

CANADA / JUDGMENT

## Gill v. Zadeh

2024 BCSC 284

COURT

Supreme Court of British Columbia

DECIDED

31 January 2024

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2024 BCSC 284 Gill v. Zadeh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gill v. Zadeh,

2024 BCSC 284

Date: 20240131

Docket: M218373

Registry: New Westminster

Between:

Manpreet Kaur Gill

Plaintiff

And:

Emadallah Hossein Zadeh, Maryam Sadat Aghvami,

and Kiana Hossein Zadeh

Defendants

Before: Associate Judge Nielsen

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

D. Luddu

Counsel for the Defendants:

K. Powar

Place and Date of Hearing:

New Westminster, B.C.

January 31, 2024

Place and Date of Judgment:

New Westminster, B.C.

### January 31, 2024

- [1] THE COURT: This is an application for an order under s. 5(6) of the Disbursements and Expert Evidence Regulation, where the plaintiff is seeking to have three reports deemed excluded reports for the purpose of that regulation. They are a physiatrist report, functional capacity evaluation, a cost of future care report, and an economist report. The defendants have agreed that the physiatrist report is to be excluded.
- [2] The matter involves a motor vehicle accident that occurred on October 10, 2017. Liability has been denied. An examination for discovery of the plaintiff took place November 29, 2021, and the trial is scheduled for nine days commencing May 27, 2024, with the 84-day deadline being March 1, 2024. The plaintiff is scheduled to see a physiatrist February 5, and the occupational therapist is scheduled for February 12, 2024.
- [3] Section 5 provides that the successful plaintiff in a motor vehicle injury claim can only recover up to 6 percent of the total award of damages plus the cost of any excluded disbursements. In order to obtain an exclusion, the plaintiff has to comply with the criteria in ss. 5(8) and (9). Section 5(8)(a) provides that the application has to be made before the disbursement is incurred, and s. 5(8)(b) provides that the plaintiff has to demonstrate that if the disbursements were not excluded, the applicant would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the vehicle-injury proceeding.
- [4] In order to establish the requisite prejudice, the plaintiff must adduce evidence concerning the factors enumerated in s. 5(9)(b)(i) through (iii), being:
- i. evidence there is a reasonable risk that the total amount of disbursements the party intends to incur to resolve the vehicle-injury proceeding will exceed the disbursement limit;
  - ii. evidence that the disbursements that are subject of the application are necessary to justly resolve the vehicle-injury proceeding in light of the complexity of the vehicle-injury proceeding or the importance of the injury in dispute, and finally;
  - iii. Evidence that the party would be unable, without undue hardship, to incur the disbursements that are subject of the application where those disbursements are not excluded.

- [5] The plaintiff alleges a whole host of injuries to her neck, back, shoulders, ribs, arms, chest, right leg, hips, foot, and headaches. It is her view that in order to prove her damages, she requires the examination by the physiatrist, the functional capacity evaluation and cost of future care report, and an economist report. The outstanding report costs are the OT IME, which will run roughly \$3,000, and the economist which can cost anywhere from \$2,000 to \$3,000. The plaintiff's damages claim is within a fairly wide range, between \$100,000 and \$1 million. I am advised there has been an offer made of less than \$100,000.
- [6] In *Le v. British Columbia (Attorney General)*, 2022 BCSC 1146, at para. 13; and in *Lo v. Vos*, 2021 BCCA 421, at para. 9, the court confirmed that expert evidence plays a crucial role in a case where a plaintiff seeks damages for personal injury because the plaintiff has the onus of proving the existence, causation, and present and future impacts of their injuries, all of which requires evidence of medical and other expert evidence. In those circumstances, expert evidence plays a crucial role.
- [7] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, at para. 39, the Court of Appeal confirmed that a claim for future care costs has to be grounded in some form of expert opinion evidence, stating in part:

... there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Aberdeen* at paras. 43, 63.

