

CANADA / JUDGMENT

Del Bianco v. Yang

2021 BCCA 315

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 315 Del Bianco v. Yang

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Del Bianco v. Yang,

2021 BCCA 315

Date: 20210820

Docket: CA46798; CA46799

Docket: CA46798

Between:

Anthony Del Bianco

Respondent

(Plaintiff)

And

Bing Jian Yang

Appellant

(Defendant)

- and -

Docket: CA46799

Between:

Anthony Del Bianco

Respondent

(Plaintiff)

And

Florante Haban

and Thyron Jay Merc Haban

Appellants

(Defendants)

Before:

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Grauer

On appeal from: Orders of the Supreme Court of British Columbia, dated March 18, 2020 (Del Bianco v. Yang, 2020 BCSC 410, Vancouver Dockets

M137014 and M158812).

Counsel for the Appellants

(via videoconference):

S. Hoyer

R.W. Parsons

Counsel for the Respondent

(via videoconference):

R.K. Dewar

K.P. Hyde

Place and Date of Hearing:

Vancouver, British Columbia

April 29, 2021

Place and Date of Judgment:

Vancouver, British Columbia

August 20, 2021

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Grauer

Summary:

Following two motor vehicle accidents, the plaintiff was awarded cost of future care damages for massage therapy treatments for 40 years. The defendants applied under s. 83(5) of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, to deduct this amount from the overall damages award on the basis that the Insurance Corporation of British Columbia would pay for the treatments as no-fault benefits under Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83. ICBC provided an affidavit promising to pay and waiving the requirement in the Regulation for ongoing certification that the treatments were necessary. The trial judge declined to deduct the treatments, citing ICBC's past refusal to pay, the fact that ICBC's reimbursement rate per treatment was lower than the awarded rate per treatment, uncertainty with respect to ICBC's future rates and ability to pay, and inconvenience to the plaintiff in having to submit reimbursement claims long-term. The defendants appealed. Held: Appeal allowed. The massage therapy treatments should be deducted. The deduction should be based on ICBC's reimbursement rate at the time of the damages assessment. The evidence did not support the inference that ICBC may not be able to reimburse insured persons in the future. The fact that the plaintiff would need to submit reimbursement claims long-term and ICBC's pre-trial refusal to pay were not relevant considerations. Additionally, ICBC's waiver of the requirement for ongoing certification is valid; ICBC has the power to waive such a requirement pursuant to s. 85 of the Act.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

- [1] This appeal concerns whether the massage therapy treatment component of a cost of future care damages assessment should be deducted because the plaintiff is entitled to those treatments as no-fault benefits from the Insurance Corporation of British Columbia. The trial judge, Justice Groves of the Supreme Court of British Columbia, declined to make that deduction and the defendants now appeal.
- [2] The plaintiff, Anthony Del Bianco, was involved in two motor vehicle accidents. In the first accident, which occurred in 2011, Mr. Del Bianco was a passenger in a vehicle struck by a vehicle owned and operated by Bing Jian Yang. In the second accident, which occurred in 2013, Mr. Del Bianco was the driver of a vehicle struck by a vehicle driven by Florante Haban and owned by Thyron Jay Merc Haban. Mr. Del Bianco commenced two separate tort actions, one against Mr. Yang and the other against the Habans. I will refer to Mr. Yang and

the Habans collectively as "the defendants".

- [3] The defendants admitted they were jointly and severally liable and only the issue of damages went to trial. The damages assessed included cost of future care awards for massage therapy treatments for 40 years and kinesiology treatments for one year.
- [4] After the trial judge gave his damages assessment reasons, the defendants applied under s. 83(5) of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, to have the massage therapy and kinesiology awards deducted from the formal judgment. They submitted that such a deduction should be made because ICBC would reimburse Mr. Del Bianco for the cost of those treatments as a benefit under Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83. Mr. Del Bianco opposed the application.
- [5] The trial judge reduced the future care costs by the amount he had awarded for kinesiology treatments. However, he declined to make any deduction for massage therapy treatments. The judge expressed concern that: (a) ICBC had failed to pay for massage therapy treatments prior to trial; (b) reimbursement would be based on the pre-tax per treatment rate set out in the Regulation, which was lower than the rate he had used in making the award; (c) it was impossible to know what the reimbursement rate would be in the future; (d) Mr. Del Bianco would be responsible for making reimbursement claims on a long-term basis; and (e) uncertainty existed with respect to ICBC's future ability to pay.
- [6] For the reasons that follow, I would allow this appeal and partially reduce the amount Mr. Del Bianco was awarded for massage therapy treatments.

Relevant Enactments and Regulations

- [7] This appeal requires consideration of the provisions of the Insurance (Vehicle) Act and the Insurance (Vehicle) Regulation as they stood when the defendants made their applications. Those provisions are set out in an appendix to these reasons. When necessary, the text of a provision will be set out in the body of these reasons. It should be noted that s. 83 of the Insurance (Vehicle) Act was amended by s. 26 of the Insurance (Vehicle) Amendment Act, 2018, S.B.C. 2018, c. 19. Those amendments are not relevant here because, by virtue of s. 31 of that amended Act, they only apply to accidents occurring on or after May 17, 2018, being the day on which that Act received royal assent.

Factual Background

- [8] Mr. Del Bianco, who was 34 years old at the time of trial, is a tile setter and stonemason. At trial, he called medical and other expert evidence to support his claim for future care costs. The defendants did not call contrary evidence. The trial judge found that Mr. Del Bianco would require 26 massage therapy treatments per year until age 65, and 10 treatments per year from age 65 to age 75. Based on a per-session cost of \$85 plus GST (i.e., \$89.25) and applying present value multipliers, the judge awarded a total of \$54,898. The judge also found Mr. Del Bianco would require kinesiology treatments for one year and awarded \$1,750

in that regard: *Del Bianco v. Yang* (22 March 2019), Vancouver M137014 (B.C.S.C.) at paras. 118-21. In total, Mr. Del Bianco was awarded \$673,770.26 (plus costs), made up as follows (at para. 133):

- \$130,000 for non-pecuniary damages;
- \$38,071 for past wage loss;
- \$12,089.26 for special damages;
- \$395,000 for loss of future earning capacity; and
- \$98,610 for cost of future care.

[9] Following the release of the damages assessment reasons, the defendants applied to have the awards for massage therapy and kinesiology treatments--i.e., \$56,648--excluded from the formal order. In support of that application, they filed an affidavit sworn by Andrew Rudkowski, the ICBC claims specialist then assigned to Mr. Del Bianco's file. Mr. Rudkowski deposed as follows:

3. I am authorized to speak on behalf of ICBC in relation to [Mr. Del Bianco's] claims and I am authorized to state ICBC's position in respect of benefits that will be paid to Mr. Del Bianco under Part 7 of the Insurance (Vehicle) Regulations [sic] ("Part 7").
4. I have read the transcript of the Oral Reasons for Judgment given by Mr. Justice Groves on March 22, 2019.
5. I, on behalf of ICBC, accept all the findings of fact made by Mr. Justice Groves. Specifically, I accept on behalf of ICBC, the Court's finding that, for Mr. Del Bianco, the following are necessary health care services:
 - a. 26 massage therapy sessions per year to Mr. Del Bianco's age 65;
 - b. 10 massage therapy sessions per year from Mr. Del Bianco's age 65 to his age 75; and
 - c. 26 kinesiology sessions.

(the "necessary health care services").

6. ICBC will reimburse Mr. Del Bianco for the necessary health care services he has incurred since March 22, 2019 and he incurs in the future, and I specifically waive on behalf of ICBC the requirements for continued certification under s. 88(1.2) of the Insurance (Vehicle) Regulations [sic].
7. I also specifically waive on behalf of ICBC, any further medical certification or examination as a condition of reimbursement for the necessary health care services under sections 98 or 99 of Part 7 and waive the application of section 90 with respect to necessary health care services.

8. I am authorized on behalf of ICBC to irrevocably, unequivocally, and unconditionally agree to pay for the health care services, as costs for these services are incurred by Mr. Del Bianco and submitted to ICBC by way of a claim for benefits under Part 7.

