessary" expenses for the treatment of Mr. Cook's collision-related injuries. In my reasons for judgment, I concluded that these treatments were reasonable and necessary. Mr. Arthurs deposes at para. 16(i) of his affidavit that based upon the reasons for judgment, ICBC accepts these costs as "medically justified and reasonably necessary". At para. 18(i) of the affidavit, Mr. Arthurs irrevocably and unconditionally commits ICBC to pay the plaintiff for all claims in relation to all four of these medications, "up to the amounts allowed pursuant to the Regulations", for "as long as the Plaintiff says he continues to need such items". This satisfies the requirement of s. 88(1) to show that expenditures for these medications are "reasonable expenses incurred by the insured as a result of [his collision-related] injuries".
- [37] With regard to physiotherapy and kinesiology as provided for in s. 88(1)(a), there are additional limits on coverage prescribed by s. 88(1.01) of the Regulation. Specifically, for treatments that exceed the prescribed number of treatment sessions in Schedule 3.1, or are obtained more than 12 weeks after the subject collision, these services will not be considered necessary within the meaning of s. 88(1) unless ICBC's medical advisor or the insured's physician certifies in writing that the treatment is necessary. At para. 17 of his affidavit, Mr. Arthurs states that he is expressly authorized by ICBC to waive the requirement for continued certification under the Regulation. The case law makes it clear that ICBC is entitled to waive these medical certification requirements: *Del Bianco* at paras. 60-68. Mr. Cook argues that on the facts of this particular case the waiver is not clear enough, because para. 17 of the Arthurs affidavit does not expressly state that ICBC waives the requirement for certification under s. 88(1.01). Mr. Cook says strict compliance is necessary and where there is ambiguity, it must be resolved in favour of the plaintiff. I do not accept Mr. Cook's submission that the waiver in para. 17 of the Arthurs affidavit is ambiguous. Paragraph 17 expressly states, among other things, that ICBC accepts the number of treatments as reasonable and waives "the continued need for certification [in] the Regulations." I have no difficulty interpreting this to include a waiver of the requirement for certification under s. 88(1.01).

- [38] However, Mr. Cook points out in his submissions that there are other potential hurdles to an insured person's entitlement to benefits under the Regulation. Mr. Cook refers specifically to ICBC's authority to require an insured to submit to an examination by a health care practitioner selected by ICBC, and to refuse benefits where the insured refuses to do so, as provided for in s. 99 of the Regulation.
- [39] Another potential hurdle, not specifically referenced by Mr. Cook in argument but of equal concern, is ICBC's authority to require an insured to submit to any medical treatment that is likely to relieve the insured's disability, or any retraining or educational program that is likely to assist in an insured's rehabilitation as provided for under s. 90(1) of the Regulation. Where the insured refuses to comply with these requirements, ICBC may invoke the procedure set out in s. 90(2) to terminate benefit payments to the insured.
- [40] Clearly, ss. 90 and 99 of the Regulation are different in nature from ss. 88 and 88(1.01). The latter provisions set out preconditions or limitations to entitlement, whereas the former are more in the nature of requirements that could later be raised by ICBC to create disentitlement. So, the requirements in ss. 90 and 99 are less immediate, and their application is by no means a certainty. Still, these requirements are potentially significant restrictions on an insured person's entitlement to Part 7 benefits. The evidence indicates that ICBC does not have a good working relationship with Mr. Cook and that Mr. Cook is mistrustful of ICBC. And although the ICBC representative that has handled Mr. Cook's claims in the past, Mr. Arthurs, was clearly prepared to provide Part 7 benefits to Mr. Cook without invoking either of these provisions to deny coverage, there is nothing in the record guaranteeing that a future ICBC representative would not require Mr. Cook to submit to these procedures. It is foreseeable that if ICBC were, in the future, to invoke either of these provisions in Mr. Cook's case, he would decline to submit to ICBC's demands to attend for medical examinations, or to take treatments, or to attend rehabilitation programs. All of this creates a degree or risk or uncertainty as to Mr. Cook's future entitlement to Part 7 benefits.
- [41] At para. 18 of his affidavit, Mr. Arthurs deposes that ICBC irrevocably, unequivocally, and unconditionally agrees to pay for Mr. Cook's medications, physiotherapy sessions, and annual gym memberships under Part 7 of the Regulation, "up to the amounts allowed" pursuant to the Regulation. Defendant's counsel submits that this commitment is clear and unambiguous. However, the commitment refers specifically to "amounts allowed" under the Regulation. In other words, the commitment is arguably only to pay that which is allowed under the Regulation. The Arthurs affidavit does not address, either expressly or implicitly, ICBC's authority to require medical examinations under s. 99, or to require medical treatments or rehabilitative programming under s. 90. In short, there is a deficiency in the affidavit evidence. At worst the affidavit is entirely silent on these points, and at best it is ambiguous. The law says that any ambiguity on the issue of entitlement is to be resolved in favour of the plaintiff. The plaintiff's award should not be reduced on account of future Part 7 benefits where there is ambiguity as to the plaintiff's future entitlement to those benefits.

