

CANADA / JUDGMENT

Kaur v. Lin

2024 BCSC 395

COURT

Supreme Court of British Columbia

DECIDED

21 February 2024

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2024 BCSC 395 Kaur v. Lin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kaur v. Lin,

2024 BCSC 395

Date: 20240221

Docket: M237951

Registry: New Westminster

Between:

Mandeep Kaur

Plaintiff

And:

Chien-Hon Lin and FirstCanada ULC

Defendants

Before: Associate Judge Bilawich

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

A.D. Walia

Counsel for the Defendants:

K. Soe

Place and Date of Hearing:

New Westminster, B.C.

February 9, 2024

Place and Date of Judgment:

New Westminster, B.C.

February 21, 2024

(by videoconference)

Introduction

[1] THE COURT: The plaintiff applies for orders that:

1. Under s. 5(6) of the Disbursements and Expert Evidence Regulation, B.C. Reg. 210/220, as amended (the "Regulation"), that the disbursements for the following be excluded for the purposes of s. 5(2):
 - a. Amended/addendum expert report of Dr. Sushil Singla, Physiatrist;
 - b. Amended/addendum expert report of Dr. Soma Ganesan, Psychiatrist;
 - c. Expert report of Mr. Darren Benning, Economist; and
 - d. Examination for discovery transcripts of the plaintiff and defendant;
2. Any disbursements incurred by the plaintiff for expert/responsive reports, addendum/amended reports, expert trial preparation, trial testimony, and/or late cancellation of trial be excluded; and
3. Any disbursements incurred by the plaintiff for the purpose of this application be excluded.

[2] The defendants oppose all of the relief sought.

Background

- [3] The plaintiff is a 41-year-old nurse. She was involved in a motor vehicle accident on April 16, 2019, in Surrey, BC. She filed her notice of civil claim on April 14, 2021. The defendants filed their response to civil claim on October 15, 2021. Liability has been denied.

- [4] The plaintiff alleges she has suffered injuries, including to her neck, shoulders, trapezii, left foot, back, scapulae, headaches, numbness in left arm and hand, sleeplessness, anxiety, depression, diminished resilience and susceptibility to future injuries, emotional upset / lability, and physiological, psychological, and emotional injuries. She claims damages for pain and suffering, special damages, loss of earnings, loss of future earning capacity and loss of housekeeping capacity.
- [5] Examinations for discovery of the plaintiff and defendant Lin were held on November 1, 2022. A continuation of the discovery of the plaintiff took place on December 4, 2023.
- [6] Trial is scheduled for June 3, 2024, for seven days. The 84-day deadline for service of expert reports is March 8, 2024.
- [7] On November 27, 2022, Order-in-Council No. 628 came into force. This amended s. 5 of the Regulation by:
- a) Capping disbursements at 6 percent of a plaintiff's total damages following trial or settlement;
 - b) Requiring plaintiffs to bring applications to have disbursements excluded from the cap before the disbursements are incurred; and
 - c) Requiring plaintiffs to bring applications for additional experts at the same time as the application to exclude the disbursements.
- [8] The plaintiff was examined by Dr. Singla, a Physiatrist, on October 19, 2023, and Dr. Ganesan, a Psychiatrist, on October 25, 2023. Plaintiff's counsel received reports from both prior to November 27, 2023.
- [9] Plaintiff's counsel says they intend to serve the following expert reports prior to prairie of the 84-day deadline:
- a) Dr. Singla, at a cost of \$7,428.75 inclusive of tax;
 - b) Dr. Ganesan, at a cost of \$4,725 inclusive of tax; and
 - c) Mr. Benning; counsel estimates his report will cost between \$3,500 - \$5,500.
- [10] Counsel says if this matter proceeds to trial, disbursements relating to each of these experts will increase further in the event rebuttal, addendum or updated reports are required. After they receive reports from Dr. Singla and Dr. Ganesan, they received updated medical records from several sources, which they suggest will have to be forwarded to their experts for review to determine whether the new records affect their opinions in any material way.
- [11] The defendants have arranged for the plaintiff to be examined by two experts:
- a) Dr. Catherine Paramonoff, Physiatrist, on September 26, 2023; and
 - b) Dr. Eugene Okorie, Psychiatrist, on February 10, 2024.

- [12] On December 18, 2023, plaintiff's counsel asked defendants' counsel to agree to the plaintiff's expert-related disbursement exclusions sought in this application. Defendants' counsel advised his clients would not agree to any part of expert costs being excluded disbursements.
- [13] On January 8, 2024, plaintiff's counsel received an email from a court reporting company advising that opposing counsel had ordered transcripts from the examination of the plaintiff held December 4, 2023, and asking whether plaintiff's counsel wanted a copy. Plaintiff's counsel wrote to defendant's counsel requesting an exclusion for this expense, which was declined. Plaintiff's counsel says they also intend to order a transcript of their examination of the defendant Lin for use at trial. No cost estimates were offered in evidence.
- [14] With regard to the plaintiff's financial circumstances, evidence was tendered indicating she was unable to work following the accident. She made several attempts to return to work, but was not able to do so. She also separated from her husband post-accident. Finally, due to financial hardship she experienced post-accident, foreclosure proceedings were commenced in relation to her home.

