

CANADA / JUDGMENT

Lundgren v. Taylor

2023 BCSC 2256

COURT

Supreme Court of British Columbia

DECIDED

22 December 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCSC 2256 Lundgren v. Taylor IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Lundgren v. Taylor, 2023 BCSC 2256 Date: 20231222 Docket: M189002 Registry: Vancouver Between: Natasha Jayne Lundgren Plaintiff And Douglas Taylor Defendant

- and - Docket: M193465 Registry: Vancouver Between: Natasha Jayne Lundgren Plaintiff And Lynda Diane Eyra Defendant Before: The Honourable Justice Chan Reasons for Judgment Re: s. 83 Deductions Counsel for the Plaintiff: S.T. Cope Counsel for the Defendant: M.F. O'Meara Place and Date of Hearing: Vancouver, B.C. November 6 and December 4, 2023 Place and Date of Judgment: Vancouver, B.C. December 22, 2023 Table of Contents Introduction. 3 The Damages Award. 3 The Legal Framework. 3 The Positions of the Parties. 5 Cost of Future Care. 6 Special Damages. 9 Conclusion. 11

Introduction

- [1] This Court issued a ruling after trial in this matter, awarding the plaintiff \$483,336.30 in damages for injuries in relation to two motor vehicle accidents: 2023 BCSC 612 ("Reasons") at para. 116. The defendants now seek to deduct from the award a sum of \$338,851.53 pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [Act]. The Damages Award
- [2] The Court awarded damages in relation to an accident on August 25, 2016, and an accident on June 24, 2018. The award was broken into the following: Non-pecuniary damages: \$130,000.00 Future cost of care: \$215,000.00 Special damages: \$138,336.30
- [3] Under cost of future care, the Court awarded damages for medications (\$5,000), occupational therapist (\$25,000), equipment and supplies (\$5,000), and home support/personal care (\$180,000).
- [4] Under special damages, the Court awarded amounts for prescriptions, bed, mattress, installation of a stairlift, massage therapy, rehabilitation expenses, house cleaning, driver anxiety counselling, bathroom renovations, home care support, wheelchair and a wheelchair van.

- [5] The defendants seek to deduct the whole amount of \$215,000 from cost of future care and \$123,851.53 from the amount for special damages, for a total deduction of \$338,851.53. The Legal Framework
- [6] The defendants rely on s. 83 of the Act and ss. 80, 84, 86, 88, and 104.2 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 and the applicable schedules [Regulation].
- [7] Section 83 of the Act provides for the integration of benefits as defined in Part 7 of the Regulation ("Part 7 Benefits") with tort damages awards. Under s. 83(5), after the plaintiff's damages have been assessed, the amount of any benefits paid or payable must be disclosed to the court and deducted from the damage award.
- [8] The Insurance Corporation of British Columbia ("ICBC") must pay Part 7 Benefits to an insured for injuries arising out of a motor vehicle accident in Canada, regardless of who was at fault for the accident: Regulation, s. 79(1).
- [9] Section 88 of the Regulation sets out the type of medical and rehabilitation treatments covered, the number of sessions and the fees that ICBC will cover as Part 7 Benefits. The benefits set out in s. 88(1) of the Regulation are mandatory, and they include health care services listed in Schedule 3.1, occupational therapy and medical, surgical, dental and other services. However, if the health care services are in excess of the prescribed number or is provided more than 12 weeks after the date of the accident, these are no longer presumed to be necessary unless there is certification in writing by a medical advisor stating that the treatments are necessary: Regulation, s. 88(1.01).
- [10] Section 88(2) of the Regulation sets out discretionary benefits that may be paid if the corporation's medical advisor's opinion is the benefits are "likely to promote the rehabilitation" of the insured. These include funds to acquire an appropriate motor vehicle, funds for alterations to the insured's residence to promote accessibility, funds for attendant care, purchase of a wheelchair, specialized bed, and other equipment, health care supplies or services not referred to in s. 88(1), funds for vocational training and funds for any other costs ICBC agrees to pay.
- [11] Part 7 Benefits paid or payable to a plaintiff are to be deducted from a plaintiff's tort damages: Act, s. 83(5). The plaintiff is only entitled to enter judgment for the balance after the Part 7 Benefits amount has been deducted. This is to prevent double recovery by a plaintiff: *Norris v. Burgess*, 2016 BCSC 1452 at para. 17, citing *Gurniak v. Nordquist*, 2003 SCC 59.
- [12] A defendant who seeks a deduction under s. 83 of the Act has the onus of establishing a deduction should be made: *Ngo v. Fong*, 2021 BCSC 1326 at para. 10.
- [13] When determining what, if any, deductions should be made under s. 83, strict compliance with the statutory scheme is required: *Wiebe v. Wiebe*, 2018 BCSC 1062.

