
CANADA / JUDGMENT

Olson v. Farran

2016 BCSC 2149

COURT

Supreme Court of British Columbia

DECIDED

18 November 2016

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2016 BCSC 2149 Olson v. Farran

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Olson v. Farran,

2016 BCSC 2149

Date: 20161118

Docket: M126282

Registry: Vancouver

Between:

Kristin Ashley Olson

Plaintiff

And

Ashraff Bhaduran Farran

Defendant

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff:

Perry A. Mazzone

Counsel for the Defendant:

Don M. Darman

Place and Date of Trial:

Vancouver, B.C.

November 7, 2016

Place and Date of Judgment:

Vancouver, B.C.

November 18, 2016

INTRODUCTION

[1] By reasons for judgment dated July 7, 2016 (indexed as 2016 BCSC 1255), I found the plaintiff 25% at fault and awarded her damages for soft tissue injuries to her low back and left and right hips sustained in a motor vehicle accident that occurred on February 17, 2011.

[2] The award of damages which totalled \$92,874.24, consisted of:

Non-pecuniary damages

\$48,750.00

Past loss of earning capacity

\$1,019.77

Future loss of earning capacity

\$18,750.00

Cost of future care

\$15,161.34

Special damages

\$9,193.13

[3] The defendant now applies for an order that the award at trial for costs of future care and special damages be reduced pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 to account for benefits payable under Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 (the "Regulation").

[4] The defendant seeks deductions for Part 7 benefits totalling \$7034 from the award for costs of future care and an additional \$2370.50 from the award of special damages.

- [5] The unusual feature of this case is that following the release of this Court's reasons for judgment, the defendant's insurer, the Insurance Corporation of British Columbia, sent a cheque for the full amount of the judgment, with no covering letter, to the plaintiff's lawyers. The cheque was payable to the plaintiff's lawyers in trust. Ms. Olson's lawyers deposited the funds to their trust account. Four days later, the defendant's counsel gave notice of his client's intention to apply for the deduction of Part 7 benefits. Shortly thereafter, plaintiff's counsel filed and delivered an acknowledgment of payment of the judgment in full, and paid out the judgment funds to Ms. Olson.
- [6] In response to the defendant's application, the plaintiff invokes the doctrines of mootness, estoppel and abuse of process in support of her position that there should be no deduction of Part 7 benefits. Alternatively, the plaintiff submits that certain of the benefits the defendant seeks to deduct are discretionary; that there are uncertainties about whether ICBC will pay the benefits; and that the Court should exercise caution in estimating the benefits she will receive for the costs of care reflected in the damages awarded at trial.

ISSUES

- [7] The following issues arise for determination on this application:
- (a) Is the deduction of Part 7 benefits now moot as a result of the defendant having paid the full amount of the judgment?
 - (b) Is the defendant estopped from seeking the deduction of Part 7 benefits by her payment of the full amount of the judgment?
 - (c) Is the defendant's application an abuse of process?
 - (d) What deductions, if any, should be made from the award of damages for costs of future care?
 - (e) What deductions, if any, should be made from the award of special damages?
- [8] Before addressing these issues I will briefly discuss the legal principles governing the deductibility of Part 7 benefits, and the background to this application.

PART 7 BENEFITS: LEGISLATIVE FRAMEWORK AND

APPLICABLE LEGAL PRINCIPLES

- [9] Section 83 of the Insurance (Vehicle) Act, provides in part:

83 (1) In this section and in section 84, "benefits" means benefits

- (a) within the definition of section 1.1, or
- (b) that are similar to those within the definition of section 1.1, provided under vehicle insurance wherever issued and in effect,

but does not include a payment made pursuant to third party liability insurance coverage.

