

CANADA / JUDGMENT

Jabbal v. Venier

2024 BCSC 151

COURT

Supreme Court of British Columbia

DECIDED

4 January 2024

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2024 BCSC 151 Jabbal v. Venier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jabbal v. Venier,

2024 BCSC 151

Date: 20240104

Docket: M232875

Registry: New Westminster

Between:

Satwinder Kaur Jabbal

Plaintiff

And:

Rebecca Jane Venier

Defendant

Before: Associate Judge Nielsen

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

J.S. Malik

Counsel for the Defendant:

C.L. Arrieta de Diaz

Place and Date of Hearing:

New Westminster, B.C.

January 4, 2024

Place and Date of Judgment:

New Westminster, B.C.

January 4, 2024

- [1] THE COURT: This is an application for an order under s. 5(6) of the Disbursements and Expert Evidence Regulation, B.C. Reg. 31/2021 that disbursements from a physiatrist and economist be excluded for the purposes of s. 5(2) of the regulation, and an order that any disbursements incurred by the plaintiff on this application also be excluded.
- [2] The parties have come to an agreement with respect to the physiatrist, Dr. Gupta. That will be an excluded disbursement. The anticipated disbursement of Mr. Kevin Turnbull, the economist, is not agreed.
- [3] By way of background, on December 11, 2018, the plaintiff was rear-ended in a motor vehicle accident. Liability has been admitted. An examination for discovery took place on November 23, 2022. The trial of the action is currently scheduled for May 6, 2024, for seven days, and the 84-day deadline for reports is February 9, 2024.
- [4] Section 5 of the regulation provides that a successful plaintiff in a motor vehicle injury proceeding can only recover disbursements up to 6 percent of the total award of damages plus the costs of any excluded disbursements. There have been a number of comments made concerning the 6-percent disbursement cap. The BC Court of Appeal in *British Columbia (Attorney General) v. Le*, 2023 BCCA 200, at para. 153, made the comment that the 6-percent disbursement cap did not reflect any reasonable interpretation of proportionality and confirmed the lower court's ruling that the previous iteration of s. 5 of the regulation was of no force and effect.
- [5] Under the current legislation, the plaintiff is required to show that were the disbursements not excluded, the applicant would suffer prejudice disproportionate to the benefit of increasing the complexity and costs of the vehicle injury proceeding. Pursuant to s. 5(6) of the regulation, the plaintiff must address those factors in s. 5(8)(a) and (b) and s. 5(9)(a) and (b).
- [6] Section 5(8)(a) requires that the application be made prior to the disbursement being incurred, which is satisfied here. Section 5(8)(b) requires prejudice disproportionate to the benefit of not increasing the complexity of the case. This will be addressed below.

- [7] Section 5(9)(a) requires the applicant to address the nature and evidentiary value of the disbursements in question, and 5(9)(b) requires the applicant to establish prejudice if the disbursements were not excluded. And finally, each of the factors in s. 5(9)(b)(i), (ii), and (iii) must be addressed. Those are: (i) there is a reasonable risk the total amount of disbursements the party intends to incur to resolve the vehicle-injury proceeding will exceed the disbursement limit; (ii) there is evidence the disbursements are necessary to justly resolve the vehicle-injury proceeding in light of the complexity of the vehicle-injury proceeding, or the importance of the issues in dispute; and (iii) there is evidence the party would be unable, without undue hardship, to incur the disbursements if they were not excluded.
- [8] In the present case, the plaintiff estimated the cost of both reports to be in the range of \$9,500. The plaintiff is seeking damages in the range of \$100,000 to \$1 million. 6 percent of \$100,000 would be \$6,000. Therefore, the current anticipated disbursements would likely exceed the 6-percent cap if the plaintiff recovered damages at the lower end of the scale.
- [9] The plaintiff worked from the date of the motor vehicle accident to the time of her retirement without interruption. She retired in May of 2021 when she was 69 years old. She is currently 71 years old. The plaintiff had planned to retire at 75 years old. Therefore, it is the plaintiff's position, given that they have the onus of proof, that they need to provide evidence of the plaintiff's pecuniary losses in the event that it was the motor vehicle accident that prevented her from continuing in her employment to age 75.
- [10] The lower court judgment in *Le v. British Columbia (Attorney General)*, 2022 BCSC 1146, made the following comment at para. 24:
- [24] In a typical case, proof of that head of damages alone requires the evidence of two experts -- a functional capacity evaluator to prove limitations on the plaintiff's ability to work and an economist to permit some assessment of what the plaintiff's future earnings might have been in the absence of the injury and the present value of what they are now able to earn. That is in addition to whatever medical evidence is necessary to prove the underlying injuries and their severity. Depending on the combination of injuries involved, that may require evidence of specialists in more than one area of medicine.
- [11] Here the plaintiff plans to call the evidence of Dr. Gupta, the physiatrist, and to complement that with the economist report of Mr. Kevin Turnbull to prove those pecuniary losses.
- [12] Turning to the factors beginning with s. 5(9)(b)(i), is there evidence of a reasonable risk that the total disbursements the party intends to incur to resolve the vehicle-injury proceeding will exceed the disbursement limit?
- [13] In the present case, we have ICBC's offer of less than \$100,000 to resolve the entire matter. Their position is that this is simply a settlement proposal, not an actual assessment of the value of the case. If the defendant was correct in its assessment, there is no question that the anticipated disbursements would exceed the disbursement limit.