- [14] The court must first determine if the plaintiff has received or is entitled to receive some Part 7 Benefits for the injuries arising from the accident. If the defendant establishes an entitlement, the court must determine or estimate the amount of the Part 7 Benefits to be deducted from the tort award: Gurniak at para. 47. The Positions of the Parties
- [15] The plaintiff is an "insured" in both the 2016 Accident and the 2018 Accident: Regulation, s. 78.
- [16] In this case, the defendants seek deductions of the award for cost of future care and the award for special damages.
- [17] The defendants seek to reduce the award by \$338,851.53. They argue the whole award for cost of future care of \$215,000 ought to be reduced, as ICBC has committed to paying the plaintiff for all amounts awarded under this head of damage. With respect to the award for special damages, the defendants argue \$123,851.53 ought to be deducted.
- [18] The defendants have tendered an affidavit from Steve Haaf, a claims review adjuster with ICBC, sworn on November 1, 2023. Mr. Haaf has authority to deal with issues arising from s. 83 of the Act and Part 7 of the Regulation.
- [19] Mr. Haaf deposed that with respect to the Court's award for cost of future care, ICBC waives the requirement for the plaintiff to undergo treatment (s. 90), the need for continued certification (s. 98) and the need to submit to a medical examination (s. 99). Mr. Haaf accepts on behalf of ICBC that equipment, supplies and homecare are "likely to promote the rehabilitation of the plaintiff" and as such, these amounts can be paid pursuant to s. 88(2) of the Regulation at ICBC's discretion. Mr. Haaf deposed that ICBC "will irrevocably, unequivocally, and unconditionally agree to pay" the amount awarded under cost of future care.
- [20] With respect to the award for special damages, the defendants seek a deduction of \$123,851.53.
- [21] The plaintiff's position is only \$30,000 of the cost of future care award can be deducted. These are the amounts for medications and the occupational therapist. The plaintiff argues the amount for equipment, supplies and homecare are not deductible as these items are not for the purpose of rehabilitation.
- [22] With respect to the award for special damages, the plaintiff's position is only \$16,813.06 ought to be deducted. These amounts relate to prescriptions, massage, chiropractic, aquatic rehabilitation and kinesiology. Cost of Future Care
- [23] The Court awarded under cost of future care damages for medications (\$5,000), occupational therapist (\$25,000), equipment and supplies (\$5,000), and home support/personal care (\$180,000). The defendants seek to deduct the entirety of this amount pursuant to s. 83 of the Act. The plaintiff's position is only \$30,000 of the cost of future care award can be deducted. These are the amounts for medications and the occupational therapist. As I understand the

plaintiff's position, the amounts for medications and the occupational therapist are mandatory amounts under s. 88(1) of the Regulation, and do not have the additional requirement that the benefits be for the purpose of rehabilitation. The plaintiff argues the amount for equipment, supplies and homecare are not deductible as these items are not for the purpose of rehabilitation.