Applicable Law

- [15] Sections 5(5) to (10) of the Regulation are as follows:

Limits on amount of disbursements

- (5) If the trial date set out in the notice of trial filed in relation to a vehicle injury proceeding is more than 3 months after the coming into force of subsection (4), the limits set out in subsection (2) do not apply to disbursements incurred by a party if the court is satisfied that the party necessarily or properly incurred those disbursements before the coming into force of subsection (4).
- (6) On 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 that the disbursements itemized in the order are excluded disbursements.
- (7) If disbursements to be incurred for expert evidence or expert reports are the subject of an application under subsection (6) and the applicant is also making an application under section 12.1 (5) of the Act, the applicant must make both applications at the same time.
- (8) The following are the conditions for the purposes of subsection (6):
- (a) the application is made before the disbursements are incurred;
 - (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.
- (9) In an application under subsection (6), a party must include the following:

- (a) the nature and the evidentiary value of each disbursement that is the subject of the application;
- (b) evidence of the prejudice the party would suffer were the disbursements that are the subject of 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 the disbursements that are the 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, 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.
- (10) For certainty, this section applies to all vehicle injury proceedings, whether or not the proceeding was commenced before the coming into force of this subsection.

Analysis

Section 5(8)(a)

- [16] Turning to s. 5(8)(a) of the Regulation, this application has been made before the relevant disbursements have been incurred.

Section 5(8)(b)

- [17] With regard to s. 5(8)(b), I am to consider whether, in the event the relevant disbursements are not excluded, the plaintiff will suffer prejudice that is disproportionate to the benefit of not increasing the complexity and cost of this proceeding.
- [18] The three experts who are the focus of the plaintiff's application have distinct areas of expertise. All three appear necessary for the plaintiff to advance the claim she alleges for physical and psychological injuries. Opinions from a physiatrist and psychiatrist would be necessary to address physical and psychological injuries. In this case, the primary reports were obtained prior to the Regulation coming into force, so it is the subsequent disbursements related to these experts that are relevant for the purposes of this analysis. Given the duration, severity and chronic nature of her alleged injuries, her inability to work for an extended period, and the associated loss of opportunity, if this circumstance persists, an economist opinion can also reasonably be considered necessary to properly advance the plaintiff's economic claims.
- [19] Expert evidence is absolutely essential to providing the types of claim that she describes. This was emphasized in *British Columbia (Attorney General) v. Le*, 2023 BCCA 200, at para. 128:

- [128] Finally, personal injury litigation typically cannot be advanced without expert evidence. Several medical experts may be required to address a plaintiff's injuries and explain their prognosis for recovery. Economists are often required to provide evidence of average wage earnings in different professions, relevant market and labour contingencies, and more. In some cases, additional experts are required to address a plaintiff's functional capacity and their future vocational prospects. The substantive law for various categories of loss (for example, the cost of future care) requires some medical justification. Section 12.1 provides that, where appropriate (as measured by statutory criteria reflecting proportionality) the court may, in the exercise of its discretion, sanction calling more than three experts in support of a claim for a defence of compensatory damages. Trial judges can attest to the frequency with which defendants argue that some aspect of a plaintiff's claim is not supported by medical evidence or ask the judge to draw an adverse inference because a plaintiff's personal physician or other caregivers, whose evidence may require an expert report, have not been called to give evidence. The reality is that, in personal injury litigation, plaintiffs typically carry the burden of proof to make out their claims.
- [20] Plaintiff's counsel noted that additional medical records were received after the primary reports of Dr. Singla and Dr. Ganesan were received, and more may well arrive prior to the 84-day deadline. Counsel argues an addendum report from them may be needed to address new records. I am not satisfied that such a need has been adequately established on the evidence tendered. Their initial reports are recent, and counsel did not identify any specific potential new issues apparent on the face of the new records.
- [21] Plaintiff's counsel notes that the respondents have arranged independent medical examinations from experts with specialties which correspond to those of Dr. Singla and Dr. Ganesan. If one assumes the defendants could serve reports of their own prior to expiry of the 84-day deadline, there is a reasonable possibility that a responsive report from Dr. Singla and Dr. Ganesan would be necessary. Further, if the plaintiff's experts are required to attend to testify at trial, costs related to preparation and attendance will likewise be necessary. The plaintiff did not provide an estimate of what each of those might cost. Ideally, they should have. Absent such evidence, I am prepared to accept they would constitute a significant sum over and above the cost of the initial reports. These costs are also interrelated to the primary report, as they are necessary for each expert's opinion to be properly presented and defended at trial.
- [22] With regard to Mr. Benning's proposed report, the estimates cost of the initial report is substantial. I do not agree that an addendum report is likely, given that the initial report would be served close to the 84-day deadline. There is no indication that the defendants intend to tender an economist report of their own. If they do, a responsive report from Mr. Benning may become necessary. If the defendants require him to attend for cross-examination at trial, preparation and attendance fee would be necessary. No estimates of these costs were provided, but I will assume they would be a substantial additional amount. Again, these downstream expert costs are interconnected with and necessary to

properly present and defend his initial report.

