
CANADA / JUDGMENT

Purewal v. Uriarte

2021 BCSC 1935

COURT

Supreme Court of British Columbia

DECIDED

5 October 2021

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2021 BCSC 1935 Purewal v. Uriarte

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Purewal v. Uriarte,

2021 BCSC 1935

Date: 20211005

Docket: M181474

Registry: Victoria

Between:

Davinder Kaur Purewal

Plaintiff

And

Martin Lorenzo Chavarria Uriarte

Defendant

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Plaintiff:

S. Missaghi

D. McKnight

Counsel for Defendant:

K. Jamieson

Place and Date of Hearing:

Victoria, B.C.

September 10, 2021

Place and Date of Judgment:

Victoria, B.C.

October 5, 2021

I. Introduction

- [1] On November 23, 2020 I awarded the plaintiff damages as a result of a motor vehicle accident which occurred on May 16, 2016. My reasons for judgment are indexed at 2020 BCSC 1798.
- [2] The plaintiff is an "insured" under s. 78 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 (the "Regulation"), and is entitled to receive benefits under Part 7 of the Regulation.
- [3] The parties appeared before me on September 10, 2021 to address the defendant's application to deduct certain benefit payments from the overall damages award. The defendant relies on s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 (the "Act") and Part 7 of the Regulation.
- [4] The defendant seeks the following deductions from the damages award:

Pretrial loss of earning capacity

\$55,398

Future loss of earning capacity

\$152,600

Future care

\$63,786

Loss of homemaking capacity

\$1,041.39

Special damages

\$7,855.19

- [5] The plaintiff agrees that \$55,398 of the pretrial loss of earning capacity award, and \$10,800 of the future loss of earning capacity award, are properly deducted from the judgment. The plaintiff disputes any remaining claimed deductions.

A. Position of ICBC on this application

- [6] The defendant submitted on this application an affidavit of Emily Perry, a claims specialist with the Insurance Corporation of British Columbia ("ICBC"). Ms. Perry 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.
- [7] Ms. Perry, on behalf of ICBC, affirms as follows:
- a) ICBC accepts the court's findings with regards to the plaintiff's loss of future earning capacity. The plaintiff received disability benefits of \$300 a week up to February 23, 2021, and ICBC confirms the plaintiff can continue to receive up to \$300 per week in disability benefits if she remains disabled, intermittently or otherwise, until age 65.
 - b) ICBC accepts that the costs of future care for Botox treatments, medications, psychological interventions, occupational therapy, and physical rehabilitation (remedial physiotherapy and massage) are necessary and reasonable, and are mandatory benefits pursuant to s. 88(1) of the Regulation.
 - c) ICBC accepts that yoga is likely to promote the rehabilitation of the plaintiff, and ICBC may pay yoga expenses under s. 88(2) of the Regulation, at ICBC's discretion. ICBC irrevocably exercises its discretion in favour of payment for yoga expenses, and ICBC waives the requirement under s. 88(2) of the Regulation for an opinion of its medical advisor in that regard.
 - d) ICBC waives the requirement for continued certification under ss. 88(1.01) and 98 of the Regulation, the power to require an insured to undergo treatment under s. 90 of the Regulation, and the power to require the plaintiff to submit to a medical examination under s. 99 of the Regulation for the future care awards made in the judgment up to certain amounts.
 - e) ICBC irrevocably, unequivocally, and unconditionally agrees to pay, under Part 7 of the Regulation, the costs of future care described in the judgment up to the amounts allowed pursuant to the Regulation, as incurred and submitted to ICBC by the plaintiff for reimbursement, and up to the amounts described above.

