

CANADA / JUDGMENT

# Elliott v. McCliggot

2020 BCSC 1129

## COURT

Supreme Court of British Columbia

## DECIDED

31 July 2020

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2020 BCSC 1129 Elliott v. McCliggot IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Elliott v. McCliggot, 2020 BCSC 1129 Date: 20200731 Docket: M144097 Registry: Victoria Between: Patricia Dawn Elliott Plaintiff And Ryan McCliggot and Slegg Construction Materials Ltd. Defendants Corrected Judgment: The citation and heading were corrected on September 29, 2022. Before: The Honourable Justice Winteringham Reasons for Judgment (s. 83 Deductions) Counsel for the Plaintiff: K.J. Hauer Counsel for the Defendants: M.F. O'Meara Written Submissions received: Victoria, B.C. July 25, 2020 Place and Date of Judgment: Victoria, B.C. July 31, 2020 Table of Contents I. OVERVIEW.. 3 II. POSITION OF THE PARTIES. 4 III. LEGAL FRAMEWORK. 4 IV. ANALYSIS. 6 V. DECISION. 6 I. OVERVIEW

- [1] This is a post-trial application brought by the defendants in a personal injury action arising out of a motor vehicle accident that occurred in Victoria, BC, on November 8, 2012. Liability was admitted. The parties each selected a trial by jury. The jury's only task was to assess damages. The trial proceeded from January 27, 2020 - February 4, 2020. The jury rendered its verdict in the evening of February 4, 2020.
- [2] The plaintiff sought an award in the range of approximately \$100,000 plus non-pecuniary damages plus agreed upon special damages of \$3,885.54. The jury awarded \$463,385.54, distributed across the relevant heads of damages as follows:
- a) Special damages: \$3,885.54;
  - b) Past loss of income earning capacity: \$46,500;
  - c) Loss of future income earning capacity: \$45,000;
  - d) Cost of future care: \$15,000;
  - e) Loss of housekeeping capacity: \$3,000; and
  - f) Non-pecuniary damages: \$350,000.

- [3] The defendants provided notice of their intention to seek certain deductions from the amount of the damages award pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 (the "Act") and Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 (the "Regulation"). Specifically, the defendants seek the following deductions:
- a) \$1,817.32 for past earning capacity; and
  - b) \$11,045.00 for medication and physiotherapy from the plaintiff's award for future care costs.
- [4] The plaintiff agrees that \$1,817.32 must be deducted from past loss of earning capacity and I direct that deduction accordingly.
- [5] The plaintiff disagrees that any amount should be deducted from the plaintiff's future care cost award. II. POSITION OF THE PARTIES
- [6] The defendants contend that s. 83(5) of the Act requires that after tort damages have been assessed, the amount of Part 7 benefits paid or payable to a plaintiff 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." The defendant relies on *Sovani v. Jin*, 2005 BCSC 1285, in support of its position that if the plaintiff "is or would be" entitled to Part 7 benefits then the court must make the appropriate deduction and that the Part 7 deduction is mandatory and not discretionary.
- [7] The plaintiff takes the position that it is not possible for the defendants to meet their burden in establishing a Part 7 deduction for future care because the court has no way of knowing the basis for the jury's future cost of care award and whether any amount of the award correlates with Part 7. That is because, the plaintiff submits, the jury does not particularize the basis of its award. As such, it is not possible for the defendants to establish the necessary correlation between the plaintiff's claim as determined by the jury and the Part 7 benefits she may receive in the future. III. LEGAL FRAMEWORK
- [8] The Act and the Regulation create a no-fault scheme which provides, subject to certain exceptions and restrictions set out in the Regulation, the Insurance Corporation of British Columbia (ICBC) must pay benefits as defined in Part 7 of the Regulation to an insured (as defined in Part 7 of the Regulation) in respect of injury arising out of a motor vehicle accident in Canada, regardless of who was at fault for the accident: Regulation, s. 79(1).
- [9] Relevant to the issue raised here, Part 7 benefits include medical and rehabilitative benefits, which can be either mandatory or permissive. In *Siverston v. Griffin*, 2020 BCSC 528, Justice Jackson described the operation of the scheme in this way at paras. 9-15: As part of the scheme created by the Act and the Regulation, Part 7 Benefits paid or payable to a plaintiff are to be deducted from a plaintiff's tort damages after those damages have been assessed at trial: s. 83(5). If the amount of Part 7 Benefits has not been ascertained, for example where it involves a future cost of care, the court must estimate the amount and take that estimate into account by deducting it from a plaintiff's damage award: Act, s. 83(5). The plaintiff is only entitled to enter judgment for the balance after the Part 7 Benefits amount or estimate has