As discussed later in these reasons, the waiver referred to by Mr. Rudkowski relates, in part, to the fact that under Part 7 of the Regulation only 12 massage therapy treatments and 12 kinesiology treatments are "pre-authorized"; reimbursement for additional treatments is contingent upon either ICBC's medical advisor or the insured's physician certifying in writing that the treatments are a "necessary health care service": s. 88(1.01) for the Regulation.

[10] In opposing the application, Mr. Del Bianco swore an affidavit in which he deposed the following:

- He requires massage therapy to be able to work.
- Prior to the trial, ICBC declined to reimburse him under Part 7 for the costs of physiotherapy and massage therapy.
- He owes his massage therapy provider approximately \$3,600.
- The application to exclude the costs awarded for future massage therapy treatments "worries me a lot and is causing me stress because ICBC has not reimbursed me in the past despite many requests."
- He is "very worried" about ICBC's ability to reimburse him in the future because of news articles he has read that include statements by Attorney General David Eby that ICBC is financially struggling.
- "I am very worried whether ICBC will continue to exist and be able to pay for my future massage therapy treatments in the next few years, let alone over the next 40 years until I reach the age of 75."
- The cost of a massage therapy treatment is \$59 for 30 minutes, \$90 for 45 minutes, and \$105 for one hour.
- Under the Insurance (Vehicle) Regulation, the maximum ICBC will pay for a massage therapy treatment is \$80.

[11] Mr. Del Bianco attached as exhibits to his affidavit several articles obtained from the Internet concerning ICBC's financial situation. One article was published in The Vancouver Sun on January 29, 2018, under the headline "ICBC's \$1.3-billion loss a 'dumpster fire': A-G David Eby", reads, in part:

"British Columbians deserve the truth no matter how brutal the news is. Years of reckless decisions by the former government have undermined ICBC's ability to deliver low-cost insurance," Eby said. "This is quite simply a financial dumpster fire."

"ICBC must become financially sustainable to keep rates affordable. If we don't take action, B.C. drivers will face a \$400 premium hike," Eby said, later stating it was his intention to keep rates "affordable."

The government plans to announce in the coming weeks major reforms to make the insurer financially stable, including legislation aimed at the spring session, Eby said.

The province is also considering safety improvements to intersections, steepening penalties for distracted driving and full-time activation of red-light cameras to help ease ICBC's financial burden over the long-term, he said.

[Emphasis added.]

Trial Judge's Reasons

(2020 BCSC 410)

- [12] The trial judge allowed the defendants' application with respect to the kinesiology treatments but denied it with respect to the massage therapy treatments. In the result, he reduced the cost of future care award by \$1,750.
- [13] The judge began his analysis by expressing concern over the fact that Mr. Rudkowski had not explained why ICBC had failed to pay Mr. Del Bianco for past massage therapy treatments. He considered the statement in para. 6 of Mr. Rudkowski's affidavit--that "ICBC will reimburse Mr. Del Bianco for the necessary health care services he has incurred since March 22, 2019 [the date of the damages assessment reasons] and he incurs in the future"--to be untrue. This was because the judge had based the massage therapy award on a pre-tax per treatment cost of \$85, but the then payment schedule in the Regulation--Schedule 3.1/ Table 1--limited pre-tax reimbursement to a maximum of \$80 per treatment.
- [14] Referring to the articles attached to Mr. Del Bianco's affidavit, the judge stated, "The evidence about the lack of financial viability of ICBC, as attested to by the Cabinet Minister responsible for ICBC, the Attorney General, is not significantly disputed": at para. 16. After again referring to the fact that reimbursement would not be at the per treatment rate he had used, the judge stated:
- [17] Additionally, and though this was not raised by counsel, but is a concern to the court, it is hard to know and predict, dare I say impossible to know and predict, at what rate ICBC will, in the future, be paying for massage therapy costs. This is not just a short-term future. This is 40 years. If, as now, this would require the plaintiff to pay the difference himself, to pay over and above what ICBC is prepared to pay, when the tort award was intended to fully compensate him. He may perhaps then seek reimbursement from ICBC. This creates a 40-year responsibility on this plaintiff to keep track of receipts, to make requests and deal with adjusters at ICBC. That is completely inconsistent with the general purpose of litigation and tort awards, to create some finality between the parties.

- [18] In light of the history of non-payment by ICBC for no apparent reason, as experienced by the plaintiff, it is unrealistic, in my view, to require him for a period of 40 years, to have to continue to deal with an adjuster at ICBC in order to obtain what the court has already ordered he is entitled to.
- [19] Additionally, as noted by the plaintiff, there is just too much uncertainty as to the ability of ICBC to make the payments at a rate ordered by the court. They are, today, not prepared to pay at the rate the court ordered. There is too much uncertainty related to their past history of being disinterested or disrespectful of the plaintiff's claims. There is too much uncertainty as to what the future holds for ICBC, as evidenced by the affidavit of the plaintiff, for the court to have absolute confidence that if money is deducted from the tort award for Part 7 scheduled benefits, that they will actually be paid.
- [20] I note the case of *Li v. Newson*, 2012 BCSC 675, a decision of Mr. Justice Abrioux, as he then was. He notes in para. 14, inter alia, that "uncertainty as to whether a Part 7 benefit will be paid must be resolved in favour of the plaintiff". I find on the facts before me considerable uncertainty that payments consistent with the tort award would be paid to Mr. Del Bianco for massage therapy for the 40 years as awarded.
- [21] As such, I am not prepared to deduct amounts for massage therapy under s. 83 from the plaintiff's tort award. These comments relate to the massage therapy treatments to age 65 and the massage therapy treatments from age 65 to age 75. There is, as noted above, in the circumstances of a 40-year payment period, too much uncertainty and, frankly, too much of a requirement placed on this plaintiff to potentially request reimbursement weekly for funds not paid directly by ICBC, but payable out of his pocket. That is simply too much to expect.
- [15] With respect to the kinesiology treatments, the judge stated:
- [22] A different circumstance, I have concluded, exists in regards to the kinesiology sessions. Those are a modest cost of \$1,750 and are designed to be sessions taking place over a period of one year, and the one year commencing relatively soon.
- [23] I am satisfied that only the amount of \$1,750 should be deducted from the award under s. 83 of the Act.
- [16] In the result, the cost of future care component of the judgment against the defendants was reduced from \$98,610 to \$96,860, making the total amount of the judgment \$672,020.26 (plus costs).

Fresh Evidence on Appeal

- [17] Without objection from Mr. Del Bianco, we granted the defendants' application to tender an affidavit from the ICBC claims specialist who has been overseeing Mr. Del Bianco's claims for Part 7 benefits since April 2020. That affidavit indicates that on March 11, 2021, Mr. Del Bianco, through his counsel, submitted 11 invoices for massage therapy treatments totalling \$1,225.00 (GST included) to ICBC for reimbursement. Those invoices are for treatments from

September 2020 to March 2021, i.e., subsequent to the judgment awarding damages for future care costs. Based on the per treatment fee for massage therapy in the Regulation having been increased from \$80 (plus GST) to \$82 (plus GST) on April 1, 2020 (see Regulation, s. 88(1.3)), ICBC reimbursed Mr. Del Bianco \$947.10.

- [18] At the hearing of this appeal, Mr. Del Bianco's counsel advised us there is no agreement between her client and ICBC with respect to whether he can retain this payment in the event this appeal is dismissed. Counsel stated that although Mr. Del Bianco would be under no legal obligation to return the money in that event, he is prepared to do so voluntarily.
- [19] In addition, Mr. Del Bianco's counsel advised us that before the hearing of the application, the defendants had paid the entire amount of the damages assessed by the trial judge, which included, as special damages, the costs of massage therapy treatments that pre-dated the damages assessment reasons. Counsel further advised us that her law firm is holding the amount in issue in this appeal in trust, but that this is not pursuant to any arrangement or agreement with the defendants.
- [20] The fresh evidence illustrates the concern about double recovery that underlies s. 83 of the Insurance (Vehicle) Act.