- [24] Section 78 of the Regulation provides that rehabilitation means: the restoration, in the shortest practical time, of an injured person to the highest level of gainful employment or self sufficiency that, allowing for the permanent effects of the injured person's injuries, is, with medical and vocational assistance, reasonably achievable by the injured person
- [25] In *Tench v. Van Bugnum*, 2021 BCSC 501, Justice Fleming held that the requirement that discretionary Part 7 Benefits be for the purpose of rehabilitation cannot be waived by ICBC:
- [56] Based on my view of the waiver power under s. 85 of the Act and my reading of Regulation s. 88(2), I agree that ICBC's authority to waive conditions or terms of plan is limited to the requirement for a medical opinion. In other words, ICBC does not have the authority to waive the requirement that the discretionary benefits are likely to promote rehabilitation. To conclude otherwise requires ICBC's discretion to provide "one or more of the following" under s. 88(2) as ungoverned by a particular purpose, and under s. 88(2)(f) completely unfettered. Unrooted from any requirement for rehabilitation, s. 88(2) changes substantially to allow for catch-all entirely discretionary accident related benefits
- [59] Where ICBC waives the requirement for the opinion of its medical advisor, the rehabilitative purpose can be established by the court's findings and ICBC's other evidence.
- [26] I turn then to the evidence and the Court's findings at trial. The Court made the following findings with respect to home support: Home Support/Personal Care
- [104] This is the largest item for cost of future care. The plaintiff is claiming approximately \$1.4 million for personal care support from now to age 85.
- [105] I am prepared to accept that the plaintiff is currently in need of assistance for some personal care and home tasks. However, I do not see the evidentiary basis to conclude that she will need this assistance until age 85, or that this ongoing need is caused by the 2016 Accident and the 2018 Accident.
- [106] While Dr. Sudol's opinion is that the plaintiff will most likely require ongoing regular caregiver and housekeeping supports going forward, Dr. Sudol also stated that prognosis for improvement is guarded. Dr. Armstrong's opinion is that the plaintiff's prognosis for recovery of function is "very guarded". Dr. Hawkeswood's view is that with a more active rehabilitation plan, the plaintiff has a fair prognosis for improvement. There is no medical opinion in evidence that states the plaintiff's current physical limitations are permanent.
- [107] Further, the plaintiff's need for homecare is not all related to the accidents. The evidence of Dr. Miller was that the plaintiff's schizophrenia will also cause decline in function.

- [108] In my view, a fair award is homecare assistance for four hours a day at \$58,400 for one year. After one year, this homecare should be reduced to two hours a day. I am prepared to award \$180,000, which is sufficient for five years of homecare.
- [27] In my view, the home support/personal care award is specifically covered under s. 88(2)(c) of the Regulation and ought to be deducted. The home support/personal care is to assist and teach the plaintiff to perform some of the personal care tasks that she was not at the time of trial capable of independently performing, in light of her injuries. I acknowledge the plaintiff's argument that the home support was to restore family roles, to in essence alleviate the burden of assisting the plaintiff off her husband and mother. However, the home support was designed to achieve that by a professional worker assisting the plaintiff and teaching her how to independently perform some of the self-care tasks. While there was no evidence at trial that the home support would be curative for the plaintiff, the evidence was the home support is for the purpose of promoting the plaintiff to the highest possible level of self-sufficiency reasonably achievable. Rehabilitation includes treatments that are remedial or preservative, even if not curative: *Skinner v. Dhillon*, 2021 BCSC 1992 at para. 37. I find the home support/personal care is for the purpose of promoting the plaintiff's rehabilitation.
- [28] I rely on para. 16 of the Haaf Affidavit: I confirm that ICBC will irrevocably, unequivocally, and unconditionally agree to pay, under Part 7, for the homecare for 4 hours/day for 1 year and 2 hours/day for a further 4 years afterwards, payable under s.88(2)(c) of the Regulation, as awarded in paragraph 108 of the Reasons for Judgment. I understand that the Abdel-Barr report priced homecare at an average rate of \$40/hour. I confirm that ICBC will pay up to this rate. ICBC has already paid \$20,181.00 since the trial of this matter under part 7 of the Regulation.
- [29] The award for equipment and supplies is for a walker, cane, orthotics, power wheelchair, grab bars, adjustable bed and other items: Reasons at para. 102. These items fall under s. 88(2)(b) (alterations to the insured's residence and necessary bathroom alterations) and s. 88(2)(d)(i) (wheelchair and bed). I find these items are for the purpose of rehabilitation, to assist the plaintiff in achieving the highest level of independence. I rely on para. 15 of the Haaf Affidavit where he deposed that ICBC will pay the amounts awarded for equipment, medication and occupational therapy under cost of future care.
- [30] There will be a deduction of \$215,000 under the award for cost of future care. Special Damages
- [31] The Court awarded as special damages the amount of \$138,336.30. These were for prescriptions, bed, mattress, installation of a stairlift, massage therapy, rehabilitation expenses, house cleaning, driver anxiety counselling, bathroom renovations, home care support, wheelchair and a wheelchair van.
- [32] With respect to the award for special damages, the defendants seek a deduction of \$123,851.53.