- (4) In an action in respect of bodily injury or death caused by a vehicle or the use or operation of a vehicle, the amount of benefits paid, or to which the person referred to in subsection (2) is or would have been entitled, must not be referred to or disclosed to the court or jury until the court has assessed the award of damages.
- (5) After assessing the award of damages under subsection (4), the amount of benefits referred to in that subsection must be disclosed to the court, and taken into account, or, if the amount of benefits has not been ascertained, the court must estimate it and take the estimate into account, and the person referred to in subsection (2) is entitled to enter judgment for the balance only.
- (6) If, for the purpose of this section or section 84, it is necessary to estimate the value of future payments that the corporation or the insurer is authorized or required to make under the plan or an optional insurance contract, the value must be estimated according to the value on the date of the estimate of a deferred benefit, calculated for the period for which the future payments are authorized or required to be made.

[10] Section 88 under Part 7 of the Regulation provides in relevant part:

88 (1) Where an insured is injured in an accident for which benefits are provided under this Part, the corporation shall, subject to subsections (5) and (6), pay as benefits all reasonable expenses incurred by the insured as a result of the injury for necessary medical, surgical, dental, hospital, ambulance or professional nursing services, or for necessary physical therapy, chiropractic treatment, occupational therapy or speech therapy or for prosthesis or orthosis.

(2) Where, in the opinion of the corporation's medical adviser, provision of any one or more of the following is likely to promote the rehabilitation of an insured who is injured in an accident for which benefits are provided under this Part, the corporation may provide any one or more of the following:

(f) funds for any other costs the corporation in its sole discretion agrees to pay.

(8) The corporation is not liable to pay for more than 12 physical therapy treatments for an insured for each accident unless, before any additional treatment is given, the corporation's medical advisor or the insured's medical practitioner certifies to the corporation in writing that, in his opinion, the treatment is necessary for the insured.

[11] While benefits payable under s. 88(1) of the Regulation are mandatory, benefits under s.88 (2) are discretionary. Even where the Corporation's medical advisor provides an opinion that a service is likely to promote the rehabilitation of the insured, s. 88(2) provides the Corporation "may provide" the benefit.

[12] The Court of Appeal explained the distinction between obligatory and discretionary benefits under sections 88(1) and (2) of the Regulation in *Ayles v. Talastasin*, 2000 BCCA 87 at para. 32:

As a claim covered by s. 88(1) I.C.B.C. is obliged to pay the benefits. It is not a matter of discretion under s. 88(2) where entitlement depends "on the opinion of the corporation's medical adviser". The risk in deducting too much from the tort award for discretionary benefits is that I.C.B.C. may ultimately refuse to pay on items which although found to be compensable in the tort claim were deducted on the assumption that they would be paid as a no fault benefit. In that instance the claimant is out of pocket for the expense and I.C.B.C. enjoys a windfall. But here the class of future expense is obligatory, not discretionary, and so the plaintiff does not stand to lose anything by the deduction. It is only in circumstances where the classification of the future cost is unclear or an issue arises whether the item is covered by Part 7 at all, that some caution is required.

[13] The purposes of the legislation are to determine the amount immediately payable to the plaintiff under the judgment; to prevent double recovery; and to shift responsibility for future care needs from the tortfeasor to a body that provides insurance regardless of fault: *Park v. Targonski*, 2015 BCSC 1531 at para. 9.

[14] *Abrioux J.* summarized the legal principles governing an application for deduction of benefits in *Li v. Newson*, 2012 BCSC 675 at para. 14:

- (a) the defendant bears the onus of proving that the plaintiff is entitled to the benefits which the defendant seeks to deduct;
- (b) strict compliance with the statute is required;
- (c) uncertainty as to whether a Part 7 benefit will be paid must be resolved in favour of the plaintiff;
- (d) the ability to make the deduction is not dependent on the actual receipt of benefits by the plaintiff. Issues between the plaintiff and ICBC regarding the benefits are not relevant to the deductibility by a tort-feasor from an award to the plaintiff;
- (e) is it no longer a requirement that there be a match between the heads of damage for a tort award and specific heads of damages under the benefit recovery scheme;
- (g) the task of the court is to estimate the amount of Part 7 benefits, if any, the plaintiff is or would be entitled to receive for the costs reflected in the future care award. It then must make the appropriate deduction;
- (h) benefits under s. 88 (2) of the Regulations arise when ICBC's medical adviser holds the opinion that the costs are "likely to promote the rehabilitation" of the plaintiff. The term "rehabilitation" is defined in s. 78 of the Regulation as follows:

"Rehabilitation" means the restoration, in the shortest practical time, of an injured person to the highest level of gainful employment or self-sufficiency that, allowing for the permanent effects of his injuries, is, with medical and vocational assistance, reasonably achievable by him.

