

CANADA / JUDGMENT

Krupinski v. Randle

2024 BCSC 1784

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1784 Krupinski v. Randle

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Krupinski v. Randle,

2024 BCSC 1784

Date: 20240926

Docket: M133322

Registry: Vancouver

Between:

Zbigniew Stanislaw (Stan) Krupinski

Plaintiff

And

Debbie Randle

Defendant

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment on Post-Judgment Issues

The Plaintiff, appearing in person:

Z.S. Krupinski

Counsel for the Defendants:

T. Tsang

M. Monroy

Place and Dates of Hearing:

Vancouver, B.C.

June 24-25, 2024

Place and Date of Judgment:

Vancouver, B.C.

September 26, 2024

Introduction

- [1] Reasons for Judgment were issued in this motor vehicle action on April 2, 2024, and indexed as 2024 BCSC 523 (the "Reasons"). The parties now seek to resolve some issues arising after and from the Reasons. In this judgment, I will not repeat the evidence or findings from the lengthy trial, but will refer briefly to the Reasons for reference in regard to each issue.
- [2] At the commencement of the hearing, the parties agreed that the issues to be resolved were:
- 1) net past wage loss;
 - 2) the addition of Botox treatments to the award for future care as contemplated in the Reasons;
 - 3) the application of s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [IVA or the Act] to the future care award;
 - 4) pre-judgment interest on special damages and past wage loss; and
 - 5) the lien of the Mr. Krupinski's previous lawyers.
- [3] The Bill of Costs prepared by Mr. Krupinski will be referred to the Registrar for determination.
- [4] I will deal with each issue in turn.

Net Past Wage Loss

- [5] At para. 343 of the Reasons, I concluded that the award for the gross amount of past wage loss was \$104,000.
- [6] It is necessary that the net amount of past wage loss be determined because, in brief, if that amount had been earned by Mr. Krupinski, he would have been required to pay income tax. Section 99(3) of the IVA provides for this income tax deduction from awards for past wage loss.

- [7] After some discussion regarding the nature of the award and the underlying evidence, the parties agreed on a rate for the deduction.
- [8] By consent, the tax to be deducted from the gross amount of the past wage loss is to be at the rate of 6.75%. The net amount of past wage loss is therefore \$96,980.

Future Care - Addition of Botox Treatments

- [9] At para. 380 of the Reasons, I stated:

Dr. Robinson recommended Botox treatments to assist with Mr. Krupinski's headaches. No claim was made [for] the cost of those treatments. However, since Mr. Krupinski was self-represented, he is permitted to apply to the court within 30 days to include the cost of Botox treatment in the award for future care. Any application should include evidence regarding the cost of such treatments.

- [10] Mr. Krupinski now applies to include the cost of Botox treatments in the award for future care. I accept his evidence at trial that he would have, and would in the future, avail himself of this treatment but he could not and cannot afford it because it is not covered by MSP.
- [11] Although there was some discussion regarding also including the cost of radiofrequency lesioning, Mr. Krupinski advised that he was proceeding only on the cost of Botox treatments. Further, there was no evidence at trial with regard to the medical necessity of radiofrequency lesioning treatments.
- [12] The issues to be determined are the cost, frequency, and duration of the Botox treatments.
- [13] Mr. Krupinski relies on the opinion of Dr. Robinson, dated April 20, 2015, wherein four treatments per year were recommended. The only evidence regarding cost, from CHANGEpain, is that the total cost is \$1,050 for each treatment, of which \$800 is the medication cost and \$250 is the injection fee. I accept this evidence and therefore find the yearly cost to be \$4,200.
- [14] With regard to the duration of the Botox treatments, Mr. Krupinski submits that it should extend for ten years, which he estimates may be his life expectancy.
- [15] The defence relies on a number of cases where the duration of Botox treatments as a cost of future care was considered. Based on those cases, their submission is that the duration of the award should be one to two years of treatments at \$1,600 to \$3,400 per year.
- [16] Relied upon by the defence are the cases of: Roy-Noel v. Buckle, 2024 BCSC 752; Richardson v. Hartwick, 2023 BCSC 2151; Rix v. Koch, 2020 BCSC 1976; Rousta v. MacKay, 2017 BCSC 644; and Valcourt v. Tariq, 2024 BCSC 818. The plaintiffs in these cases were of varying ages and circumstances, but the principles and analyses are helpful in assessing Mr. Krupinski's claim.