- [23] With regard to the disbursements relating to discovery transcripts, the plaintiff did not tender estimates of their anticipated cost. I presume the discovery of the defendant likely focused primarily on liability and is thus relatively brief. The discovery of the plaintiff took place over two days and presumably would involve more substantial transcripts. The lack of evidence on this item makes assessment problematic. Estimates could have been obtained from the court reporter.
- [24] To complete the analysis under this factor, it is also necessary to consider evidentiary issues raised in s. 5(9) of the Regulation.

Section 5(9)(a)

- [25] This section requires that the court consider the nature and evidentiary value of each disbursement that is the subject of the application. The reasons set out in with regard to s. 5(8)(b) above, I am satisfied that each of the disbursements which are the subject of this application are appropriate and necessary to advance the plaintiff's claim.

Section 5(9)(b)(i)

- [26] With respect to s. 5(9)(b)(i), whether there is a reasonable risk that the total amount of disbursements the plaintiff intends to incur to resolve the vehicle-injury proceeding will exceed the disbursement limit, assessing this is problematic.
- [27] Determination of the disbursement limit depends oncoming up with an estimate of the total award of damages anticipated following trial or from settlement. Settlement negotiations are normally conducted on a without-prejudice basis, so any offers exchanged are inadmissible. Formal offers to settle, if any, cannot be disclosed to the court or set out in any document used in the proceeding until all issues other than costs have been determined. See Rule 9-1(2) of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [28] Coming up with a reasonable estimated range of damages depends in large part on there being available expert evidence. Where expert reports are the subject of the exclusion application, by definition they are not available to assist the plaintiff or the court estimating a range of damages. If the plaintiff does obtain expert reports prior to an exclusion application, by definition their costs cannot be considered for exclusion.
- [29] In this case, the plaintiff did obtain primary reports from Dr. Singla and Dr. Ganesan, but she chose not to waive privilege so they could be used in support of this application. Counsel resists premature waiver of the solicitor's brief privilege.
- [30] In this case, there is evidence indicating that the plaintiff has sustained relatively serious physical and psychological injuries which persist more than four years post-accident. She has for the most part been unable to return to work. This indicates her injuries, and thus her claims for damages are substantial. Expected damages for recovery can vary

significantly, depending on whether or not the necessary expert evidence can be secured. If without necessary expert evidence she has a \$100,000 claim, the disbursement limit is \$6,000. If with necessary expert evidence she has a claim for \$1 million, the disbursement limit is \$60,000.

- [31] Unfortunately, I do not have sufficient evidence available to arrive at any particular range of damages necessary for calculating a disbursement limit or range. Plaintiff's counsel did not propose a range during argument. A further problematic aspect of the evidence tendered is that plaintiff's counsel did not offer an estimate of overall anticipated disbursements they expect would be incurred should the matter proceed to trial. Without this broader disbursement information, determination whether the limit is at risk of being exceeded by the disbursements for which exclusion is sought is difficult. I note that Associate Judge Hughes reached a similar conclusion in *Garcia v. Gill*, 2024 BCSC 108, at paras. 23-24.

Section 5(9)(b)(ii)

- [32] With respect to subsection (ii), evidence that the disbursements that are the subject of the application are necessary to justly resolve the vehicle-injury proceeding in light of the complexity of the proceeding or the importance of the issues in dispute. For the reasons set out under s. 5(8)(b) analysis above, I am satisfied that the plaintiff has established this factor.

Section 5(9)(b)(iii)

- [33] With respect to subsection (iii), evidence that the party would be unable, without undue hardship, to incur the disbursements that are the subject of the application if those disbursements were not excluded. Specific income and expense evidence would have been preferable. However, based on the evidence that the plaintiff has not been able to return to work for roughly four years, that she suffered post-accident breakdown of her marriage, and post-accident financial strains which resulted in her home being subjected to foreclosure proceedings, I am satisfied that the plaintiff has adequately established this factor.

Conclusion

- [34] The plaintiff has not tendered sufficient evidence to establish s. 5(9)(b)(i) of the Regulation, that there is a reasonable risk that the total amount of disbursements she intended to incur to resolve this vehicle-injury proceeding will exceed the disbursement limit. Accordingly, she has not satisfied all of the elements necessary to have the subject disbursements excluded. Her application is dismissed.
- [35] Defendants have been successful in resisting the application. They are entitled to costs of the application in any event of the cause, but not payable forthwith.

"Associate Judge Bilawich"

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