

CANADA / JUDGMENT

Page v. Roy

2023 BCSC 1717

COURT

Supreme Court of British Columbia

DECIDED

22 September 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCSC 1717 Page v. Roy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Page v. Roy,

2023 BCSC 1717

Date: 20230922

Docket: M191258

Registry: Vancouver

Between:

Veronica Louise Page

Plaintiff

And

Shirley Elizabeth Roy, Ronald Glenn Delainey and

Teresa Arlene Plaxton

Defendants

Corrected Judgment: The cover page of the judgment was corrected at on October 11, 2023.

Before: The Honourable Justice Matthews

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

T.F. Dennis

Counsel for the Defendants:

Z. Fang

Place and Date of Hearing:

Vancouver, B.C.

September 22, 2023

Place and Date of Judgment:

Vancouver, B.C.

September 22, 2023

- [1] This is a motor vehicle accident case for which I gave judgment after trial on October 14, 2022. The defendants seek deductions, pursuant to s.83 of the Insurance (Vehicle) Act, RSBC 1996, c.231, totalling \$20,351.50 from the cost of future care award which totalled \$23,164.00. The judgment, except the cost of future care award and costs and disbursements, was paid on December 20, 2022.
- [2] In April 2023 the defendants provided a draft affidavit of an Insurance Corporation of British Columbia ("ICBC") adjuster in which the adjuster waived the power to require "an insured" undergo treatment, to have continued certification and to submit to a medical examination in order to be entitled to future Part VII benefits. The affiant unequivocally, irrevocably and unconditionally agreed to pay the matters awarded for cost of future care up to the Part VII limits albeit in an unsworn affidavit. I presume the adjuster meant "this insured", i.e. the plaintiff Ms. Page.
- [3] Today's date, September 22, 2023, was secured for a full-day hearing of the section 83 matter. The date was set sometime in June 2023. Unfortunately, the defendants did not provide a sworn affidavit and filed notice of application until September 11, 2023 and so it was not until that time that the plaintiff was able to take the position that the section 83 deductions were not contested.
- [4] However, the affidavit evidence demonstrates that on one occasion, after the draft affidavit with the attestations I have described, ICBC did not pay the appropriate section 83 amounts. Counsel for Ms. Page had to remind ICBC of its draft attestations to compel appropriate payment. ICBC then made the appropriate payment. That matter, which counsel for the defendants describes as a mistake, has not been addressed in the sworn affidavit. The sworn affidavit does not acknowledge that matter, describe it as a mistake, provide details that allow me to conclude it was a mistake or provide details of a future plan of action that will preclude such a problem from arising again.

- [5] The law is that a court on a section 83 application is to accept section 83 attestations in sworn evidence. See, for example, *Del Bianco v. Yang*, 2021 BCCA 315. In my view, that law does not apply when other evidence calls the reliability of the attestation into question. The court must be absolutely confident that ICBC will follow through on its promise to pay, in order for there to be an evidentiary foundation, including that there is no uncertainty that the benefits will be paid, for the deductions. An unexplained failure to do what the adjuster was prepared to attest to in the draft affidavit, and did attest to subsequently, in the period between the trial and the section 83 application, must be explained and there must be evidence on which the Court can conclude it will not happen again. Although defence counsel did not seem to view this as a serious issue or one that should give the Court pause, I am not persuaded to make the order sought on the current state of the evidence.
- [6] I offered counsel the opportunity to address the shortcomings in the evidence, which he has reluctantly accepted and asked for an adjournment to do so.
- [7] The plaintiff opposes the adjournment. Her counsel made a compelling argument in part related to the plaintiff's position that she should have special costs of this application. Ms. Page submitted that the judgment cannot be entered, and a portion remains outstanding. She submits that the plaintiff should not have to chase ICBC to make the section 83 application and to provide the evidence in support.
- [8] In this case the outstanding part of the judgment is at least the difference between the defendants' claim for deductions of \$20,351.50 and the cost of future care award of \$23,164.00. The difference is \$2,812.50. I agree that the plaintiff would be unreasonably prejudiced in the adjournment if that amount is not paid forthwith. However, the defendants have agreed to pay that amount if the matter is adjourned and has agreed to pay it within seven days of this order.
- [9] I am of the view that the defendants should be given the opportunity to redress the problems in their evidence and bring the section 83 application on a proper foundation, especially given that the prejudice to Ms. Page can be addressed through payment of the amount that would be outstanding on the judgment if all of the defendants' deductions are allowed.
- [10] Accordingly, I adjourn the section 83 application on these conditions. The defendants are to pay Ms. Page \$2,812.50 by 2:00 p.m. on September 29, 2023. By September 26, 2023, at 4:00 p.m. the defendants are to provide supplemental affidavit evidence explaining the initial refusal to pay appropriate amounts for massage therapy in June 2023 and identifying any other problems with paying costs of future care amounts between the trial and today. The defendants' supplemental affidavit evidence must provide an evidentiary basis with specifics as to how the court can accept the attestations in light of the previous failure or failures.