- [42] The easiest way to resolve these ambiguities would be for ICBC to expressly waive its authority to require the plaintiff to submit to future medical exams, treatments, or rehabilitation programs. In my view, ICBC's waiver of "the need for continued certification" in para. 17 of the Arthurs affidavit cannot reasonably be interpreted to include a waiver of ICBC's authority to require the plaintiff to submit to further medical exams, treatments, or rehabilitation programs under ss. 90 and 99 of the Regulation. There are many recent cases where ICBC has expressly waived its right to invoke these provisions: *Del Bianco* at para. 9; *Aarts-Chinyanta* at para. 10, 95; *Tench v. Van Bugnum*, 2021 BCSC 501 [Tench] at para. 11; *Purewal v. Uriarte*, 2021 BCSC 1935 at paras. 7, 42; *Kim v. Sodhi*, 2020 BCSC 2023 at para. 7.
- [43] I appreciate the purpose of the legislative scheme to shift responsibility for future treatment costs that would be covered under the no fault scheme from the tortfeasor to the insurer. I further appreciate that a key purpose of s. 83(5) is to prevent a plaintiff from receiving double recovery at the expense of the defendant. However, one cannot overlook that the effect of a successful application under s. 83(5) is to reduce the amount of damages to which the plaintiff is otherwise entitled. This should not occur where there is uncertainty as to the plaintiff's future entitlement to Part 7 coverage. As explained in *Del Bianco* at para. 67, "what must be determined is the certainty of that coverage". The case law acknowledges that uncertainty as to the plaintiff's future coverage based on the ambiguity of an ICBC waiver may lead the court to refuse or limit a reduction. See, for example, *Tench* at paras. 74-79, cited with approval in *Del Bianco* at para. 65.
- [44] As I have noted above, ICBC has irrevocably, unequivocally, and unconditionally agreed to pay for the treatments listed in the Arthurs affidavit, up to the limits prescribed in the Regulation. It is possible that the defendant, counsel for the defendant, and Mr. Arthurs on behalf of ICBC simply overlooked the requirement to obtain an express waiver of ICBC's right to invoke ss. 90 and 99 of the Regulation. In this context, I gave serious consideration to whether to allow the defendant the opportunity to consider and address the deficiency by filing a supplementary affidavit.
- [45] However, I have concluded that it would not be appropriate to do so. The defendant's application was filed on 9 July 2020. The hearing took place over a number of dates since then, and finally concluded on 15 February 2022 with the submissions of Mr. Cook, who is self represented. Mr. Cook made it clear that he was putting the defendant to the strict proof of the requirements in s. 83(5) of the Act. He argued that the Arthurs affidavit was deficient in a number of respects, including the failure to address s. 99 of the Regulation. Defendant's counsel made reply submissions arguing that Mr. Cook's submissions were without merit. Counsel did not request an opportunity to file further evidence. Rather, his position was that the defendant met her burden based on the affidavit evidence of Mr. Arthurs. In these circumstances, both parties had a full opportunity to place their positions before the court.
- [46] With respect to gym membership fees, these are discretionary benefits under s. 88(2). In *Del Bianco* at para. 66, the Court left open the question of whether ICBC had the authority to waive the requirement under s. 88(2) that a discretionary benefit is "likely to promote the

rehabilitation of an insured". Assuming that ICBC does have the authority to waive that condition, I am satisfied on the basis of the Arthurs affidavit that ICBC has accepted that an annual gym membership meets the requirements of ss. 88(2) and (2)(d.1) and that ICBC agrees to pay the amounts provided for in the cost of future care award. However, there is still uncertainty as to Mr. Cook's entitlement to these benefits given the failure of Mr. Arthurs to address ss. 90 and 99 of the Regulation in his affidavit.