Grounds of Appeal

- [21] In their factum, the defendants submit the trial judge erred:
- (a) in relying on principles and purposes governing tort awards rather than the provisions, principles, and purposes governing determinations of deductions under section 83 of the [Insurance (Vehicle) Act] ;
 - (b) in relying on irrelevant considerations to reject any section 83 deductions for massage therapy benefits to which the plaintiff is entitled under Part 7 of the Regulation ; and
 - (c) in admitting and relying on inadmissible evidence of ICBC's future financial viability as a basis for making no section 83 deductions for massage therapy benefits under Part 7 .

The admissibility of evidence point was not raised before the trial judge.

- [22] In addition, Mr. Del Bianco, in seeking to uphold the judge's order, submits ICBC cannot waive the medical certificate condition for treatments in excess of the number pre-authorized under Part 7 for the purposes of an application under s. 83 of the Insurance (Vehicle) Act. This point was not raised before the trial judge.

Order Sought on Appeal

[23] The defendants no longer seek to have the judgment against them reduced by the total amount awarded for massage therapy, i.e., \$54,898. What they now seek is a deduction of \$51,688.57 based on: (1) the pre-tax per treatment \$80 benefit in effect at the time they made their application; and (2) the present value multipliers the trial judge used in making his award.

The Purpose of the Deduction Provisions and this Court's Jurisprudence

[24] In the early 1970s the Legislative Assembly enacted two statutes that brought into existence a no-fault insurance scheme for persons injured in motor vehicle accidents, namely, the Automobile Insurance Act, S.B.C. 1973, c. 6, and the Insurance Corporation of British Columbia Act, S.B.C. 1973, c. 44. On the coming into force of these acts, ICBC became the universal motor vehicle insurer in this province. Under the scheme created by this legislation, a person injured in a motor vehicle accident can recover damages against the driver and owner of the vehicle responsible for their injuries and claim certain no-fault benefits from ICBC.

[25] From the beginning, the scheme envisioned that an injured person's claim against a tortfeasor would be reduced by the no-fault benefits paid or payable by ICBC. Section 25 of the 1973 Automobile Insurance Act read, in part:

(1) In this section and in section 26, unless the context otherwise requires,

"benefits" means a payment that is, or may be, made in respect of bodily injury or death under a plan established under this Act; except a payment pursuant to a contract of third party liability insurance or an obligation under a plan of third party liability insurance;

"insurance money" means a payment that is, or may be, made in respect of loss of, or damage to, a motor-vehicle or trailer under a plan established under this Act; except a payment pursuant to a contract of third party liability insurance or an obligation under a plan of third party liability insurance.

(5) The liability of any person to whom this section applies for loss, damage, injury, or death of any other person shall be reduced

(a) by the total amount of benefits and insurance money paid or payable in respect of the loss, damage, injury, or death; and

(b) where [ICBC] has not paid or assumed liability to pay benefits or insurance money in respect of the loss, damage, injury, or death by reason of

(i) a failure on the part of that other person, or his personal representative, or any person claiming through, on behalf of, or in respect of that person, to claim those benefits or the insurance money to which he is entitled; or

(ii) a violation of any term or condition of this Act, the regulations, or a plan by the person suffering the loss, damage, injury, or death or his personal representative, or any person claiming through, or on behalf of, or in respect of that person; or

(iii) loss or damage to a motor-vehicle or trailer that, contrary to the laws of the Province, is not designated in an unexpired owner's certificate,

by the total amount of benefits and insurance money that would have been otherwise payable in respect of the loss, damage, injury, or death.

- (6) Where a person commences an action in respect of loss, damage, injury, or death caused by a motor-vehicle or trailer or its use or operation, the amount of benefits and insurance money by which the liability of any other person may be reduced under subsection (5) shall not be disclosed to the court or to the jury and the court shall assess the award of damages and costs without disclosure of, or reference to, the amount of benefits and insurance money.
- (7) After assessing the award of damages and costs pursuant to subsection (6), the amount of benefits and insurance money referred to in subsection (6) shall be disclosed to the court and taken into account, or, if the amount has not been ascertained, the court may estimate the amount and that amount shall be taken into account, and the person shall be entitled to judgment to be entered for the balance only.
- (8) Where, for the purpose of this section, or section 26, it is necessary to estimate the value of future payments that the corporation is authorized or required to make under a plan, that value shall be estimated according to the value, as of the date of the estimate, of a deferred benefit, calculated for the period in respect of which those future payments are authorized or required to be made.

[Emphasis added.]

Over time, the language defining the no-fault benefits to be deducted has changed, referring to them as benefits the injured person "receives or is entitled to receive". Sections 83(1), (2), (4), (5), and (6) of the current Insurance (Vehicle) Act are the present day equivalents of these provisions.

[26] The no-fault benefits available to an injured party were initially set out in Regulation No.1 Pursuant to the Automobile Insurance Act, B.C. Reg. 428/73, which contained the following:

7.09 Medical rehabilitation and funeral expense benefits--(a) Where bodily injury is sustained by an insured as the result of an accident for which indemnity is provided under this Part, [ICBC] shall pay as benefits all reasonable expenses incurred, as the result of that injury, for necessary medical, surgical, dental, hospital, professional nursing, physiotherapy, chiropractic, and ambulance services, and, in addition, for such other services and supplies as are, in the opinion of the insurer's attending physician as approved by the corporation's medical adviser, essential for the physical or psychological treatment or rehabilitation of the insured.

- (b) The maximum limit of liability under subsection (a) is \$50,000.
- (c) Where bodily injury mentioned in subsection (a) results in the death of the insured, the corporation shall promptly pay as indemnity burial and funeral expenses not exceeding \$500.
- (d) The corporation is not liable under this section for those portions of any expenses payable or recoverable under any medical, surgical, dental, or hospitalization plan or law, or under any other insurance contract or certificate issued to, or for the benefit of, the insured; and the corporation shall not reimburse any medical plan or hospital plan that is applicable to or interested on behalf of any person pursuant to any contract of law.

Today, the no-fault benefits are set out in Part 7 - Accident Benefits of the Insurance (Vehicle) Regulation.

[27] This Court first considered the above-mentioned statutory and regulatory scheme in *Fisher v. Wabischewich* (1978), 5 B.C.L.R. 335 (C.A.), rev'g (1977), 2 B.C.L.R. 132 (S.C.). In that case, a trial judge awarded the plaintiff damages for injuries sustained in a motor vehicle accident that included a \$57,371 cost of future care component. The defendant then applied, pursuant to s. 25 of the Automobile Insurance Act, to have \$45,000 of that amount excluded from the formal judgment on the basis that ICBC would cover that portion of the plaintiff's future care expenses under s. 7.09 of the Regulation. The defendant called an ICBC adjuster whose evidence the trial judge summarized as follows (at 134-35):

Mr. Joseph Morley, the major claims adjuster for the corporation, testified that it was the policy of the corporation to pay any expenses incurred by an "insured" (in this case the plaintiff) pursuant to Reg. 7.09 including those expenses approved by the medical advisor to the corporation. The corporation would pay these expenses when incurred during the whole of the insured's life, even if they exceeded the sum of \$40,000. The corporation would not pay expenses deemed to be unreasonable or not approved by the medical advisor to the corporation. Mr. Morley suggested that any issue as to whether any expense incurred by the "insured" was reasonable or fell within Reg. 7.09 could be determined by proceedings in court.

[28] The trial judge dismissed the defendant's application based on a narrow interpretation of the words "paid or payable" in s. 25(5)(a), i.e., he held they did not refer to expenses the plaintiff may incur in the future and to which ICBC may become liable to pay under s. 7.09.

[29] This Court allowed the defendant's appeal and deducted \$44,000 from the amount awarded for cost of future care. In doing so, Chief Justice Farris stated that the purpose of the deduction was two-fold (at 336):

- (1) It is to determine the sum that the plaintiff shall receive at the time of the judgment. It is not to fix the amount of the future benefits. The amount of benefits that the plaintiff will receive in the future is determined by the provisions of the Act. These may well be in excess of the amount estimated by the trial judge in his award. However, by deducting the amount that the trial judge has estimated, the amount that is immediately payable to the plaintiff is determined; and
- (2) It is to prevent the plaintiff from being compensated twice. He cannot receive a lump sum in respect of future benefits and also receive the benefits.

