

CANADA / JUDGMENT

McColl v. Sullivan

2020 BCSC 2041

COURT

Supreme Court of British Columbia

DECIDED

21 December 2020

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

2020 BCSC 2041 McColl v. Sullivan IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: McColl v. Sullivan, 2020 BCSC 2041 Date: 20201221 Docket: M153118 Registry: Vancouver Between: Alissa McColl Plaintiff And Jason Sullivan and Yong H. Lee Defendants Before: The Honourable Madam Justice W.A. Baker (via Teleconference) Reasons for Judgment (Insurance (Vehicle) Regulation Application) Counsel for Plaintiff: E. Goodman T.R. O'Mahony Counsel for Defendants: P.A. Mazzone Place and Date of Hearing Vancouver, B.C. November 2, 2020 Place and Date of Judgment: Vancouver, B.C. December 21, 2020

- [1] On February 6, 2020 I awarded the plaintiff damages as a result of two accidents on December 3, 2013 and March 1, 2014. My reasons for judgment are indexed at 2020 BCSC 137.
- [2] The plaintiff is an "insured" under section 78 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83, and is entitled to receive benefits under Part 7 of the Regulation.
- [3] The parties appeared before me on November 2, 2020 to address the defendants' application to deduct Part 7 benefits from the overall damages award. The defendants rely on s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 and Part 7 of the Regulation.
- [4] The defendants seek to reduce the total award for future care costs by \$202,257.
- [5] In Luck v. Shack, 2020 BCSC 1074 the court thoroughly summarized the principles and statutory framework relevant to such deductions. I do not intend to repeat the court's analysis. I highlight the following points which are directly relevant to my analysis of the case before me.
- [6] Section 83 of the Act provides for the provision of no fault benefits to injured persons. Section 83(5) requires me to deduct from my award for future care costs the value of any benefits payable to the plaintiff under the Act and Regulation: Luck, para. 16-12.
- [7] Section 88(1) of the Regulation states that medical and rehabilitative treatments set out in Table 1, Schedule 3.1 are mandatory benefits which must be paid by ICBC. Other treatments or benefits which are not mandatory are: treatments not listed in Table 1, Schedule 3.1; treatments that exceed the quantity set out in Column D of Table 1, Schedule 3.1; and

treatments provided more than 12 weeks after the accident. These discretionary benefits are only payable by ICBC if the plaintiff provides written certification from a specified medical practitioner that additional treatment is required, or ICBC's medical advisor advises in writing that the treatment is likely to promote the rehabilitation of the insured: Luck, para. 23-25, 42-47.

- [8] The court can rely on ICBC's position regarding a plaintiff's eligibility for benefits; however, any uncertainty as to whether a benefit will be paid must be resolved in favour of the plaintiff. Where the benefits are mandatory, or ICBC has unequivocally and irrevocably promised to pay the benefits, the court may be satisfied that benefits should be deducted from the award. However, the court must still independently analyze the evidence and makes its own findings regarding the payment of benefits and whether those benefits should be deducted from an award: Luck, para. 27-29, 33-35.
- [9] The defendants seek deductions from the future care award in relation to the following costs: Item Amount sought to be deducted from award Mandatory/Discretionary Pain medication \$15,346 mandatory Psychological evaluation \$348 mandatory Psychology sessions \$4,577 mandatory Massage therapy \$24,553 mandatory Occupational therapy \$44,525 mandatory Kinesiology \$28,168 mandatory Botox \$13,180 discretionary Ergonomic equipment \$1,510 discretionary Vocational counselling \$5,240 discretionary Retraining \$20,000 discretionary Gym and pool pass \$14,118 discretionary Pilates/yoga \$30,692 discretionary Mandatory treatments
- [10] The plaintiff agrees that the costs of pain medication, occupational therapy, and kinesiology should all be deducted from the award, as presented by the defendants.
- [11] The plaintiff agrees that psychological evaluation and treatments should be deducted. However, with respect to the costs of the psychological evaluation and treatments, the plaintiff submits that deduction should be made using the fees set by regulation at the time the judgment was rendered, and not using the fees as adjusted for inflation on April 1, 2020. I am satisfied that the fee schedule in force at the time of my decision is the appropriate schedule for the purposes of s. 83 deductions. As such, the deduction for psychological evaluation will be \$340, and for treatments will be \$4,485.
- [12] The plaintiff submits that the deduction for massage therapy should be discounted to reflect the fact that ICBC paid \$80 per visit at the time the judgment was rendered. At that time, the lowest cost of massage therapy, as set out in the evidence at trial, was \$100 per visit. I agree that a discount of 20% on the cost of massage therapy is warranted. The deduction for massage therapy will be \$19,642. Discretionary treatments and benefits