[47] I conclude that the defendant has failed to discharge her onus of proving Mr. Cook's entitlement to future benefits. In the event that I am wrong in this conclusion, I will go on to address the second step in the analysis by estimating the amount of the deductions I would have made if entitlement had been proven.

(2)(b) The Amount of Deductions

(2)(b)(i) Deduction for Medications as a Part 7 Benefit

[48] In my reasons for judgment, I determined that Mr. Cook was entitled to 60% of the costs of four medications, Cyclobenzaprine, extra strength Tylenol, Zopiclone, and Rabeprazole, for a total of \$186.60 per year. Using the plaintiff's present value table, the total award for medications was \$3,765.39. Had the defendant proven entitlement to coverage for medications under Part 7, I would have been satisfied that the value of the benefit would have been at least that amount. Indeed, Mr. Cook's benefits would likely have exceeded the amount provided for in the judgment, because I only awarded Mr. Cook 60% of the future cost of these medications, whereas ICBC committed to cover the full cost for as long as Mr. Cook says he continues to need them. Thus, had entitlement been proven, I would have deducted \$3,765.39 from the cost of future care award on account of Part 7 benefits for medication.

(2)(b)(ii) Deduction for Physiotherapy Treatments as a Part 7 Benefit

[49] At trial, I determined that the plaintiff's damages award should include 70% of the cost of 48 physiotherapy treatments per year, at a cost of \$85 per session, for a total of \$2,856 per year. Using the plaintiff's present value table, the total award for future physiotherapy treatments was \$82,168.83. The prescribed fee limit for physiotherapy under Schedule 3.1 of the Regulation is \$79, exclusive of tax. However, in my reasons for judgment I only awarded Mr. Cook 70% of the cost of each treatment, whereas ICBC unequivocally committed to cover the prescribed amount of \$79 per treatment. Thus, Mr. Cook would receive at least \$2,856 per year in Part 7 coverage for physiotherapy treatments. Accordingly, had I been satisfied that Mr. Cook was entitled to future coverage for physiotherapy treatments, I would have deducted a total of \$82,168.83, representing the entire value of the cost of future care award for physiotherapy.

(2)(b)(iii) Deduction for Gym Membership Fees as a Part 7 Benefit

[50] In my reasons for judgment, I determined that Mr. Cook was entitled to damages for the cost of an annual gym membership, at \$403.55 per year until the age of 65 and \$302.70 per year thereafter. Using the plaintiff's future value table, the total award for gym membership fees was \$6,234.78. In the Arthurs affidavit, ICBC committed to cover the full cost of gym memberships at the rates specified in my reasons for judgment, for as long as Mr. Cook says he continues to need gym memberships. Accordingly, had I been satisfied of Mr. Cook's entitlement, I would have deducted the entire amount of \$6,234.78 from the cost of future care award.

(2)(b)(iv) Deduction for Kinesiology Sessions as a Part 7 Benefit

[51] At trial, I determined that the plaintiff would require six kinesiology sessions at a total cost of \$438. At para. 19 of his affidavit, Mr. Arthurs states that ICBC will pay the plaintiff for the cost of attending six kinesiology sessions in the amount of at least \$438. This does not exceed the limits provided for in Schedule 3.1 of the Regulation. Therefore, had I been satisfied of Mr. Cook's entitlement, I would have deducted the entire amount of \$438 from the plaintiff's cost of future care award.

Conclusion

[52] The defendant's application for deductions from the plaintiff's damages award is allowed in part. A total of \$16,847.04 is to be deducted from the plaintiff's damages award of \$199,292.92, on account of Part 7 benefits that he has already received. In the result, the damages award is reduced to \$182,445.88.

Costs

[53] Costs, for both the trial and for this application, have yet to be addressed. Given that Mr. Cook is self represented, I do not foresee that these issues could be dealt with by written submissions. In the interests of moving the matter along, I hereby direct that within 14 days of the release of these reasons, counsel for the defendants is to arrange through Supreme Court Scheduling for a further half-day hearing on the question of costs. Mr. Cook is to be consulted regarding the hearing date. Subject to further direction, the costs hearing is to take place no later than the end of May 2022.

"Riley J."

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