- (i) the uncertainty of the entitlement of payment created by the Regulation may lead the court to conclude that only a nominal deduction is appropriate. Trial judges must be cautious in their approach to determining the estimate inasmuch as a reduction results in a lessening of the award in the tort action. If that is a result of uncertainty created by the Regulation, ICBC cannot be heard to complain;
- (j) the court is to take into account ICBC's discretion with respect to whether certain amounts will be paid in addition to restrictions in the Regulation with respect to amounts payable.

[Citations omitted.]

FACTUAL BACKGROUND

Costs of future care

[15] Before the 25% reduction for contributory negligence, I assessed the plaintiff's damages for costs of future care as follows:

- (a) six sessions of psychological therapy at \$200 per session in the amount of \$1,200;
- (b) adaptive equipment totalling \$6,404.13;
- (c) 40 sessions of physiotherapy at \$78.75 per session in the amount of \$3,200;
- (d) 16 sessions of kinesiology services at \$94.50 per session in the amount of \$1,512;
- (e) a gym membership in amount of \$1,600;
- (f) 40 sessions of massage therapy in the amount of \$4,000; and
- (g) medications in the amount of \$3,500.

[16] Under Part 7 of the Regulation, ICBC pays the following amounts for benefits:

- (a) \$145 for each psychological therapy session;
- (b) \$25.20 for the first physiotherapy session, \$17.65 for each subsequent session and \$23.60 for each prolonged session;
- (c) \$50 for each kinesiology session; and
- (d) \$23 for each massage therapy session.

[17] The defendant contends that the award of damages for costs of future care should be reduced by \$6,164 for mandatory benefits consisting of:

40 sessions of physiotherapy at \$23.60 per session

\$944

16 kinesiology sessions at \$50 per session

\$800

40 sessions of massage therapy at \$23 per session

\$920

medications

\$3,500

[18] In addition, the defendant maintains that there should be a further deduction of \$870 for psychological services (six sessions at \$145 per session), as a discretionary benefit payable under s. 88(2) of the Regulation.

[19] Thus, the defendant proposes a total deduction of \$7,034 from the award for costs of future care.

Special damages

[20] The award of special damages compensated the plaintiff for out-of-pocket expenses she incurred for physiotherapy; massage therapy; personal training; chiropractic treatments; active rehabilitation; pain medications; taxi fares for medical appointments; therapeutic aids; an ergonomic chair and a new bed.

[21] Before trial, ICBC reimbursed the plaintiff a total of \$1,603.42 for special damages that are not included in the Court's award. The amounts reimbursed by ICBC for special damages included \$282.90 for massage therapy; \$770 for personal training; \$56.97 for chiropractic therapy; \$463.55 for pain medications and \$30 in taxi fares.

[22] In addition, ICBC made direct payments to the plaintiff's care providers for a total of 53 sessions of physiotherapy and some kinesiology.

[23] However, ICBC only paid these benefits after persistent and prolonged urging by the plaintiff's solicitor and care providers. Payments were often late, and at times erratic. For example, massage therapy received by the plaintiff in September 2013 was not reimbursed until September 2014. Ms. Olson received no reimbursement for massage therapy undertaken in June and July 2014. The plaintiff discontinued her massage therapy in August 2015 after the Corporation ceased to respond to her requests for reimbursement.

[24] The Corporation provided only partial and intermittent funding for the program of kinesiology and personal training recommended by the plaintiff's care providers.

