

CANADA / JUDGMENT

Courchesne v. Chau

2025 BCSC 1479

COURT

Supreme Court of British Columbia

DECIDED

31 July 2025

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2025 BCSC 1479 Courchesne v. Chau

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Courchesne v. Chau,

2025 BCSC 1479

Date: 20250731

Docket: M193371

Registry: Vancouver

Between:

Chantal Courchesne

Plaintiff

And

Tsz Chau, 1110486 BC Ltd. and

GM Financial Canada Leasing Ltd. Societe

De Location GM Financial Ltee

Defendants

Before: The Honourable Justice Chan

Reasons for Judgment

Re: Ruling on s. 83 Deductions

Counsel for the Plaintiff:

W.E. Derber

Counsel for the Defendants:

E. Haupt

Place and Date of Hearing:

Vancouver, B.C.

July 4, 2025

Place and Date of Judgment:

Vancouver, B.C.

July 31, 2025

Introduction

- [1] The plaintiff Chantal Courchesne was injured in a motor vehicle accident while she was a passenger in a taxi en route to Vancouver International Airport in Richmond on October 29, 2017. After trial, this court assessed her damages at approximately \$3.7 million: 2023 BCSC 1969 [Courchesne 2023].
- [2] The defendants bring an application pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [BC Act] to estimate the amount of benefits to be deducted from the award of damages, such that judgment be entered for the balance only. The defendants seek a deduction of approximately \$1,307,200 from the award.
- [3] The plaintiff argues there ought to be no deductions, as she was an Ontario resident at the time of the accident and elected to receive benefits under the Ontario vehicle insurance scheme. Initially, the plaintiff's position was that under the Ontario scheme, she had to elect whether to receive benefits under the Ontario vehicle insurance scheme or the British Columbia scheme. She elected Ontario, and as such, she argued she is not and has never been entitled to receive benefits pursuant to the BC Act. However, as I understand it, this position was later modified, which I will discuss below. The plaintiff argues she has received all the benefits she is entitled to pursuant to the Ontario vehicle insurance scheme.
- [4] This hearing was held to deal with the plaintiff's entitlements to benefits under both the BC scheme and the Ontario scheme. If this Court finds the plaintiff has entitlements to further benefits under either scheme, a hearing may be required to determine the extent of any deductions that should be made.

The Legislative Schemes

The BC Scheme

Part 7 Benefits

- [5] The defendants rely on s. 83 of the BC Act and ss. 80, 84, 86, 88, and 104.2 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 and the applicable schedules [BC Regulation].
- [6] Section 83 of the BC Act provides for the integration of benefits as defined in Part 7 of the BC Regulation ("Part 7 Benefits") with tort damages awards. Under s. 83(5), after the plaintiff's damages have been assessed, the amount of any benefits paid or payable must be disclosed to the court and deducted from the damages award.
- [7] Under the regime set out by the BC Act and the BC Regulation, subject to certain exceptions and restrictions set out in the latter, the Insurance Corporation of British Columbia ("ICBC") must pay Part 7 Benefits to an insured for injuries arising out of a motor vehicle accident in Canada, regardless of who was at fault for the accident: BC Regulation, s. 79(1).
- [8] Section 80 of the BC Regulation sets out disability benefits for an employed person that may be paid when a person is unable to work, payable for up to 104 weeks.
- [9] Section 84 of the BC Regulation sets out benefits payable for homemaking services.
- [10] Section 86 of the BC Regulation sets out that if benefits are paid under s. 80 or 84 of the BC Regulation, and a person continues to be disabled after 104 weeks, ICBC may have to continue paying for the duration of the disability or until the person reaches age 65.
- [11] Section 88 of the BC Regulation sets out the type of medical and rehabilitation treatments covered, the number of sessions covered, and the fees that ICBC will cover as Part 7 Benefits. The benefits set out in s. 88(1) of the BC Regulation are mandatory, and include health care services listed in Schedule 3.1, occupational therapy, and medical, surgical, dental and other services. However, if the health care services are in excess of the prescribed number or if a treatment is provided more than 12 weeks after the date of the accident, those treatments are no longer presumed to be necessary unless there is certification in writing by a medical advisor stating otherwise: BC Regulation, s. 88(1.01).
- [12] Section 88(2) of the BC Regulation sets out discretionary benefits that may be paid if the corporation's medical advisor's opinion is the benefits are "likely to promote the rehabilitation" of the insured. These benefits include funds to acquire an appropriate motor vehicle; funds for alterations to the insured's residence to promote accessibility; funds for attendant care, purchase of a wheelchair, specialized bed, and other equipment, health care supplies or services not referred to in s. 88(1); funds for vocational training; and funds for any other costs ICBC agrees to pay.
- [13] Section 104.2 of the BC Regulation sets out that the medical and rehabilitation benefits in s. 88 as of April 1, 2019 are payable for expenses after that date, regardless of the date of the accident.

