
CANADA / JUDGMENT

Jurczak v. Mauro

2013 BCSC 1370

COURT

Supreme Court of British Columbia

DECIDED

8 August 2013

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2013 BCSC 1370 Jurczak v. Mauro

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jurczak v. Mauro,

2013 BCSC 1370

Date: 20130808

Docket: M085184

Registry: Vancouver

Between:

Paula Cheri Jurczak

Plaintiff

And

Victor Mauro, Kathleen J. Rysiew

and Roadway Towing Ltd.

Defendants

Before: The Honourable Mr. Justice Silverman

Reasons for Judgment

Counsel for the Plaintiff:

T. Delaney

Counsel for the Defendant, Mauro:

T. Heuchert

& K. Hall

Place of Trial:

Written Submissions of the Plaintiff:

Written Submission of the Defendant:

Vancouver, B.C.

July 10, 2013

July 9, 2013

Place and Date of Judgment:

Vancouver, B.C.

August 8, 2013

INTRODUCTION

[1] Judgment in this personal injury case arising out of a motor vehicle accident was rendered on April 19, 2013. I awarded damages to the plaintiff in the following categories and amounts:

Non-pecuniary loss

\$ 70,000

Past Wage Loss

\$110,000

Loss of Earning Capacity

\$120,000

Future Care

\$ 7,500

Housekeeping

\$ 7,500

Special Damages

\$ 6,500

TOTAL:

\$321,500

- [2] On this application, the defendant argues that, as the plaintiff is an insured pursuant to Part 7 of the Regulations ("Regulations") to the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 (the "Act"), her tort award must be reduced pursuant to s. 83 of the Act and Judgment should be entered for the balance only.
- [3] More specifically, the defendant submits that a total of \$8,782.08 should be deducted from the tort award of \$321,500 and that in accordance with s. 83(5), Judgment should therefore be entered for the balance of \$312,717.92.
- [4] The total of \$8,782.08 to be deducted consists, in the defendant's submissions, of the following:

\$2,700.00

Total Temporary Disability Payments (TTDs)

\$1,925.68

Special Damages

\$4,156.40

Future Care Costs

- [5] Section 83(5) of the Act states the following:

After assessing the award of damages under subsection (4), the amount of benefits referred to in that subsection must be disclosed to the court, and taken into account, or, if the amount of benefits has not been ascertained, the court must estimate it and take the estimate into account, and the person referred to in subsection (2) is entitled to enter judgment for the balance only.

- [6] In addition to the evidence at trial, I have before me evidence in the form of two affidavits: one from the insurance adjuster (the "adjuster") responsible for this file, and one from a paralegal in the law firm representing the plaintiff.
- [7] With respect to the TTDs in the amount of \$2,700, there is no dispute that this amount must be deducted from the tort award in accordance with s. 83 of the Act.
- [8] The parties disagree with respect to whether there should be a deduction for the amounts of special damages and future care costs, or at least some portion of those amounts.
- [9] Section 83 of the Act requires the trial judge to estimate the amount of the benefits to which the plaintiff is or would be entitled under the Regulations and to take that estimate into account before Judgment is entered.

[10] In conducting that exercise, trial judges are to be "cautious in their approach" since any deduction results in a lessening of the award in the tort action: *Schmitt v. Thomson* (1996), 132 D.L.R. (4th) 310, 18 B.C.L.R. (3d) 153 at para. 19.

[11] Part 7 of the Regulations deals with the issue of providing benefits to insured persons injured in an accident. Section 88(1) states the following:

Where an insured is injured in an accident for which benefits are provided under this Part, the corporation shall pay as benefits all reasonable expenses incurred by the insured as a result of the injury for necessary medical, surgical, dental, hospital, ambulance or professional nursing services, or for necessary physical therapy, chiropractic treatment, occupational therapy or speech therapy or for prosthesis or orthosis.

[My emphasis.]

[12] Section 88(2) provides other benefits where payments are discretionary, that is, "the Corporation may provide" benefits where they are likely to promote the rehabilitation of an insured "in the opinion of the Corporation's medical adviser." [My emphasis.]

[13] Benefits to be paid under s. 88(1) of the Regulations are mandatory. However, benefits under s. 88(2) are discretionary and dependent upon "the opinion of the Corporation's medical adviser." Even if such an opinion is forthcoming, the section provides that the insurer "may provide" benefits.

[14] The parties disagree about whether the benefits, or some of them, that are the subject of this application are mandatory or discretionary.

