

CANADA / JUDGMENT

Kim v. Sodhi

2020 BCSC 2023

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Supreme Court of British Columbia

DECIDED

18 December 2020

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2020 BCSC 2023 Kim v. Sodhi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kim v. Sodhi,

2020 BCSC 2023

Date: 20201218

Docket: M168557

Registry: Vancouver

Between:

James Yeung Sik Kim

Plaintiff

And

Kulwant Singh Sodhi

Defendant

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for Plaintiff:

M. Quinn

P. Neijens, Articled Student

Counsel for Defendant:

T. Hulley

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 19, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 18, 2020

- [1] In reasons for judgment dated October 24, 2019 and indexed at 2019 BCSC 1823, I awarded the plaintiff damages totalling \$394,860 for injuries he sustained in a motor vehicle accident on December 8, 2014. That award included \$170,000 for cost of future care.
- [2] The defendant now applies under s. 83(5) of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [the Act] for an order that \$138,896 be deducted from the future care award because it relates to rehabilitation treatments and services available to the plaintiff under Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 [the Regulation]. The plaintiff has been paid the balance of the judgment.
- [3] The future care award was based on the recommendations of an occupational therapist, Shannon Smith, who relied on the opinions of medical experts as well as her own assessment. I concluded at paras. 50 and 51 of my earlier judgment:
- [50] In order to have the best possible chance of recovery or reducing his symptoms to a more manageable level, I find the plaintiff will require all of the therapies and aids recommended by Ms. Smith. The cost of some of those care is expressed as a range, based on possible variations in price and duration of need. The plaintiff's economist has identified the present value of that range as between \$143,000 and \$213,000.
- [51] Plaintiff's counsel's submits an award of \$170,000 would be appropriate and I find that to be entirely reasonable. I award \$170,000 for cost of future care.
- [4] Section 88(1) of the Regulation requires the Insurance Corporation of British Columbia ("ICBC") to pay for certain rehabilitation benefits, while s. 88(2) gives ICBC discretion to approve payment of other categories of benefits if its medical advisor considers them likely to promote rehabilitation. Section 98 creates an ongoing obligation on the person receiving benefits to provide medical evidence of the continuing need for them, if requested by ICBC, and s. 99 allows ICBC to require an examination by a health care professional of its choosing. Section 87 makes the payment of certain benefits subject to annual review. All medical and rehabilitation benefits are subject to a total maximum of \$150,000: Regulation, Schedule 3, s. 3(2)(a).

- [5] Sections 83(2), (4), (5) and (5.1) of the Act provide:
- (2) A person who has a claim for damages and who receives or is entitled to receive benefits respecting the loss on which the claim is based, is deemed to have released the claim to the extent of the benefits.
- (4) In an action in respect of bodily injury or death caused by a vehicle or the use or operation of a vehicle, the amount of benefits paid or provided, or to which the person referred to in subsection (2) is or would have been entitled, must not be referred to or disclosed to the court or jury until the court has assessed the award of damages.
- (5) 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.
- (5.1) In estimating, under subsection (5), an amount of benefits that has not been ascertained, the court may not consider the likelihood that the benefits will be paid or provided.
- [6] The defendant has now obtained an affidavit from Micah Cumberbatch, an ICBC claims specialist, who says he has analyzed the treatments and services recommended by Ms. Smith and concluded that many of them are payable as accident benefits under Part 7 of the Regulation. Mr. Cumberbatch states:
13. I am authorized on behalf of ICBC to accept the decision of the Court in the matter herein, including all findings of fact relating to, inter alia, liability to the Plaintiff's injuries, his ongoing condition, and regarding causation of said injuries and ongoing condition. ICBC also accepts all findings related to the reasonableness of, necessity for, and the number of hours or sessions required, for treatments and therapies for the benefit of the Plaintiff, forming the basis for the Court's award for cost of future care.
- [7] Mr. Cumberbatch says that he is authorized by ICBC to say that it will "irrevocably, unequivocally and unconditionally" pay for psychological counselling, occupational therapy, adjunctive treatment (physiotherapy and massage therapy), medications and housekeeping services as recommended by Ms. Smith. He further states:
26. I am authorized on behalf of ICBC to waive:
- the necessity for continuing, or any review, pursuant to s. 87 of the Regulation, regarding benefits payable under sections 84 and 86 of the Regulation.
 - the necessity for continuing, or any medical certification pursuant to section 88(1.01) of the Regulation.
 - the necessity for continuing, or any medical certification or prior written approval, pursuant to section 88(2) of the Regulation.