[25] On several occasions between the time of the accident and the time of trial, ICBC only reimbursed the plaintiff for medications six months or more after their purchase, or did not reimburse the plaintiff at all.

[26] The defendant seeks deductions totaling \$2,370.50 from the award of special damages comprised of \$580 for physiotherapy, \$157.50 for active rehabilitation, \$1,574.15 for massage therapy and \$58.87 for pain medications. The defendant maintains that these are all mandatory benefits payable under s. 88(1) of the Regulation.

Payment of the Judgment

[27] On July 21, 2016, the Corporation, as the defendant's insurer, paid the judgment in the full amount of \$92,874.24 by cheque payable to the plaintiff's lawyers in trust. The Corporation sent no covering letter or other correspondence with the payment, which the plaintiff's solicitors deposited to their trust account.

[28] In his affidavit sworn in support of the defendant's application, Mr. Phan, the ICBC adjuster now assigned to this matter, says nothing about the payment of the judgment. The Corporation has proffered no evidence on whether its full payment of the judgment before determination of deductibility of Part 7 benefits was intentional or inadvertent.

[29] On July 25, 2016, counsel for the defendant notified plaintiff's counsel of his instructions to seek a deduction for Part 7 benefits.

[30] On July 27, 2016, plaintiff's counsel filed an acknowledgement of payment of the judgment.

[31] At paras. 3 and 4 of her affidavit sworn October 25, 2016, the plaintiff, after referring to the fact that her lawyers filed the acknowledgement of payment on July 27, 2016, deposed that the judgment funds were then paid out to her.

[32] Ms. Olson has begun to use the funds to pay for treatments for her injuries. The plaintiff has deposed that she has been very conservative in obtaining treatment following receipt of the judgment funds, as a result of the Corporation's application for deduction of Part 7 benefits and the possibility that she may have to repay money to ICBC.

[33] I find the plaintiff received and began to spend the judgment funds after she had notice of the defendant's intention to apply for deduction of Part 7 benefits.

DISCUSSION AND ANALYSIS

(a) Is the deduction of Part 7 benefits now moot as a result of the defendant having paid the full amount of the judgment?

[34] Ms. Olson contends that as a result of the defendant having paid the full amount of the judgment, there is no longer a live issue between the parties regarding the deductibility of Part 7 benefits. The plaintiff submits the defendant's application should be dismissed as moot.

[35] In the leading case of *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, Sopinka J., for the Court explained the doctrine of mootness at paras. 15 and 16:

- [15] The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it.
- [16] The approach with respect to mootness involves a two-step analysis. It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case. (In the interest of clarity, a case is moot if it does not present a concrete controversy even though a court may elect to address the moot issue.)
- [36] The issue I must address is whether, after payment of the judgment in full, there remains a live controversy affecting the rights of the parties concerning the deductibility of Part 7 benefits. To put it another way, will a decision on this application have any practical effect on the rights of the parties?
- [37] Because I have come to different conclusions concerning the practical effects of determinations of the deductibility of Part 7 benefits with respect to special damages and costs of future care, I will deal with each separately.

Mootness: Special Damages

- [38] The defendant asks the Court to deduct \$2,370.50 from the award of special damages for Part 7 benefits.
- [39] At trial, the plaintiff claimed special damages totalling \$12,227.51. At the commencement of the trial, the defendant conceded that with two exceptions, all of the special damages claimed by the plaintiff were reasonable expenses incurred as a result of the accident. The defendant only contested the plaintiff's claims for \$301.77 for the medication Cymbalta, and for \$1,128.04 for a bed, an expense which is not in issue on this application. The Court resolved both contested expenses in favour of the plaintiff.
- [40] In circumstances where the defendant has conceded that the plaintiff's special damages are reasonable, and has paid the judgment in full, no practical purpose would be served by the Court ordering the deductions sought. The plaintiff incurred and paid all of the out-of-pocket expenses in issue. She has been reimbursed for those expenses by payment of the judgment. If the deductions from the award for special damages were ordered, the plaintiff would be obliged to repay \$2,370.50 to the Corporation, which, after having acknowledged that expense was reasonable and properly incurred would then, perhaps after some delay, return the same amount to Ms. Olson in the form of Part 7 benefits. No useful purpose would be served by putting the plaintiff through that exercise.

