

CANADA / JUDGMENT

Nagra v. Prasad

2023 BCSC 2297

COURT

Supreme Court of British Columbia

DECIDED

8 December 2023

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2023 BCSC 2297 Nagra v. Prasad

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nagra v. Prasad,

2023 BCSC 2297

Date: 20231208

Docket: M205206

Registry: New Westminster

Between:

Harpreet Nagra

Plaintiff

And

Rajendra Prasad

Defendant

Before: Master Nielsen

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

R. Sidhu

Counsel for the Defendant:

M.E. Habib

(as Agent for D.M. Foster)

Place and Date of Hearing:

New Westminster, B.C.

December 8, 2023

Place and Date of Judgment:

New Westminster, B.C.

December 8, 2023

- [1] THE COURT: This is an application brought by the plaintiff in response to the order on November 27, 2023, bringing into force the Disbursements and Expert Evidence Regulation, B.C. Reg. 31/2021 that caps disbursements at 6 percent of a plaintiff's total damages following trial or settlement, and requires plaintiffs to bring applications to have disbursements excluded from the cap before the disbursement is incurred, and requires plaintiffs to bring applications for additional experts at the same time as the application is made to exclude the disbursements.
- [2] The plaintiff intends to obtain a report from the expert, Mr. Jeff Padvaiskas, who is an occupational therapist, and they also anticipate the need for rebuttal reports from him and also from Dr. Foley, a physiatrist from whom they already have a report.
- [3] Sections 5(6) to (10) of the Disbursements and Expert Evidence Regulation came into force on November 27, 2023, and those sections provide:
- (6) On application by a party to a vehicle injury proceeding, the court may, if satisfied that the conditions set out in subsection (8) are met, order that the disbursements itemized in the order are excluded disbursements.
- (7) If disbursements to be incurred for expert evidence or expert reports are the subject of an application under subsection (6) and the applicant is also making an application under section 12.1 (5) of the Act, the applicant must make both applications at the same time.
- (8) The following are the conditions for the purposes of subsection (6):
- (a) the application is made before the disbursements are incurred;
- (b) were the disbursements not excluded, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the vehicle injury proceeding.
- (9) In an application under subsection (6), a party must include the following:

- (a) the nature and the evidentiary value of each disbursement that is the subject of the application;
- (b) evidence of the prejudice the party would suffer were the disbursements that are the subject of the application not excluded, which 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.
- (10) For certainty, this section applies to all vehicle injury proceedings, whether or not the proceeding was commenced before the coming into force of this subsection.
- [4] By way of background, the plaintiff, Mr. Nagra, was injured in a motor vehicle accident on August 29, 2017. He is 37, he is single, and currently lives with his parents in Surrey, British Columbia. I have evidence before me that suggests his earnings are modest. His best yearly earnings over the past three years is for 2021 at \$25,677.
- [5] The report of Mr. Padvaiskas, the occupational therapist, is anticipated to cost between 5,000 to \$5,500 inclusive, and that amount would not include his appearance at court to give evidence by way of cross-examination. That cost alone accounts for almost a fifth of the annual income earned by the plaintiff.
- [6] The plaintiff was working at the TD Bank, and as a screening officer for CATSA at the Vancouver Airport. He had hoped to go into law enforcement, and in 2022 he completed his Law Enforcement Foundation certificate for CDI College, but since the accident he has been suffering with headaches, daily neck pain, back pain, mid-back pain. He has disturbed sleep, driving anxiety, and symptoms of mild depression. He struggles with those problems and they do, according to him, interfere with his ability to work.
- [7] He has difficulty paying for the recommended medical treatment, and he is concerned that without appropriate funds, he will not be able to pursue his career goal in law enforcement in the near future, or at all, given the injuries he sustained in the motor vehicle accident.
- [8] Turning to the various factors in section 5(6) through (10), here, the plaintiff has made the application before the disbursements were incurred. The examination by Dr. Padvaiskas is scheduled to take place on December 11, 2023. Further, if any rebuttal reports are needed from Dr. Foley, the physiatrist, they have included that under the rubric of their application.