[Emphasis added.]

- [30] I note that the Supreme Court of Canada also referred to the prevention of double recovery in *Gurniak v. Nordquist*, 2003 SCC 59 at para. 35, [2003] 2 S.C.R. 652. In that case, benefits paid under Quebec's no-fault insurance scheme to the spouse and children of a Quebec resident killed in a traffic accident in British Columbia were deducted from the damages they were awarded in a tort action brought under the Family Compensation Act, R.S.B.C. 1979, c. 120 [now R.S.B.C. 1996, c. 126].
- [31] In *Halliday v. Sanrud* (1979), 15 B.C.L.R. 4 (C.A.), a jury awarded a 19-year-old plaintiff \$600,000 in general damages. The trial judge, with the agreement of the parties, apportioned \$470,000 to cost of future care and future wage loss. The judge refused to make any deductions with respect to future no-fault benefits on the basis of the trial decision in *Fisher v. Wabischewich* and because ICBC had failed to present any evidence in regard to what payments it would make in the future. In allowing the defendant's appeal, Justice Craig stated that ICBC should advise the Court what medical and rehabilitation expenses it regards as payable, or may be payable, under s. 7.09 of the Regulation, and present evidence on disputed items, but that the corporation's failure to do so did not relieve the trial judge of the obligation to estimate these amounts: at 15. Based on the cost of future care evidence the plaintiff had presented at trial--which this Court was advised ICBC accepted--Craig J.A. estimated the present value of those benefits on the basis that they would be payable for 45 years. As that amount exceeded the then \$100,000 maximum for no-fault benefits, \$100,000 was deducted: at 15-18.
- [32] In *Lindal v. Lindal* (1980), 115 D.L.R. (3d) 745 (B.C.C.A.), rev'g (1978), 90 D.L.R. (3d) 668 (B.C.S.C.), aff'd on other grounds [1981] 2 S.C.R. 629, the trial judge awarded the plaintiff, who had been severely and permanently disabled in a motor vehicle accident, \$192,000 for cost of future care, being the present value of the estimated cost for maintaining him in a care facility for his expected life span, and \$127,000 for loss of past and future income. At a subsequent hearing to address the impact of no-fault benefits payable by ICBC, the judge deducted the entire \$192,000 from the damages award. He did so on the basis of uncontradicted evidence that ICBC accepted that a care facility was necessary and would pay for it. In relation to the lost income component of the award, the judge deducted \$7,850, being disability benefits ICBC had already paid, and \$35,000, being the present value of the

weekly disability benefit ICBC would pay the plaintiff pursuant to s. 7.03 of the Regulation until he reached age 65.

[33] The plaintiff cross-appealed the \$35,000 deduction. He based his argument on s. 7.07 of the Regulation, entitled "Annual review of payments exceeding 104 weeks", which read:

Any benefit payable pursuant to section 7.03, 7.04, 7.05, 7.06 and 7.08 may be annually reviewed, revised, and changed or ended as the corporation sees fit on the advice of the corporation medical advisor.

[34] The plaintiff argued that this gave ICBC the absolute discretion to reduce or discontinue his weekly benefit on the advice of its medical advisor. In rejecting that argument, Justice Taggart said this (at 755):

In the present case there was evidence that the respondent is totally disabled from engaging in any occupation or employment. This provided a basis upon which the Judge could make a deduction in respect of future weekly benefit payments. In addition there is no suggestion that the Insurance Corporation of British Columbia has any intention of reducing or discontinuing the future weekly benefit payments. On the contrary the testimony of an employee of the corporation was that the respondent would be provided with \$50 a week for as long as he was totally disabled.

[Emphasis added.]

[35] In *Baart v. Kumar* (1985), 66 B.C.L.R. 1 (C.A.), one of the issues concerned an award of \$7,820 the trial judge had made to cover the costs of weekly visits to a psychiatrist for two years. Prior to trial, the plaintiff did not claim or receive no-fault benefits. Nevertheless, the judge deducted the entire amount on the basis that psychiatric services were a "medical service" falling under s. 7.09(a) of the Regulation and, therefore, a no-fault benefit to which the plaintiff was entitled without the need for the prior approval of ICBC's medical advisor. The plaintiff's appeal failed. A majority in this Court agreed with the trial judge. In the course of his reasons, Justice Seaton said this (at 12-13):

The enactments with which we are concerned have been changed from time to time. The general purpose of them, to shift responsibility from the person at fault to a body that provides insurance regardless of fault, has continued. The shift necessarily takes away the right to claim against a person other than the insuring body. That is a common feature in no-fault plans; the workers' compensation scheme is a familiar example. This Court recognized that shift in *Fisher v. Wabischewich* [citation omitted].

The argument is that psychiatric services are not medical services, that they therefore required the approval of the medical advisor before they would be paid by I.C.B.C., that such approval had not been given, and that therefore the plaintiff was not entitled to benefits.

The words "would have been entitled" in the Act are overlooked in this submission. They would appear to cover the point. If the plaintiff had applied appropriately, there is no reason to think that approval would have been wrongly withheld.

[Emphasis added.]

- [36] In *Schmitt v. Thomson* (1996), 18 B.C.L.R. (3d) 153 (C.A.), a five-judge division was convened to consider s. 24 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1979, c. 204, and the previous decision of a three-judge division in *Jang v. Jang* (1991), 54 B.C.L.R. (2d) 121 (C.A.). Section 24 was the then iteration of s. 25 of the 1973 Automobile Insurance Act. *Jang v. Jang* was considered authority for the proposition that there could be no deductions on account of future discretionary Part 7 benefits absent a commitment from ICBC to pay those benefits. That case involved s. 88(2) of the then [and current] Regulation, which stated ICBC "may provide" funding for certain items and services if its medical advisor is of the opinion that the item or service in question is likely to promote rehabilitation.
- [37] *Schmitt v. Thomson* overruled *Jang v. Jang*. Writing for the Court, Justice Hollinrake stated that "[t]he uncertainties as to the payment of future benefits cannot act as a bar to the court estimating these future benefits as best it can as required by s. 24(5)" [now s. 83(5)]: at para. 19.
- [38] In the course of his reasons, Hollinrake J.A. rejected the defendant's argument that if an award for loss of future income is based on a certain period (e.g., to a certain age), then the benefits deduction should be based on that same period. In that regard Hollinrake J.A. noted that uncertainty with respect to future payments was created by s. 87 of the then [and current] Regulation, which states:

Any benefits payable under section 80, 84 or 86 may be reviewed every 12 months and terminated by the corporation on the advice of the corporation's medical advisor.

However, he went on to state that ICBC could negate that uncertainty:

24 I should add here that in my opinion there is nothing to stand in the way of the Corporation waiving for a specific period of time its discretion under s. 87 of the regulations to review benefits payable every 12 months under Regulations 80, 84 or 86.

- [39] In *Ayles v. Talastasi*, 2000 BCCA 87, 73 B.C.L.R. (3d) 60, the trial judge awarded \$51,500 to a 17-year-old plaintiff to cover the lifetime cost of headache medication: [1998] B.C.J. No. 796 (S.C.). The judge later deducted that amount on the basis that ICBC accepted that the medication was covered as a Part 7 benefit: [1998] B.C.J. No. 2705 (S.C.). In dismissing the plaintiff's challenge to that deduction, after citing *Schmitt v. Thomson*, Justice Donald said this:
- [31] In the present case there is no uncertainty of the kind contemplated in the above underlined passage. I.C.B.C. accepts that medication for the plaintiff's headache condition falls properly within the ambit of s. 88(1) of the Regulations which reads:

88.(1) Where an insured is injured in an accident for which benefits are provided under this Part, the corporation shall, subject to subsections (5) and (6), pay as benefits all reasonable expenses incurred by the insured as a result of the injury for necessary medical, surgical, dental, hospital, ambulance or professional nursing services, or for necessary physical therapy, chiropractic treatment, occupational therapy or speech therapy or for prosthesis or orthosis.

