

CANADA / JUDGMENT

Fortin v. Bircham

2023 BCSC 1270

COURT

Supreme Court of British Columbia

DECIDED

9 June 2023

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2023 BCSC 1270 Fortin v. Bircham IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Fortin v. Bircham, 2023 BCSC 1270 Date: 20230609 Docket: M123502 Registry: Kelowna Between: Dylan Fortin Plaintiff And Fred Bircham, Patricia Dandeneau and Nicole Dandeneau Defendants Before: The Honourable Mr. Justice Basran Oral Reasons for Judgment In Chambers Counsel for the Plaintiff: J.S. Kennedy Counsel for the Defendants: B. Hambly Place and Date of Hearing: Kelowna, B.C. May 9, 2023 Place and Date of Judgment: Kelowna, B.C. June 9, 2023

- [1] THE COURT: On August 18, 2021, I issued reasons for judgment in respect of a motor vehicle accident involving the parties that occurred on May 7, 2017. It is indexed as Fortin v. Bircham, 2021 BCSC 1618. In that decision, among other things, I awarded the plaintiff, Dylan Fortin, \$35,000 for the cost of his future care. The defendants seek a deduction of this amount pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [Act] and Insurance (Vehicle) Regulation, B.C. Reg. 447/83 [Regulation]. Cost of Future Care Award
- [2] The award for cost of future care consisted of:
- 1) active rehabilitation at \$81 per session for ten sessions;
 - 2) a gym or pool membership for 12 months;
 - 3) referral to a pain specialist; and
 - 4) physiotherapy/chiropractic treatment/massage therapy ("passive therapies") at \$80 per session, two sessions per month, for the rest of Mr. Fortin's working career.
- [3] To date, the Insurance Corporation of British Columbia ("ICBC") has paid Mr. Fortin \$4,265 in Part 7 medical benefits since the trial of this matter concluded. This amount consists of \$2,089 for chiropractic treatment and \$2,176 for massage therapy. To What Extent are the Defendants Entitled to a Deduction pursuant to s. 83 of the Act? Relevant Legal Principles
- [4] Section 88 of the Regulation sets out the medical rehabilitation benefits under Part 7 that Mr. Fortin is entitled to. Section 88(1) sets out the mandatory medical and rehabilitation benefits under Part 7. The relevant portions of the Regulation provide: Medical or rehabilitation benefits 88 []

- (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) medical, surgical, 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. [] (1.2) 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 that 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.
- [5] Section 88(1.01) of the Regulation provides that treatments of a particular kind that are in addition to the number of treatments listed in Column D of Table 1, or that are provided more than 12 weeks after the date of the accident, are not necessary healthcare services unless ICBC's medical advisor or the insured's physician certifies to ICBC in writing that, in the opinion of the medical advisor or physician, the treatment is necessary for the insured.
- [6] A person who has a claim for damages and receives or is entitled to receive benefits respecting the loss on which the claim is based is deemed to have released their claim to the extent of the benefits: s. 83(2) of the Act.
- [7] The purpose of s. 83 of the Act is to prevent double recovery by a plaintiff: *Norris v. Burgess*, 2016 BCSC 1452 at para. 17.
- [8] A plaintiff is entitled to judgment for the balance after Part 7 benefits paid and payable are deducted: s. 83(5) of the Act.

- [9] The onus to establish deductions to be made under s. 83 lies with the defendants: *Sovani v. Jin et al.*, 2005 BCSC 1285 at para. 14.
- [10] In *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953, Justice MacDonald held:
- [78] [] If the benefits are mandatory, the court must deduct. No further evidence is required. If the benefits are discretionary, in that ICBC may pay the benefits or they are subject to ongoing medical certification, they are too uncertain and the court should decline to deduct the benefit amount from the award. Alternatively, the court may deduct a nominal amount to reflect the uncertainty of a plaintiff receiving the future benefits. [Emphasis in original.]
- [11] Awards for counselling, occupational therapy assessments, kinesiology, physiotherapy, vocational counselling, and medications are deductible: *Wark v. Kang*, 2020 BCSC 196 at para. 37.
- [12] Referral to a pain specialist is a mandatory benefit under s. 88(1): *Smith v. Law*, 2022 BCSC 840 at para. 36. Findings of Fact
- [13] On behalf of ICBC, Dave Foster, Claims Review Advisor, waived the need for continued certification pursuant to s. 88(1.01) of the Regulation with respect to physiotherapy, chiropractic treatment, massage therapy, and ten sessions of active rehabilitation until the amount of \$35,000 was exhausted.
- [14] Mr. Dave Wright, manager of Claims Services, deposed similarly prior to his retirement. Deducting the aforementioned \$4,265 from this total yields a purported remaining balance of \$30,735 available to be paid to Mr. Fortin in respect of his treatments.
- [15] Mr. Fortin's date of birth is May 2, 1978. He is 45 years old. The parties agree that Mr. Fortin's anticipated retirement age is 65.
- [16] Applying the purported \$35,000 maximum, Kevin Turnbull, a chartered accountant and economist, calculated that Mr. Fortin's access to passive treatments will cease when he is approximately 58 years old, assuming that the cost of these treatments increases by two percent per annum. Positions of the Parties
- [17] The defendants seek a total deduction of \$35,000 from the cost of future care award because they assert that ICBC will pay for all of the treatments and services that comprise this award up to this limit. Alternatively, they submit that any reduction in the deduction should take into account that Mr. Fortin has already received \$4,265 in respect of Part 7 benefits.
- [18] Mr. Fortin seeks a reduced deduction pursuant to s. 83 of the Act on two bases: first, the 35,000-dollar limit will not provide him with access to two sessions per month for passive therapies for the duration of his working career; and second, a referral to a pain specialist is not necessarily covered under provincial healthcare benefits and, therefore, may not be recovered as a Part 7 benefit. Discussion

