

CANADA / JUDGMENT

Napoleone v. Sharma

2008 BCSC 1746

COURT

Supreme Court of British Columbia

DECIDED

18 December 2008

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2008 BCSC 1746 Napoleone v. Sharma IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Napoleone v. Sharma, 2008 BCSC 1746 Date: 20081218 Docket: M102498 Registry: New Westminister Between: Gisella Napoleone Plaintiff And Jaspal Sharma Defendant Before: The Honourable Madam Justice Bruce Reasons for Judgment Counsel for the Plaintiff T. Spraggs, O. Wilson Counsel for the Defendant S. Avram Date and Place of Trial/Hearing: Written Submissions New Westminister, B.C.

INTRODUCTION

- [1] On November 12, 2008 I issued reasons for decision in regard to the plaintiff's claim for damages arising out of a motor vehicle accident. In these reasons I asked for written submissions on the narrow issue of whether the plaintiff was entitled to the net or the gross cost of special expenses such as physiotherapy, massage therapy, and prescription medications.
- [2] Both parties provided written submissions within the thirty day deadline. I have reviewed these submissions and have determined that Ms. Napoleone is only entitled to receive the net cost of the special expenses. She is not entitled to be compensated for that portion of the special expenses covered by a private insurer. These are the reasons for my decision.

BACKGROUND

- [3] Ms. Napoleone was injured in a motor vehicle accident on January 7, 2006 in Surrey, BC. As a consequence of this accident she suffered soft tissue injuries that were treated with physiotherapy and massage therapy. Ms. Napoleone's physician also prescribed medication for the pain and to help her sleep.

- [4] Ms. Napoleone testified that through her husband's employment she was covered on extended health plan that paid 80% of the cost of physiotherapy and massage therapy. There was no evidence as to who was responsible for the cost of this insurance plan or how her husband came to be covered by the plan. There was also no evidence as to whether the insurer had a claim for subrogation in the event Ms. Napoleone was awarded compensation for these expenses. ARGUMENT
- [5] Ms. Napoleone argues that the insurance exception to the general rule against double recovery is applicable to this case. In support of this proposition, Ms. Napoleone relies upon *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, *Brennan v. Singh* (1999), 86 A.C.W.S. (3d) 537 (S.C.), and *Kean v. Porter*, 2008 BCSC 1594.
- [6] The defendant argues the insurance exception is not available to Ms. Napoleone because there is no evidence that she or her husband paid for the insurance benefits by any means. In support of this proposition, the defendant relies upon *Cunningham and Ratych v. Bloomer*, [1990] 1 S.C.R. 940. DECISION
- [7] The general rule in an action for damages arising out of negligence is that the plaintiff is only entitled to be restored to the position she would have been in had the accident not occurred. The plaintiff is awarded damages for her actual loss and no more: *Cunningham* at para. 5 per McLachlin J. (dissenting in part)
- [8] The law has recognized a limited exception to the rule against double recovery which is referred to as the "private insurance" exception. In *Cunningham* at para. 75 Mr. Justice Cory, speaking for the majority, adopts the following passage from *Bradburn v. Great Western Rail Co.*, [1874-80] All E.R. 195 as accurately describing the underlying rationale for the exception: I think that there would be no justice or principle in setting off an amount which the plaintiff has entitled himself to under a contract of insurance, such as any prudent man would make on the principle of, as the expression is, "laying away for a rainy day". He pays the premiums upon a contract which, if he meets with an accident, entitles him to receive a sum of money. It is not because he meets with the accident, but because he made a contract with, and paid premiums to, the insurance company, for that express purpose, that he gets the money from them. and I think that it ought not, upon any principle of justice, to be deducted from the amount of damages proved to have been sustained by him through the negligence of the defendant.
- [9] Whether the plaintiff has paid for private insurance or has obtained these benefits through an employment contract, the exception will apply. It is also irrelevant that it is the plaintiff's husband who secured these benefits. See, *Brennan* at para. 182-3. However, the onus rests with the plaintiff to prove he or she has paid for the provision of insurance benefits in some fashion. As Cory J. says in *Cunningham* at para. 94: In my view, *Ratych v. Bloomer*, supra, simply placed an evidentiary burden upon plaintiffs to establish that they had paid for the provision of disability benefits. I think the manner of payment may be found, for example, in evidence pertaining to the provisions of a collective bargaining agreement just as clearly

as in a direct payroll deduction.

- [10] There is no evidence before the court as to what, if any, consideration passed between Mr. Napoleone and his employer in respect of the extended health benefits. There is no evidence of whether Mr. Napoleone pays all or a portion of the insurance cost or whether it was negotiated as a part of a collective bargaining scheme. The only evidence before the court is that the plan was secured through Mr. Napoleone's employer and it covers 80% of Mrs. Napoleone's health related expenses.
- [11] Without an evidentiary foundation to support the claim, I am unable to apply the private insurance exception to the case at hand. As Cory J. says at para. 93 of Cunningham, it is only when this evidentiary requirement is met that the court may be satisfied the plaintiff has shown the prudence and corresponding deprivation that underlies the exception and permits double recovery.
- [12] For these reasons, I must dismiss Ms. Napoleone's claim for the gross cost of the special expenses. "Bruce J."

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Prepared on 26 October 2026 · Esheria