- [33] With respect to the award for special damages, the plaintiff's position is only \$16,813.06 ought to be deducted. These amounts relate to prescriptions, massage, chiropractic, aquatic rehabilitation and kinesiology. The plaintiff argues the other amounts awarded were not for the purpose of promoting rehabilitation.
- [34] The evidence at trial was the plaintiff claimed the following out of pocket expenses as special damages: Prescriptions \$ 3,250.80 Bed and stairlift \$ 7,406.66 Massage \$ 2,995.00 Chiropractic \$ 4,995.35 Aquatic rehabilitation \$ 3,974.25 Kinesiology \$ 1,341.00 Rehabilitation expenses \$ 6,071.80 Housecleaning \$ 10,962.68 Foot care \$ 2,395.00 Osteopathy \$ 320.00 Driver anxiety training \$ 3,675.60 Podiatrist \$ 1,285.00 Physiotherapy \$ 5,622.99 Counselling \$ 4,079.00 Bathroom renovations \$ 5,501.89 Home support \$ 18,480.25 Odds and ends \$ 1,576.65 Travel \$ 4,173.35 Wheelchair van \$ 13,501.00 Wheelchair \$ 36,802.88 Total \$138,411.15
- [35] The Haaf Affidavit sets out that ICBC agrees to pay the following in special damages under Part 7 of the Regulation: Bed and mattress \$ 4,922.00 Foot care \$ 2,395.00 Odds and ends \$ 135.71 Wheelchair van \$13,501.00 Wheelchair \$36,802.88 Rehabilitation expenses: \$ 5,194.62 Occupational therapy: \$ 3,675.60 Bathroom renovations: \$ 5,501.89 Odd and ends \$ 284.80 Total \$72,413.50
- [36] The evidence and submissions made on behalf of the defendants on this application were difficult to follow. The calculations in the written submissions do not match up with the figures in the Haaf Affidavit. While counsel for the defendants in his written submissions sought to deduct \$123,851.53 from the award for special damages, the Haaf Affidavit at para. 21 sets out ICBC promises to pay as Part 7 Benefits \$72,413.50 towards the award for special damages. The Haaf Affidavit sets out that \$51,438.03 has already been reimbursed to the plaintiff, but it is unclear to me if this amount went towards any of the items ordered to be paid under special damages. The defendants bear the onus of proving that deductions ought to be made. As such, in my view, there should be a deduction only for the amount clearly set out to be paid toward special damages in the Haaf Affidavit which are for the purpose of promoting rehabilitation.
- [37] With respect to the items listed above in para. 21 of the Haaf Affidavit which ICBC has promised to pay, in my view, the foot care and rehabilitation expenses are not for the purpose of promoting rehabilitation. The rehabilitation expenses were for items such as neck wrap, foot wrap, heat packs, heating pad, TENS machine pads and other items that in my view, are for pain management and not rehabilitation. The evidence is the foot care, ankle brace, dumbbells, heat pack, headrest and other items were to ease pain for the plaintiff. These items should not be deducted.
- [38] There will be a deduction of \$64,823.88 from the award for special damages.

Conclusion

[39] There will be a total deduction of \$279,823.88 from the award. "Chan J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/22/2023BCSC2256.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/lundgren-v-taylor-2023-bcsc-2256>

Prepared on 26 October 2026 · Esheria