- [11] The revised application must be set down to be heard at 9:00 a.m. during the weeks of October 3, 10 or 16, on a date that is acceptable to counsel for Ms. Page. If the matter is to be heard during the weeks of October 3 or 10, I will be sitting in New Westminster and counsel may set it down in Vancouver to be heard through MS Teams or may set it down to be heard in New Westminster.
- [12] I turn to special costs. The plaintiff seeks special costs of this application on the basis that the defendants have acted in a manner that is reprehensible by withholding part of her judgment and delaying having this application heard.
- [13] With regard to general principles regarding special costs, the plaintiff relies on *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177, and, in particular, the Court of Appeal's explanation for the phrase "reprehensible conduct" at para. 57. Counsel for the plaintiff notes that at para. 57 the Court of Appeal described a continuum of circumstances in which special costs could be awarded ranging from milder forms of misconduct deserving of reproof or rebuke to scandalous or outrageous conduct. The Court of Appeal also cited its previous decision in *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] 9 B.C.L.R. (3d) 242 (C.A.), at para.17 where Mr. Justice Lambert said special costs are justified by reference to a single standard, that is conduct that can properly be categorized as reprehensible, but recognized that the word "reprehensible" is "a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke."
- [14] The chronology of matters that occurred between the trial and today are relevant to the plaintiff's claim for special costs. Having paid the judgment except for cost of future care in December 2022, counsel for the defendants advised in January 2023 that the defendants would be bringing an application for the section 83 deductions of cost of future care.
- [15] Between March 2023 and June 2023 there were several discussions pertaining to dates for this application as well as communications with the Court through Scheduling. I will describe those momentarily.
- [16] In March 2023 counsel for the plaintiff, in the course of the discussions about scheduling and the amount of time required for the application which affected the time at which it could be scheduled, pointed out that an application may not be necessary at all and asked counsel for the defendants to provide the affidavit pertaining to the section 83 matters, at which time they could determine whether a hearing was required.
- [17] An unsworn affidavit was delivered in April 2023 but, as I have said, a sworn affidavit that put the plaintiff's counsel into a position to make the determination about whether it had any objections to the section 83 deductions was not provided until September 11, 2023, eleven days before this hearing despite that counsel for the defendants had advised in January 2023 that the application would be made. There is no explanation as to why the sworn affidavit and a notice of application were not provided well before September 2023 and indeed why they were not provided at the time that plaintiff's counsel asked for the affidavit in March

2023.