[15] In *Ayles v. Talastasin*, 2000 BCCA 87 ("Ayles"), the Court of Appeal discussed the distinction between mandatory and discretionary benefits under ss. 88(1) and (2) at para. 32:

As a claim covered by s. 88(1) I.C.B.C. is obliged to pay the benefits. It is not a matter of discretion under s. 88(2) where entitlement depends "on the opinion of the corporation's medical adviser". The risk in deducting too much from the tort award for discretionary benefits is that I.C.B.C. may ultimately refuse to pay on items which although found to be compensable in the tort claim were deducted on the assumption that they would be paid as a no fault benefit. In that instance the claimant is out of pocket for the expense and I.C.B.C. enjoys a windfall. But here the class of future expense is obligatory, not discretionary, and so the plaintiff does not stand to lose anything by the deduction. It is only in circumstances where the classification of the future cost is unclear or an issue arises whether the item is covered by Part 7 at all, that some caution is required.

[16] What emerges from the authorities is that on an application for s. 83 deductions, the Court should embark on a two-step approach. First, the Court must determine if there are some Part 7 benefits which the plaintiff has received or is entitled to receive. Second, the Court then must estimate the amount of the deduction.

- [17] The defendant bears the onus of proving that a deduction should be made. Uncertainty as to whether benefits will be paid must be resolved in favour of the plaintiff: *Lynn v. Pearson*, 1998 CanLII 5518 (BC CA) at para. 18.
- [18] The defendant argues as follows:
1. With respect to the special damages and future cost of care amounts which are the subject of this application, they are "mandatory" benefits under s. 88(1), and the defendant has every intention of making the payments to the plaintiff as a result. It follows that the plaintiff "does not stand to lose anything by the deduction" and consequently, the caution referred to in *Ayles* is inapplicable.
 2. I can be satisfied that these are mandatory payments which will in fact be paid, for three reasons:
 - (a) They refer to the types of benefits noted in s. 88(1).
 - (b) Counsel has asserted in her submissions that the amounts sought to be reduced are in fact mandatory and that they will be paid in full.
 - (c) The adjuster deposes that "I am prepared to reimburse the plaintiff" with respect to each of the individual claims that make up the totality of \$8,782.08.

[19] The plaintiff argues as follows:

1. The benefits in question are not mandatory. Rather, they are s. 88(2) benefits.
2. The Court cannot be satisfied, based on the information before it, that the defendant will in fact pay to the plaintiff the amount that it now says it will pay. The uncertainty arises from two things:
 - (a) the assurance of counsel that the insurance company will pay has been considered by our courts to be insufficient: *McCreight v. Currie*, 2008 BCCA 150 ("McCreight").
 - (b) the assertion in the adjuster's affidavit that "I am prepared to reimburse" is also insufficient: *Tsang v. Borg*, 2013 BCSC 1004.

SPECIAL DAMAGES

The Defendant's Argument

- [20] The defendant seeks reduction under this heading in the amount of \$1,925.68 consisting of \$1,244.35 for physiotherapy sessions and \$681.33 for medication expenses.
- [21] Both physiotherapy sessions and medication are the types of benefits referred to in s. 88(1) of the Regulations. It follows that the payments are mandatory. The defendant will pay these amounts to the plaintiff.

- [22] The original Judgment does not specify the basis upon which the amount of special damages was calculated. It does note that the "plaintiff's claim for special damages totals \$8,074.73."
- [23] It then concludes with the following:
- After consideration of all of the foregoing, I am satisfied that the correct amount of special damages for which the plaintiff is entitled to be compensated is \$6,500.
- [24] The plaintiff's claim for special damages at trial included \$3,110 for physiotherapy.
- [25] In her affidavit, the adjuster confirms that the plaintiff received Part 7 coverage for physiotherapy from January 3, 2007 to June 5, 2007.
- [26] Even if the defendant had not been reimbursed, non-payment of benefits is not a bar to the deduction.
- [27] In her affidavit, the adjuster confirms that physiotherapy is considered a benefit payable under s. 88(1). According to the plaintiff's itemization of physiotherapy visits, she attended 41 physiotherapy sessions after June 5, 2007.
- [28] The adjuster has conservatively estimated payment of those sessions at \$30.35 per session for a total of \$1,244.35 under Part 7.
- [29] The plaintiff's claim for special damages at trial also included medication and similar items totalling \$681.33. The adjuster deposes that the foregoing would be considered medical benefits payable under s. 88(1) and as such, she is prepared to reimburse these expenses under Part 7 in full.
- [30] The total of \$1,244.35 and \$681.33 is the amount of special damages by which the defendant says the Judgment should be reduced (\$1,925.68).