- [41] The defendant argued that the deductions from the award of special damages are necessary to avoid the risk the plaintiff might obtain double recovery of these expenses. That submission is without merit. Ms. Olson has incurred and paid, and has been fully reimbursed for all of the expenses claimed and awarded as special damages. She has filed and delivered an acknowledgement of payment. Ms. Olson has closed the book on her claim for special damages. Further, I would expect that if the Corporation were to request she execute a release and waiver of any claim for payment of Part 7 benefits with respect to the amounts awarded as special damages, she would do so with alacrity.
- [42] The issue of deductions for Part 7 expenses from the award for special damages engages no "live controversy" between these parties. Further, this is not a case where the Court should exercise its discretion to hear an issue that is moot. This is, in essence, a private dispute. The question of whether certain amounts should be deducted from the plaintiff's award of special damages does not engage the public interest. Accordingly, I decline to make any deduction from the award of special damages on the basis that issue is moot.

Mootness: Costs of Future Care

- [43] The deductibility of Part 7 benefits from the award for costs of future care raises different considerations. The plaintiff has not yet received or paid for the services relating to those benefits. In my view, it remains open to the defendant to apply before entry of the judgment, for a reduction of the damages awarded at trial for costs of future care to account for Part 7 benefits.
- [44] Section 83(5) of the Insurance (Vehicle) Act requires the trial judge to estimate the amount of the benefits which the plaintiff is or would be entitled to receive under Part 7 of the Regulation and to take that amount into account before judgment is entered. Although ICBC has paid the full amount of the judgment to the defendant, the judgment has not yet been entered. The defendant may still apply to reduce the judgment amount.
- [45] The Court's order on this application, as it relates to costs of future care, will affect the rights of the parties. If the Court makes an order for the deduction of Part 7 benefits, the result will be a reduction of the plaintiff's entitlement to damages. The defendant would have the right to seek recovery of any overpayment of damages. I conclude that the issue of whether, and to what extent, the award of damages for costs of future care should be reduced for Part 7 benefits is not moot.
- (b) Is the defendant estopped from seeking the deduction of Part 7 benefits by her payment of the judgment in full?
- [46] The plaintiff argues that the defendant, having paid the judgment in full, is estopped from claiming a Part 7 deduction. The plaintiff contends that the Corporation, by paying the entire judgment amount, led her to believe that it did not intend to enforce its rights regarding the deduction of Part 7 benefits.