- [14] Given the vagaries of litigation, parties can never know with absolute certainty the value of a particular claim until the court ultimately pronounces judgment. However, what we do have here are the allegations of various physical injuries by the plaintiff. The defendant emphasizes the extent of the plaintiff's pre-existing injuries, from which I take their position to be that she would not have been able to continue in her current employment, irrespective of the accident, given her pre-existing conditions.
- [15] The settlement proposal of the defendant was less than \$100,000. Therefore, with a 6-percent cap, that would not cover the anticipated disbursements. I am satisfied that item (i) has been established, that there is the reasonable risk that the disbursements will exceed the disbursement limit.
- [16] Then turning to criteria (ii), evidence 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 issues in dispute. In this regard I note the comments of Justice N. Smith in the lower court's decision in *Le*, supra, at para. 24 cited above. There is a claim in this case for pecuniary loss. We have the plaintiff taking the position she would have worked until 75. However, she was required to retire from her position at 69. There is a potential for six years of wage loss at the top end of the scale, and perhaps less, in view of the plaintiff's alleged pre-existing conditions. Again, that is a matter to be decided at trial.
- [17] In my view, it would be helpful to the court to have the opinion of an economist, as it would allow for a calculation of the pecuniary loss, at any given point of time, whether that was 75 years of age or less
- [18] The defence argues that the report is not necessary as the court could simply embark on an assessment of the potential pecuniary loss with the assistance of counsel. Given the comments of Justice N. Smith, I do not agree. In my view, this is a case where expert evidence is warranted and would be helpful to the court. Indeed, it is possible that the economist report may, in fact, reduce the complexity of the proceeding and the time required.
- [19] I pause to note that whether the economist report is an excluded disbursement would not preclude the defendants from arguing, pursuant to Supreme Court Civil Rule 14-1(5) after the case had concluded, that the particular disbursement was neither necessary nor properly incurred. If the court indicated an economist report wasn't useful or necessary, or the report wasn't utilized, the registrar could take that into account on an assessment of costs. The fact that a disbursement is excluded for the purpose of the regulation would not prejudice the position of the defendant at a subsequent assessment of costs.

- [20] Finally, with respect to undue hardship, the plaintiff and her husband are both retired. They are on fixed incomes. The combined disbursements of Dr. Gupta and Mr. Turnbull would be in the neighbourhood of \$9,500 just for the reports. That does not include the cost of their attendance at court, should they be required for cross-examination.
- [21] According to the plaintiff, with their pensions, they have monthly expenses of about \$4,500, which include groceries, mortgage, utilities, and insurance. The cost of the expert reports, in her view, would result in undue hardship if the disbursements were not excluded. There would a risk that the plaintiff would lose a chunk of her damages in order to cover the cost of the disbursements incurred if they exceeded the 6 percent cap.
- [22] The plaintiff has raised the issue of privilege and the fact that this application allows the defendant to peer into the plaintiff's litigation brief. That may be, however, Section 5(8) and (9) require evidence in support of the application for exclusion.
- [23] Finally, I am sympathetic to the plaintiff's position that the onus is on the plaintiff's shoulders to prove her case. It is for plaintiff's counsel to decide what strategies to employ in order to do so, not the defendant.
- [24] I am going to exclude the economist's report for the purpose of the regulation, and I am also going to exclude the disbursements incurred on this application. The physiatrist report has been excluded by agreement.

(SUBMISSIONS ON COSTS)

[25] THE COURT: The plaintiff will have her costs of the application.

"Associate Judge Nielsen"

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