- [14] Part 7 Benefits paid or payable to a plaintiff are to be deducted from a plaintiff's tort damages: BC Act, s. 83(5). The plaintiff is only entitled to enter judgment for the balance after the Part 7 Benefits amount has been deducted. The purpose of this scheme is to prevent double recovery by a plaintiff: *Norris v. Burgess*, 2016 BCSC 1452 at para. 17, citing *Gurniak v. Nordquist*, 2003 SCC 59 at para. 48.
- [15] A defendant who seeks a deduction under s. 83 of the BC Act has the onus of establishing a deduction should be made: *Ngo v. Fong*, 2021 BCSC 1326 at para. 10.
- [16] When determining what, if any, deductions should be made under s. 83, strict compliance with the statutory scheme is required: *Wiebe v. Wiebe*, 2018 BCSC 1062 at para. 29. Uncertainty as to whether benefits will be paid must be resolved in favour of the plaintiff: *Wiebe* at para. 28, citing *Li v. Newson*, 2012 BCSC 675 at para. 14.
- [17] The court should follow a two-part test when considering whether a s. 83 deduction is appropriate: The court must first determine if the plaintiff has received or is entitled to receive some Part 7 Benefits for the injuries arising from the accident. If the defendant establishes an entitlement, the court must determine or estimate the amount of the Part 7 Benefits to be deducted from the tort award: *Jurczak v. Mauro*, 2013 BCSC 1370 at para. 16. So long as the benefits are similar, the scheme does not require a match between a specific head of damage in the tort award and a specific head of damage under the insurance scheme: *Gurniak* at paras. 45-47.

Where there is other insurance

- [18] The plaintiff was a resident of Ontario at the time of the accident, with vehicle insurance through the Ontario vehicle insurance scheme. As such, ss. 104 and 179 of the BC Regulation apply:

Other insurance

104

- (2) If an insured is also insured under vehicle insurance that provides compensation similar to benefits provided under this Part or similar benefits or insurance under similar legislation of another jurisdiction, the liability of the corporation for payment of benefits under this Part must be determined,
- (a) if a claim is made in respect of an accident that occurs in the Province, as if section 179 applied in respect of benefits provided under this Part, and
- (b) if a claim is made in respect of an accident that occurs in another jurisdiction, as if the provisions of the legislation of that jurisdiction respecting terms, conditions and priorities of vehicle insurance applied in respect of benefits provided under this Part.
- (3) Subsection (2) does not apply in respect of benefits payable under section 80.

Part 13 -- Part 13 Optional Insurance Contracts**Other priorities**

179 Subject to section 175, insurance coverage under an optional insurance contract evidenced by an owner's policy of the kind referred to in section 57.1 of the Act, is, in respect of liability arising from or occurring in connection with the ownership, use or operation of a vehicle owned by the insured named in the optional insurance contract and within the description or definition of the vehicle in the policy, primary insurance, and insurance under any other vehicle liability policy is excess insurance only.

[Emphasis added.]

[19] As I understand it, since the plaintiff was a resident of Ontario at the time of the accident and had similar motor vehicle insurance in Ontario, both parties agree her Ontario insurance was the primary insurance and BC insurance through ICBC is excess insurance in respect of Part 7 benefits.

The Ontario Scheme

[20] In Ontario, motor vehicle insurance is governed by the Insurance Act, R.S.O. 1990, c. 1.8 and the Statutory Accident Benefits Schedule, Ontario Regulation 34/10 [SABS].

[21] Pursuant to s. 5(1) of SABS, a person may claim income replacement benefits if she "was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment".

[22] Pursuant to s. 18(3)(a) of SABS, a person may claim up to \$65,000 in medical and rehabilitation benefits from one accident. That maximum amount may be increased to \$1 million if the person has sustained a catastrophic impairment, which is defined in s. 3.1(1). The definition sets out eight criteria which, if met, would establish that designation. For insured persons who do not sustain catastrophic impairments within the meaning of s. 3.1(1), medical and rehabilitation benefits are only payable up to 260 weeks after the accident: SABS, s. 20.

