CANADA / JUDGMENT

Gill v. Gregory

2025 BCSC 352

COURT
Supreme Court of British Columbia

DECIDED
18 February 2025

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2025 BCSC 352 Gill v. Gregory

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gill v. Gregory,

2025 BCSC 352

Date: 20250218

Docket: M197166

Registry: Vancouver

Between:

Navreet Gill

Plaintiff

And

Nicolaas Wayne Gregory

Defendant

Before: Associate Judge Robertson

Oral Reasons for Judgment Re Disbursements

In Chambers

Counsel for the Plaintiff:

I. Bownick

Counsel for the Defendant:

E. Tolfo

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 18, 2025

Place and Date of Judgment:

Vancouver, B.C.

February 18, 2025

[1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.

[2] This application is the second of two, the first being leave to rely on more than the three expert limit as set out in s. 12.1 the Evidence Act, R.S.B.C. 1996, c. 124, and this one being the companion application for the exclusion of certain disbursements over the cap as set out in the Disbursement and Expert Evidence Regulation, BC Reg 210/2020 ("DEER"), given the requirement that such applications be brought together.

Background

[3] This matter involves a motor vehicle accident that occurred on September 14th, 2018. The plaintiff was in a vehicle traveling on Highway 1. That vehicle was struck from behind. Liability has been admitted.

[4] The plaintiff is a heavy-duty mechanic and was able to return to work relatively quickly after the motor vehicle accident with limited time off. Currently his primary employer is Coast Mountain Bus Lines. However, he also has a job working for the Vancouver Port Authority. Between his two jobs, he is back to not only full-time hours but above full-time hours.

[5] Initially it was felt, and there was some expert evidence to the effect, that he would fully recover from his physical injuries. However, this has not occurred. In particular, at a recent April 2024 examination for discovery the plaintiff testified that he has, notwithstanding his ability to work significant hours, been unable to work from time to time due to his injuries, and that efforts he took to start his own business doing mobile servicing of equipment and trailers has been negatively affected by his ongoing symptomology and injuries that have resulted in an inability to take on those parts of his job that have more of a heavy duty or physical component to them.

[6] Nonetheless, the plaintiff's earnings have stayed relatively consistent since the motor vehicle accident. The plaintiff does argue, however, that at trial a significant issue will be whether or not that income would have increased but for the motor vehicle accident as well as the long-term effects of the motor vehicle accident on his future earning capacity.

[7] Trial is scheduled for ten days commencing March 24, 2025.

The Parties Positions and Evidence before the Court

[8] The plaintiff seeks that disbursements incurred for the following costs be exempted under DEER:

a) Examination, report and attendance of the physiatrist including any late cancellation fees that may be incurred;

b) Trial preparation, trial attendance, and late cancellation fees of the psychiatrist. In this respect the plaintiff admits that the report itself has already been incurred so is not seeking an exemption for that;

c) Investigation, report and trial attendance of an economist as well as any late cancellation fees that may be charged in that respect; and

d) Mediation fees that were anticipated to be incurred when this application was filed and have now been incurred as a result of a mediation that was conducted in January, and was obviously unsuccessful.

[9] The total cost of all of the expenses that are being sought to be excluded are between approximately $19,000 and $25,000, with a rounding down on the lower end and a rounding up on the higher.

[10] The evidence of the plaintiff is that the claim could fall anywhere between $300,000 and a million dollars. At $300,000, the low end in that respect, the 6% cap would result in $18,000 being available to cover all of the plaintiff's disbursements.

[11] There is evidence before the court of some of the disbursements that have already been incurred.

[12] For example, there is some indication of the costs related to obtaining the report of the psychiatrist and of a neurosurgeon who originally prepared a report in 2019, but who is not being called by the plaintiff as a witness, suggests that the actual disbursements, once those costs are taken into account, will be significantly higher and I would estimate some $10,000 to $15,000 higher than the amount being sought to be excluded on this application. Thus, if $18,000 is the amount that is allowable under the cap, that being the lower amount expressed by the plaintiff, there is a risk that approximately $11,000 to $16,000 will be potentially unrecoverable once all of those costs are taken into account. I note that that excludes the ordinary litigation costs such as photocopying, witness fees, costs for obtaining clinical records etc., assuming some of those have also already been paid by the defendants

as part of the ongoing litigation management, although no evidence is before the court today as to those amounts.