The Plaintiff's Argument

- [31] Part 7 of the Regulations provides at s. 88(8) that the insurer is not liable to pay for more than 12 physical therapy treatments unless, before any additional treatments are given, the insurer's medical advisor or the insured's medical doctor certifies in writing the treatment is necessary.
- [32] In this case, the defendants are asking the Court to deduct the sum of \$1,925.68 from the award of special damages: \$1,244.35 for about 41 physiotherapy treatments the plaintiff attended and paid for; and \$681.33 for medication and items for her TENS machine. These costs were all incurred before the trial. The fact that the plaintiff has not been reimbursed to date for any of the foregoing expenses should leave the Court with some uncertainty as to whether or not they will in fact be paid.

[33] In the Reasons for Judgment, the Court accepted that the plaintiff was entitled to be reimbursed for some of her special damages. If this deduction is made the Court can have no confidence that ICBC will, in fact, pay the sum of \$1,925.68 to the plaintiff. There is a real risk the defendants will turn around after the deduction has been made and refuse to make the payment to the plaintiff.

Conclusion

[34] With respect to the \$1,244.35 that the defendant seeks to deduct for physiotherapy treatments, I agree that they are, at first blush, mandatory benefits under s. 88(1). However, unlike the other benefits referred to in that subsection, "physical therapy treatments" are also referred to in s. 88(8) which must be read together with s. 88(1).

[35] In my view, the two subsections when read together lead to the conclusion that reimbursement is only mandatory for 12 physiotherapy treatments. There is no obligation on ICBC to reimburse for the balance.

[36] The insurer has already reimbursed the plaintiff for more than 12 physiotherapy treatments prior to June of 2007. Therefore, only non-mandatory benefits remain in terms of physiotherapy.

[37] The defendant says that the insurer will nevertheless pay these benefits. This is conveyed through the assertions of the defendant's lawyer and adjuster.

[38] I accept as truthful the stated beliefs and intentions of counsel and the adjuster. However, while I do not ignore them, these assertions provide something less than an undertaking from the insurer and something less than certainty that the benefits will be paid.

[39] There is no assurance that counsel or the adjuster, or both, will not be replaced, or that the insurer's instructions will not change.

[40] In McCreight, the Court said this:

the submission did not include any explanation as to the authority under which ICBC could pay the full amount of the future care award for physiotherapy under Part 7. Moreover, there was no suggestion counsel was speaking for ICBC. His submission on behalf of the respondent reads as an opinion as to what ICBC would do and why. While such a submission might be helpful to a trial judge called upon to estimate the value of potential Part 7 benefits, I am not persuaded it is evidence, expert or otherwise, on which the trial judge can rely for a finding of fact

[41] I am less than confident that the entire amount will be reimbursed. There is a real risk that it will not be.

[42] I am required to estimate the amount to which the plaintiff is entitled. In doing so, I am required to be cautious and to take into account any uncertainty concerning payment. The onus of establishing that a deduction should be made is on the applicant. Any uncertainty as to whether the benefits will be paid must be resolved in favour of the plaintiff.

[43] I am satisfied that a portion will be paid. I estimate that amount at \$600 with respect to physiotherapy. Therefore, I order the amount to be deducted with respect to physiotherapy is \$600.

[44] The deduction sought for medication is \$681.33. I am satisfied this represents mandatory benefits under s. 88(1), and I am satisfied that it will be paid. I allow that deduction.

[45] It follows that the amount to be deducted concerning special damages is \$1,281.33.

Cost of Future Care

The Defendant's Argument

[46] The defendant further submits that of the \$7,500 awarded for future care, any amount for benefits payable under Part 7 must also be deducted.

[47] The defendant submits that \$4,156.40 should be deducted under this heading consisting of the following:

1. \$3,156.40 representing 104 physiotherapy treatments at \$30.35 each; and
2. \$1,000 representing medication expenses.

[48] In the trial Judgment, there is again no specific breakdown with respect to the amount of the award. Rather, the Judgment notes that:

... the evidence leads to a reasonable inference that there will be future care costs which arise directly from the injuries caused by the MVA.