- [13] The defendants submitted on this application an affidavit of John Arthurs, a claims specialist with ICBC. Mr. Arthurs affirms that he is the ICBC representative with authority to deal with issues arising in this action in relation to s. 83 of the Act, and Part 7 of the Regulation. He affirms that he has authority to make decisions and representations on behalf of ICBC and, in particular, with respect to Part 7 issues and payments to the plaintiff.
- [14] ICBC has filed an appeal of the judgment. Subject to that appeal, Mr. Arthurs, on behalf of ICBC, affirms as follows:
- a) ICBC accepts that the plaintiff is entitled to benefits (up to the amounts described by the court) pursuant to Table 1 of Schedule 3.1 of the Regulation.
 - b) ICBC waives the requirement under s. 88(1.01) of the Regulation that the plaintiff provide written certification from a specified medical practitioner that additional treatment is required.
 - c) ICBC accepts that the costs of future care for Botox treatments, ergonomic equipment, vocational counselling, retraining, psychotherapy sessions, a gym/pool pass, and Pilates/yoga are likely to promote the rehabilitation of the plaintiff, and ICBC waives the requirement under s. 88(2) of the Regulation for an opinion of ICBC's medical advisor in that regard.
 - d) ICBC irrevocably, unequivocally, and unconditionally agrees to pay under Part 7 of the Regulation the costs of future care described above up to the amounts allowed pursuant to the Regulation, as incurred and submitted to ICBC by the plaintiff for reimbursement, and up to the amounts described in the judgment, and up to the maximum remaining available under the Part 7 benefits payable i.e. \$282,805.11 from an initial entitlement of \$300,000 (\$150,000 for each of the accidents).
- [15] The plaintiff argues that Botox treatments, the use of the gym and pool, and Pilates/yoga are ameliorative, and not rehabilitative. As such, the plaintiff argues that she is not entitled to them under the Regulation, and no deduction should be made. I do not agree that Botox treatments, the use of the gym and pool, and Pilates/yoga have no rehabilitative purpose. Further, in light of the express, irrevocable, unequivocal, and unconditional agreement of ICBC to pay the costs of these treatments and benefits as rehabilitative treatments, I cannot accept the argument of the plaintiff. I find that Botox treatments, the gym and pool, and Pilates/yoga have rehabilitative purposes. I accept the representations of ICBC as to its agreement to fund these treatments under s. 88(2) of the Regulation. I agree that the cost of Botox treatments, the gym/pool pass, and Pilates/yoga should be deducted from the award.
- [16] The plaintiff agrees that ergonomic equipment, vocational counselling, and retraining all fulfill a rehabilitative purpose, but argues that ICBC has not waived all requirements for funding of pursuant to s. 88(2), and as a result there should be no deduction from the award. The plaintiff argues that the requirements for funding are still uncertain because there is an outstanding appeal. I do not agree that the outstanding appeal has any bearing on the issue.

If the judgment is overturned on appeal, that is an entirely different issue than the issue of whether the requirements under s. 88(2) have been met. ICBC has stated its express, irrevocable, unequivocal, and unconditional agreement to pay the costs of ergonomic equipment, vocational counselling, and retraining, and to waive any requirement for the provision of a an opinion of ICBC's medical advisor. I find that these treatments and benefits have rehabilitative purposes. I accept the representations of ICBC as to its agreement to fund these treatments and benefits under s. 88(2) of the Regulation. I agree that the costs of ergonomic equipment, vocational counselling, and retraining, should be deducted from the award. Should there be a global reduction of the deductions from the award

- [17] The plaintiff argues that any deduction should be reduced by 20% on a global basis, relying on *Richmond v. Osztovits*, 2020 BCSC 1160 and *Sangha v. Inverter Technologies Ltd.*, 2019 BCSC 1174. I do not agree that those cases are helpful in addressing the case before me.
- [18] In *Richmond* the court addressed the fact that the judgment did not break down the future care award into the various type of treatments, and recognized that some treatments were incurred at rates higher than those paid by ICBC. As result, in *Richmond* the court discounted the future care award to address the payment discrepancies between actual costs and the ICBC scheduled payment amounts. In the case before me, each treatment has been individually analyzed and only those amounts which ICBC will pay have been deducted.
- [19] In *Richmond* the court expressly rejected the argument that the deduction should be reduced to reflect the possibility that ICBC may not pay in the future. On the evidence before me on this application, I agree that it would be inappropriate for me to speculate that ICBC will not honour its stated agreement to pay the plaintiff for the various treatments and benefits at issue, even those that will occur over the lifetime of the plaintiff.
- [20] The passages cited by the plaintiff in *Sangha* do not relate to future care costs. Rather, these passages relate to the special damages claimed by the plaintiff in *Sangha*. The issue in *Sangha* was whether the assurance given by ICBC was ambiguous given in a change in the Regulation related to discretionary and mandatory benefits. This specific issue does not arise in the case before me.

Conclusion

- [21] I find that the following deductions from the future care award will be made to reflect the costs of treatments and benefits which will be paid by ICBC:
- | Item | Amount to be deducted |
|--------------------------|-----------------------|
| Botox | \$13,180 |
| Pain medication | \$15,346 |
| Ergonomic equipment | \$1,510 |
| Vocational counselling | \$5,240 |
| Retraining | \$20,000 |
| Psychological evaluation | \$340 |
| Psychotherapy sessions | \$4,485 |
| Massage | \$19,642 |
| Occupational therapist | \$44,525 |
| Kinesiology, year one | \$28,168 |
| Gym/pool pass | \$14,118 |
| Pilates/yoga | \$30,692 |
| TOTAL | \$197,246 |

- [22] I find that the future care award of \$324,132 made in the judgment dated February 6, 2020 must be reduced by \$197,246 to reflect the costs of treatments and benefits which will be paid by ICBC pursuant to the Regulation, and in accordance with the affirmations made by ICBC in the application before me.
- [23] If the parties wish to make submissions on costs, they may do so in writing within 30 days of this judgment. If I receive no submissions on costs, I award costs of this application to the defendants at Scale B. "Baker 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/20/20/2020BCSC2041.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/mccoll-v-sullivan-2020>

Prepared on 28 October 2026 · Esheria