[23] Pursuant to s. 59 of SABS, a person injured in an accident outside of Ontario may need to elect to receive Ontario benefits or the benefits in the jurisdiction where the accident occurred. While the plaintiff initially took the position that s. 59 of SABS applied to her, after submissions and upon further review, the Court was of the view that s. 59 did not apply to the plaintiff, as s. 59 deals with situations where an Ontario resident is involved in an accident in a motor vehicle insured in Ontario. I set out below s. 59:

PART XI**INTERACTION WITH OTHER SYSTEMS****Accidents outside Ontario**

59. (1) This section applies if,
- (a) as a result of an accident in another province or territory of Canada or a jurisdiction in the United States of America, a person insured in that jurisdiction within the meaning of subsection (4) dies or sustains an impairment or incurs an expense described in section 15, 16 or 19; and
 - (b) no benefits are received under the law of the jurisdiction in which the accident occurred. O. Reg. 34/10, s. 59 (1).
- (2) The person, or the person claiming benefits in respect of him or her, may elect to receive either of the following, but not both:
1. The benefits described in this Regulation, other than the benefits referred to in paragraph 2.
 2. Benefits in the same amounts and subject to the same conditions as if the person was a resident of the jurisdiction in which the accident occurred and was entitled to payments under the law of that jurisdiction. O. Reg. 34/10, s. 59 (2).
- (3) If an election is made under subsection (2), the insurer shall pay benefits in accordance with the election. O. Reg. 34/10, s. 59 (3).
- (4) For the purpose of this section, a person is insured in the jurisdiction in which the accident occurred if, at the time of the accident,
- (a) the person was authorized by law to be or to remain in Canada and was living and ordinarily present in Ontario;
 - (b) the person met the criteria prescribed for recovery under the law of the jurisdiction in which the accident occurred;
 - (c) the person was not an owner, driver or occupant of an automobile registered in the jurisdiction in which the accident occurred; and
 - (d) the person,
 - (i) was an occupant of the insured automobile,
 - (ii) was the named insured, a person specified in the policy as a driver of the insured automobile, the spouse of the named insured or a dependant of the named insured or spouse and was an occupant of an automobile,
 - (iii) was the named insured, his or her spouse or a dependant of the named insured or spouse and was struck by an automobile while not an occupant of an automobile,
 - (iv) was struck by the insured automobile while not an occupant of an automobile,

- (v) if the named insured is a corporation, unincorporated association, partnership or sole proprietorship, was a person for whose regular use the insured automobile was supplied, his or her spouse or a dependant of the person or spouse and suffered an impairment while being the occupant of an automobile or suffered an impairment caused by an automobile of which he or she was not an occupant, or
- (vi) was struck by an automobile that was driven by a person described in subclause (i), (ii) or (v).
O. Reg. 34/10, s. 59 (4).

[Emphasis added.]

[24] I understand both parties now agree the plaintiff was not subject to s. 59 of SABS, as the plaintiff was an occupant of a vehicle registered in B.C. (the taxi) when the accident occurred. I also find support for my position in *Maycid v. TD General Insurance Company*, 2022 CanLII 14959 (ON LAT), where it is stated at para. 1 that s. 59 applies to situations where Ontario residents driving vehicles insured in Ontario are involved in accidents occurring outside Ontario.

Issues

[25] The parties ask this court to rule on the following issues:

1. Is the plaintiff entitled to receive benefits under Part 7 of the BC Regulation?
2. Is the plaintiff entitled to income replacement benefits under SABS?
3. Can the defendants deduct the \$1 million benefit payable pursuant to SABS for a catastrophic impairment despite the plaintiff being denied that designation?

Is the plaintiff entitled to Part 7 benefits?

[26] As the parties now agree the plaintiff was not required to elect from which jurisdiction she would receive benefits pursuant to s. 59 of SABS, I find the plaintiff is entitled to benefits pursuant to Part 7 of the BC Regulation. Both parties agree s. 179 of the BC Regulation makes clear that the Ontario insurance was the plaintiff's primary insurance, with BC insurance the excess insurance. As the plaintiff has received the maximum amount she is entitled to under the Ontario scheme, she is entitled to access any benefits she may be entitled to under Part 7. There is nothing to preclude the plaintiff from accessing the Part 7 benefits.

[27] I find the plaintiff is an insured for the purpose of Part 7 and is entitled to receive benefits under Part 7.

Is the plaintiff entitled to income replacement benefits under SABS?

