

CANADA / JUDGMENT

Mladjo v. Etheridge

2020 BCSC 2276

COURT

Supreme Court of British Columbia

DECIDED

21 January 2020

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2020 BCSC 2276 Mladjo v. Etheridge

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mladjo v. Etheridge,

2020 BCSC 2276

Date: 20200121

Docket: M179597

Registry: Vancouver

Between:

Elissa Peterson Mladjo

Plaintiff

And

Curtis Etheridge

Defendant

Before: The Honourable Madam Justice Francis

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

S. Beach

Counsel for the Defendant:

V. Rasidagic

Place and Date of Hearing:

Vancouver, B.C.

January 21, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 21, 2020

- [1] THE COURT: The defendant has brought an application under s. 83 of the Insurance (Vehicle Act), R.S.B.C. 1996, c. 231 [Act], to deduct \$51,188.93 from the award for costs of future care made in my order of June 13, 2019. Reasons for judgment with respect to that decision are indexed at 2019 BCSC 950.
- [2] Section 83 of the Act provides that a person who has received, is entitled to receive, or will receive benefits from ICBC is deemed to release the claim for damages to the extent of those benefits, and the plaintiff is entitled only to the balance after deductions. The defendant seeks a reduction in the cost of care award on the basis that certain benefits have been or will be paid for under Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 [Regulation].

Are the payments sought to be deducted in the nature of rehabilitation?

- [3] Section 88(2) of the Regulation gives ICBC discretion to pay for a treatment that is likely to promote the rehabilitation of an insured. Rehabilitation is defined in the Act as "the restoration in the shortest time practicable, 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".
- [4] Some of the amounts that the defendant seeks to have deducted under s. 83 comprise payments that ICBC made under s. 88(2) for the rehabilitation of the plaintiff. The plaintiff submits that certain of these payments, namely, the gym pass, the neck pillow, the back support, the TENS machine and the electrodes, are not in the nature of rehabilitation but are for maintenance of her current level of functioning and, therefore, these benefits should not be deducted from her award as they were not made under s. 88(2).
- [5] All the items in issue were part of a tort award I made for cost of future care, the very nature of which is an award for treatments that are reasonably necessary to restore a plaintiff to their pre-accident condition, to the extent that is possible.

- [6] While Ms. Mladjo has chronic pain and will likely never completely recover, all of the care recommendations in the occupational therapist's report that was relied on to support the cost of care award are properly characterized as rehabilitative. They are aimed to contribute to the restoration of Ms. Mladjo to the highest level that, allowing for the permanent effects of her injury, is reasonably achievable by her. If they were not rehabilitative, they would not have formed part of the cost of care award.
- [7] Therefore, I find that the gym pass, the neck pillow, the back support, the TENS machine and the electrodes fall within the scope of s. 88(2) of the Regulation insofar as they are likely to promote rehabilitation. Therefore, it is appropriate for the defendant to deduct the cost of these items from the cost of care award.

Discount Rate

- [8] Counsel for the plaintiff argues that, because I applied the discount rate prescribed under the Law and Equity Act, R.S.B.C. 1996, c. 253 to the cost of future care award, the plaintiff would be undercompensated if the defendant were allowed the full deduction sought.
- [9] ICBC has provided an affidavit that says that it will pay for the s. 88(1) and 88(2) benefits as the costs are incurred, but only up to the amounts in my judgment. The amounts in my judgment were discounted to account for the present value of the future loss, so they did not reflect the actual cost of future care that will be incurred by the plaintiff. The plaintiff says that if I order the deduction of benefits sought by the defendant she will not receive the full amount of the future care ordered in my judgment.
- [10] The cost of future care order was based on information contained in the report of the occupational therapist, Ms. Shivji. Ms. Shivji's report provided evidence of the cost of specific treatments. Counsel provided me with tables at the hearing of the trial that applied the prescribed discount rate to Ms. Shivji's estimation of the cost of these treatments.
- [11] Section 56 of the Law and Equity Act provides that certain discount rates must be used in calculating the present value of future loss and it authorizes the Chief Justice of this Court to prescribe the discount rates. The discount rate is presently prescribed at 2%, which s. 56 deems to be the difference between the investment rate of return and the rate of general price inflation.
- [12] The rationale for the discounting of future care awards was summarized by Chief Justice Finch in *Townsend v. Kroppmanns & Currie*, 2002 BCCA 365 at para. 33:

The award for cost of future care is usually based on evidence as to various anticipated costs of providing adequate care for the injured plaintiff over the course of her lifetime. The costs will not be incurred until dates or times in the future, but the law allows a one-time lump sum award to be made at the conclusion of the trial. That lump sum amount is determined by "capitalizing" the future costs. Because the lump sum can earn interest for the plaintiff, the law recognizes that the present amount required to provide for future care will be less than the sum of all future care

costs. Expert opinion evidence has therefore been admitted to reduce those future costs to a present lump sum amount.

- [13] In this case, ICBC has provided evidence that carefully limits the Corporation's commitment to pay future benefits to the amounts set out in my judgment. After the mandatory discount, the amount in my judgment was less than the anticipated future cost of the plaintiff's care. If I grant the defendant the relief it seeks, the plaintiff will be undercompensated because she will not have the benefit of earning interest on the lump sum award and she will not have access to all of the future care that I have determined she will need.
- [14] It is quite possible that the ICBC affiant was not aware that the cost of future care awarded in my judgment was subject to the prescribed discount rate and that the cost of care of the plaintiff would be higher over time than the discounted lump sum award she was ordered to receive. It may be the case that ICBC is prepared to pay for the plaintiff's future care for the therapies in issue, without the discount rate being applied.
- [15] I will therefore adjourn the application with leave for the defendant to submit further evidence. If ICBC provides evidence that it will pay the actual cost of future care of the plaintiff as the costs are incurred without subjecting those costs to a reduction based on the discount rate, I do not foresee any basis on which the plaintiff could challenge such an application.
- [16] If ICBC is not prepared to make such a commitment, then the parties may appear before me for further argument.
- [17] A third issue was raised by the plaintiff with respect to the cost of the occupational therapist. As this issue may be resolved upon further evidence being provided by ICBC, I will adjourn it. Either party has leave to bring this issue back before me should the parties be unable to reach a resolution.

"Francis, J."

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