II. Applicable legal principles

- [8] In *Aarts-Chinyanta v. Harmony Premiums Motors Ltd.*, 2020 BCSC 953 at paras. 78-81 and *Luck v. Shack*, 2020 BCSC 1074 at paras. 16-29, the court thoroughly summarized the principles and statutory framework relevant to such deductions. I do not intend to repeat the court's analysis. I highlight the following points which are directly relevant to my analysis of the case before me.
- [9] Section 83 of the Act provides for the provision of no fault benefits to injured persons. Section 83(5) requires me to deduct the value of any benefits paid or payable to the plaintiff under the Act and Regulation from my damages award: *Luck* at para. 16-21. The purpose of s. 83 of the Act has consistently been described as preventing double recovery: *Aarts-Chinyanta* at para. 52; *Tench v. Van Bugnum*, 2021 BCSC 501 at para. 16; *D'Arcy v. Salimi*, 2021 BCSC 1610 at para. 10.
- [10] 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: *Luck* at paras. 23-25, 42-47.
- [11] 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: *Aarts-Chinyanta* at paras. 96-97; *Luck* at para. 50. 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: *Aarts-Chinyanta* at para. 46; *Luck* at paras. 33-35.
- [12] In *Del Bianco v. Yang*, 2021 BCCA 315, the court of appeal considered whether ICBC's waivers and assurances for benefits could establish certainty that a plaintiff will receive the benefits sought to be deducted from the judgment by ICBC. The court of appeal concluded that where ICBC accepted the court's findings and agreed future treatments were necessary, waived the requirement for continued medical certification, and irrevocably, unequivocally, and unconditionally agreed to pay for those treatments, such evidence provided the necessary certainty that a plaintiff would receive no fault benefits for the specified treatments: *Del Bianco* at para. 69.

III. Analysis

A. Deductions for future loss of earning capacity

- [13] Under s. 80 of the Regulation, an insured is entitled to disability benefits if they were employed prior to the accident and were rendered totally disabled within 20 days of the accident. Insured persons are eligible for disability payments for either 104 weeks or until such a time as they are no longer totally disabled, whichever is shorter. These benefits may be extended for the duration of the disability or until the insured reaches age 65, pursuant to s. 86 of the Regulation.
- [14] The requirement to pay disability benefits is subject to ss. 87 and 90 of the Regulation, which provide that ICBC may review entitlement every 12 months and may be terminated on the advice of ICBC's medical advisor, who may also require the insured to undergo treatments or risk termination of benefits. While Ms. Perry waives s. 90 in relation to future care costs, her affidavit is ambiguous as to whether ICBC has waived its rights under s. 90 in relation to the future disability benefits. Therefore, I find that ICBC has not waived its rights under s. 87 or s. 90 of the Regulation, which means that it could terminate disability benefits in the future.
- [15] In the case at bar, the plaintiff received disability benefits from the date of the accident until February 23, 2021, considerably in excess of 104 weeks. In February 2021, the plaintiff returned the disability benefit cheque to ICBC because she had started working. The plaintiff did not provide ICBC with details of her employment situation, or with medical evidence indicating that she is no longer disabled. On this application, ICBC takes the position that she remains entitled to disability benefits.
- [16] I found the plaintiff was totally disabled at the time of trial, but discounted her future loss of earning capacity claim by approximately one third due to the likelihood that she would be able to work at some point in the future. I assessed the present value of her future earning potential at \$529,628, and reduced the award to \$350,000 to account for the likelihood of her eventual return to the workforce.
- [17] On this application, the plaintiff says that she is no longer totally disabled, and therefore is no longer entitled to receive s. 80 disability benefits. She says that ICBC cannot represent on this application an entitlement to benefits which is not supported by the legislation. Therefore, she argues there should be no deduction beyond the benefits she has already received from the date of trial, in the amount of \$10,800.
- [18] Even if the plaintiff is now working, a return to work does not itself disentitle an insured person to disability benefits. In *Fedyk v. Insurance Corporation of British Columbia*, 2013 BCSC 1466, the court held as follows:
- [103] Whether a claimant is "totally disabled" is a question which the facts of each case determine. If an insured claimant experiences enough temporary relief to allow their return to work for a time, and if the disability alleged is the same disability for which benefits were originally paid, that is a factor to consider, not a bar to their claim.