[32] As a claim covered by s. 88(1) I.C.B.C. is obliged to pay the benefits. It is not a matter of discretion under s. 88(2) where entitlement depends "on the opinion of the corporation's medical adviser". The risk in deducting too much from the tort award for discretionary benefits is that I.C.B.C. may ultimately refuse to pay on items which although found to be compensable in the tort claim were deducted on the assumption that they would be paid as a no fault benefit. In that instance the claimant is out of pocket for the expense and I.C.B.C. enjoys a windfall. But here the class of future expense is obligatory, not discretionary, and so the plaintiff does not stand to lose anything by the deduction. It is only in circumstances where the classification of the future cost is unclear or an issue arises whether the item is covered by Part 7 at all, that some caution is required.

[33] Mr. Czepil argues that even if it is clear that the future costs fall under s. 88(1) the deduction should be nominal. He gives three reasons: there may be disagreements over future claims, the regulations are uncertain, and the regulations could be changed. I do not accept these arguments. The acknowledgment by I.C.B.C. that the plaintiff is entitled to the medication costs provides enough certainly to deduct the whole amount. My decision in that respect rests on I.C.B.C.'s acknowledgment that the correct interpretation of s. 88(1) is that the plaintiff's ongoing requirement for headache medication for headaches whose cause is rooted in this accident is a requirement for reasonable expenses for necessary medical services within the meaning of s. 88(1). The possibility that there may be some disagreement in the administration of the individual claims as they are presented in the future is simply part of an ongoing entitlement. The deduction must be made on the basis of entitlement not on the possibility that claims may be unfairly adjusted in the future.

[34] On the second point, the application of the regulations to this case is perfectly clear; and on the third point, a change in the regulations adverse to the plaintiff is too speculative to affect the result.

[Emphasis added.]

[40] In *Lynn v. Pearson* (1998), 55 B.C.L.R. (3d) 401 (C.A.), aff'g (1997), 3 C.C.L.I. (3d) 175 (B.C.S.C.), the trial judge deducted a nominal \$1,500 from a substantial cost of future care award, being his estimate of the plaintiff's entitlement to Part 7 benefits. Those benefits were subject to two conditions: (1) the opinion of ICBC's medical advisor that the item or service in question is likely to promote the plaintiff's rehabilitation; and (2) ICBC's discretion. There was no commitment from ICBC to pay for any particular item or service. In dismissing the defendant's appeal, Justice Finch (as he then was) said this:

- [18] Although I do not subscribe to all of the learned trial judge's reasoning on the issue, I have not been persuaded that he reached the wrong conclusion. The defendant bears the onus of proving that the plaintiff is, or will be, entitled to the benefits which it claims to have deducted from the award for the cost of future care. Strict compliance with the requirements of the statute is called for. Uncertainty as to whether Part VII benefits will be paid or whether they would "match" elements of the tort award must be resolved in the plaintiff's favour.
- [19] The evidence in this case does not support the result for which the defendant contends. In my view the learned trial judge correctly interpreted the reasons of this Court in *Schmitt v. Thomson* and applied them appropriately to the facts that he found. The estimate made by the judge of the plaintiff's entitlement to future Part VII benefits is not one with which, in my view, this Court should interfere.

[Emphasis added.]

- [41] *Uhrovic v. Masjhuri*, 2008 BCCA 462, 86 B.C.L.R. (4th) 15, aff'g 2007 BCSC 1096, 51 C.C.L.I. (4th) 134, is another case in which a trial judge made a nominal deduction (\$1,000) from a substantial cost of future care award based on the plaintiff's need for homemaker assistance. As in *Lynn v. Pearson*, this benefit was subject to two conditions: (1) the opinion of ICBC's medical advisor that the service is likely to promote the plaintiff's rehabilitation; and (2) ICBC's discretion. There was no commitment by ICBC to pay for this service and the judge found the plaintiff's chances of obtaining this benefit were "very low": at para. 17. In dismissing an appeal by the defendant, this Court stated that given the judge's findings of fact, the circumstances were no different than those in *Lynn v. Pearson*: at para. 42.

Analysis

- [42] In my view, the trial judge erred in principle in several respects in declining to make any deduction from the amount he awarded for massage therapy treatments. I will address those errors before addressing Mr. Del Bianco's submissions with respect to ICBC's waiver of the medical certificate condition for treatments beyond those that are pre-authorized. However, there are two indisputable facts that should be mentioned at the outset. The first is that ICBC is not a party to these actions; it is the defendants, not ICBC, who seek the deduction. The second is that ICBC's obligation to pay Mr. Del Bianco Part 7 benefits arises from the fact that he is an "insured" as that term is defined in s. 78 of the Regulation.

The Treatment of Mr. Rudkowski's Affidavit

- [43] The trial judge began his discussion of the merits of the defendants' application by stating:
- [13] It is concerning to the court that the representative of ICBC, Andrew Rudkowski, has not, in his affidavit, explained the failure of ICBC prior to trial to pay the massage therapy costs of the plaintiff.

This remark was based on statements in Mr. Del Bianco's affidavit that in the past ICBC had refused to pay for his massage therapy treatments. However, in the context of an application focused on future Part 7 benefits, one would not expect Mr. Rudkowski to address past dealings between ICBC and Mr. Del Bianco. Further, Mr. Rudkowski's affidavit post-dates the damages assessment reasons in which Mr. Del Bianco was awarded the cost of those past treatments.

[44] More troubling is the judge's acceptance of Mr. Del Bianco's counsel's submission that Mr. Rudkowski had been untruthful in his affidavit:

[14] Equally concerning is the apparent exaggeration, even today, less than one year into a potentially 40-year commitment, as to the extent of ICBC's commitment to pay what was ordered after trial. In paragraph 6, Andrew Rudkowski deposes that "ICBC will reimburse Mr. Del Bianco for the necessary health care services he has incurred since March 22, 2019 and he incurs in the future". That is, as noted by defence counsel, not true. They will only reimburse under their payment schedule of \$80, when the court determined on the evidence the cost of such treatment at \$85.

[Emphasis added.]

With respect, this statement is based on a misapprehension of the evidence. It is impossible to read Mr. Rudkowski's affidavit in any way other than as stating a commitment by ICBC to reimburse Mr. Del Bianco in accordance with the payment schedule set in the Regulation.

ICBC's Financial Viability

[45] The trial judge accepted news articles from the Internet attached as exhibits to Mr. Del Bianco's affidavit as evidence of ICBC's "lack of financial viability": at para. 16. Based on those articles, he found there was uncertainty with respect to ICBC's future existence and its ability to pay Mr. Del Bianco Part 7 benefits over the span of 40 years: at para. 19.

[46] The defendants now say those articles were not admissible for the truth of their contents and that notwithstanding their failure to object, the trial judge should have exercised his gatekeeper function to exclude them because there was no way to test the reliability of the statements attributed to Attorney General Eby. Mr. Del Bianco's position is that while the failure to object at trial is not fatal to raising this issue for the first time on appeal, it is an important consideration.

[47] Support for the proposition that the articles were not admissible for the truth of their contents is found in *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953 at para. 14, 39 B.C.L.R. (6th) 352. In that case, which involved an application under s. 83(5) of the Insurance (Vehicle) Act to reduce the amount of a damages award, the trial judge declined to admit similar articles attached as exhibits to an affidavit sworn by the plaintiff's counsel. See also: *Sidhu v. Alton*, 2021 BCSC 265 at para. 70.