[13] As to the financial circumstances of the plaintiff, there is no direct evidence from the plaintiff on this point. Rather, the evidence before the court is in the form of an affidavit from a paralegal at the plaintiff's counsel's office. She deposes that the income earned by the plaintiff for the years 2019 to 2023 (excluding 2022 as no tax return was filed) indicate a range of income from approximately $160,000 to $195,000. There is no evidence as to his living expenses, debts, liabilities, or assets. However, the plaintiff's evidence on discovery, with those transcripts being before the court, was that he is single, has no dependants, and owns his own home from which he is able to draw some income as a result of a secondary suite.

Legal Framework and Analysis

[14] The parties do not disagree as to the requirements for an exemption under DEER. The legislation is quite clear in that respect. Under s. 5(8), the plaintiff must establish:

a) That were the disbursements not excluded, they would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the vehicle injury proceeding.

b) The application must be brought before the disbursements in question are incurred.

c) That there will be a hardship if the exclusion is not made.

d) And that the disbursements are in fact necessary.

[15] The parties did not address in argument the last element as to necessity for the disbursements. Rather, the main arguments were with respect to what the defence argued was:

a) Whether or not the disbursement had been incurred when the application was filed; and

b) the plaintiff's inability to meet the onus upon him to establish that there is both a hardship and risk in that respect or that the disbursements had not yet been incurred.

When the disbursement was incurred

[16] It is evident that some of the disbursements for which an exemption is sought have not been incurred, namely the trial attendance and any late cancellation fees in that respect, as well as the mediation. The issue as to timing is with respect to the costs for reports where which the examination had been conducted prior to the application's filing.

[17] In this respect, the evidence before the court is the affidavit of the plaintiff's paralegal in which she deposes as follows:

The plaintiff has recently attended examinations with an occupational therapist, physiatrist, and psychiatrist. I have also been instructed to obtain a report from an economist. We have not yet received any reports or invoices from any of the above-mentioned experts.

[18] The argument of the plaintiff is largely based on the decision of Ali v Mercedes-Benz Financial Services Canada Corporation, 2024 BCSC 384 ("Ali") where the associate judge was asked to consider the issue of when a disbursement had been incurred and, relying on Couture v. Oviatt, 2009 BCSC 15 at paras. 24-25, found that the disbursements were not incurred until an invoice had been issued. I am advised that Ali is currently under appeal, with the appeal having been argued and reasons not yet delivered.

[19] I had an opportunity to consider the issue of when a disbursement is incurred in Asadollahi v. Orenchuk, 2024 BCSC 2330. Based on the argument made before me, and having regard to Hansard Spruce Mills (Re), 1954 CanLII 253 (BCSC), I found that I was not bound to follow Ali as there were cases not brought to the attention of that presider, and because the reports in Asadollahi had been delivered with the only item being outstanding being the invoice. I found that an expense was incurred once an obligation to pay for the services rendered arose or, put another way, a cost is incurred once a party becomes liable to pay for services provided. In Asadollahi, what was of assistance before court was the tendering into evidence of the retainer letter that showed how the plaintiff's liability would arise. We do not have that in the case at hand. In my view, any retainer terms should be before the court in these applications.

[20] In any event, the plaintiff argues here that the reports have not yet been delivered and therefore the examination and preparation of the report costs have not yet been incurred with respect to the two experts anyways, with the psychiatrist being excluded.

[21] The argument is largely based on what he describes, although there is no evidence to the point, as an arrangement where the services provided by the experts is their opinion. The fact that there is an examination that needs to be done in order to obtain that opinion is not determinative as to a liability to pay. Rather it is only when the service, that being the opinion being formed and delivered, that a plaintiff will become liable, and the cost incurred.

[22] Although, the plaintiff admitted that it was not entirely clear if the liability would arise on the ordering of an opinion (or request for a verbal one), or on the delivery of a report. There were various hypotheticals I put to counsel during submissions on that point, for example, what would happen if an examination was undertaken, a report ordered, a report prepared but not yet delivered, but on the eve of doing so counsel for the plaintiff notified the doctor that there had been a settlement. One would expect, I suggested, that the doctor would be rendering an invoice for the services undertaken up to that point. Of course, that is just a hypothetical, there was, as I stated, no evidence before the court.