- [19] In other words, the question is not whether the insured person's health improved to the point that they were able to regain some level of employment, but whether they remained "totally disabled" from completing all substantial requirements of their occupation prior to the accident. Accordingly, insured persons are permitted to return to work in a different role or diminished capacity. This is codified in s. 86(5) of the Regulation, which provides that ICBC will pay the difference between an insured person's disability benefits and post-accident income if they must return to work in a diminished capacity.
- [20] In cases where an injured party's health recovers, the court has found that benefits under s. 80 may be reinstated if their health declines and they continue to be disabled once again: *Halbauer v. Insurance Corporation of British Columbia*, 2002 BCCA 5 at paras. 20, 64; *Cai v. Insurance Corporation of British Columbia*, 2013 BCSC 2213 at paras. 34, 43, 45; *Symons v. Insurance Corporation of British Columbia*, 2014 BCSC 1883 at paras. 23-29.
- [21] The defendant argues that the plaintiff remains entitled to disability benefits. If the plaintiff ceases to become totally disabled and the disability benefits terminate, but then subsequently experiences a decline in her health and is unable to work, ICBC says her entitlement to disability benefits would revive.
- [22] ICBC has not continued to issue disability benefits to the plaintiff since February 2021, which is strange given its position before me that she remains eligible to disability benefits. Therefore, its behaviour in ceasing payments is contrasted with the defence position in argument that the plaintiff's entitlement to benefits has not ceased.
- [23] Section 83(5.1) of the Act stipulates that the court may not consider the likelihood that benefits will be paid or provided when assessing any deductions. However, this subsection was enacted after the accident in this case, and it was common ground between the parties that it was not applicable in my analysis.
- [24] The operation of the statute and my findings at trial give rise to an unusual scenario. The defendants do not want to establish any evidence to prove the plaintiff is no longer totally disabled, as they wish to deduct the disability benefits from the future loss of earning capacity award. If a deduction is not made, they argue that the plaintiff will receive disability benefits totalling \$356,304 over her lifetime, plus the amount of \$350,000 which was awarded at trial. In other words, the plaintiff will receive a double recovery equal to \$706,304, which is some \$200,000 more than her future earning capacity established at trial.
- [25] On the other hand, after arguing at trial that she was totally disabled, the plaintiff now wishes to establish that she is no longer totally disabled and therefore is no longer eligible to receive disability benefits.
- [26] The defendant argues that \$152,600 should be deducted from the future loss of capacity award, which they say is the present value of 2/3 of the disability benefits she is entitled to receive until age 65, reflecting a similar discount to that I applied to the present value of the plaintiff's future earning capacity.

- [27] The defendants referred to *Stevenson v. Hunter*, [1981] B.C.J. No. 2143, 29 B.C.L.R. 120 (B.C.S.C.) and *Kingston v. Mann*, 2021 BCSC 426, where the court reduced the future loss of earning capacity by the present value of the disability benefits at issue. However, in *Stevenson*, the court found that there was no possibility that the plaintiff would work again, quite unlike the case before me. In *Kingston*, ICBC made an unequivocal commitment to pay disability benefits for two years. In those cases there was no uncertainty as to whether ICBC would pay the benefits.
- [28] In *Zhang v. 328633 B.C. Ltd.*, 2021 BCSC 650, however, the court considered representations from ICBC which were essentially the same as in the case before me. The court found as follows:
- [28] In terms of the certainty of the payments, Ms. Ahira's affidavit states that "ICBC will continue to pay the Plaintiff \$1,303.57 per month until her 65th birthday, as required by section 86 of the Regulation". However, I note that, unlike the cost of future care items discussed below, this commitment was not secured by an "irrevocable, unequivocal, unconditional" guarantee. Even more importantly, any "requirement" to pay under s. 86 remains subject to ICBC's rights under ss. 87 and 90 of the Regulation. Unlike the cost of future care benefits discussed below, ICBC failed to expressly waive its rights under these sections.
- [29] In *Luck v. Shack*, 2020 BCSC 1074, this court noted "concerns" with the ICBC adjuster's affidavit, as it did not expressly waive the need for continued medical certification, despite the presence of the "irrevocable, unequivocal, unconditional" language in the affidavit (paras. 52, 57). On this basis, the court did not deduct the full amount enumerated in the affidavit, but only deducted the benefits which were strictly mandatory under the legislation.
- [30] I must assume that ICBC stated its reduced commitment to payment of TTDs intentionally, particularly given the number of cases that have sought to provide ICBC with direction on what is required in order to support the deduction. Although it is not strictly necessary to include the "irrevocable, unequivocal, unconditional" language (*Schmitt v. Thomson* (1996), 18 B.C.L.R. (3d) 153 (C.A.), para. 25), the absence of that language, coupled with ICBC's unwaived power to reduce benefits by invoking ss.87 and 90, causes me to conclude that ICBC has not met the standard required to support this deduction. I contrast Ms. Ahira's affidavit with the one recently before this Court in *Kingston v. Mann*, 2021 BCSC 426, where a deduction for future TTDs was allowed given that the adjuster in that case "irrevocably, unequivocally and unconditionally" promised to pay for the specified period of 104 weeks.
- [31] Given the uncertainty created by the ICBC evidence, I decline to make the requested deduction for TTDs: *Luck*, para. 28.
- [29] For the reasons expressed by the court in *Zhang*, I cannot find that ICBC has committed to pay future disability benefits with the certainty required to allow me to make the requested deduction.