- [18] I turn to a case that plaintiff's counsel says is on point and on which the plaintiff relies: *Purewal v. Uriarte*, 2021 BCSC 1935. That case, like this case, was a section 83 application. In that case the defendant did not pay any part of the judgment promptly. Approximately four months after trial the defendant paid only 25 percent of the judgment. The amount it paid, so far as I can tell, bore no relation to amounts it sought to have deducted. In addition to section 83 deductions, the defendant also sought deductions for other matters but those deductions do not seem to relate to the defendant having paid only 25 percent of the judgment and delaying that payment to four months after the judgment.
- [19] In addition, the defendant did not move to set the section 83 application for hearing. The plaintiff had to set it down in order to move the issue along. The plaintiff in that case continued to chase the defendant, who finally paid the portion of the judgment not subject to the deductions it sought some seven months after the judgment. When the parties reached the section 83 hearing it had to be adjourned because it could not be completed in the one hour set aside.
- [20] This case has some but not all of those features and not those that are most egregious. The feature that lies at the feet of the defendants in this case is in large part the delay in getting the hearing to this date. As I have already described, in March 2023 counsel for the plaintiff urged counsel for the defendants to provide the affidavit evidence pertaining to the section 83 deductions after which point counsel for the plaintiff advised there may be no need for a hearing. Indeed, that turned out to be correct but there was an unexplained delay on the part of the defendants in taking that common-sense step.
- [21] The defendants did provide a draft affidavit one month later but, for the reasons I have already addressed, a draft affidavit is not good enough and this case demonstrates why that is. The defendants did not provide its sworn affidavit until September 11, 2023, and at that time the plaintiff had the information she needed to take no position on the deductions. However, by that time the plaintiff continued to not have been paid the full amount of her judgment and so had determined to seek special costs of this application, a matter she had been raising with counsel for the defendants since April 2023.
- [22] Part of the reason for the delay was a lack of focus and clear communications on the part of the defendants with counsel for the plaintiff and with the Court, through Scheduling, about the time required for the application. The defendants initially asked for a 9:00 a.m. hearing for which many dates could have been made available at a relatively early time.
- [23] The Court, through Scheduling, inquired as to whether one hour would be sufficient. It is not clear what determination the defendants, who had all of the information at that time, made about the time requirement. The evidence shows that plaintiff's counsel said that two hours would probably be required but at that juncture raised the issue that if the defendants provided their affidavit, it may be that zero time would be required. The defendants then sought a hearing for two to four hours. A four-hour hearing is a full day and significantly

restricts the availability of the Court, and I presume counsel, in finding a mutually available date.

- [24] Communications between the plaintiff and the defendants about dates continued. It appears that plaintiff's counsel and some delay on the part of plaintiff's counsel in responding to requests for dates was part of the reason for the delay. Eventually, in June 2023, defence counsel urged plaintiff's counsel to agree that it be set for today, September 22, 2023, otherwise the prospect of getting a date in 2023 would diminish. Plaintiff's counsel agreed even though he was scheduled to be in trial.
- [25] I conclude that most of the delay was created by the defendants, including the failure to provide a sworn affidavit back in March 2023 which would have allowed the hearing to be set for 9:00 a.m. or avoided entirely. However, this conduct does not reach the level of being reprehensible, even though that word captures milder conduct that is deserving of rebuke. There is no sense that it was intentional or indifferent to the plaintiff's circumstances. The defendants raised their intention to seek section 83 deductions early on and sought dates within a few months of doing that. The effort to get dates was ineffectual for the reasons I have described, but it was not part of a pattern that was indifferent to getting this matter on and heard.
- [26] However, the defendants' conduct between when the judgment occurred and now is conduct that warrants uplift costs. While the defendants are not responsible for ICBC's refusal to properly pay massage benefits in June 2023, the defendants are the applicants and are responsible for bringing complete evidence and setting this matter down in a timely way. The defendants' failure to provide the sworn affidavit in a timely way which might have avoided the hearing, the defendants' failure to address the time needed for the hearing properly which might have permitted an earlier hearing, and the defendants' failure to bring complete evidence on this application is misconduct that, although it falls short of reprehensible, does justify uplifted costs.
- [27] Today was a waste of a time for all. That is entirely of the defendants' doing. It is my view that supports an award of costs uplifted for today's hearing. I assess those costs summarily. It was a full-day hearing. I assess them at \$1,320 plus disbursements of \$200 that are payable forthwith by the defendants to the plaintiff.
- [28] I delivered these reasons orally. I have edited them without changing the substance.

"Matthews J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/17/2023BCSC1717cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/page-v-roy-2023>

Prepared on 27 October 2026 · Esheria