[23] Again, much of this would turn on what the exact arrangements are between the expert and the plaintiff's counsel, which is why the retainer terms are important pieces of evidence that ought to be before the court.

[24] To some extent counsel for the plaintiff, although they did not make specific arguments in this respect, but did rely on the general BCMA Fee Guidelines when calculating the expected costs of the disbursements, specifically with respect to the neurosurgeon's rates that are used. Not all doctors comply where the BCMA Fee Guidelines for their services, but some of them would here. I can take some notice that in those fees there is in fact a bundling of all of these services related to the medal/legal opinion. In particular, there is just one item for the preparation of the medical/legal opinion which includes "the information contained in the actual report" with no separate charge-out item for the examination itself.

[25] Regardless, that evidence is not sufficient for me to conclude that the liability to pay, based on the arrangements between the plaintiff and these experts, had not yet been incurred.

Risk and Hardship

[26] As to whether or not there is a risk that disbursements incurred may be unrecoverable under the cap, and if they are the plaintiff will suffer a hardship, I am satisfied, based on the general evidence, as to the ranges of potential outcomes, that there is a risk that the 6% cap will result in a disbursement cap as low as $18,000.

[27] I am satisfied that the disbursements, even if I find that some have already been incurred such that they are not capable of being excluded under the legislation, that there is a potential of shortfall to the plaintiff, possibly around the $10,000 mark, given the evidence as to disbursements that have been and are expected to be incurred

[28] The relevant question on this application, however, is whether or not that would cause undue hardship.

[29] The plaintiff suggests and relies on various cases where comments have been made as to the inherent hardship that a plaintiff suffers if they have to fund the disbursements of their own litigation because of this legislative cap. In this respect, they rely on the following comment at para. 49 in James v. Riar, 2024 BCSC 605 ("James"):

Being put in a position to go unremedied or under-remedied for actual losses pertaining to one's quality of life is to suffer undue hardship.

Further, in Joshan v Pathak, 2024 BCSC 195, the court noted as follows at para. 9:

If the disbursements were not recovered the end result would be the plaintiff would have their assessed damages clawed back in order to cover the cost of proving their case in court. That is a form of prejudice, and if it occurred, it would be disproportionate to the benefit of not increasing the complexity of the proceeding.

[30] The plaintiff seemed to suggest that those decisions stand for the proposition that if there is any risk of having your damages claim clawed back then there is evidence of hardship.

[31] With respect, the inclusion of "hardship" in the legislation must be interpreted to have some meaning. To interpret the legislation as the plaintiff suggests would essentially remove any such meaning. I am satisfied that there must be evidence of something more than a claw back from recovery. That evidence must translate to some sort of hardship.

[32] The concept of hardship may not be the same for every plaintiff. A risk of having to incur or pay out of hand $1,000 may be a hardship for one, and not another, based on their overall financial condition.

[33] As such, in order to establish hardship, one would expect evidence of not only the income of the plaintiff, but also a general statement as to their expenses and personal circumstances.

[34] For example, in James, immediately prior to the statement referred to above, the court specifically commented on the evidence before the court as to the plaintiff's specific circumstances, namely that their income was modest, that they were undergoing a financial strain as a result of a separation and a family law divorce proceeding and in order to address some of their financial condition they were not living in the former family home but renting it out but not having the full costs of the home covered in that respect.

[35] In other cases where there has been no real evidence as to the specifics of the plaintiff's expenses, the court could take some judicial notice based on their income or lack of income. In this respect, the evidentiary threshold to meet may be different where, for example, a plaintiff has never returned to work since the motor vehicle accident. Here, however, the plaintiff has returned to work. He is making a decent income as what appears to be as a single person without any dependants, owning his own home from which rental income is being earned.

[36] While I can imagine that a potential for up to $10,000 as a claw back from a damages award would provide a significant financial strain, on the evidence before the court I am simply unable to conclude that it would constitute a hardship without better evidence in that respect.

Order and Disposition

[37] As such, I dismiss the application, notwithstanding that the expenses are in my view necessary and that there is a risk that they will be unrecoverable due to the 6% cap put in place by DEER.

"Associate Judge Robertson"

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