

CANADA / JUDGMENT

Kwiatkowski v. Russo

2024 BCSC 278

COURT

Supreme Court of British Columbia

DECIDED

24 January 2024

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2024 BCSC 278 Kwiatkowski v. Russo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kwiatkowski v. Russo,

2024 BCSC 278

Date: 20240124

Docket: M202319

Registry: Vancouver

Between:

Joel Kwiatkowski

Plaintiff

And

Alexi Avitia Russo and Carolyn Esther De Wolde

Defendants

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

C. Perry, Articled Student

Counsel for the Defendants:

C. Tham

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 24, 2024

Place and Date of Judgment:

Vancouver, B.C.

January 24, 2024

[1] THE COURT: This is an application for an order that certain proposed expenses be excluded under the newly in force Disbursements and Expert Evidence Regulation, B.C. Reg. 210/2020, as amended by B.C. Reg. 241/2023 (the "Regulations").

[2] Under the Regulations, the court has jurisdiction to exclude disbursements from the 6% cap (the "Cap"), if an application is made before the disbursements are incurred and, if no order is made, the party making the application would suffer "prejudice disproportionate to the benefit of not increasing the complexity and cost of the vehicle injury proceeding". Under s. (9) of the Regulations, the evidence in support of the application 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.

[emphasis added]

[3] Given the nature of the application and its urgency in that the outcome will affect the plaintiff's strategy, these Reasons are being given on an urgent basis, in court. As such, I have edited them to correct syntax and similar errors, and to add citations where available, but have not changed the basis for the decision or outcome in any way.

Evidence in Support of Application:

[4] The matter involves a motor vehicle accident that occurred on November 22, 2018, when the plaintiff was 19 years old. He is now 24 years old. Liability has been admitted. Trial is scheduled for May 27, 2024, meaning that the 84-day deadline is on March 1, 2024.

- [5] The disbursements for which the relief is sought are not referenced in the evidence today as to any specific or particularly named expert but rather, by reference to their general modality, that being in respect of a functional capacity evaluation ("FCE") and cost of future care report, an economist report for future wage loss and net present value and future care costs, and mediation fees, as well as for the disbursements of bringing this application.
- [6] The plaintiff relies primarily on the report of its own physiatrist, Dr. Chow in support of the application, specifically his comment that a FCE to determine the plaintiff's current level of functioning is "recommended." Further, Dr. Chow's observations are that the plaintiff has functional limitations in the cervical spine, and that the injured area lacks the resiliency and tolerance to excessive loading force on the head and neck, concluding as follows:

This would include prolonged sitting, especially with the head in an extended position or doing things in an awkward head and neck position. Repetitive neck movements and strenuous upper extremity tasks, such as carrying, lifting, pulling, and pushing beyond a certain level will result in pain when the injured tissue tolerance is exceeded.

- [7] Further, in commenting specifically on his job as a mechanic, Dr. Chow opines:

Hopefully, he will obtain his Red Seal in two years' time to be an auto mechanic. This job however is not ideal for his neck problems since the work will require postural tasks and medium/heavy physical demand tasks, which will aggravate his pain. In my opinion, he can perform light to medium physical demand tasks, but will need to limit postural tasks, especially with neck movements and neck extension or awkward head and neck position for a prolonged time.

- [8] The plaintiff relies on the statements as establishing the necessity of the disbursements being sought with respect to both the functional capacity and cost of future care, and the economist reports he seeks to retain, which he argues will assist the court with the quantification of the claims, including any contingencies.
- [9] In contrast, the defendant looks to other points in the evidence, in particular, the examination for discovery transcript where the plaintiff deposed that he had only limited time off work. In particular, the evidence shows that he missed two weeks of work and was able to return to his job, although with some pain thereafter. At his discovery, the plaintiff testified that he quit his job because he found another job, although that decision for a change could also be consistent with his view that the prior job was not sufficiently accommodating to his neck pain.
- [10] In any event, other than asking for some assistance from other employees with activities that require lifting etc., the plaintiff's evidence at discovery was that he is working full-time and has not sought out any accommodations from his employer.

- [11] Dr. Chow's other comments, including the following factors concerning the plaintiff:

He lives in a four-bedroom rental house with his roommates. He is able to do all indoor and outdoor chores.

Since summer 2018, he has been working full-time as a mechanic. He took two weeks off after the car accident and then returned to modified duties for a few weeks before returning full-time and full duties.

Functionally, he continues to have neck pain with postural activity. He has pain with his work tasks. However, I do note that he had a mountain bike accident, March 2009, and fractured his arm and had surgery with respect to his ongoing physical activities.

- [12] As stated, Dr. Chow found the only activity that the plaintiff seemed to stop doing was the mountain biking, and that was due to the previous arm fracture with the mountain bike accident and not because of neck pain and, in that respect, was able to continue on with most of his pre-accident activities.
- [13] In short, the defendant argues that given these portions of the report along with the discovery evidence, the plaintiff cannot establish that these disbursements are "necessary to justly resolve" the issues in this matter, having regard to the complexity and importance of these issues in this action.
- [14] As to the third element to be established, undue hardship, the evidence of the plaintiff is primarily his income level. Pre-accident he was in high school, such that there is no pre-accident comparison. However, since then the highest he has earned is just under \$48,000 a year.
- [15] Plaintiff's counsel provided hearsay evidence as to the anticipated costs of these reports, which I do note does not include any cost quotes or statements from any particular experts but rather a sworn statement by counsel for the plaintiff as to costs based on his professional experience. He deposes that the FCE and cost of future care report will fall between \$5,000 and \$7,000 and an economist will fall between \$2,000 and \$5,000, and a further \$3,000 to \$7,000 for trial attendance, mediation. He also states that his office can expect to incur \$1,500 to \$2,000 in mediation fees, which is half the total of such costs.
- [16] As I said, there are no materials from the proposed experts as to their costs themselves or, for that matter, any actual proposed experts identified, merely these general statements from counsel for the plaintiff.