- [9] The plaintiff also submits that in the context of this case, the complexity of the trial may actually be reduced in the event that we have the report of the occupational therapist as it will limit the depth to which the court will have to go in order to assess the cost of any loss of future earning capacity, or future cost of care.
- [10] In my view, if the disbursements were not excluded from the cap, the plaintiff would suffer prejudice disproportionate to the benefit of not increasing the complexity of the trial, assuming that was the result, given his limited financial resources, the fact that he is relatively young, and he has put the time and effort into a new career, which is now at jeopardy because of the injuries he has allegedly suffered in the motor vehicle accident. If the medical evidence indicates he cannot pursue his chosen career, that will be a severe limitation on the plaintiff now and into the future.
- [11] The opinion of Dr. Foley provides a prognosis which states in part, "It is my opinion that Mr. Nagra is experiencing a partial disability of his instrumental activities of daily living, recreational and vocational function that is permanent."
- [12] Turning to s. 5(9), I have evidence of the cost of the disbursement. It is projected to be in the range of \$5,000 to \$5,500 for the report, without the anticipated cost of attendance for cross-examination. The prejudice the party would suffer if the disbursement was not excluded, would be the potential of not being able to afford the costs associated with that report, and the prejudice being the plaintiff would be unable to prove their loss in terms of future -- loss of future earning capacity, and the loss occasioned by the cost of his future care.
- [13] That subsection further requires evidence that there is a reasonable risk that the total amount that the party intends to incur to resolve the injury will exceed the disbursement limit. We have that potential here.
- [14] Also, there has to be evidence that the disbursements that are subject of the application are necessary to justly resolve the proceeding. The plaintiff has the onus of proof with respect to his injuries and their alleged effects. There is the allegation in the notice of civil claim that he suffered a loss of future income and a cost of future care, and in my view, the report of the occupational therapist is necessary in order to prove that -- the necessary causation, the causal link between his alleged injuries and his ability to earn income, and medical costs, into the future.
- [15] The general difficulty facing plaintiffs with respect to the 6 percent cap and the court's discretion to grant limited relief was addressed by the BCCA the Court of Appeal in the decision of *British Columbia (Attorney General) v. Le*, 2023 BCCA 200, at para. 101, where they stated:
- [101] In my view, the same considerations that applied in *Crowder* to the three-expert limitation in R. 11-8 apply in this case to the 6% ceiling in s. 5 of the Regulation. In enacting s. 12.1(5-6) of the Evidence Act, the Legislature obviously accepted the ruling in *Crowder* and intended that the Court would have the discretion to relieve against the three-expert limit

where it would result in prejudice. Yet the exercise of such discretion by the Court may be largely neutered, or "hollowed out", by the 6% limit on disbursements: a plaintiff may adduce the evidence of the number of additional experts permitted by the Court, but may not be able to recover the cost thereof after trial. Plaintiffs will be forced to take the risk that the cap will be exceeded, to abandon all or part of their cases, or to settle without going to trial. If this is correct, then damage awards and settlement amounts, as well as costs, are also likely to be less than they would be without the cap, since plaintiffs will be able to prove only part of their damages or will be constrained to 'settle for less' than would otherwise be the case. Obviously, these effects rebound to the benefit of ICBC.

- [16] Finally, the plaintiff must provide evidence that he would be unable, without undue hardship, to incur the disbursements that are the subject of the application were those disbursements not excluded, and again, as I have indicated, the bare costs of the report is in the range of \$5,000 to \$5,500. This plaintiff currently earns roughly \$25,000 a year. The cost of the report is virtually a fifth of his yearly income. Therefore, this test is met.
- [17] I find that the requested disbursements are excluded. A further issue has been raised concerning whether the court has the ability to address rebuttal reports on the exclusion application. The plaintiff has sought, on this application, that any future rebuttal reports from the occupational therapist, Mr. Padvaiskas, and also Dr. Foley be labelled as excluded disbursements for the purpose of the regulation. The defendant submits that this issue is premature and it should not be assessed on this application, and in particular, because this application is brought on short leave.
- [18] I agree with the submissions of the plaintiff that the court's order should address the particular experts, not the individual report in a piecemeal approach to each expert. I find the reports required from the occupational therapist, Mr. Padvaiskas, and the physiatrist, Dr. Foley, fall into the excludable disbursements category for the reasons that they meet the criteria of ss. 5(6) through (10) of the Disbursement and Expert Evidence Regulation.
- [19] Is there anything else?
- [20] CNSL R. SIDHU: Just with respect to costs.
- [21] You are seeking costs?
- [22] CNSL R. SIDHU: Yes. Well, I think we had made a reasonable proposition that the plaintiff would attend the defence assessment, as long as the plaintiff's assessment was considered an excluded disbursement and that was denied yesterday at --
- [23] THE COURT: Is liability admitted?
- [24] CNSL R. SIDHU: It is not.
- [25] THE COURT: All right. My inclination would be costs to the plaintiff in the cause. I will hear from you on that.

- [26] CNSL M. HABIB: Sorry, Your Honour, just to be clear. In the cause as in for today's application?
- [27] THE COURT: Yes. They have to win overall to get their costs of today's application.
- [28] CNSL M. HABIB: Oh, I see. As I submitted, it is -- it is the defence's position that today's application was not necessary as we consented to the things that were urgent, and additionally we -- we suffered the prejudice of having to cancel our IME last minute yesterday. So we do not have the benefit of that. So it is -- it is my position that costs should not be awarded today.
- [29] THE COURT: All right. Thank you.
- [30] CNSL R. SIDHU: Sorry, if I could just clarify. The consent was only made in court today. That was the only time it was consented to. The first time was when we -- after I spoke to it.
- [31] THE COURT: Thank you both. The plaintiff will have their costs of the application in the cause.

"Master Nielsen"

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