- ICBC's ability to terminate benefits for refusal by the Plaintiff to undergo treatment or training, pursuant to section 90 of the Regulation.
- the requirement for prior written approval from ICBC pursuant to s. 88(3) of the Regulation.
- the requirement that the Plaintiff must provide a certificate or report of an attending health care practitioner, pursuant to s. 98 of the Regulation.
- the requirement for a medical examination, pursuant to s. 99 of the Regulation.

[8] The affidavit of Mr. Cumberbatch does not make clear where within ICBC his authorization comes from or the authority of the person or persons providing it. I do not know if he is relying only on instructions from his immediate supervisor, instructions from some higher level of management, or a resolution of the board of directors.

[9] The total amount calculated by Mr. Cumberbatch as the appropriate deduction (\$138,896) is based on the number of hours of service or the number of treatments referred to by Ms. Smith and the present value multipliers set out in the economist's report, but applies those calculations to the rates at which ICBC pays for those services or treatments pursuant to the Regulation.

[10] Mr. Cumberbatch says that ICBC paid Part 7 benefits totalling \$1,815 to the plaintiff prior to trial and no invoices submitted by the plaintiff were refused. Almost all of the amount Mr. Cumberbatch refers to consisted of payments made to the Medical Services Plan of BC for basic medical care. The list of past payments includes only one for treatments comparable to those now at issue.

[11] Some such treatments were included in the plaintiff's claim for special damages at trial. I allowed that claim for \$4,860. The defendant did not agree that amount was appropriate until closing argument. The defendant also argued for a future care award of only \$5,000. The plaintiff now says in his affidavit:

36. Mr. Cumberbatch's Affidavit attests that ICBC will "irrevocably, unequivocally and unconditionally" pay for my treatments. I do not believe that ICBC will cover these costs for the next twenty-five to thirty-five years since ICBC refused to pay for my out-of-pocket expenses of \$4,860.50 prior to trial.

37. Historically, ICBC was not interested in having a dialogue with me about my case. Now, there are assurances from Mr. Cumberbatch that it will have a twenty-five to thirty-five year relationship with me, which is difficult to believe and accept.

[Emphasis in original.]

[12] The plaintiff also refers to media reports regarding ICBC's financial position and says:

39. As such, the future of ICBC is uncertain which has caused me considerable stress and anxiety. There is no guarantee that ICBC will continue to cover the considerable costs of various treatments and services I require into the foreseeable future.
- [13] Like almost anyone who is not a lawyer or insurance professional, the plaintiff probably does not fully appreciate the two distinct roles that ICBC plays in matters of this kind or sees little difference in the distinction.
- [14] ICBC is not a party to this action, although everyone involved knew that the defendant was insured by ICBC. As the defendant's insurer, ICBC gave instructions on the conduct of his defence and pays the damage award based on the defendant's third party liability coverage. ICBC's liability to pay no-fault benefits under Part 7 of the Regulation arises from the plaintiff's own ICBC motor vehicle insurance policy. Any dispute between the plaintiff and ICBC that could not be resolved about Part 7 benefits would have to become the subject of a separate action in which ICBC would be the named defendant.
- [15] In *Boparai v. Dhami*, 2020 BCSC 1813 at para. 30 [Boparai], Justice Davies recently summarized the principles governing the determination of whether, and if so to what extent, awards for the cost of future care made in tort proceedings should be deducted under s. 83 of the Act and Part 7 of the Regulation:
- 1) Two purposes are served by the deductibility of benefits that a plaintiff in a tort action is entitled to receive from ICBC. The first determines the sum that the plaintiff receives when her tort claims are adjudicated. The second is to prevent the plaintiff from being compensated twice. See: *Quigley v. Jonsen*, 2020 BCSC 216 [Quigley] at para. 3; *Luck v. Shack*, 2020 BCSC 1074 at para. 19 [Luck].
 - 2) A defendant who seeks a deduction under s. 83 of the Act has the burden of establishing that a deduction should be made. See: *Lynn v. Pearson*, (1998), 55 B.C.L.R. (3d) 401 (C.A.) at para. 18.
 - 3) There must be strict compliance with the statute in determining what deductions, if any, should be made. Any "uncertainty as to whether a Part 7 benefit will be paid must be resolved in favor of the plaintiff". Any uncertainty created by the Regulation may lead the court to conclude that only a nominal deduction is appropriate: See: *Li. v. Newson*, 2012 BCSC 675 at paras. 14(c) and (i); *Luck* at para. 28.
 - 4) Although there are substantive differences in ICBC's obligations to provide non-discretionary benefits under s. 88(1) of the Regulation and discretionary benefits under s. (2) both are liable to deduction from a tort award. See: *Quigley* at para. 10 citing *Ayles v. Talastasi*, 2000 BCCA 87 at para. 32; *Luck* at para. 29.