Analysis and Conclusion

- [17] There is no question that the applicant bears the onus on an application for an exclusion under the Regulations, and must adduce evidence as to the three items referenced in s. 5(9)(b).
- [18] The defendant relies on *Zhang v. Srott*, 2021 BCSC 2532, with respect to the nature of the evidence filed here, in particular, although this case predated the current iteration of the legislation after there had been a challenge and amendment made and is brought in a situation that is not analogous to that before the court today, namely, the defendant there was seeking an IME, and the plaintiff in response said that the IME would be unjust, given

the Cap, which would effectively preclude their ability to obtain a responsive report, and as such, much of the comments are more in the nature of obiter.

- [19] Nonetheless, the court in Zhang commented on the necessity of having the appropriate evidence.
- [20] The purpose of this legislation is to inject proportionality into the incurring of disbursements, which in the case of motor vehicle injury litigation has become increasingly high. The disbursements and costs, mostly charged by medical practitioners, can exceed the costs of counsel, particularly where there are multiple expert opinions that were retained, to use the vernacular, to enable a party to look under every possible rock, to investigate every possible injury or symptom that could support or refute claims, and the quantification of those claims. The word used by this court in other contexts, such as for IMEs, is that bolstering of opinions should not be encouraged, particularly given the emphasis on proportionality.
- [21] I do acknowledge that other legislation has been introduced to address some of this, including now the limit on expert reports.
- [22] Regardless, the legislation is intended, as I said, to inject this proportionality, as illustrated by the wording in the Regulations that I emphasized earlier, but do so with a mechanism with the parties to seek out orders such as they are seeking today to ensure that a fair trail can be held on the merits if there is a risk of hardship if the Cap applies.
- [23] The mechanism that has been put in place in that regard is one that does still require to the court to act as a gatekeeper. The requirements of the section must be met, and there must be some evidence beyond more than mere speculation, particularly as to necessity. However, the strength, or nature of the evidence, may vary according to each of the three factors.
- [24] With respect to the risk of exceeding the Cap, I do not accept the defendant's arguments that the nature of the evidence with respect to anticipated outcome of a claim needs to be direct evidence from the plaintiff himself.
- [25] Here, the evidence is from plaintiff's counsel, and is general in that it is based on more than one potential outcome as to a damage award ranging anywhere from \$65,000 to \$400,000. While it is unfortunate that a potential outcome cannot be narrowed down, I do not fault plaintiff's counsel for that and nor is more evidence required in respect of the risk factor. In fact, I would go so far as to say it could be unjust to require a plaintiff to come to court and throw open its own file, disclose its strategy and set out an analysis as to all the negatives and weaknesses of its case, in order to satisfy the court that there is a risk that the Cap will be exceeded.
- [26] I am satisfied that the evidence here was sufficient, and that that test is met.

- [27] As to the hardship, the defendant makes a similar argument as to the sufficiency of the evidence. While ideally there would be an affidavit as to the prejudice of carrying the costs given the risk, in some cases the risk will be obvious based on the applicant's income level. As the plaintiff's counsel points out here, if these disbursements were incurred, they would essentially amount to 25% of his gross earnings. It is reasonable to conclude that the plaintiff will suffer a hardship by bearing an extraordinary cost amounting to 25% of their income, as will be case if these disbursements exceed the Cap.
- [28] Turning then to the necessity of the disbursement, which is likely to be the factor that the majority of these applications will likely turn upon, there must be evidence that the evidence is necessary to, as stated "justly resolve the vehicle injury proceeding in light of the complexity of the vehicle injury proceeding or the importance of the issues in dispute". That evidence must be something more than speculation, and must address the issue as to proportionality.
- [29] The evidence here is that there was a nominal amount of time taken off work. While there may be ongoing pain and interference with work activities as a result, as the defendant points out that does not necessarily mean a significant future wage loss claim, but likely a loss of capital asset claim which does not require an economist opinion. With respect to the FCE, Dr. Chow has addressed much of that, such that obtaining a further opinion from a FCE is not proportionate in these circumstances and may only serve to bolster Dr. Chow's opinions.
- [30] As such, I find that the plaintiff has not met the burden of establishing that the FCE report or the economist report is necessary in this case, having regard to the proportionality requirements and the gatekeeper role of the court.
- [31] That leaves mediation. It surprises me that the plaintiff would have to seek leave to have the costs for mediation excluded, or that the defendant would oppose such an exclusion. I chose to believe that if it was the only disbursement for which an exclusion was being sought that an application would not have been necessary.
- [32] The court, and members of the bench, have frequently commented upon the importance of alternate dispute resolution, not only to the parties involved but all members of the public as it helps to lessen the burden on an overburdened legal system.
- [33] I am satisfied that mediation is necessary as contemplated in s. 5(9)(b). A plaintiff should not be put to the risk of funding alternate dispute resolution if it is not successful. I will make the order as to the mediation costs.
- [34] I will also make the order that the disbursements of this application are included. If the legislature intended that an application be needed, if there is any part of the application that is successful, then the cost for the application should also be excluded from the Cap.
- [35] As to costs of this application, did you want to make quick submissions?

(Submissions re costs)

[36] THE COURT: Each party shall bear their own costs on today's application. While the defendant was substantially successful on this application, that this legislation is so new, meaning that parties are having to come to court to determine the boundaries for when exclusions will be granted, means that the application was not unreasonable. Thank you to the parties for their submission.

"Associate Judge Robertson"

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