- [47] The party relying on the doctrine of promissory estoppel must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, she acted on it or in some way changed her position: *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at para. 13
- [48] The promisor's representation must have been unambiguous and precise: *Telus Communications Inc. v. Telecommunications Workers Union*, 2010 BCSC 1429 at para. 36.
- [49] Here, the defendant pleaded the deduction of Part 7 benefits under s. 83 of the Insurance (Vehicle) Act in her response to civil claim. Whether the defendant or her insurer, by delivering the cheque for the judgment amount, made a clear and precise representation that they would not seek deduction of Part 7 benefits is arguable. However, it is unnecessary to decide that point. The plaintiff's assertion of estoppel fails on another ground. On Ms. Olson's evidence, her counsel paid out the judgment funds to her two days after defendant's counsel gave notice of his client's intention to pursue the deduction of Part 7 benefits. The plaintiff then began to spend those funds, with some caution, knowing that she might be obliged to repay money to ICBC. In these circumstances, the plaintiff has not shown that she altered her position in reliance upon any representation of the defendant, or the defendant's insurer. The plaintiff has failed to establish the element of detrimental reliance necessary to found an estoppel.
- (c) Is the defendant's application an abuse of process?
- [50] Courts have "the inherent jurisdiction and residual discretion to prevent misuse of the court's procedure in a way that would be manifestly unfair to a party or bring the administration of justice into disrepute": *Gonzalez v. Gonzalez*, 2016 BCCA 376 at para. 18, citing *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26; [2013] 2 S.C.R. 227 at para. 39; and *Toronto (City) v. Cupe Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 at para. 35.
- [51] The doctrine of abuse of process is often, but not exclusively applied where litigation before the court is found to be in essence an attempt to re-litigate a claim which the court has already determined: *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 at para. 56 (C.A.) per Goudge J.A. dissenting, and approved in *Toronto (City)* at para. 37.
- [52] The overriding concern with abuse of process is "the integrity of judicial decision-making": *Toronto (City)* at para. 43.
- [53] Here, the defendant does not seek to re-litigate a matter already determined by the court. Nor is this a case where the defendant has invoked the court's process for an improper purpose, or in a way that would be manifestly unfair to the plaintiff, or otherwise bring the administration of justice into disrepute. The defendant is entitled to apply for the deduction of Part 7 benefits under s. 83 of the Insurance (Vehicle) Act. I have found that the doctrine of mootness precludes the defendant from obtaining any deduction from the award of special damages. In my view, it is not "manifestly unfair" to the plaintiff for the Court to determine

the balance of the defendant's application.

[54] In short, the defendant's application is not an abuse of process.

(d) What deductions, if any, should be made from the award of damages for costs of future care?

[55] The defendant seeks deductions for costs of medications, physiotherapy, kinesiology and massage therapy totaling \$6,164, all of which she maintains are mandatory benefits under s. 88(1) of the Regulation.

[56] Medication falls within "necessary medical service", and as such is a mandatory benefit under s. 88(1).

[57] Where an amount is payable as a mandatory benefit under s. 88(1) of the Regulation, it should be deducted even though ICBC has not yet paid for that treatment: *Wepryk v. Juraschka*, 2012 BCSC 1584 at paras. 8 and 9.

[58] Accordingly, there will be a deduction of \$3,500 for medications from the award of costs of future care.

[59] The defendant also asks the Court to deduct \$944 for physiotherapy, \$800 for kinesiology and \$920 for massage therapy as mandatory benefits under s. 88(1).

[60] Physiotherapy treatments are mandatory benefits under s. 88(1). Massage therapy, as a "physical therapy", is also a benefit the Corporation is obliged to pay under s. 88(1) of the Regulation: *Raguin v. Insurance Corporation of British Columbia*, 2011 BCCA 482.

[61] The defendant submits, and I accept that kinesiology, as a form of physical therapy also falls under s. 88(1).

[62] However, s. 88(1) must be read with s. 88(8). When the two subsections are read together, reimbursement is only mandatory for 12 physical therapy treatments: *Jurczak v. Mauro*, 2013 BCSC 1320 at para. 35. The Corporation is only liable to pay for more than 12 treatments where, before any additional treatment is given, the Corporation's medical advisor or the insured's medical practitioner certifies to the Corporation in writing that the treatment is necessary for the insured.

[63] Here, the Corporation has already reimbursed Ms. Olson for more than 12 physical therapy treatments. Accordingly, any further benefits for physical therapy treatments, including physiotherapy, massage therapy or kinesiology, are not mandatory.

[64] The Corporation has not offered any assurance these benefits will be paid.

[65] Dr. Garbuz, the defence orthopedic expert at trial, thought the plaintiff would benefit from six months of intensive physiotherapy. He thought some supervision of the plaintiff's exercise program would be beneficial but believed that after three to six months of physiotherapy, Ms. Olson would be able to exercise on her own. Dr. Garbuz did not believe further massage therapy would provide any long-term benefit, but acknowledged in cross-

examination that it would offer Ms. Olson some short-term relief. Because Dr. Garbuz is a specialist in the diagnosis and treatment of hip injuries, he confined his examination to the plaintiff's hips. He did not assess her low back injury, or offer any recommendations for treatment of that injury.