- 5) The filing of the affidavit of an adjuster authorized to "irrevocably, unequivocally and unconditionally" agree to pay for any treatment referenced in the reports of the medical experts who testified at trial up to the amount awarded by the jury may fully resolve uncertainty as to whether a benefit will be paid as Part 7 benefits. See: *Wark v. Kang*, 2020 BCSC 196 at para. 44; *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953 at paras. 80 and 81 [my emphasis.].
- 6) Although the filing of such an affidavit may carry considerable weight it does not, however, relieve the court of its obligation to independently analyse the evidence and then determine to the extent that it is able to do so the Part 7 benefits which the plaintiff is likely to receive in the future: See: *Sangha v. Inverter Technologies Ltd.*, 2019 BCSC 1174 [Sangha] at paras. 15 and 16.
- 7) Judges must be cautious when assessing a suitable amount to deduct from a cost of care award. Examples of uncertainties a judge should consider includes: how long the plaintiff will need the service; and, the possibility of legislative changes that may take away (or alter) a plaintiff's eligibility for Part 7 benefits. See: *Cikojevic v. Timm*, 2012 BCSC 574 at para. 14; *Sangha* at para. 9.
- 8) Deductibility under s. 83(5) of the Act of entitlement to Part 7 benefits is not to be determined based upon a plaintiff 'making' or 'advancing' a claim. Section 83(5) only reduces a defendant's liability to the amount of the Part 7 benefits to which a plaintiff is entitled that correlate to the claim as determined and assessed by the court. The defendants have the burden of establishing such correlation as to both the claim and the quantum of the award made. See: *Siverston v. Griffin*, 2020 BCSC 528 [Siverston] at paras. 46 and 47.
- 9) Although such correlation may be readily ascertainable by factual findings when liability for and the quantum of entitlement for cost of future care are reduced to judgment by a trial judge sitting without a jury, when a lump sum award is made by a jury determining correlation of the award to the services and treatments available under Part 7 and the degree of correlation may not be possible. See: *Siverston* at para. 48 and 49; *Elliot v. McCliggot*, 2020 BCSC 1129 [Elliot] at para. 13.
- [16] *Boparai* involved a future care award by a jury. Davies J. dismissed the defendant's application for a s. 83 deduction, in part because it was impossible to determine "what aspects of [the plaintiff's] multi-faceted claims for the cost of her future care were accepted by the jury": at para. 32.
- [17] There is no similar difficulty in this case. The expert witnesses' detailed recommendations and my acceptance of those recommendations in their entirety made it possible for Mr. Cumberbatch to determine what portions of the future care award duplicate benefits payable under the Regulation.

- [18] This case is therefore more similar to *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953 [Aarts-Chinyanta]. There, following a non-jury trial, Justice D. MacDonald awarded damages that included \$106,800 for cost of future care. The defendant applied to deduct that entire amount under s. 83. The defendant relied on an affidavit from an ICBC employee similar to the affidavit sworn by Mr. Cumberbatch here.
- [19] MacDonald J. found that some components of the future care award were mandatory benefits under s. 88(1) of the Regulation and that ICBC had waived the need for ongoing medical authorization. She found that the amounts for those benefits had to be deducted to avoid double recovery. Other portions of the future care award fell within the category of discretionary benefits under s. 88(2), but MacDonald J. accepted the affidavit evidence to the effect that ICBC "irrevocably, unequivocally and unconditionally" agreed to pay them. She therefore found those amounts to be properly deductible and said at para. 104 there "is little risk that ICBC will dishonour its commitment."
- [20] A different result was reached in *Del Bianco v. Yang*, 2020 BCSC 410 [Del Bianco], which is understood to be currently under appeal. Justice Groves declined to deduct an amount awarded for future massage therapy. Groves J. noted that the maximum rate at which ICBC was permitted to pay for such treatments under the Regulation was lower than what the court determined on the evidence to be the cost of those services. He also referred to the plaintiff's evidence of concern, based on media reports, about the future of ICBC:
- [16] The court is faced with the representations of a claims specialist from ICBC that they will, in the future, pay these costs. The evidence about the lack of financial viability of ICBC, as attested to by the Cabinet Minister responsible for ICBC, the Attorney General, is not significantly disputed. Nor is it disputed that ICBC is not prepared to pay for massage therapy at a rate that the court has ordered.
- [17] Additionally, and though this was not raised by counsel, but is a concern to the court, it is hard to know and predict, dare I say impossible to know and predict, at what rate ICBC will, in the future, be paying for massage therapy costs. This is not just a short-term future. This is 40 years. If, as now, this would require the plaintiff to pay the difference himself, to pay over and above what ICBC is prepared to pay, when the tort award was intended to fully compensate him. He may perhaps then seek reimbursement from ICBC. This creates a 40-year responsibility on this plaintiff to keep track of receipts, to make requests and deal with adjusters at ICBC. That is completely inconsistent with the general purpose of litigation and tort awards, to create some finality between the parties.
- [18] In light of the history of non-payment by ICBC for no apparent reason, as experienced by the plaintiff, it is unrealistic, in my view, to require him for a period of 40 years, to have to continue to deal with an adjuster at ICBC in order to obtain what the court has already ordered he is entitled to.