- [19] There is no doubt, and the parties agree, that Mr. Fortin is entitled to Part 7 benefits. The next step is estimating the amount of the deduction.
- [20] The \$35,000 cost of future care award was intended, among other things, to provide Mr. Fortin with access to two passive therapies of his choice per month at an estimated cost of \$80 per session for the rest of his working career. Providing for these passive therapies comprises a significant proportion of the total cost of future care award because the present value of this expense as of the date of trial was \$1,920 per year. Mr. Fortin is expected to work for approximately 20 more years from the date of this application.
- [21] The affidavits of Mr. Foster and Mr. Wright could have deposed that ICBC would "irrevocably, unequivocally, and unconditionally" pay for two sessions of passive therapies per month for the duration of Mr. Fortin's working career. Had they done so, the defendants would have been entitled to a deduction of \$35,000. Instead, ICBC set a limit on these payments to Mr. Fortin of \$35,000.
- [22] This amount was not intended to be a limit on Mr. Fortin's expenditures for passive therapies. The bulk of this amount, properly invested, was anticipated to provide an income stream that would fund these passive therapies for the rest of his working career.
- [23] The cost of the referral to a pain specialist is a mandatory benefit under s. 88(1), so this expense is deductible.
- [24] I accept Mr. Turnbull's present value calculations that demonstrate Mr. Fortin will lose access to passive therapies in the year in which he turns 58 if he is restricted to receiving reimbursement up to a limit of \$35,000. On instructions to exclude \$1500, he calculated that the net present value of \$33,500 at the date of trial is \$24,439 applying an inflation or discount rate of two percent. The difference between these two amounts is \$9,061.
- [25] I appreciate that Mr. Fortin has received payments for Part 7 benefits totalling \$4,265 to the date of this application. In my view, this amount is a reasonable estimate of the cost of the passive therapies from the date of trial to the date of this application so the difference in the calculations proposed by the defendants is inconsequential.
- [26] Accordingly, the defendants are entitled to a s. 83 deduction of \$25,939. This is based on \$35,000 less \$9,061.
- [27] I am also acceding to Mr. Fortin's request that ICBC's "irrevocable, unequivocal, and unconditional" commitment to paying these benefits be reflected in the formal order to minimize any future confusion regarding its intent.
- [28] (Submissions on costs)
- [29] THE COURT: Mr. Turnbull's report assisted in my determination of the appropriate s. 83 deduction. On that basis, Mr. Fortin is entitled to his costs at Scale B and the disbursement in relation to the cost of that report for this application.

[30] Anything further at this time?

[31] CNSL J. KENNEDY: If I might, since we are before the court, it would be my understanding then, going forward, if you could provide some potential direction, is that this money that you have in essence set aside for Mr. Fortin, \$9,061, I believe you said, Mr. Fortin would continue to access the Part 7 benefits until the 35,000 is extinguished, and that he would thereby have the 9,000 to invest to pay for anything after that date. I just don't want to walk away today and potentially have ICBC suggest that Mr. Fortin has to exhaust that 9,000 first and then they will start to pay later on. I'm not sure if that's something you can comment on or not, or whether you just leave that to us after the fact.

[32] THE COURT: Ms. Hambly, your views on this?

[33] CNSL B. HAMBLY: I think clarity from the court on how you see the practical reality of that working out would be helpful.

[34] THE COURT: In my view, Mr. Fortin is entitled to that \$9,000 immediately, so that he can invest those funds to ensure that he has access to passive therapies beyond the anticipated age of 58, at which time the \$35,000 will be exhausted. It would be appropriate for him to receive that amount at this time, or as soon as reasonably possible.

[35] CNSL J. KENNEDY: Thank you.

[36] CNSL B. HAMBLY: So to clarify, \$9,061 of the \$35,000 cost of future care award is payable as a lump sum, in Mr. Justice's view?

[37] THE COURT: Yes.

[38] CNSL B. HAMBLY: Okay, thank you.

[39] THE COURT: Thank you, counsel. That concludes this matter. "Basran J."

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