- [66] Dr. Vondette, the plaintiff's expert in physical medicine and rehabilitation, recommended an intensive exercise program supervised by physiotherapists and kinesiologists. He believed this program would result in significant reconditioning of the plaintiff's lumbar spine and would produce some reduction of low back pain, as well as clinically significant progress with the plaintiff's right hip pain. Dr. Vondette thought that the plaintiff required a supervised exercise program for several months.
- [67] The plaintiff's general practitioner, Dr. Abbey also recommended massage and physiotherapy and a supervised exercise program.
- [68] In making my award for costs of future care, I found that the weight of medical opinion supported an intensive program of physiotherapy and kinesiology for the plaintiff, lasting for several months but probably not exceeding six months. My assessment for physiotherapy allowed for both the plaintiff's participation in the reconditioning program and the likelihood that she will require some physiotherapy to manage ongoing flare-ups of her hip or lower back pain.
- [69] The award for massage therapy was based on Dr. Abbey's recommendation that Ms. Olson continue to receive massage therapy for flare-ups of her low back and hip pain.
- [70] In light of the Corporation's past delayed or partial reimbursement for these therapies, I am not satisfied that the full amounts will be reimbursed.
- [71] The onus of showing that a deduction should be made is on the defendant. I must estimate the amount to which Ms. Olson is entitled, exercising caution and taking into account any uncertainty concerning whether the benefits will be paid. Any such uncertainty must be resolved in favour of the plaintiff.
- [72] Based on the Dr. Garbuz's opinion, and the defendant's position at trial that Ms. Olson would benefit from a three to six-month exercise program under the supervision of a physiotherapist, I am satisfied that a portion of the physiotherapy will be paid. I estimate that amount to be \$500 and order that the amount to be deducted with respect to the physiotherapy is \$500.
- [73] In light of the Corporation's past partial and disrupted payment for kinesiology, there is no certainty that the Corporation will pay for any further kinesiology treatments. I therefore decline to deduct any portion of the \$800 sought by the defendant for kinesiology sessions.

- [74] Similarly, there is no certainty that the insurer will pay for future massage therapy treatments, particularly where such treatments may only provide temporary relief to Ms. Olson, rather than a lasting improvement in her condition. Again, I decline to deduct any portion of the \$920 sought by the defendant for massage therapy.
- [75] The defendant also seeks a deduction of \$870 for psychological services. Psychological therapy is a benefit payable in the Corporation's sole discretion under s. 88(2)(f) of the Regulation.
- [76] The defendant submits the Court should conclude from ICBC's past funding for physiotherapy and active rehabilitation that there is no uncertainty about whether the Corporation will fund psychological therapy for the plaintiff.
- [77] I disagree. The Corporation's checkered record of funding the plaintiff's treatment before trial raises significant uncertainty about whether this benefit will be paid. Further, Mr. Phan, the Corporation's representative, offers no assurance in his affidavit that ICBC will pay for psychological therapy for Ms. Olson. Nor is there any opinion from the Corporation's medical advisor, as required under s. 88(2), that the psychological services are likely to promote the rehabilitation of the insured. The uncertainty concerning whether this benefit will be paid must be resolved in favour of the plaintiff. I am not satisfied the Corporation will pay any portion of this benefit. Accordingly, there will be no deduction for psychological therapy.
- [78] The deductions from the award of costs of future care for Part 7 benefits total \$4000.
- (e) What deductions, if any, should be made from the award of special damages?
- [79] As a result of my conclusion on mootness, there will be no deduction from the award of special damages.

CONCLUSION

- [80] The order should be drawn to reflect the deduction of \$ 4000 from the total award of damages on account of s. 83 of the Insurance (Vehicle) Act.

COSTS

- [81] Success has been divided. Each party will bear their own costs of this application.

"PEARLMAN J."

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