

CANADA / JUDGMENT

Joshua v. Pathak

2024 BCSC 195

COURT

Supreme Court of British Columbia

DECIDED

16 January 2024

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2024 BCSC 195 Joshua v. Pathak

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Joshua v. Pathak,

2024 BCSC 195

Date: 20240116

Docket: M226258

Registry: New Westminster

Between:

Punardeep Joshua

Plaintiff

And

Anil Kumar Pathak

Defendant

Before: Associate Judge Nielsen

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

A.D. Walia

Counsel for the Defendant:

L. Kempers

Place and Date of Hearing:

New Westminster, B.C.

January 16, 2024

Place and Date of Judgment:

New Westminster, B.C.

January 16, 2024

- [1] This is an application for an order under s. 5(6) of the Disbursements and Expert Evidence Regulation seeking to exclude the reports of Dr. Singla, physiatrist, and Mr. Benning, an economist, pursuant to s. 5(2) of the Regulation. On an application by a party to a vehicle injury proceeding, the court may, if satisfied that the conditions set out in subsection 8 are met, order the disbursements itemized in the order to be excluded disbursements.
- [2] In s. 5(8), the legislation provides that the following are the conditions for the purposes of subsection 6, and that is:
- a) the application is made before the disbursements were incurred. That has been satisfied here and;
 - b) were the disbursements not excluded, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the vehicle injury proceeding.
- [3] Then subsection 9 provides in an application under subsection 6, the party must include the following:
- a) the nature and evidentiary value of each disbursement that are subject to the application;
 - b) the evidence of the prejudice the party would suffer were the disbursements that are subject to the application not excluded, which must include:
 - i. evidence that 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 disbursements that are subject to 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; and
 - iii. evidence that the party would be unable, without undue hardship, to incur the disbursements that are the subject of the application were those disbursements not excluded.

- [4] This matter involves a motor vehicle accident that occurred on April 14, 2018. It was a rear-end-type motor vehicle accident. The plaintiff, Mr. Joshan, is 24 years old, and he lives with his parents. He states that he had hoped to be a heavy-duty mechanic, but after having done that for approximately a year, he concluded that the restaurant business was a better fit for him as the workload of a heavy duty mechanic was more challenging than he had anticipated.
- [5] He had hoped that employment as a heavy-duty mechanic would help him become more independent from his family. Regretfully, to date, that has not happened as he lives with his parents because he cannot afford to move out and live independently. He describes his income as modest.
- [6] Mr. Joshan has not filed income tax returns. We do not have the benefit of his actual earnings. However, we do have his description of his income as being modest, and we also have his evidence that he simply cannot afford to live independently based on the money he earns, and he has to, at least for the time being, live with his parents.
- [7] Turning to the requirements of s. 5, we do have the first factor satisfied, that the application has been made prior to the disbursement being incurred. And the second factor in s. 5(8)(b) is the prejudice disproportionate to the benefit of not increasing the complexity of the proceeding.
- [8] The plaintiff's injuries are itemized, and consist mainly of soft tissue injuries. There is a claim for future income loss and care. I was advised the defendants have advanced an offer that, if accepted, would result in the disbursements not being covered by the 6 percent cap.
- [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.
- [10] The plaintiff submits that the reports themselves would, in fact, decrease the complexity of the proceeding. With respect to Mr. Benning, his report would provide the court with future loss multipliers and avoid the consequent floundering that the parties would be faced with in the event they did not have expert evidence on that topic. There is also the argument that rather than increasing the complexity of the proceeding, the reports of the physiatrist, Dr. Singla, and the economist, Mr. Benning, would, in fact, decrease the complexity of the proceeding.
- [11] Turning to s. 5(9)(a), the nature and evidentiary value of the disbursements, I note that the defendants themselves will have the evidence of a physiatrist, Dr. Paramonoff, and the plaintiff is going to be assessed by her in the near future. Levelling the litigation playing field would involve a physiatrist on the part of the plaintiff as well. The benefits of a physiatry specialty are obvious in a case like this. The plaintiff has the onus of proving the causal relationship of their injuries to the car accident.

- [12] Turning to s. 5(9)(b)(i), evidence that there is a reasonable risk that the total amount of disbursements the party will incur to resolve the injury will exceed the disbursement limit as submitted by the plaintiff, we do not have a crystal ball. There is no way of telling with any degree of certainty what the outcome of the litigation would be. However, the fact that there has been a settlement offer which, if accepted, would essentially exclude the cost of the two reports is evidence of risk in this regard. The report of Dr. Singla, the physiatrist, would be in the range of \$5,500 to \$8,000, and the cost of the economist's report would be in the range of \$3,000 to \$6,000.
- [13] Next, turning to s. 5(9)(ii), evidence that the disbursements that are subject of the application are necessary in light of the complexity, I am satisfied that they are. Again, the defendants have retained their own physiatrist, and where there is a chance of a loss of future earning capacity, future earnings, and cost of future care, the evidence of an economist can be invaluable. And I note the comments of Master Elwood in *Raniga v. Kang*, 2021 BCSC 2340, at paras. 27- 30.
- [14] Finally, we have s. 5(9)(b)(iii), evidence that the party would be unable, without undue hardship, to incur the disbursements that are subject of the application were those disbursements not excluded. We do not have the same degree of financial disclosure here as there was in *Nagra v. Prasad*, 2023 BCSC 2297, where the costs of the reports could be weighed against the plaintiff's income.
- [15] However, we do have evidence of the plaintiff's financial circumstances, those being that he earns a modest income in a family-run restaurant and is required to live with his parents. He is the first to admit that he cannot live independently without his parents' assistance because of his modest income. And I should also note that the plaintiff has not filed income tax returns, so we do not have the benefit of his precise earnings. We simply have the benefit of his subjective evidence in that regard, although I am advised he is in the process of filing income tax returns.
- [16] I am satisfied that the reports of Dr. Singla, the physiatrist, and the reports of Mr. Benning, the economist, should be excluded, together with any subsequent rebuttal reports, trial preparation, trial testimony, and late cancellation, if required. I am also prepared to exclude the costs of this application.
- [17] I have heard submissions on costs, and I agree with the submissions of counsel for the defendant that the ordinary order that the plaintiff will have costs in the cause is appropriate in all circumstances.

"Associate Judge Nielsen"

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