been deducted. The purpose of this aspect of the legislative 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. A defendant who seeks a deduction under s. 83 of the Act has the onus of establishing a deduction should be made: *Lynn v. Pearson* (1998), 55 B.C.L.R. (3d) 401 (C.A.) at para. 18; *Sovani v. Jin*, 2005 BCSC 1285 at para. 32. Section 83(5.1) of the Regulation, which became effective May 17, 2018, dictates that in estimating the amount of benefits, the court may not consider the likelihood that the benefits will be paid or provided. When determining what, if any, deductions should be made under s. 83, strict compliance with the statutory scheme is required: *Lynn* at para. 18; *Wiebe v. Wiebe*, 2018 BCSC 1062 at para. 29. In *Jurczak v. Mauro*, 2013 BCSC 1370, Justice Silverman set out a two-step approach to follow when considering whether a s. 83 deduction is appropriate:

- [16] First, the Court must determine if there are some Part 7 benefits which the plaintiff has received or is entitled to receive. Second, the Court then must estimate the amount of the deduction. It is important to note that at the first stage, the court's task is to determine whether the plaintiff who "has a claim" received or is entitled to receive Part 7 Benefits for services or treatments "respecting the loss on which the claim is based": Act, s. 83(2), (4) and (5); *Uhrovic v. Masjhuri*, 2007 BCSC 1096 at para. 11, cited with approval in *Li v. Newson*, 2012 BCSC 675 at para. 14; *Gurniak* at para. 31. In other words, the defendant must establish the plaintiff has a claim for which she is entitled to a corresponding benefit under Part 7. However, s. 83 does not contemplate a second level of matching between a specific head of damage in a tort award and a specific head of Part 7 Benefits. If the defendant establishes an entitlement, the court must proceed to determine or estimate the amount of the plaintiff's Part 7 Benefits. The amount of the entitlement is to be deducted from the overall tort award: *Gurniak* at para. 47.
- [10] I have set out Jackson J.'s reasons in *Siverston* in some detail because she provides a helpful analytical framework for determining s. 83 deductions. IV. ANALYSIS
- [11] The defendants have the burden of proving a correlation between the plaintiff's claim, as determined by the court, and Part 7 benefits such as medication and physiotherapy at issue here.
- [12] In her affidavit, Tracey Gold, claims specialist with ICBC, deposed that the cost of medication and physiotherapy expenses are benefits under Part 7 and that medications are paid under Part 7 at the cost in which they are incurred. Physiotherapy is paid at the rate of \$79 per session. In her affidavit, Ms. Gold states that based on her review, the verdict included the cost of medication at \$7,920 and the cost of physiotherapy of \$3,125. She went on to depose: I have reviewed the number of sessions of treatments awarded as set out in the Cost of Future Care table [aid memoire provided by the plaintiff] as best I can, as the verdict did not particularize the physiotherapy treatments sought by the plaintiff. I am authorized on behalf of ICBC to waive the need for continued certification under s. 88(1.01) of the Regulation in payment of the physiotherapy sessions.

[13] The difficulty with the defendants' position is that it is impossible to determine how much of the future care cost award was apportioned to the cost of physiotherapy or medications. That is because the plaintiff invited the jury to consider other items under this head of damage including injections and a gym pass. The jury awarded \$15,000 under this head of damages. In this case, as in Siverston, the lump sum nature of the jury's cost of future care award makes it impossible for me to ascertain whether, under Part 7, the plaintiff is entitled to a corresponding benefit and, if so, to what degree. V. DECISION

[14] Accordingly, I grant the following:

- a) The verdict for past earning capacity is reduced by \$1,817.32; and
  - b) The defendants' application to reduce the cost of future care award is dismissed.
- "Winteringham J."

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Prepared on 28 October 2026 · Esheria