[30] I decline to make the deductions for disability benefits sought by the defendants. However, I will reduce the award by \$10,800 to reflect the disability benefits which were paid after the trial.

B. Deduction for future care award

[31] In the context of this application, "future care awards" are those medical and rehabilitation benefits payable under s. 88 of the Regulation.

[32] Under s. 88(1) of the Regulation, ICBC must pay benefits for all reasonable expenses incurred by the insured as a result of an accident. The mandatory benefits under this section which are relevant to the case before me include:

- a) massage therapy, physiotherapy, and psychology (s. 88(1)(a)),
- b) occupational therapy (s. 88(1)(b)), and
- c) medical services and medication (s. 88(1)(c)).

[33] Under s. 88(2) of the Regulation, ICBC may pay for benefits if, in the opinion of ICBC's medical advisor, they are "likely to promote rehabilitation of an insured". Section 1 of the Act defines "rehabilitation" as follows:

the restoration, in the shortest time practicable, of an injured person to the highest level of gainful employment or self-sufficiency that, allowing for the permanent effects of the injured person's injuries, is, with medical and vocational assistance, reasonably achievable by the injured person

[34] ICBC pays mandatory benefits at rates set by way of regulation each year, and these rates form the basis of the deductions sought before me.

[35] In *D'Arcy*, Justice McDonald held that where a benefit is discretionary, "the court should decline the deduction unless the evidence establishes that ICBC has undertaken to pay the discretionary benefits in the future": para. 11.

[36] In *Aarts-Chinyanta*, Justice MacDonald described the two-step process a court should take when determining if s. 83 deductions are appropriate:

[53] First, the court should determine whether the plaintiff has received or is entitled to receive Part 7 benefits as defined in the Act. Second, once entitlement is established, the court should estimate the amount of the deduction.

[Emphasis in original.]

[37] With respect to discretionary benefits, they are payable where the service is likely to promote rehabilitation of an insured.