- [48] There is no question that the failure to object to the admissibility of evidence creates a significant hurdle to raising that objection on appeal: *Lam v. Chiu*, 2014 BCCA 32 at paras. 47-48, 55 B.C.L.R. (5th) 227; *Parliament v. Conley*, 2021 ONCA 261 at paras. 63-65, 155 O.R. (3d) 161. In the present case, however, I need not decide whether to give effect to the defendants' objection because the articles Mr. Del Bianco submitted do not call ICBC's continued existence or ability to pay Part 7 benefits into question. That Mr. Del Bianco deposed he was "very worried whether ICBC will continue to exist" is not relevant.
- [49] Nothing in what Mr. Eby was reported to have said supports an inference that ICBC's insolvency or demise is on either the short-term or long-term horizon. The "dumpster fire" and other remarks attributed to Mr. Eby concern steps his government was considering in the context of ICBC continuing to be the universal motor vehicle insurer in this province, as it has been for almost 50 years under governments of several political stripes. These remarks focus on what the government might do to keep the rates ICBC charges for insurance affordable.
- [50] As well, the trial judge's concern ignores the fact that ICBC is a Crown corporation. Just as it would be speculative to suppose that future legislative or regulatory changes would adversely affect Mr. Del Bianco's access to Part 7 benefits (see *Ayles v. Talastasi* at para. 34), so too would it be speculative to suppose that a future government would abolish ICBC without taking steps to ensure it keeps the commitments it has made to insured persons and the courts. In this regard, the following from the judgment of Justice Forth in *Wark v. Kang*, 2020 BCSC 196, 34 B.C.L.R. (6th) 325, is apposite:
- [38] I see no risk that ICBC will dishonor this commitment. ICBC is an agent of the government and, as noted in other cases, the Court can presume that the future conduct of ICBC will be honourable and this commitment will be met: *Norris v. Burgess*, 2016 BCSC 1452 at para. 35. As in [*Sovani v. Jin*, 2005 BCSC 1285], at paras. 46-50, I am not convinced that I should be assessing the relationship between the plaintiff and ICBC on the delivery of the future services, particularly given the fact that Ms. Kunzer has "irrevocably, unequivocally, and unconditionally" agreed on behalf of ICBC to pay the Part 7 benefits.

[Emphasis added.]

See also: *Sidhu v. Alton* at para. 85.

Future Payment Rates and the Need to Submit Claims

- [51] Although not raised by Mr. Del Bianco, the trial judge expressed concern over the fact that it was "impossible to know and predict" the rate at which ICBC would pay for massage therapy in the future. He also expressed concern over the fact that if a deduction were made, then Mr. Del Bianco would have a "40-year responsibility" to submit claims to ICBC. In the judge's view, this was "completely inconsistent with the general purpose of litigation and tort awards, to create some finality between the parties", and "too much to expect" from Mr. Del Bianco: at paras. 17, 21. Further, because ICBC had previously declined to pay for massage

therapy treatments, the judge considered it "unrealistic" to have Mr. Del Bianco deal with an ICBC adjuster for 40 years: at para. 18.

- [52] To begin, the fact that it is not possible to know what the Part 7 rates for massage therapy will be in the future is not a relevant consideration. This will invariably be the case for all the services listed in Schedule 3.1/Table 1, as those rates are subject to annual adjustments based on the consumer price index; they can increase but not decrease: Regulation, s. 88(1.3)-(1.4). By virtue of s. 83(5) of the Insurance (Vehicle) Act, the judge was required to "estimate" that amount, in much the same way that he determined what amount to award for future massage therapy treatments. In the latter case, he based his award on a per treatment cost of \$89.25, being \$85 plus 5% GST: damages assessment reasons at para. 118.
- [53] Although the trial judge did not set out how he arrived at the \$85 per treatment cost, it is apparent from the material filed on this appeal that he did so based on the average cost of those treatments. In the cost of future care report tendered by Mr. Del Bianco, the present value calculations for massage therapy were based on a pre-tax per treatment cost of \$86, being the mid-point of the cost range provided to the economist who prepared the report. That cost range is not set out in the report. However, in the affidavit Mr. Del Bianco filed on the application (sworn December 2, 2019), he deposed his massage therapy treatment provider's pre-tax rates were as follows: \$59 (30 minutes); \$90 (45 minutes); and \$105 (60 minutes); the average being \$84.66. Of note is that an attachment to that affidavit indicates that from early January 2017 until mid-December 2019, Mr. Del Bianco had 50 massage therapy treatments, 47 of which were 30 minutes. The other three were 45 minutes.
- [54] That Mr. Del Bianco would have to submit claims to ICBC for an extended period was also not a relevant consideration. The requirement to submit claim forms is a common feature of benefits plans. In this respect, ICBC is no different than many dental and health-care plans. In *Halliday v. Sanrud*, this Court determined the amount to be deducted from a cost of future care award based on the present value of benefits the plaintiff was entitled to claim for 45 years. Some of those claims were for the monthly costs of prescription drugs and non-prescription medical supplies. This case demonstrates that lengthy timelines are not necessarily a barrier to making Part 7 deductions.
- [55] In addition, contrary to what the trial judge said, there is "finality between the parties", those parties being Mr. Del Bianco and the defendants. As Justice MacDonald correctly observed in *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, "The legislative scheme is designed to remove the burden of future care from the tortfeasor and place it on the insurance provider, ICBC": at para. 71. Once a deduction is made and the formal order is entered, the litigation between the parties will be at end, subject to appeals. See also: *Baart v. Kumar* at 12 ("The general purpose of [the legislation is] to shift responsibility from the person at fault to a body that provides insurance regardless of fault").

- [56] That ICBC had previously declined to pay for Mr. Del Bianco's massage therapy treatments was also not relevant in light of its commitment to pay on a going-forward basis. As mentioned above, it is presumed that ICBC will honour the commitments it makes with respect to the payment of Part 7 benefits.
- [57] In this case, there was a straightforward way to determine what deduction to make for future massage therapy treatments. Unfortunately, the defendants did not propose it until this appeal. At trial, the defendants sought to have the entire amount awarded for massage therapy treatments deducted; an award the trial judge based on a per treatment cost of \$85 plus GST. They now seek a deduction based on a per treatment cost of \$80 plus GST, i.e., the maximum per treatment cost permitted by the Regulation at the time of their application.
- [58] The defendants' proposal is both reasonable and sensible. At the time of the application, the maximum pre-tax amount ICBC was authorized to pay per treatment was \$5 less than the pre-tax per treatment cost the trial judge used in making the award. This differential must be accounted for in Mr. Del Bianco's favour. As the award was based on the present value of \$85 plus GST per treatment, the deduction should be based on the present value of \$80 plus GST per treatment. Using the multipliers used by the trial judge, the deduction should be \$51,668, unless, as submitted by Mr. Del Bianco, ICBC's waiver of the medical certificate condition for treatments in excess of the number pre-authorized under Part 7 cannot be considered.

Entitlement to Benefits/Waiver of the Medical Certificate Condition

- [59] Mr. Del Bianco's position is that there can never be a deduction for treatments listed in Schedule 3.1/Table 1 in excess of the pre-authorized number. With reference to s. 83(4) and (5) of the Insurance (Vehicle) Act, he submits that an insured is never entitled to treatments beyond that number because: (a) by reason of s. 88(1.01) of the Regulation, the need for those treatments must be certified in writing by either the insured's physician or ICBC's medical advisor; and (b) ICBC's waiver of the medical certificate condition is not a consideration in determining an insured's entitlement to those treatments. I do not agree. To accept Mr. Del Bianco's argument would undermine the legislative objective behind what is today s. 83 of the Insurance (Vehicle) Act, which is to preclude a plaintiff from receiving double compensation: see *Fisher v. Wabischewich* at 336.
- [60] To begin, it is clear that ICBC has authority to waive a medical certificate condition. In *Schmitt v. Thomson*, this Court accepted that ICBC has authority to waive a condition that operates in its favour in the context of an application to reduce a damages award on account of Part 7 benefits. In that case, Hollinrake J.A. stated that "there is nothing to stand in the way of the Corporation waiving for a specific period of time its discretion under s. 87 of the regulations to review benefits payable every 12 months": at para. 24. In other words, this Court accepted that ICBC can remove any uncertainty with respect to whether a plaintiff will receive Part 7 benefits in the future by waiving its right to annual reviews that could result in the termination of those benefits. At that time, the 1979 Insurance (Motor Vehicle) Act

contained the following provision:

12. For the better administration of the plan, the corporation may either generally or for a particular case waive a term or condition of the plan; but no term or condition shall be deemed waived by the corporation unless the waiver is in writing and signed by an officer of the corporation.

"[P]lan" was defined as in s. 1.(1) as including Part 7 benefits:

[A] plan of universal compulsory automobile insurance established by the corporation under this Act and regulations, and includes extension insurance.