- [28] To be eligible to receive the income replacement benefit under SABS, the plaintiff needs to be employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffer a substantial inability to perform the essential tasks of that employment: SABS, s. 5.
- [29] The evidence at trial was the plaintiff continued to work on a modified basis until November 21, 2019. This was approximately 107.5 weeks after the accident.
- [30] The plaintiff had applied for income replacement benefits through SABS in late 2017. In January 2018, the plaintiff received correspondence from her insurance provider that she was not entitled to these benefits, as she had returned to work on a modified basis, and the disability certificate submitted by her physician indicated she did not suffer a substantial inability to complete the essential tasks of her employment as a result of injuries sustained in the accident.
- [31] The defendants argue the plaintiff suffered a substantial inability to perform the essential tasks of her employment in early October 2019, which was within 104 weeks after the accident. The accident occurred on October 29, 2017. One hundred and four weeks after the accident expired on October 27, 2019.
- [32] The defendants rely on a report by Dr. Kevin Loopeker dated November 15, 2019. Dr. Loopeker conducted a post-concussion vision exam on November 12, 2019. In describing the plaintiff's symptoms, Dr. Loopeker wrote the following:

Chantal reported her primary residual current concussion symptom is her "eye pain headache". This discomfort is isolated to the superior retrobulbar region of both eyes and is entirely associated with excessive electronic screen viewing (computer, television, cinema screen, business meeting screen projector). Because of her recent busy work schedule, she has been experiencing almost constant pain since the beginning of October and is trying to control this pain alternating between Advil and Eleve usage. Chantal reports she can be woken up with this eye pain if she overworked her eyes the day before.

[Emphasis added.]

- [33] At trial, Dr. Loopeker testified he recommended specialty eyeglass lenses and vestibular therapy to the plaintiff: Courchesne 2023 at para. 103. The plaintiff testified that the recommendation for more therapy was the straw that broke her, as she could not endure having to take more time off work for more treatment. She decided to give notice on November 21, 2019, and did not return to work: Courchesne 2023 at para. 53.
- [34] The defendants argue the injury that caused her to suffer a substantial inability to perform the essential tasks of her job was the eye pain referenced by Dr. Loopeker, which started in the beginning of October 2019. The defendants argue the plaintiff ought to have applied again to SABS for income replacement benefits, as she met the criteria, having suffered the eye pain within 104 weeks of the accident.

[35] I am not persuaded by the defendants' argument. The evidence was the plaintiff continued to work until November 21, 2019. She did not suffer a substantial inability to perform the essential tasks of her job until then. The plaintiff continued to work while she was in pain. While she had an injury earlier, she was not unable to perform her job until later. Section 5 of SABS does not reference the injury, but the substantial inability to perform the essential tasks of the job. In my view, that must refer to when the plaintiff was no longer working. She stopped working at 107.5 weeks after the accident.

[36] I find the plaintiff is not entitled to any income replacement benefits from SABS.

Can the defendants deduct the \$1 million payable pursuant to SABS for a catastrophic injury?

[37] The plaintiff applied in 2022 for a "catastrophic impairment" designation from SABS, which would have entitled her to receive up to \$1 million in medical and rehabilitation benefits. She was advised in July 2024 that she did not qualify for a catastrophic designation. She has two years to appeal the ruling but has indicated in her affidavits that she does not plan to do so.

[38] The defendants argue they ought to be able to deduct \$1 million from the award, as the plaintiff is entitled to appeal her denial. The defendants cited no jurisprudence and did not refer the court to anything in the legislation which would support the plaintiff having a duty to appeal denials of coverage from another jurisdiction's insurance scheme. The defendants' argument is they have been prejudiced by the plaintiff's lack of appeal.

[39] I am not persuaded by the defendants' argument. No such duty is set out in the insurance policy, the BC legislative scheme or the Ontario legislative scheme. The plaintiff is a third party as between ICBC and the defendants. It is difficult to find she has a duty to appeal any denials of coverage, unless it is set out in the legislation. The defendants have cited no case authorities for the proposition that the plaintiff is obligated to pursue appeals of denials of coverage from other insurance schemes. Further, I note the court has been provided with no guidance on how to assess the potential success of an appeal in any event. The court has no evidence from the plaintiff's Ontario insurance provider that even if successful in her appeal, the continuing requirements on the plaintiff to receive the up to \$1 million in benefits would be waived. Uncertainty about whether benefits would be paid must be resolved in favour of the plaintiff.

[40] I find the defendants cannot deduct \$1 million from the award.

Conclusion

[41] I find the plaintiff is entitled to Part 7 benefits under the BC Regulation. I do not find the defendants have proven the plaintiff is entitled to additional benefits from SABS (income replacement or medical and rehabilitation benefits pursuant to a catastrophic impairment designation) which ought to be deducted from the award.

[42] If the parties cannot agree on deductions pursuant to Part 7, they can schedule a further hearing.

"Chan J."

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