- [17] In Richardson, Justice Marzari, at para. 115, reminds us that an assessment of damages for cost of future care is not a precise accounting exercise, but rather the court doing the best it can based on the evidence before it. With regard to duration, in Roy-Noel at para. 114, Justice Crerar states: "[] Botox treatments have received sufficient judicial consideration such as to confirm that lifetime or at least long-term treatment is necessary: [citations omitted]". In Rix, ten years of Botox treatments were awarded, also on the recommendation of Dr. Robinson, for a plaintiff who was fifty years old at the time of trial.
- [18] Mr. Krupinski submits, and I agree, that although there is nothing in the expert reports regarding duration of the Botox treatments, the reports diagnose chronic pain that has existed for the thirteen years post-accident. Although it is new evidence, I accept that his neck pain is getting worse. I recognise that there is no actuarial evidence of life expectancy, and I also accept his estimate of his life expectancy being ten years. I find that Botox treatments for that duration are reasonable in the circumstances.
- [19] Therefore, I make an additional award for the cost of future care for the cost of Botox treatments for ten years at the rate of \$4,200 per year, for a total of \$42,000.
- [20] It is agreed that there is no necessity to determine the present value of this award because it will also be considered in the application of s. 83 to the future care award.

Section 83 of the IVA - Future Care Award

- [21] The defendant applies for an order that, pursuant to s. 83 of the IVA, the amount of the future care award--being \$6,534 and any amount awarded for Botox--be deducted from the total damage award made in this matter.
- [22] The amount of \$6,534 was awarded at trial for cost of future care for a rehabilitation program. At the hearing, the defendant fairly offered that, because user fees are not covered, the amount of \$1,534 can be paid to Mr. Krupinski, reserving \$5,000 to be deducted under s. 83.
- [23] I have now also awarded \$42,000 for the cost of Botox treatments. The defence therefore seeks that the sum of \$47,000 be deducted from the award of damages. This deduction is for future payments that the Insurance Corporation of British Columbia ("ICBC") has committed to paying to Mr. Krupinski under Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 [the Regulation] on an as-incurred basis.
- [24] The evidence in support of the defence application consists primarily of Affidavit #1 of Jennifer Brown, the ICBC Claims Specialist, who affirms as follows:
- a) ICBC accepts that the items awarded under Cost of Future Care by the Honourable Madam Justice Watchuk in the Reasons for Judgment were/are medically necessary and reasonable benefits pursuant to Part 7 of the Regulation;