[61] In the present case, ICBC's authority to waive a term or condition is set out in s. 85 of the 1996 Insurance (Vehicle) Act, which reads, in part:

- (1) An insurer may for a particular case waive a term or condition of the plan or an optional insurance contract.
- (2) A term or condition of the plan or an optional insurance contract is not waived by the insurer in whole or in part unless the waiver is in writing and signed by a person authorized for that purpose by the insurer.

The definition of "plan", in s. 1(1) of the Act, includes Part 7 benefits:

"plan" means the plan of universal compulsory vehicle insurance referred to in section 2 and operated by the corporation under Part 1 and the regulations under that Part;

[62] Mr. Del Bianco cites *Tench v. Van Bugnum*, 2021 BCSC 501, in support of his argument. In that case, the defendants applied to reduce a cost of future care award on the basis that the plaintiff was entitled to benefits under both s. 88(1.01) and (2) of the Regulation. Section 88(2) deals with discretionary benefits ICBC is authorized to pay for "[w]here, in the opinion of the corporation's medical advisor, provision of any one or more [of them] is likely to promote the rehabilitation of an insured". Unlike the treatments listed in Schedule 3.1/Table 1, benefits under s. 88(2) are described in generic terms, e.g., "the acquisition of one motor vehicle equipped as necessary and appropriate to its use or operation by the insured", one-time funding for "alterations to the insured's residence that are necessary to make the residence accessible to and usable by the insured", and "attendant care".

[63] In a portion of *Tench v. Van Bugnum* that Mr. Del Bianco cited in oral argument, Justice Fleming said this about the scope of ICBC's authority to waive:

[46] Having considered [*LaPrairie v. ICBC*, 2004 BCSC 473], the legal principles that govern applications for deductions under s. 83 and the Part 7 accident benefit scheme, I accept that s. 85 is best understood as providing ICBC with limited authority to waive regulatory requirements that establish terms and conditions of the plan. I do not accept this authority includes the power to waive fundamental aspects of the statutory/regulatory scheme, where for example the effect would be to create new categories of insurance coverage or

entitlement to benefits, or remove statutory mechanisms that operate to protect the interests of both parties.

- [64] However, Fleming J. went on to hold that in the context of an application to reduce a damages award, ICBC does have authority to waive the medical certificate condition with respect to benefits under s. 88(1.01)--i.e., more than the number of pre-authorized treatments listed in Schedule 3.1/Table 1--and discretionary benefits that fall under s. 88(2) of the Regulation:
- [56] Based on my view of the waiver power under s. 85 of the Act and my reading of Regulation s. 88(2), I agree that ICBC's authority to waive conditions or terms of [the] plan is limited to the requirement for a medical opinion. In other words, ICBC does not have the authority to waive the requirement that the discretionary benefits are likely to promote rehabilitation. To conclude otherwise requires ICBC's discretion to provide "one or more of the following" under s. 88(2) as ungoverned by a particular purpose, and under s. 88(2)(f) completely unfettered. Unrooted from any requirement for rehabilitation, s. 88(2) changes substantially to allow for catch-all entirely discretionary accident related benefits.

[Emphasis added.]

- [65] Justice Fleming then considered the affidavit (i.e., the waiver) provided by ICBC in determining whether uncertainty existed with respect to what benefits would be provided. In particular, by reason of ambiguity in that affidavit, she found uncertainty existed in regard to physiotherapy and chiropractic treatments, both of which are listed in Schedule 3.1/Table 1, each with 25 pre-authorized treatments. In assessing damages, Fleming J. had made an award based on the plaintiff, who was 29 years old, requiring 12 physiotherapy and 12 chiropractic treatments for one year followed by 10 to 12 treatments annually: 2019 BCSC 1877 at paras. 208-09. Because it was unclear from the wording of the affidavit whether ICBC's waiver of the medical certificate condition extended beyond four years, Fleming J. limited the deduction for those treatments to four years: at paras. 74-79.
- [66] I agree with Fleming J. that in determining whether a plaintiff is entitled to a benefit listed in Table 3.1/Table 1 in excess of the pre-authorized number of treatments, ICBC's waiver of the need for a medical certificate is a relevant factor. Whether ICBC also has authority to waive the condition under s. 88(2) of the Regulation that a discretionary benefit is likely to promote rehabilitation is something that does not need to be decided in this case.
- [67] When an application is made to reduce an award for a treatment listed in Schedule 3.1/Table 1 on the basis that insurance under the "plan" will cover all or some of those costs as a Part 7 benefit, what must be determined is the certainty of that coverage. For treatments in excess of the pre-authorized number, the issue is whether, and to what extent, insurance coverage for those treatments is certain. ICBC is authorized by s. 85(1) of the Insurance (Vehicle) Act to waive the medical certificate condition for treatments in excess of the pre-authorized number.

- [68] Waiving the need for a medical certificate does not create a new form of coverage or an entitlement that did not otherwise exist. It does no more than facilitate access to coverage provided under the "plan". Indeed, waiving the need for a medical certificate is a reasonable thing to do when, based on medical evidence, a trial judge has found that treatments listed in Schedule 3.1/Table 1 are necessary on an ongoing basis.
- [69] In the present case, ICBC, by way of Mr. Rudkowski's affidavit: (a) accepted the trial judge's findings of fact and agreed that future massage therapy treatments are necessary health care services; (b) waived the requirement for continued medical certification, and (c) "irrevocably, unequivocally, and unconditionally" agreed to pay for those treatments. That evidence provides the necessary certainty that Mr. Del Bianco will receive no-fault benefits for future massage therapy treatments.

Disposition

- [70] I would allow this appeal and reduce the cost of future care component in the trial judge's formal orders (entered on May 25 and September 24, 2020) from \$96,860 to \$45,192, thereby reducing the total damages awarded in those orders from \$672,020.26 (plus costs) to \$620,352.26 (plus costs).

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Grauer"

APPENDIX

Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231

Definitions and application

1(1) In this Act:

"optional insurance contract" means a contract of vehicle insurance other than vehicle insurance provided under the plan, and includes

- (a) a binding oral agreement, and
- (b) a contract that provides insurance for a vehicle for which, or for the use or operation of which, a permit or licence is not required under the Motor Vehicle Act, if the contract provides that this Act applies;

"plan" means the plan of universal compulsory vehicle insurance referred to in section 2 and operated by the corporation under Part 1 and the regulations under that Part;

Part 1 - Universal Compulsory Vehicle Insurance

1.1 In this Part:

"benefits" means the prescribed benefits;

Part 5 - Provisions Relating to Parts 1 and 4

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.
- (3) Nothing in this section precludes the insurer from demanding from the person referred to in subsection (2), as a condition precedent to payment, a release to the extent of the payment.
- (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,
- (6) If, for the purpose of this section or section 84, it is necessary to estimate the value of future payments that the corporation or the insurer is authorized or required to make under the plan or an optional insurance contract, the value must be estimated according to the value on the date of the estimate of a deferred benefit, calculated for the period for which the future payments are authorized or required to be made.

85(1) An insurer may for a particular case waive a term or condition of the plan or an optional insurance contract.

- (2) A term or condition of the plan or an optional insurance contract is not waived by the insurer in whole or in part unless the waiver is in writing and signed by a person authorized for that purpose by the insurer.

- (3) Neither the insurer nor the insured waives any term or condition of the plan or an optional insurance contract by any act relating to the appraisal of the amount of loss or to the delivery and completion of proofs or to the investigation or adjustment of any claim under the plan or an optional insurance contract.

