

CANADA / JUDGMENT

Hale v. Hill

2021 BCSC 1147

COURT

Supreme Court of British Columbia

DECIDED

11 June 2021

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2021 BCSC 1147 Hale v. Hill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hale v. Hill,

2021 BCSC 1147

Date: 20210611

Docket: M173828

Registry: Vancouver

Between:

Lorraine Hale

Plaintiff

And

Wendell Hill and Coldwater Hotel Ltd.

Defendants

- and -

Docket: M173817

Registry: Vancouver

Between:

Lorraine Hale

Plaintiff

And

Susan Daniels and Paddy-Gayle Konopski

and Ryan Weatherbie

Defendants

Before: The Honourable Madam Justice E. McDonald

Reasons for Judgment on Applications

after Trial

Counsel for the Plaintiff:

M. Quinn,

J. Skinnider

Counsel for the Defendants, Wendell Hill, Coldwater Hotel Ltd. and Susan Daniels:

J. Milligan,

C. Lofranco

Place and Date of Hearing:

Vancouver, B.C.

March 31, 2020,

Place and Date of Judgment:

Vancouver, B.C.

June 11, 2021

INTRODUCTION

- [1] On January 13, 2021, I awarded Ms. Hale damages for injuries she sustained in two motor vehicle accidents. My reasons for judgment are indexed as 2021 BCSC 46 (the "Judgment").
- [2] On March 31, 2021, the parties appeared before me to address the following post-trial issues:
- i. The defendants apply pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [Act] and Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 [Regulation] to deduct amounts from the cost of future care award.
 - ii. The plaintiff applies for reopening or reconsideration of her claim for loss of housekeeping capacity.

- [3] The plaintiff opposes the defendants' request to deduct amounts from the cost of future care award. The defendants oppose the plaintiff's request to reopen or reconsider the claim for loss of housekeeping capacity.

FACTS

- [4] In the Judgment, I awarded Ms. Hale \$536,587, which comprises the following amounts:
- a) non-pecuniary damages - \$110,000;
 - b) past loss of earning capacity - \$61,000;
 - c) loss of future earning capacity - \$295,000;
 - d) cost of future care - \$66,319 [consisting of: \$22,378 (snow removal/yard work); \$29,961 (massage therapy); \$13,758 (medication); and \$222 (adaptive aids)]; and
 - e) special damages - \$4,268.
- [5] I have reviewed and considered all of the evidence, including the affidavit evidence.
- [6] Mr. Darren Anthony, a claims specialist at ICBC, who has conduct of Ms. Hale's tort and Part 7 claims, made an affidavit on March 19, 2021 in support of the defendants' request to deduct amounts pursuant to s. 83 of the Act.

DEDUCTIONS SOUGHT

- [7] The defendants submit that pursuant to s. 83 of the Act and Part 7 of the Regulation, it is appropriate to make deductions to the cost of future care and special damages awarded to the plaintiff.
- [8] As to the deductions sought to the special damages award, plaintiff's counsel submits that no deduction is appropriate because the parties agreed on the amount of the special damages. Plaintiff's counsel submits that the defendants are renegeing on their agreement as to the special damages by requesting a deduction. The defendants submit that all they agreed to was the amount of Ms. Hale's special damages and nothing more.
- [9] In my view, the agreement reached was limited to the amount that Ms. Hale would claim as special damages. That agreement eliminated the need for Ms. Hale to prove the amounts that she had paid out of her pocket for the claimed expenses.
- [10] In Part 7 of the Regulation, s. 88 sets out the medical and rehabilitative benefits that Ms. Hale is entitled to. Subsections 88(1) and (2), respectively, set out the mandatory and discretionary medical and rehabilitative benefits. Pursuant to s. 83(2) of the Act, a person who has a claim for damages and who receives or is entitled to receive benefits in respect of the loss is deemed to have released the claim to the extent of the benefits.

