

CANADA / JUDGMENT

Plensky v. Di Biase

2010 BCSC 1649

COURT

Supreme Court of British Columbia

DECIDED

22 November 2010

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2010 BCSC 1649 Plensky v. Di Biase IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Plensky v. Di Biase, 2010 BCSC 1649 Date: 20101122 Docket: M062847 Registry: Vancouver Between: Dallas Lynn Plensky Plaintiff And Marco Antonio Di Biase and Lina Vassallo Defendants Before: The Honourable Madam Justice Ross Reasons for Judgment Counsel for the Plaintiff: Valmon J. LeBlanc Counsel for the Defendants: Stephen Grey Place and Date of Hearing: Vancouver, B.C. October 14, 2010 Place and Date of Judgment: Vancouver, B.C. November 22, 2010

- [1] The plaintiff, Dallas Plensky, was injured in a motor vehicle accident that occurred on July 20, 2004. The jury awarded Ms. Plensky \$61,800 for the costs of future care as one component of its verdict. The defendants' application is to deduct an appropriate amount from the jury's award for the cost of future care. The defendants do not seek to deduct any Insurance (Vehicle) Regulation, B.C. Reg. 447/83 [Regulation] Part 7 benefits paid to date.
- [2] As Ms. Plensky was injured in a motor vehicle accident that occurred on July 20, 2004, the parties agree that the provisions of s. 25 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996 c. 231 [the "Act"], apply, see *Boota v. Dhaliwal*, 2009 BCCA 586 at paras. 67-68. That section provides: Liability reduced 25(1) In this section and in section 26, "benefits" means a payment that is or may be made in respect of bodily injury or death under a plan established under this Act, other than a payment pursuant to a contract of third party liability insurance or an obligation under a plan of third party liability insurance, and includes accident insurance benefits similar to those described in Part 6 of the Insurance Act that are provided under a contract or plan of automobile insurance wherever issued or in effect.
- (2) A person who has a claim for damages and who receives or is entitled to receive benefits respecting the claim, is deemed to have released the claim to the extent of the benefits.
- (3) Nothing in this section precludes the corporation from demanding from the claimant, as a condition precedent to payment, a release to the extent of the payment.
- (4) In an action in respect of bodily injury or death caused by a motor vehicle or trailer or its use or operation, the amount of benefits paid, or to which the claimant 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 is entitled to enter judgment for the balance only.
- (6) If, for the purpose of this section or section 26, it is necessary to estimate the value of future payments that the corporation or other insurer is authorized or required to make under a plan or 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.
- [3] Section 88 of the Regulation, provides in part: Medical or rehabilitation benefits 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.
- (6) The corporation is not liable for any expenses paid or payable to or recoverable by the insured under a medical, surgical, dental or hospital plan or law, or paid or payable by another insurer.
- (7) The maximum amount payable by the corporation under this section for medical, surgical, dental, nursing or physical therapy services or for chiropractic treatment, occupational therapy or speech therapy listed in the payment schedules established by the Medical Services Commission under the Medicare Protection Act is the amount listed in the payment schedules for that service, treatment or therapy.
- (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.
- [4] There are a number of limitations on ICBC's obligation to pay Part 7 benefits under s. 88 as set out in the plaintiff's submissions:

1. Before incurring a rehabilitation expense for which he or she intends to request payment from ICBC under s. 88(2), the insured must obtain ICBC's written approval, and ICBC may require him or her to submit such information as it considers necessary before giving such approval (s. 88(3)).
 2. ICBC is not liable for any expenses paid or payable to or recoverable by the insured under a medical, surgical, hospital or dental plan or law, or paid or payable by another insurer (s. 88(6)).
 3. The maximum amount payable by ICBC for medical, surgical, dental, nursing or physical therapy services or for chiropractic treatment is the amount listed in the Medical Services Commission's MSP payment schedules for that service, treatment or therapy (s. 88(7)).
 4. ICBC is not liable to pay for more than 12 physical therapy treatments for an insured unless, before any additional treatment is given, either ICBC's medical adviser or the insured's physician certifies in writing that, in his or her opinion, the treatment is necessary for the insured (s. 88(8)).
- [5] Certain principles are to be applied in the consideration of the appropriate deduction to be made. These include:
- (a) the central question of whether the plaintiff is a person who is or would have been entitled to Part 7 benefits. If so, the court must estimate the value of the future payments that ICBC is authorized or required to make and deduct that amount, see *Sovani v. Jin*, 2005 BCSC 1285 at para. 46;
 - (b) the defendant bears the onus of proving that the plaintiff is or will be entitled to the benefits for which it claims the deduction. Strict compliance with the Act is required. Any uncertainty is to be resolved in the plaintiff's favour, see *Lynn v. Pearson* (1998), 55 B.C.L.R. (3d) 401 (C.A.) at para. 18;
 - (c) the estimate of future benefits is based upon the evidence from the trial in the tort action. It is open to the trial judge to hear further evidence on the issue of the estimate, see *Schmitt v. Thomson* (1996), 18 B.C.L.R. (3d) 153 (C.A.) at paras. 19-20; and
 - (d) 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 Regulations with respect to amounts payable, see *Sauer v. Scales*, 2009 BCSC 1705 at paras. 22-23.
- [6] At trial, Ms. Plensky advanced a claim for the cost of future care that included high and low estimates in present day dollars as follows:
- | Item | Low Estimate | High Estimate |
|---|--------------|---------------|
| Anti-inflammatories, muscle relaxants, pain medication | \$ 107.92 | \$ 1,300.91 |
| Anti-depressants | \$ 1,851.64 | \$ 22,320.05 |
| Therapies, Massage, Physiotherapy, Acupuncture, Kinesiology | \$ 2,550.00 | \$ 8,500.00 |
| Personal Trainer | \$ 4,900.00 | \$ 4,900.00 |
| Feldenkrais Physiotherapy | \$ 1,300.00 | \$ 1,300.00 |
| Psychological treatment | \$ 12,011.35 | \$ 12,011.35 |
| Botox Injections | \$ 760.80 | \$ 4,564.80 |
| Career Counsellor | \$ 600.00 | \$ 1,500.00 |
| Assistance with housework and gardening | \$ 2,817.42 | |

\$14,289.23 Total \$26,899.13 \$70,686.34

- [7] The defendants concede that certain categories of the claim are not covered. These are the claims for assistance with housework, massage, acupuncture, personal training and career counselling. The total for the high estimate of these claims is \$24,939.23: Assistance with housework \$14,289.23 Career Counsellor 1,500.00 Personal Trainer 4,900.00 Massage & Acupuncture 4,250.00 Total: \$24,939.23 The defendants propose to exclude this amount from consideration for the deduction. Applying the principle that uncertainties are to be resolved in the plaintiff's favour, it is reasonable to exclude from consideration for the deduction, the maximum amount claimed at trial for categories that are not covered. Thus, the maximum amount to be considered for the deduction is \$36,861 that being the jury's award less \$24,939.23 for the categories that are not covered.
- [8] With respect to the balance of the categories claimed, counsel for the defendants submitted that it would be appropriate to divide the remaining items into mandatory claims covered by s. 88(1) and discretionary claims covered by s. 88(2). By counsel's calculation, 60% approximately of the claims fall under s. 88(1). Counsel submits that all of the mandatory claims ought to be deducted, an amount he calculates to be \$22,357, together with some portion of the amount attributable to discretionary claims. It was counsel's submission that in the result, after appropriate consideration of all contingencies, an appropriate deduction would be \$32,000.
- [9] It was the position of plaintiff's counsel that an appropriate deduction, after consideration of all contingencies, would be \$5,000. Counsel noted that even with the mandatory items, there is a requirement that the treatment be reasonable and necessary. Payments are subject to restrictions with respect to rates and number of visits in some cases. Further, given the substantial discretion with respect to matters covered under s. 88(2), any reduction should be nominal for those aspects of the claim.
- [10] I will now consider each remaining category of claim in turn. First, with respect to the medication, the maximum claimed was \$23,620.96. The defendant's position is that these amounts are covered as part of necessary medical services pursuant to s. 88(1). The plaintiff's position is that the writing of a prescription for medication may be covered by s. 88(1) as a medical service, but the supply of the medication by a pharmacy is not. Counsel noted that in *Ayles v. Talastasi*, 2000 BCCA 87 at para. 31, ICBC had accepted that the medications fell within s. 88(1) and that it was obliged to pay. Thus no issue arose as to the scope of the section. Counsel submits that in any event Ms. Plensky's insurer has been paying for her prescriptions and is advancing a subrogated claim and, accordingly, ICBC is not liable to pay pursuant to s. 88(6). Thus, ICBC's liability to pay would only arise in the event Ms. Plensky lost her coverage and it was not replaced with something comparable.