1. Mandatory benefits under s. 88(1)

- [38] Ms. Perry represented to the court that ICBC accepts that my awards for Botox, medications, psychological intervention, occupational therapy, and physical rehabilitation are necessary and reasonable, and are mandatory benefits pursuant to s. 88(1) of the Regulation. ICBC also accepts that yoga is likely to promote the rehabilitation of the plaintiff, and irrevocably exercises its discretion to pay the costs of yoga up to \$2,400.
- [39] The plaintiff argues that Botox injections and yoga are not mandatory benefits.
- [40] Botox has been considered a mandatory benefit in some cases, and a discretionary benefit in others. For example, in *Aarts-Chinyanta*, Justice MacDonald held that Botox treatments were discretionary: para. 101. Conversely, in *Plensky v. Di Biase*, 2010 BCSC 1649, the court agreed that Botox injections were mandatory: para. 16.
- [41] In the case before me, at trial I found that that Botox was recommended for the plaintiff's recovery. Botox includes a medical services component (the injection) and a medication component (the cost of the Botox). As such, I find that Botox injections are mandatory benefits within the meaning of s. 88(1)(c) of the Regulation.
- [42] Ms. Perry represented to the court that ICBC waives the need for continued certification under s. 88(1.01) and 98 of the Regulation, the power to require treatment under s. 90 of the Regulation, and the power to require a medical examination under s. 99 of the Regulation for all future care awards.
- [43] Ms. Perry represented to the court that ICBC irrevocably, unequivocally, and unconditionally agrees to pay the costs of future care up to the amounts allowed pursuant to the Regulation and up to the amounts described in my judgment, as incurred and submitted to ICBC. Ms. Perry set out the relevant amounts as follows: Botox \$7,000; medication \$30,000; psychological interventions \$15,000; occupational therapy \$341; and physical rehabilitation (physiotherapy and massage) \$8,700.
- [44] Given the representations made by Ms. Perry on behalf of ICBC, and the application of s. 88(1) of the Regulation, I find that Botox injections, medications, psychological intervention, occupational therapy, and physical rehabilitation are necessary and reasonable, and are mandatory benefits for the purposes of my assessment of ICBC's entitlement to deduct these expenses from the future care award.
2. Discretionary benefits under s. 88(2)
- [45] Subsection 88(2) of the Regulation provides that discretionary benefits are payable by ICBC if, in the opinion of the Corporation's medical advisor, the benefits serve a "rehabilitative" purpose.
- [46] In the case before me, there has been no determination by ICBC's medical advisor that yoga has a rehabilitative purpose. Instead, Ms. Perry accepts on behalf of ICBC that it has a rehabilitative purpose, and waives the need for the opinion of a medical advisor.

- [47] However, based on the evidence presented by the occupational therapist at trial, I found that yoga would assist the plaintiff in managing her pain. I did not find that yoga had a rehabilitative purpose. As such, as stated by the court in Tench at paras. 60-64, there is no basis in my reasons or the evidence at trial to conclude that yoga will serve a rehabilitative purpose.
- [48] While ICBC may have the ability to waive some statutory requirements, it cannot create facts which are contrary to the evidence at trial so as to allow for a deduction of awarded costs of future care.
- [49] I decline to deduct the costs of yoga from the future care award.

3. Application of s. 88(6) of the Regulation

- [50] The plaintiff argues that no deductions should be made for Botox, medications, psychological interventions and physical rehabilitation because the plaintiff has access to benefits for these services through her husband's insurance plan.

- [51] Section 88(6) of the Regulation provides as follows:

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, except expenses referred to in subsection (1) (a) and (b).

- [52] Subsections 88(1)(a) and (b) list the following healthcare services:

- (a) health care services listed in Column A of Table 1 or Table 2, as applicable, of Schedule 3.1 and provided by the applicable health care practitioner,
- (b) occupational therapy provided by an occupational therapist

- [53] Column A of Table 1 of Schedule 3.1 includes the following services which are relevant in this case: massage therapy, physiotherapy, and psychology. The services listed in s. 88(1)(c) relevant to the case at bar are medical services and medications.

- [54] Accordingly, benefits payable under ss. 88(1)(a) and (b) of the Regulation, but currently paid for under an extended health plan, are fully deductible under s. 83 of the Act. The mere fact that the benefits are currently paid for under an extended plan does not undermine the insured persons existing entitlement under Part 7.

- [55] Therefore, ICBC remains liable to pay for psychological interventions, occupational therapy, and physical rehabilitation even if those are covered by other insurance available to the plaintiff, and ICBC is entitled to deduct the amounts it claims in respect of these services from the future care award.

- [56] Medical services (i.e., the Botox injections) and medications are covered by the plaintiff's extended health plan, but are excluded from the application of s. 88(6) of the Regulation. As such, ICBC is not entitled to deduct medical services (Botox injections) and medication costs from the future care award.