- [11] Now that Ms. Hale's tort damages have been assessed, s. 83(5) provides that the Part 7 benefits paid or payable must be disclosed to the court and considered.
- [12] A plaintiff is entitled to judgment for the balance only after Part 7 benefits are deducted. That is consistent with the purpose of the deduction being to prevent double recovery of Part 7 benefits and tort damages for the same loss: *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953 at para. 52; *Tench v. Van Bugnum*, 2021 BCSC 501 at para. 16.
- [13] In *Aarts-Chinyanta*, at para. 53, the court stated that there is a two-step process for determining an application to deduct Part 7 benefits consisting of: (1) determining whether the plaintiff has received or is entitled to receive Part 7 benefits; and (2) estimating the amount of deduction.
- [14] At paras. 78-81, the court also stated that, for mandatory benefits, the court must make the deduction and, for discretionary benefits, the court should decline the deduction unless the evidence establishes that ICBC has undertaken to pay the discretionary benefits in the future.
- [15] The defendants submit that for future care items, such as medication and massage therapy, the deduction is mandatory. For benefits related to symptom management and adaptive aids, the amount is discretionary.
- [16] In Mr. Anthony's affidavit, he acknowledges that Ms. Hale has received and is entitled to Part 7 benefits. He also states that "ICBC accepts the court's finding with respect to the award for future care as set out in the Reasons for Judgment" and ICBC is not seeking to deduct any amount from the award for heavy yard work and snow removal.
- [17] The defendants submit that because Mr. Anthony "irrevocably, unequivocally and unconditionally" agreed to pay the amounts, whether the amounts are discretionary or mandatory benefits, they have met the burden of showing that Ms. Hale will receive payment for the amounts sought to be deducted.
- [18] In the present case, the defendants submit that the tort damages award payable should be reduced to the following amounts:
- i. \$29,485 for cost of future care, reflecting a deduction of \$36,834 from the award of \$66,319; and
 - ii. \$2,389.29 for special damages, reflecting a deduction of \$1,878.71 from the award of \$4,268.
- [19] The defendants urge me to find that Mr. Anthony's evidence satisfies the burden to show that Ms. Hale will receive payment for previously incurred expenses for medication and massage therapy and that there is no risk that her entitlement to future benefits will be curtailed. The defendants submit that there is no basis to find that ICBC will act unfairly or contrary to the representations and assurance contained in Mr. Anthony's evidence: *Norris v. Burgess*, 2016 BCSC 1452 at para. 35.

- [20] As the benefits are either mandatory, or there has been an unequivocal and irrevocable promise to pay the benefits, as demonstrated by Mr. Anthony's evidence, the defendants submit that there can be no uncertainty about whether the Part 7 benefits will be paid in the future: *Wark v. Kang*, 2020 BCSC 196 at para. 38.
- [21] Ms. Hale opposes the deductions sought. Ms. Hale's counsel submits that Ms. Hale ought not to be required to bear the risk of uncertainty regarding future payments for her cost of future care. Her counsel also submits that Ms. Hale ought to receive the amount awarded for the cost of future care so that she can use it to fund her care without the need to involve ICBC.
- [22] Ms. Hale provided an affidavit in which she describes being concerned about the care that she is receiving from some of her treatment providers. For example, Ms. Hale states that her treatment providers are not being responsive to her and, despite discussing other vocational/educational options, they are now only focussing on a return-to-work process. In short, Ms. Hale is concerned that ICBC will not continue to cover her treatments in the future due to the problems that she is currently experiencing with her treatment providers.
- [23] In response to Ms. Hale's concerns, counsel for the defendants points out that there is no evidence that ICBC is responsible for Ms. Hale's current concerns with her current treatment providers. There is also no evidence to suggest that ICBC is preventing Ms. Hale from finding alternate treatment providers if she is unhappy with her current providers.
- [24] Regarding "symptom management modalities", i.e. massage therapy, and "symptom management and adaptive aids", in my reasons for judgment, I noted the parties' agreement that the claim for these costs estimated by Ms. Webber were appropriate. I accepted and awarded the amounts as estimated by Ms. Webber for massage therapy and adaptive aids.
- [25] The plaintiff submits that there ought to be no deduction since the award for the cost of symptom management and adaptive aids are not rehabilitative. However, the defendants submit that the definition of "rehabilitation" in s. 78 of Part 7 includes medical and vocational assistance, and therefore adaptive aids do fall within that definition.
- [26] The definition of "rehabilitation" in s. 78 of Part 7 provides as follows:
- "rehabilitation" means the restoration, in the shortest practical time, of an injured person to the highest level of gainful employment or self sufficiency that, allowing for the permanent effects of the injured person's injuries, is, with medical and vocational assistance, reasonably achievable by the injured person;
- [27] In paragraph 110 of my Judgment, I found it likely that Ms. Hale would experience some pain and discomfort from lower back strain into the future. With appropriate treatment, I also found that Ms. Hale is likely to better manage her lower back pain and increase her function. Given my finding that with appropriate treatment, Ms. Hale was likely to better manage her pain but also increase her function, I find, in the particular circumstances of this case, that the massage therapy and adaptive aids costs do fall within the definition of

rehabilitation.