The evidence leads me to the conclusion that the appropriate award for future care costs is \$7,500

[49] As the award for future care was not broken down in the Judgment, the defendant and the adjuster have made estimates regarding future physiotherapy and medication expenses which would be payable as benefits under Part 7.

[50] The only evidence at trial in support of the award for future care was the plaintiff's past expenditures and the evidence of the defendant's expert, Dr. Wade, that the plaintiff may benefit from physiotherapy for a period of six to twelve months. Treatment twice a week for twelve months would be 104 physiotherapy sessions. In the adjuster's affidavit, she confirms that she is prepared to pay for up to 104 treatments at \$30.35 per session under Part 7.

- [51] Consequently, the defendant submits that the amount of \$3,156.40 (104 x \$30.35) should be deducted from the tort award for future physiotherapy treatments.
- [52] The adjuster confirms that the only other item claimed by the plaintiff for future care that would be payable under Part 7 is medication.
- [53] As the Reasons for Judgment did not provide a breakdown of the future care award, the defendant submits that a reasonable estimate of future medications which would be payable under Part 7 would be \$1,000.
- [54] As with special damages, the defendant's counsel argues that physiotherapy and medication expenses are "mandatory" under s. 88(1), and the adjuster deposes that "I am prepared to reimburse "

The Plaintiff's Argument

- [55] As she did under the argument with respect to special damages, the plaintiff notes that it is only the first 12 physiotherapy treatments which are "mandatory". By virtue of s. 88(8), the rest are "discretionary".
- [56] As a result, the Court has an obligation to determine whether or not there is a likelihood that the plaintiff will in fact receive them in the future. Uncertainty in this regard must be resolved in favour of the plaintiff.
- [57] First, it should be noted this Court found as a fact the plaintiff has suffered a permanent impairment. This Court preferred the evidence of Dr. Shuckett to that of Dr. Wade with respect to the likelihood of improvement (or lack thereof). The Court said: "I am satisfied, on a balance of probabilities, that the plaintiff is unlikely to experience further significant improvement ..."
- [58] On this application, the defendant has ignored the Court's findings regarding the plaintiff's need for future care and treatment and its findings that Dr. Shuckett's opinion of unlikely recovery should be preferred to that of Dr. Wade's. Instead, the defendant suggests the plaintiff should only be entitled to physiotherapy for a period of between 6-12 months based on Dr. Wade's evidence. That was not the finding of this Court.
- [59] Taking this position raises serious concerns whether ICBC will actually reimburse the plaintiff when she presents receipts to them in the future for physiotherapy and other benefits. It appears most likely ICBC will turn around and cut off her claim for benefits after a period of about 6-12 months, notwithstanding the express findings made by this Court.
- [60] As noted in the authorities, this Court should take these facts into account when estimating the amount of future benefits and in particular the lack of certainty that the benefits will continue to be honoured beyond one year.

Conclusion

[61] With respect to physiotherapy expenses, the reasoning concerning special damages is equally applicable.

[62] In *Tsang v. Borg*, 2013 BCSC 1004, McKinnon J. held as follows:

[10] In her affidavit, Shelley Ruggles, the insurance adjuster assigned to administer the plaintiff's entitlement, indicates some uncertainty about whether future treatments are recoverable. She writes, "Further requests for treatment could be covered under s. 88 of the Regulations". This suggests some uncertainty.

[11] It is only where there is no uncertainty as to whether the insurer will accept the treatment and pay the cost that deductions can be made, see *Ayles (Guardian ad litem of) v. Talastasin*, 2000 BCCA 87. At bar there is no such certainty and I therefore resolve the issue in favor of the plaintiff.

[63] Similar reasoning is applicable here. Having already paid for 12 physiotherapy sessions, which are a mandatory benefit under s. 88(1), there is no certainty that the insurer will pay for any future physiotherapy treatments. I decline to deduct any portion of the \$3,156.40 sought by the defendant.

[64] I agree that the defendant's reasoning concerning future medication is reasonable and provides the type of certainty required to allow that deduction and I do allow it.

DECISION

[65] The total of the three deducted amounts are as follows:

TTDs

\$2,700

Special Damages

\$1,281.33

Future Care Cost

\$1,000

TOTAL:

\$4,981.33

[66] I order that the amount of \$4,981.33 will be deducted from the tort award of \$321,500 and that in accordance with s. 83(5), judgment will therefore be entered for the balance of \$316,518.67.

"Silverman J."

The Honourable Mr. Justice Silverman

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