- [11] In view of the position taken by ICBC with respect to the scope of s. 88(1) in Ayles, I think it unlikely indeed that medications prescribed for conditions caused by the accident would be not be found to fall within that section. However, given s. 88(6) and the evidence that Ms. Plensky's extended health insurer is paying for her medications, ICBC's obligation to pay is contingent. Accordingly, there should be a substantial reduction with respect to this category of claim.
- [12] The next category is the claim for physiotherapy. This claim falls within the scope of s. 88(1). However, such claims are subject to the requirement they be reasonable and necessary. In that regard, Ms. Kennedy, who gave evidence with respect to ICBC's policies and procedures, stated that if the corporation's medical advisor gave the opinion that the treatments were not necessary, the corporation would deny treatment. Payment in addition is subject to the restrictions imposed by s. 88(7) and (8). In that regard, while the schedule in the claim called for treatments at \$85 per session, ICBC's schedule for payments as set out in its Claims Procedures Manual ("CPM") provides for payment of \$17.65 per visit with \$23.60 for a prolonged visit. Thus assuming the claim was for 25 sessions at \$85 or \$2,125, the maximum recovery would be \$590, which amount should be subject to a further deduction with respect to the contingency that it would be found unnecessary by the corporation based on advice from its medical advisor.
- [13] The claim for kinesiology was presented at \$85 per session. Again, assuming the claim was for 25 sessions, the maximum would be \$2,125, provides that kinesiologists will be paid at \$50 per hour for one-on-one treatment. If treatment is in a group setting, the rate will be pro-rated. It is not clear on what basis these services will be approved. Ms. Kennedy testified that there was some discretion to pay beyond the limits stated in the CPM; however, it appeared that this varied by the individual adjuster. The maximum amount provided for this category pursuant to the CPM is \$1,250, to which a further deduction for the contingency that further treatment would be found not necessary by the ICBC advisor would be appropriate.
- [14] The next category is the claim for Feldenkrais physiotherapy at 10 sessions for \$130 per session. The CPM provides that there is no Part 7 coverage for any type of alternative therapy or treatment, even when it is provided by licensed or regulated practitioners referred to in s. 88(1) of the Regulation. Ms. Kennedy was not familiar with this form of therapy and did not know if it would be regarded as an alternative therapy. In any event, if recognized as a form of physiotherapy, presumably the tariff would apply. However, given the uncertainty surrounding whether this treatment would be recognized by ICBC, in my view, provision for this claim should not be included in the deduction.
- [15] The next category is the claim for psychological counselling in where \$12,011.35 was the maximum claimed. The claim advanced by the plaintiff was for approximately 76 sessions spread over four years at a cost of \$170 per session. Psychological counselling is covered as a discretionary claim pursuant to s. 88(2). Services are subject to the tariff that prescribes a maximum hourly rate payable of \$145 for a registered psychologist with a Ph.D. Thus, the maximum coverage would be \$11,020 which would require a significant additional reduction

for contingencies given that this is a discretionary category.

- [16] The final category is Botox injections, the maximum claimed being 12 injections at \$380.40 for a total claim of \$4,564.80. The defendants' position was that these were covered under s. 88(1) as they have been prescribed by Ms. Plensky's physician.
- [17] Excluding the claims for medications, the value of the allowable claims pursuant to the CPM is \$17,424: Botox \$ 4,564.80 Physiotherapy 590.00 Kinesiology 1,250.00 Psychological Counselling 11,020.00 Total: \$17,424.80 With respect to medications, while the amount claimed is large, \$23,620.96, ICBC's responsibility to cover the costs is contingent upon Ms. Plensky losing and not replacing her present long-term disability coverage. Thus, as noted, it is appropriate to consider a significant reduction with respect to this claim. In addition, as discussed above, all the other claims, but in particular the claim for psychological counselling, are subject to a degree of uncertainty with respect to whether they will be accepted as reasonable and necessary. Psychological counselling further falls within the discretionary category. In the result, in my view a fair deduction after consideration of all of the contingencies, and taking a cautious approach, is \$10,000. "Ross J."

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Prepared on 29 October 2026 · Esheria