- [28] Despite the assurances contained in Mr. Anthony's affidavit, I must still consider and weigh all of the evidence to decide what Part 7 benefits Ms. Hale is likely to receive in the future. In doing so, I can consider whether there are any uncertainties, such as the possibility of legislative changes that could alter eligibility for the benefits: *Boparai v. Dhami*, 2020 BCSC 1813 at para. 30.
- [29] Counsel for Ms. Hale referred me to the decision in *Kim v. Sodhi*, 2020 BCSC 2023. In *Kim* (at paras. 27 and 28), the court noted that it is not "mere speculation" to note that regulations and policies might change as time goes by. Depending on the age of the plaintiff, it may be reasonable to recognize that the person might be subject to any uncertainties for a longer period of time.
- [30] The court in *Kim* (at para. 25) also noted that despite any suspicions that a plaintiff might have about ICBC, a clear match between the court's findings of future care needs and services covered by Part 7 mean that the court is "bound by the legislation and the case law to assume ICBC will honour its commitment and give effect to s. 83 of the Act."
- [31] Ms. Hale is in her mid-50s and it is reasonable to infer that the period for which she may be subject to any uncertainties is likely going to be shorter than it would be for younger plaintiffs such as those considered in *Kim* and *Aarts-Chinyanta*. I have also considered Ms. Hale's evidence that she feels somewhat neglected by some of her current treatment providers, that she appears concerned that this may be connected to ICBC, and that it may negatively impact her treatment in the future.
- [32] Despite Ms. Hale's concerns, there is no evidence before me that ICBC has anything to do with her relationship with, and the quality of, her current treatment providers. There is also no evidence that Ms. Hale has been prevented by ICBC from seeking new treatment providers if that is her wish.
- [33] On the contrary, there is evidence from Mr. Anthony regarding ICBC's "irrevocable, unequivocal and unconditional" commitment to pay these benefits. In my view, Mr. Anthony's affidavit carries considerable weight because he provides a clear and unequivocal acceptance on behalf of ICBC of my findings of facts and my cost of future care award generally.
- [34] After considering all of the evidence, I find that any uncertainty that may exist as to whether a benefit will be paid is resolved by Mr. Anthony's affidavit. In light of the evidence, I am unable to find that Ms. Hale bears an unreasonable risk of any contingencies or uncertainties regarding future payments.
- [35] Therefore, pursuant to s. 83 of the Act and Part 7 of the Regulation, the following deductions shall be made:

- i. \$29,485 for cost of future care, reflecting a deduction of \$36,834 from the award of \$66,319; and
- ii. \$2,389.29 for special damages, reflecting a deduction of \$1,878.71 from the award of \$4,268.

APPLICATION TO REOPEN

- [36] Counsel for Ms. Hale seeks to reopen the matter of Ms. Hale's claim for past and future loss of housekeeping and yard-work capacity. In her claim and in closing submissions, Ms. Hale advanced a separate claim for loss of housekeeping and yard-work capacity and she sought an award of \$20,000.
- [37] There is authority for treating a claim for such loss of capacity as distinct from, for example, the claim for housekeeping expenses as part of the claim for cost of future care: *Broad v. Clark*, 2018 BCSC 1068 and *Munoz v. Singh*, 2014 BCSC 567.
- [38] Ms. Hale seeks to reopen the matter because in the reasons for judgment no specific amount is awarded for this separate head of damage, although there is a finding that Ms. Hale's injuries from the Accidents "permanently impaired her ability to do heavy yard work and snow removal". As part of the cost of future care awarded to Ms. Hale, I assessed \$22,378 as the present value calculation of the cost of heavy yard work and snow removal services.
- [39] The defendants submit that reopening is not appropriate in the circumstances and that awarding the plaintiff both the cost of future care for yard work and snow removal plus an amount for loss of housework capacity would amount to double compensation.
- [40] In *Tench v. Van Bugnum*, 2019 BCSC 1877, Justice Fleming succinctly set out the legal principles that apply to distinct claims for past and future loss of housekeeping and yard-work capacity:
 - [225] An award for loss of housekeeping capacity provides compensation for the value of the housekeeping the plaintiff would have done but was or will be incapable of performing because of the injuries caused by the accident. It does not depend on replacement costs actually being incurred. Loss of housekeeping capacity reflects the loss of personal capacity, an asset, and is therefore compensable as a pecuniary loss. In some circumstances, however, it can be compensated by a non-pecuniary award.
 - [226] *McTavish v. McGillivray*, 2000 BCCA 164 suggests the loss of housekeeping capacity should be treated as non-pecuniary where the plaintiff is still able to perform household tasks with difficulty or has decided they need not be done.
 - [227] More recently in *Kim v. Lin*, 2018 BCCA 77 at paras. 33-34, the Court of Appeal returned to the question of how to properly characterize and value a loss of housekeeping claim, concluding:

- [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
- [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.
- [228] Kim upheld an award of \$418,000 for the loss of housekeeping capacity. Aspects of the claim for the cost of future care related to household chores and yard work were disallowed because they duplicated the loss of housekeeping capacity award: 2016 BCSC 2405 at para. 233.
- [229] The Court of Appeal has commented more than once on the distinction between loss of housekeeping capacity and the future cost of care, as well as the potential for overlap. In *O'Connell v. Yung*, 2012 BCCA 57, Justice Kirkpatrick wrote:
- [65] As explained by Professor Cooper-Stephenson in *Personal Injury Damages in Canada*, 2d ed. (Scarborough: Carswell, 1996) at 315, the claims for loss of home making capacity and for cost of future care are distinct:

The claim for loss of homemaking capacity is for the loss of the value of work which would have been rendered by the plaintiff, but which because of the injuries cannot now be performed. The plaintiff has lost the ability to work in a manner that would have been valuable to her- or himself as well as to others. The claim is not the same as that under future cost of care, which is for the value of services that must now be rendered to the plaintiff. It is true that the two claims may overlap - just as the normal claim for loss of earnings and cost of care may do so - because the cost of care claim may include items which the plaintiff-homemaker would have performed but for the accident. However, a large portion of homemaking involves the performance of work for others, namely, the family unit, and in many cases the claim for loss of homemaking capacity is wholly distinguishable from that for cost of care. The loss is a "negative" loss, in the sense that it is the loss of something the plaintiff would have had (her homemaking work) but which she now does not have because of the accident. This places it squarely under the head of loss of working capacity. In contrast, the expense of services provided by others to care for the plaintiff are "positive" losses - the addition of an extra expense - and they clearly fall under cost of care.

[Emphasis in original.]

[230] As the defendants point out, duplication has been the subject of recent comment. In *Firman v. Asadi*, 2019 BCSC 270, Justice Verhoeven remarked:

[236] Duplication in the award must be avoided. Where potential costs for housekeeping assistance are awarded, in the context of costs of future care, then the case for a separate pecuniary award for loss of housekeeping capacity is lessened and perhaps eliminated, depending on the specific facts of the case. In this case a minor award for housekeeping assistance has been made.

[41] After considering the submissions and the authorities, I have concluded that it is not appropriate to reopen consideration of Ms. Hale's claim for past and future loss of housekeeping and yard-work capacity. I have so concluded because I previously considered that aspect of her claim and I awarded compensation to her through the non-pecuniary award and the cost of future care award.

[42] In the analysis of Ms. Hale's non-pecuniary losses, I considered, among other things, the evidence of Ms. Hale's sister, Linda Hale, that following the accidents Ms. Hale became reluctant to engage in physical activities such as gardening. I also considered Ms. Hale's difficulty performing yard work and snow clearing in the analysis of the cost of future care. I assessed \$22,378 as the present value of the cost of yard work and snow removal services to assist Ms. Hale in the future.

[43] I found an impairment related to performing yard work and snow removal only and I compensated Ms. Hale for the impairment with an amount tied to the future cost of assistance with those tasks. By doing so, it eliminated the case for a separate pecuniary award for loss of housekeeping capacity.

[44] In my view, awarding Ms. Hale amounts for yard work and snow removal assistance, in the context of costs of future care, plus a separate pecuniary award for loss of housekeeping capacity, would not reflect the impairment that I found. In addition, the additional award sought could also result in a duplication in the award based on the facts that were before me.

[45] Therefore, I decline to reopen and award Ms. Hale a separate amount for her claim for loss of housekeeping and yard-work capacity.

"E. McDonald J."

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