C. Deduction for housekeeping capacity

- [57] Homemaking benefits are a distinct category under Part 7. Section 84(1) of the Regulation provides that ICBC shall compensate an insured for homemaking services if the insured was a homemaker prior to accident and is substantially and continuously disabled as the result of an accident for the period of the disability or for 104 weeks, whichever is shorter. A "homemaker" is defined under s. 78 of the Regulation as a member of a household who, without payment, does the majority of the housekeeping. Based on my findings at trial, the plaintiff is a homemaker within the meaning of the Regulation.
- [58] The plaintiff has received \$1,041.39 in homemaker benefits pursuant to s. 84(1). The plaintiff advanced a claim at trial based on her costs of hiring housecleaning services in the future. I awarded the plaintiff \$20,000 for loss of housekeeping capacity.
- [59] The defendants argue that the benefits provided pursuant to s. 84(1) are sufficiently akin to the loss of housekeeping capacity award, and that the benefits already paid should be deducted pursuant to s. 83 of the Act. The defendants argue that an exact match in terminology is not necessary under the Act, relying on *Gurniak v. Nordquist*, 2003 SCC 59.
- [60] In *Aarts-Chinyanta*, Justice MacDonald relies on the Supreme Court of Canada's decision in *Gurniak* to conclude, "there need not be a precise match between the heads of damages in the tort award and the categories of damages under the benefit recovery scheme": para. 55. As long as the benefits under the two regimes are broadly similar, the court will deduct from the tort award any benefits the plaintiff is entitled to under the benefit recovery scheme.
- [61] The plaintiff argues that homemaker benefits do not have a rehabilitative purpose and are therefore not deductible under s. 88(2), relying on *Canning v. Mann*, 2019 BCSC 1279. I agree with the defendants that the court in *Canning* mistakenly assessed the homemaking award under s. 88(2) of the Regulation, when it should have been assessed pursuant to s. 84(1). There is no rehabilitative requirement for homemaking benefits, and such benefits are mandatory under the Regulation.
- [62] I find that the homemaking benefits paid pursuant to s. 84 of the Regulation, in the amount of \$1,041.39 will be deducted from the tort award.

D. Deduction for special damages

- [63] The plaintiff was awarded special damages in the amount of \$12,884. In the event I found the plaintiff's injuries were caused by the accident, the defendants did not dispute the amount claimed for special damages. Before trial, the plaintiff received reimbursement of her expenses in the amount of \$7,855.19. It is this amount which the defendants seek to have deducted from the special damage award at trial.
- [64] The plaintiff relies on *Siverston v. Griffin*, 2020 BCSC 528, in her argument that there should be no deduction for special damages. However, it is not clear from the decision in *Siverston* that the plaintiff had been advanced any benefits prior to trial. In the case before me, the plaintiff did receive some Part 7 benefits in relation to the special damages claim. It is not clear to me how those benefits do not fall within s. 83(5) of the Act. They are benefits paid by ICBC under the Act and Regulation, and therefore must be deducted from the award with judgment entered for the balance awarded at trial.
- [65] I find that \$7,855.19 must be deducted from the special damages award.

IV. Conclusion on deductions

- [66] I order the following deductions from the trial award to be made in the formal judgment:

- a) \$55,398 pre-trial loss of earning capacity;
- b) \$10,800 future loss of earning capacity;
- c) \$24,041 future care;
- d) \$1,041.39 homemaker benefits; and
- e) \$7,855.19 special damages.

V. Costs and Ancillary Orders

- [67] The plaintiff argues that the conduct of ICBC in advancing payments on the judgment to her, and the delays of ICBC in bringing this application to court, represent bad faith and justifies an order for special costs.
- [68] The plaintiff relies on the following facts:
- a) In June 2020 the occupational therapist's report was forwarded to the ICBC adjuster, and the plaintiff requested funding under Part 7 for the recommended future care items. No payments were forthcoming.
 - b) The trial was heard in June 2020, and the decision was released in November 2020. The plaintiff was awarded damages in the amount of \$646,084.
 - c) In December 2020, defence counsel asked plaintiff's counsel for dates in January or February 2021 to have the s. 83 deductions application heard.