Insurance (Vehicle) Regulation, B.C. Reg. 447/83

Part 7 - Accident Benefits

78 In this Part:

"insured" means

- (a) a person named as an owner in an owner's certificate,
- (b) Repealed. [B.C. Reg. 257/86, s. 21.]
- (c) a member of the household of a person named in an owner's certificate,
 - (c.1) an insured as defined in section 42 who is not in default of premium payable under section 45,
 - (c.2) a member of the household of an insured described in paragraph (c.1),
- (d) an occupant of a vehicle that
 - (i) is licensed in the Province and is not exempted under section 43 or 44 of the Act, or
 - (ii) is not required to be licensed in the Province, but is operated by a person named in a driver's certificate,
- (e) a cyclist or pedestrian who collides with a vehicle described in an owner's certificate, or
- (f) a resident of the Province who is entitled to bring an action for injury or death under section 20 or 24 of the Act,

and includes the personal representative of a deceased insured;

79(1) Subject to subsection (2) and sections 80 to 88, 90, 92, 100, 101 and 104, the corporation shall pay benefits to an insured in respect of death or injury caused by an accident that occurs in Canada or the United States of America or on a vessel travelling between Canada and the United States of America.

(2) Where an accident occurs in the United States or on a vessel travelling between Canada and the United States, no benefits are payable under this Part to

- (a) a cyclist, or
- (b) a pedestrian

unless the cyclist or pedestrian is named in an owner's certificate or a driver's certificate or is a member of the household of a person named in an owner's certificate or a driver's certificate.

87 Any benefits payable under section 80, 84 or 86 may be reviewed every 12 months and terminated by the corporation on the advice of the corporation's medical advisor.

88(0.1) In this section:

"British Columbia consumer price index" means the annual average All-items Consumer Price Index for British Columbia, as published by Statistics Canada under the authority of the Statistics Act (Canada);

"fiscal year" means the period beginning on April 1 in one year and ending on March 31 in the next year.

- (1) If an insured is injured in an accident for which benefits are provided under this Part, the corporation must, subject to this section, pay as benefits all reasonable expenses incurred by the insured as a result of the injury for necessary
 - (a) health care services listed in Column A of Table 1 or Table 2, as applicable, of Schedule 3.1 and provided by the applicable health care practitioner,
 - (b) occupational therapy provided by an occupational therapist, and
 - (c) dental, hospital, ambulance and professional nursing services, speech therapy, medication, prostheses and orthoses.

(1.01) For the purposes of subsection (1)(a), a treatment

- (a) that is in addition to the number of treatments listed in Column D of Table 1 of Schedule 3.1 corresponding to that health care service, or
- (b) that is provided more than 12 weeks after the date of the accident

is not a necessary health care service unless the corporation's medical advisor or the insured's physician certifies to the corporation in writing that, in the opinion of the medical advisor or physician, the treatment is necessary for the insured.

(1.1) Repealed. [B.C. Reg. 383/89, s. 14.]

(1.2) Subject to subsection (1.3), the benefits paid under subsection (1) must not,

- (a) for each health care service referred to in subsection (1)(a), exceed the fee limit set out in Column B or C, as applicable, of Table 1 of Schedule 3.1 corresponding to the health care service,
- (b) for occupational therapy, exceed the fee limit of \$112 per hour, and
- (c) for each health care service referred to in subsection (1)(a) that is provided by a physician, exceed the fee limit set out in Column B of Table 2 of Schedule 3.1.

(1.3) For the fiscal year beginning of April 1, 2020, and for each fiscal year after that, each fee limit referred to in subsection (1.2) must be determined annually by multiplying

- (a) the fee limit amount for the immediately preceding fiscal year, and
- (b) the sum of
 - (i) 1, and
 - (ii) the annual percentage change in the British Columbia consumer price index, as determined under subsection (1.5) and rounded to the nearest 1/10 of a percentage point.

(1.4) Despite subsection (1.3)(b)(ii), if the annual percentage change as determined under subsection (1.5) is a negative number, the annual percentage change is rounded up to zero.

(1.5) The annual percentage change referred to in subsection (1.3)(b)(ii) must be calculated using the following formula:

where

APC = the annual percentage change in the British Columbia consumer price index;

CPI1 = the sum of the 12 individual monthly British Columbia consumer price indexes for the consecutive 12 month period ending on December 31 of the fiscal year immediately preceding the fiscal year for which the fee limit is being determined;

CPI2 = the sum of the 12 individual monthly British Columbia consumer price indexes for the consecutive 12 month period immediately preceding the 12 month period referred to in the description of CPI1.

(1.6) The fee limit amount determined under subsection (1.3) must be rounded to the nearest dollar and an amount ending in .50 must be rounded up to the next dollar.

- (2) Where, in the opinion of the corporation's medical advisor, provision of any one or more of the following is likely to promote the rehabilitation of an insured who is injured in an accident for which benefits are provided under this Part, the corporation may provide any one of the following:
- (5) The amount by which the liability of the corporation under this section is limited is the amount set out in section 3 of Schedule 3.

88.01(1) If an accident occurs for which benefits are provided under section 88, the insured must provide to the corporation a receipt for the expenses incurred that will be compensated as benefits under that section no later than 60 days from the date that those expenses are incurred.

- (2) The corporation is not liable to an insured who, without reasonable excuse, fails to comply with this section.

90(1) Where, in the opinion of the corporation's medical advisor or vocational advisor and in the opinion of the medical practitioner attending an insured who is receiving benefits under section 80, 84, 86 or 88,

- (a) any medical, surgical or other similar treatment is likely to relieve in whole or part the disability of the insured, or
 - (b) a retraining or educational program is likely to assist in the rehabilitation of the insured,
- the corporation may require the insured, at the expense of the corporation, to undergo treatment or complete the program.
- (2) Subject to subsection (3), where an insured refuses to comply with a requirement under this section, the corporation may, after giving the insured at least 60 days' notice in writing, by registered mail, postage prepaid, addressed to the insured at his last address according to the corporation's records, terminate payment of benefits under section 80, 84, 86 or 88.
 - (3) The insured may, within the period of 60 days mentioned in subsection (2), apply to a judge of the Supreme Court for an injunction against terminating the benefits on grounds that
 - (a) the treatment the insured is required to undergo
 - (i) is unlikely to relieve the insured's disability, or
 - (ii) may injuriously affect the balance of the health of the insured, or
 - (b) the program the insured is required to complete is not likely to assist in the rehabilitation of the insured.

98(1) An insured must, on request of the corporation, promptly provide a certificate or report of an attending health care practitioner as to the nature and extent of the insured's injury, and the treatment, current condition and prognosis of the injury.

(1.1) The certificate or report required by subsection (1) must be provided to the corporation

- (a) in any form specified by the corporation including, without limitation, narrative form, and
 - (b) in any format specified by the corporation including, without limitation, verbal, written and electronic formats.
- (2) The corporation is not liable to an insured who, to the prejudice of the corporation, fails to comply with this section.

99(1) An insured who makes a claim under this Part must allow a health care practitioner selected by the corporation, at the expense of the corporation, to examine the insured as often as it requires.

- (2) The corporation is not liable to an insured who, to the prejudice of the corporation, fails to comply with this section

Schedule 3

3(1) For the purpose of section 88, the amount by which the liability of the corporation is limited is the amount set out in

- (a) the certificate providing coverage for the accident, or
- (b) if more than one certificate provides coverage, in the certificate providing the higher or highest limit or coverage.
- (2) Despite subsection (1), the amount by which the liability of the corporation is limited in respect of each insured injured
 - (a) in the same occurrence on or after January 1, 1990 and before January 1, 2018 must not exceed \$150 000, and
 - (b) in the same occurrence on or after January 1, 2018 must not exceed \$300 000.
- (3) The maximum amount that may be reimbursed under section 88(2)(d.1) for health care supplies, health care services or a combination of health care supplies and health care services is \$1 000.
- (4) The amount referred to in subsection (3) is part of the maximum amounts set out in subsection (2).

Schedule 3.1

Health Care Services, Fee Limits and Pre-Authorized Treatments

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Table 1

Item

Column A

Health Care

Service

Column B

Fee Limit for

Assessment Visit

and Report

Column C

Fee Limit for

Standard Treatment

Column D

Number of Pre-Authorized Treatments

1

Acupuncture

\$105

\$88

12

2

Chiropractic

\$199

\$53

25

3

Counselling

\$210

\$120

12

4

Kinesiology

\$135

\$78

12

5

Massage therapy

\$107

\$80

12

6

Physiotherapy

\$250

\$79

25

7

Psychology

\$340

\$195

12

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