- [21] In Aarts-Chinyanta, MacDonald J. found media reports on the financial position of ICBC to be inadmissible.
- [22] However, while generally accepting the defendant's position that the law required deduction, MacDonald J. recognized that some uncertainty remained and had to be recognized:
- [115] In terms of the future costs of care, the plaintiff argues the Part 7 expenses are not being used only for future care items. For example, ICBC is making Medical Services Plan ("MSP") payments and other payments for benefits not articulated in the Judgment but which are being attributed to Ms. Aarts-Chinyanta's Part 7 fund. I was taken to exhibits of printouts of payments to Ms. Aarts-Chinyanta or to her treatment providers. There were payments to her general practitioner and to MSP, as well as for taxi services, and so forth.
- [116] I accept the plaintiff's submission that some payments coming from Ms. Aarts-Chinyanta's Part 7 benefit pool are being used for MSP payments and other various expenses. Lastly, because Ms. Aarts-Chinyanta will likely benefit from some treatments shortly after trial (e.g., counselling), there should be a slight reduction to the deduction amount to offset the discount rate. The discount rate assumes benefits over Ms. Aarts-Chinyanta's lifetime.
- [23] In the result, the future care cost deduction was reduced by 25% to account for those contingencies.
- [24] As said above, the evidence in this case is that ICBC is prepared to pay for the services found necessary at the prescribed rates. It cannot pay a greater amount, but in some cases the prescribed rates do not match the evidence on which the future care award was based. For example, ICBC pays for occupational therapy at the rate of \$115 and hour, while Ms. Smith referred to a rate of \$110 plus 30% in travel costs. Ms. Smith recommended massage therapy at a cost of \$110 per session, but ICBC is permitted to pay only \$82.
- [25] I fully understand that the plaintiff, having experienced ICBC-directed opposition to his claim through trial, is now suspicious of ICBC's good faith. However, in view of the clear match between my findings of his future care needs and the services covered by the Regulation, I am bound by the legislation and the case law to assume ICBC will honour its commitment and give effect to s. 83 of the Act.
- [26] That said, the principle remains that the plaintiff is not required to bear the risk of any uncertainty concerning future payments. In Aarts-Chinyanta, the court recognized that through a contingencies deduction
- [27] The contingencies recognized by the court in Aarts-Chinyanta, including the payment of basic medical services from the plaintiff's benefits pool, are also present here. In addition, there is evidence that, as in Del Bianco, some of the rates ICBC pays for services pursuant to the Regulation do not match the amounts the Court found necessary. And it is not mere speculation to recognize that regulations and policies are subject to change over time.

- [28] This plaintiff is also about 12 years younger than the plaintiff in Aarts-Chinyanta, meaning he may require benefits and be subject to any uncertainties for a longer period. In these circumstances, I reduce the future care cost deduction (as calculated by Mr. Cumberbatch to be \$138,896) by 40% to take into account these contingencies. I therefore order that \$83,338 is to be deducted from the future care award.
- [29] In order to obtain the benefits that are the subject of that deduction, the plaintiff will likely be required to deal over the years with a series of ICBC employees, who may or may not be aware of the commitments and waivers Mr. Cumberbatch has made on behalf of ICBC. In an effort to reduce future confusion, ICBC's "irrevocable, unequivocal and unconditional" commitment to pay these benefits should be recited in the formal order.

"N. Smith, J."

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