
CANADA / JUDGMENT

Nunez v. Remming

2020 BCSC 2040

COURT

Supreme Court of British Columbia

DECIDED

21 December 2020

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2020 BCSC 2040 Nunez v. Remming

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nunez v. Remming,

2020 BCSC 2040

Date: 20201221

Docket: M131061

Registry: Vancouver

Between:

Victor Matthias Nunez

Plaintiff

And

Mark Harry Remming, Insurance Corporation of British Columbia,

and John Doe and/or Jane Doe

Defendants

Before: The Honourable Madam Justice W.A. Baker

(via Teleconference)

Reasons for Judgment Re Insurance Benefits

Counsel for the Plaintiff:

J. M. Cameron

Counsel for Mark Remming and

Insurance Corporation of British Columbia:

G. W. Zenk

No other appearances

Place and Date of Hearing

Vancouver, B.C.

December 15, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 21, 2020

- [1] The matter was decided by a jury, which delivered its verdict on November 29, 2019. The jury awarded the plaintiff \$17,000 for costs of future care.
- [2] The defendants apply before me on December 15, 2020 to deduct Part 7 benefits from the award for costs of future care. The defendants rely on s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 and Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83.
- [3] The plaintiff is an "insured" under section 78 of the Regulation, and is entitled to receive benefits under Part 7 of the Regulation.
- [4] The principles and statutory framework relevant to such deductions has been set out extensively in previous decisions of this court. I do not intend to repeat this analysis. I highlight the following points which are directly relevant to my analysis of the case before me.
- [5] 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: *Li v. Newson*, 2012 BCSC 2012; *Siverston v. Griffin*, 2020 BCSC 528.
- [6] 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.

- [7] 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: *Sangha v. Inverter Technologist Ltd.*, 2019 BCSC 1174; *Bopari v. Dhami*, 2020 BCSC 1813; *Wark v. Kang*, 2020 BCSC 196
- [8] The defendants have the burden of proving a correlation between the plaintiff's claim as determined by the court, and Part 7 benefits: *Siverston, Li, Elliot v. McCliggot*, 2020 BCSC 1129.
- [9] In the case before me, the defendants have produced an affidavit from Ms. Whiting, a claims specialist with ICBC. Ms. Whiting affirms that she 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. She affirms that she 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.
- [10] Ms. Whiting, on behalf of ICBC, affirms as follows:
- a) ICBC accepts the recommendations of the experts who provided opinions on future care, Dr. Yip, Dr. O'Connor, and Dr. Gatha, on causation and reasonableness in the place of the opinion of ICBC's medical advisor for the purposes of Part 7 benefits up to the amount awarded by the jury of \$17,000, which acceptance stands in place of ICBC's right to rely upon the opinion of ICBC's medical advisor pursuant to s. 90 of the Regulation;
 - b) ICBC accepts the care recommendations of Dr. Yip, Dr. O'Connor, and Dr. Gatha are necessary and the expenses are reasonable and payable under s. 88(1) of the Regulation, the treatments are likely to promote the plaintiff's rehabilitation and may return him to his pre-injury status or improve his post-injury capacity and independence, and the treatments are payable under s. 88(2) of the Regulation;
 - c) ICBC waives the need for continued certification under ss. 88(1.01) and 88(2) of the Regulation up to the amount awarded by the jury in the amount of \$17,000, and no further certificates from the plaintiff's medical practitioner or ICBC's medical advisor are required to show the treatment is necessary or the gym pass is likely to promote rehabilitation;
 - d) ICBC irrevocably, unequivocally, and unconditionally agrees to pay under Part 7 of the Regulation any treatment referenced in the reports of Dr. Yip, . Dr. O'Connor, and Dr. Gatha up to the amount awarded by the jury in the amount of \$17,000;
 - e) ICBC does not agree to pay more than the fee limit per treatment as set out in column C for any treatments set out in Table 1 of Schedule 3.1 of Part 7 of the Regulation;

- f) ICBC waives the requirement for any further medical certification or examination as a condition of reimbursement for the necessary health care services under ss. 98 and 99 of the Regulation, and also waives the application of s. 90 of the Regulation;
 - g) If the Regulation entitles the plaintiff to benefits further to those enumerated in Ms. Whiting's affidavit, ICBC will provide those benefits in accordance with its obligations under the Regulation.
- [11] The difficulty for the defendants is that neither party adduced a comprehensive cost of future care report at trial. As a result, Ms. Whiting had to review the various expert reports and attempt to tease out the different rehabilitation recommendations. The defendants submit that recommendations for physiotherapy, chiropractic treatments, gym pass, topical anti-inflammatory cream, psychological counselling, and an assessment by a hand surgeon can be gleaned from the different expert reports. However, the exact number of the different treatments, the length of time the treatments will be completed, and the exact cost of the different treatments and recommendations, cannot be discerned from the expert reports.
- [12] The jury award does not break down what the award for future care is comprised of. This creates a significant difficulty for the defendants. For example, if ICBC pays \$80 per physiotherapy treatment, but the plaintiff pays out of pocket \$100 per treatment, ICBC is only entitled to deduct \$80 per treatment from the award for physiotherapy treatments. The plaintiff is entitled to maintain the award for the difference of \$20 per treatment.
- [13] The plaintiff also argues that the summary provided by the defendants does not include possible costs associated with a future hand surgery, immobilization of the wrist, possible post surgical complications, treatment of possible early onset arthritis, medication needs, and possible psychiatric counselling.
- [14] Unlike judgment of a trial judge, which is likely to set out in some detail the judge's assessment of the different care items claimed, a jury award is a black box. This is particularly so in the case before me where there was no cost of future care report which can be used to try to correlate the lump sum award with the care items claimed.
- [15] In the case before me it is impossible for me to estimate the expected benefit payable by ICBC in relation to the different future care costs, as I cannot know which future care items, and the extent of those future care items, the jury intended its award to include.
- [16] Like the court in Elliot and Siverston, the lump sum nature of the jury's cost of future care award makes it impossible for me to ascertain whether, under Part 7, the plaintiff is entitled to a corresponding benefit and, if so, to what degree.
- [17] I dismiss the defendants' application to deduct Part 7 benefits from the jury's future care award made at trial.

[18] 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 plaintiff at Scale B.

"Baker J."

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Prepared on 26 October 2026 · Esheria