- d) On December 21, 2020 the defendant filed a notice of appeal.
 - e) On December 22, 2020 the court provided the parties with the date of January 22, 2021 to hear the s. 83 application.
 - f) On January 15, 2021 counsel for the defendant advised he would not be ready for the hearing, and it would have to be adjourned.
 - g) On January 15, 2021 counsel for the plaintiff asked the defendant and their insurer to pay out the judgment, less the amounts for which ICBC claimed a deduction.
 - h) On January 22, 2021 the defendant abandoned his appeal.
 - i) On February 16, 2021, the defendant's insurer made a payment of \$147,430.81 towards the judgment. No payment was made for the loss of homemaking capacity award.
 - j) Counsel for the plaintiff ultimately sought a date for the hearing of this application in April 2021, and the court provided dates in May 2021. Counsel for the defendant was not available on the dates provided.
 - k) Finally, on May 19, 2021 a one-hour hearing was set for July 19, 2021.
 - l) In June 2021 counsel for the plaintiff wrote to the then-adjuster, noting that more than \$450,000 of the judgment amount had not been paid, even though the appeal had been abandoned four months earlier, and only after that, on June 9, 2021, did the adjuster forward a cheque for the judgment amount, except the outstanding disputed s. 83 deductions.
- [69] I note that the July 19, 2021 hearing did not proceed because the materials provided clearly indicated that more than one hour would be required for the hearing of this application. It was reset for a full day on September 10, 2021.
- [70] The plaintiff argues that she has been prejudiced as a result of the unexplained delay on the part of ICBC in paying out uncontested portions of the judgment, and delaying in setting this application. She says that ICBC has engaged in reprehensible conduct and is likely to engage in further dishonourable conduct in the future.
- [71] I agree that ICBC has taken an exceptionally long time to make the payments I ordered in this case. ICBC unreasonably delayed making payments that were not subject to potential s. 83 deductions, including after the defendant had abandoned his appeal of my decision. The defendant has also delayed in bringing on this application, leaving the plaintiff with the question of what deductions should be made outstanding for almost one year after my decision.

- [72] The court in *Fatin v. Watson*, 2021 BCSC 1210 considered whether an order for special costs should be made against ICBC in failing to bring a s. 83 deduction application to court in a timely way. In that case, like the case before me, the plaintiff had to bring the motion on for hearing because the defence failed to take any steps in that respect. It took six months to bring the application forward. While the court in *Fatin* did not order special costs, it did state:
- [59] Successful plaintiffs are entitled to the fruits of their judgment within a reasonable time after it is pronounced. It is therefore incumbent on the defendants in motor vehicle cases who wish to make a post-trial application under s. 83 of the Act to do within a reasonable time after judgment is pronounced.
- [73] In the case before me, the delay on the part of the defendant, and his insurer ICBC, are far more egregious than in *Fatin*. After moving quickly to get dates in January 2021 for the hearing of this application, the defendant let the matter slide and only on the initiative of the plaintiff was it finally set for hearing in July. The defendant ought to have known that one hour would not be adequate, given the issues raised and the volume of material filed, and should have requested a one-day hearing in July. Because they did not, the matter had to be adjourned to September, leaving the plaintiff with a significant issue outstanding for almost one year.
- [74] Further, no explanation has been given as to why all but the contested s. 83 deductions were not paid to the plaintiff shortly after the judgment was rendered in November 2020. While there may have been discussions and negotiations between counsel on aspects of the s. 83 deductions, there were significant portions of the judgment which were not in dispute. The plaintiff had to wait seven months to receive the uncontested portions of her judgment. That is simply not acceptable.
- [75] Therefore, I find the conduct of the defendant and their insurer in bringing this application, and in withholding payment of substantial portions of the judgment in anticipation of this application, to be reprehensible and deserving of rebuke.
- [76] I order special costs against the defendants on this application.
- [77] In addition, I order the commitments and waivers made by Ms. Perry in her affidavit in support of this application to be included in the formal order entered in this case, as was done in *Kim v. Sodhi*, 2020 BCSC 2023.

"W.A. Baker J."

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