- [8] In all but the most obvious cases, evidence from medical experts or other health care professionals will be required to illustrate the required link so that the trier of fact can assess what future costs are likely to flow from the plaintiff's injuries. The BC Court of Appeal makes a salient comment in *Jurczak v. Mauro*, 2013 BCCA 507, at para. 37, where they say in part that if there are mathematical aids that may be of assistance are available for the purpose of quantifying damages for future loss of earnings, the court should start its analysis by considering them, and a failure to do so can lead the trial judge to committing an error in principle.
- [9] It is the plaintiff's position that the disbursements in issue on this application are necessary for the purpose of enabling the trier of fact to reach the conclusions needed with respect to the damages claimed. The plaintiff also emphasizes that this is a case where the reports that they are seeking to have excluded are, in their view, necessary for the purposes of establishing their clearly pleaded losses, and this is not a case where the plaintiff is attempting to overwhelm the court with duplicate evidence, or to eat up court resources by focusing on tangential issues.
- [10] The plaintiff in her affidavit complains of having lost work as a result of her injuries, and having been able to work less on an ongoing basis. She also attests that she is having difficulty doing household chores, and had required a housekeeper in the past. However, since COVID, she has had some difficulty in finding and keeping a housekeeper. In terms of her missed days from work, she indicates that not only is she missing work, but she has also

reduced her hours of strenuous work by doing more office work rather than job-site attendances. The plaintiff is employed by Elite Fire Protection as a fire safety planning manager, and she still works there.

- [11] The plaintiff submits that the physiatrist will provide the court with the evidence and conclusions regarding her injuries, causation, and prognosis, and that an OT IME will provide the court with evidence it needs to draw conclusions about her injuries and functionality, the cost of future care, and abilities to carry out activities of daily living, work, and recreational activities, and in particular her alleged reduced ability to do job site visits. With respect to the economist report, they take the position that it will assist in quantifying the loss of any future earning capacity, as she had intended to retire at 75 before the motor vehicle accident, and she is now unsure how long now she will be able to work into the future because of her injuries. She is currently 47 years old.
- [12] The defence emphasizes that the work she has missed can be quantified at approximately 300 hours, that she has resumed all her work duties with exception of installing heavy equipment, and she is back to working 40 hours a week unless she has a severe migraine. She has not requested any ergonomic modifications in her workplace. She has resumed gardening, and she completed rehab in 2019. She currently rides her stationary bike for exercise. These points were taken from an examination for discovery, but I do not actually have the transcript with those questions and answers. Plaintiff's counsel submits that the lack of the transcript results in a lack of context, or the exact question asked, together with the answer.
- [13] The plaintiff's income has been steadily increasing since 2015. In 2021, she earned \$102,560. She is a T4 income earner.
- [14] The defendant emphasizes that there has not been the requisite evidence adduced to show that the amount the plaintiff has to incur in costs will necessarily exceed the disbursement limit, nor that the disbursements that are subject of the application are necessary to resolve the proceeding, given that we have the breakdown of her hours missed. Defence counsel further submits there is insufficient evidence to show that the plaintiff would be unable, with undue hardship, to incur the disbursements that are subject of the application were those disbursements not excluded.
- [15] In my view, the two reports, the functional capacity evaluation and cost of future care report, and the economist report, would be useful to the court. Indeed, it could actually reduce complications at trial, and the time needed to quantify the alleged losses.
- [16] Here, the plaintiff planned to retire at 75. An economist can provide a basis to calculate what those losses would be at any point in time, up to and including, a retirement age of 75. In my view, that is a worthwhile and necessary expenditure in the context of this case, and I note the comments of the BC Court of Appeal in Jurczak, *supra* at para. 37.

- [17] In terms of economic hardship, the plaintiff has had good earnings. However, she is recently separated from her husband, and her teenage son is currently living with her. In addition, she has been paying all the household expenses fully since November of 2023. She attests that her monthly income is \$5,500 to \$5,800 net, and that her fixed monthly expenses are approximately \$3,800 for grocery, mortgage, utilities, and insurance. On top of that are expenses for her son with respect to his hockey commitments.
- [18] Given the plaintiff's circumstances, it is my view that the plaintiff would be unable, without undue hardship, to incur the disbursements that are the subject of the application were those disbursements not excluded. I am going to exclude those two disbursements. In addition to that, the plaintiff is seeking that the disbursements incurred on this application also be excluded. I agree that they should be excluded. That just leaves the issue of costs.

(SUBMISSIONS ON COSTS)

[19] THE COURT: The plaintiff will have her costs in the cause.

"Associate Judge Nielsen"

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Prepared on 25 October 2026 · Esheria