- b) ICBC waives the power to require an insured to undergo treatment under section 90 of the Regulation, the need for continued certification under section 98 of the Regulation, and the power to require an insured to submit to a medical examination under section 99 of the Regulation;
 - c) ICBC waives the requirement pursuant to section 88(1.01) of the Regulation for ongoing certification from ICBC's medical advisor or the plaintiff's doctor for a rehabilitation program;
 - d) ICBC upon the sought deductions being granted by the Court, will irrevocably, unequivocally, and unconditionally agree to pay the plaintiff, under Part 7 of the Regulation for the items awarded by the Court in the Cost of Future Care section in the Reasons for Judgment pursuant to section 88 of the Regulation, as incurred and submitted to ICBC by the plaintiff for reimbursement, up to the amounts indicated for each item awarded in the Reasons for Judgment.
- [25] In her affidavit, Ms. Brown confirms that the requirements for certification are waived. Further, she confirms that ICBC agrees to pay to Mr. Krupinski amounts incurred by him under Part 7 of the Regulation for the items awarded by the court for future care.
- [26] Mr. Krupinski does not dispute the application of s. 83. However, he is skeptical of the waivers and confirmation, citing previous unhappy dealings with ICBC and his resultant lack of trust in ICBC. He seeks further assurances that there is certainty that his treatments will be covered by ICBC.
- [27] The defendant relies on a number of cases that have considered the provisions of s. 83 in similar circumstances.
- [28] Section 83(5) of the Act provides that, after the plaintiff's damages have been assessed, the amount of Part 7 benefits paid or payable to the plaintiff must be disclosed to the court and taken into account. If the amount of benefit has not been ascertained, the Court must estimate it and take that estimate into account. The plaintiff is only entitled to judgment for the balance of damages after Part 7 benefits--either actual or estimated--are deducted from the total damages award.
- [29] The onus to establish deductions under s. 83(5) lies with the defendants and includes Part 7 benefits that the plaintiff "is or would have been entitled to." Once this has been established, the court must make the appropriate deduction to the damages award: *Sovani v. Jin*, 2005 BCSC 1285 at paras. 19, 32, 63.
- [30] In *Norris v. Burgess*, 2016 BCSC 1452, Justice Funt restated the purpose of s. 83 of the Act and the legislative scheme being to prevent double recovery by a plaintiff: *Norris* at para. 17. On the role of ICBC, the court noted:

- [35] ICBC is an agent of the government. The Court will not presume that the future conduct of ICBC will be other than honourable. A deduction under s. 83(5) of the Insurance (Vehicle) Act is based on entitlement and "not on the possibility that claims may be unfairly adjusted in the future": *Ayles (Guardian ad litem of) v. Talastasin* (2000), 73 B.C.L.R. (3d) 60 at para. 70 (C.A.).
- [31] In *Aarts-Chinyanta v. Hayer et al.*, 2020 BCSC 953, Justice MacDonald confirmed that "when determining entitlement, the court should not concern itself with disputes between the plaintiff and ICBC" and that "the prior conduct of the insurer in denying benefits should not preclude a deduction from an award": para. 56.
- [32] The possibility of uncertainty with respect to the payment of benefits was considered in *Schmitt v. Thomson* (1996), 18 B.C.L.R. (3d) 153 (C.A.), 1996 CanLII 2323 (BC CA). In *Schmitt*, the court cited the decision of *Trifunovic v. Anderson*, 1992 CarswellBC 732, [1992] B.C.J. No. 1027 (S.C.), for the proposition that there is "[] no reason to assume that either [ICBC] or its medical advisers will act other than properly in providing the plaintiff with the benefits [] to which she is entitled under the [Act] and [Regulations]": *Schmitt* at para. 13.
- [33] In *Aarts-Chinyanta*, Macdonald J. provided further helpful commentary on the effect of affidavit evidence from ICBC promising to pay Part 7 benefits:
- [78] As I understand the principles flowing from *Schmitt* and subsequent jurisprudence, if there is no statutory entitlement to benefits, there can be no deduction because an ICBC specialist cannot authorize deductions beyond what the statute permits. Once statutory entitlement is established, based on the award and the legislation, the question is whether the Part 7 benefits are mandatory or discretionary. If the benefits are mandatory, the court must deduct. No further evidence is required. If the benefits are discretionary, in that ICBC may pay the benefits or they are subject to ongoing medical certification, they are too uncertain and the court should decline to deduct the benefit amount from the award. Alternatively, the court may deduct a nominal amount to reflect the uncertainty of the plaintiff receiving the future benefits.
- [79] There is an exception to the general rule regarding discretionary benefits. The exception is where ICBC, through affidavit evidence, undertakes or promises to pay discretionary benefits going forward. Once presented with such evidence, the court must be satisfied the undertaking or promise is sufficient in that there is no significant uncertainty the benefits will be paid: *Sangha*. If the court is satisfied with the undertaking or promise, the court should deduct the benefits from the damages award because the uncertainty has been removed.

[80] ICBC can therefore make post-trial representations regarding ongoing access to benefits to which entitlement is already established. In addition to the findings of fact and award of damages at trial, this Court may consider representations from ICBC specialists regarding whether the conditions subsequent to ongoing entitlement (e.g., 12 month reviews) will be waived or enforced. ICBC can provide assurances with respect to discretionary conditions which ICBC controls.

[81] In summary, ICBC cannot undertake to do more than it was empowered to do under the legislative scheme, consistent with the findings at trial. ICBC representations cannot broaden entitlement at the outset: Andrews at para. 25. However once entitlement is established, ICBC can reduce or eliminate any contingencies associated with its exercise of discretion. Post-trial affidavit evidence is admissible for this purpose..

[Emphasis added.]

[34] Most recently, in *Del Bianco v. Yang*, 2021 BCCA 315, the Court of Appeal held that "[] it is presumed that ICBC will honour the commitments it makes with respect to the payment of Part 7 benefits": para 56. The Court of Appeal also found that ICBC's past denials or refusals to pay Part 7 benefits are not relevant to its commitments to pay future benefits, nor are the plaintiff's concerns regarding ICBC's financial viability, future rates, or extended claim-submission timelines: paras. 43, 49-54.

[35] In *Wark v. Kang*, 2020 BCSC 196, Justice Forth similarly found that the potential for future legislative changes does not raise uncertainty with respect to ICBC's commitment to pay Part 7 benefits to the plaintiff, particularly in light of ICBC's unequivocal promise to pay them: para. 45.

[36] On the basis of the evidence, being Ms. Brown's affidavit, which I accept, the submissions, and the case law, I agree with the defendant that the statutory pre-conditions are satisfied and there is no uncertainty as to whether the benefits which are the subject of this application will be paid under Part 7 on an as-incurred basis in the future. By operation of law, the benefits awarded must be paid to Mr. Krupinski in accordance with the Regulation.

[37] The defendant has therefore established that the cost of future care items of \$5,000 for rehabilitation and \$42,000 for Botox treatments, for a total of \$47,000, should be deducted from the award of damages pursuant to s. 83 of the Act.

Pre-Judgment Interest

[38] Mr. Krupinski is entitled to be paid pre-judgment interest on the awards for special damages and net past wage loss.

[39] At issue in this hearing was the amount of interest to be paid.

[40] By consent, the parties agreed that the pre-judgment interest to be paid to Mr. Krupinski is \$17,380.50 on the net past wage loss (as determined above), and \$135.76 on the special damages, for a total of \$17,516.26.

[41] The total amount of special damages with pre-judgment interest is therefore \$1,415.66.

[42] The total amount of net past wage loss with pre-judgment interest is therefore \$114,360.50.

Lien of Previous Solicitors

[43] Mr. Krupinski's previous lawyers, Slater Vecchio LLP, have a lien on the award of damages. It is understood that the resolution of that lien is not a matter before this court.

[44] It is agreed that the amount of the lien, provided by Slater Vecchio LLP to counsel for the defendant, is \$67,107. That amount will be paid into court pending resolution of any issues between Mr. Krupinski and his previous lawyers.

Bill of Costs

[45] As set out in the Reasons, Mr. Krupinski is entitled to his costs of the action at Scale B. The parties are in agreement that the appropriate process for assessment of the Bill of Costs is a hearing before the Registrar.

[46] The parties are referred to the Registrar, and are to make the necessary arrangements for the pre-hearing conference and the Registrar's hearing.

[47] Mr. Krupinski will provide to the defendant an amended Bill of Costs

Costs of this Hearing

[48] As discussed in the hearing, Mr. Krupinski is also awarded his costs of this hearing.

"The Honourable Madam Justice Watchuk"

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