

CANADA / JUDGMENT

Quigley v. Jonsen

2020 BCSC 216

COURT

Supreme Court of British Columbia

DECIDED

19 February 2020

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2020 BCSC 216 Quigley v. Jonsen IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Quigley v. Jonsen, 2020 BCSC 216 Date: 20200219 Docket: M74318 Registry: Nanaimo Between: Robyn Kathleen Quigley Plaintiff And Wanda Jonsen Defendant -and- Docket: M75819 Registry: Nanaimo Between: Robyn Kathleen Quigley Plaintiff And Jessica Johanson Defendant -and- Docket: M76543 Registry: Nanaimo Between: Robyn Kathleen Quigley Plaintiff And Eugenie Cymbalisty Defendant Before: The Honourable Mr. Justice Thompson Supplementary Reasons for Judgment Counsel for the Plaintiff (all actions): J. Murphy, Q.C. Counsel for the Defendants (all actions): K. Sugiyama Place and Date of Hearing: Nanaimo, B.C. February 10, 2020 Place and Date of Judgment: Nanaimo, B.C. February 19, 2020

- [1] On 5 November 2019, the plaintiff was awarded \$381,503 together with court order interest. My reasons for judgment are indexed at 2019 BCSC 1812. The cost of future care part of the award amounted to \$64,558. The defendants apply pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, to deduct \$39,558 from the damages award.
- [2] Section 83 provides, in material part, as follows: Liability reduced 83 (2) A person who has a claim for damages and who receives or is entitled to receive benefits respecting the loss on which the claim is based, is deemed to have released the claim to the extent of the benefits. . . .
- (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 provided, 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. (5.1) In estimating, under subsection (5), an amount of benefits that has not been ascertained, the court may not consider the likelihood that the benefits will be paid or provided.

- (6) If, for the purposes of this section or section 84, it is necessary to estimate the value of benefits that may or must be paid or provided, the value must be estimated according to the value on the date of the estimate of the deferred benefits, calculated for the period for which the benefits are authorized or required to be paid or provided.
- [3] There are two purposes served by the deductibility of benefits that the plaintiff in a tort action is entitled to receive from ICBC. The first is to determine the sum that the plaintiff receives when her tort claims are adjudicated. (The amount of any deduction does not fix the amount of the future benefits to be paid by ICBC -- this is determined by the Insurance (Vehicle) Act and regulations; the amount ultimately paid may be greater than the amount estimated in the tort judgment.) The second purpose is to prevent the plaintiff from being compensated twice; she cannot receive a lump sum for future benefits, and also receive those benefits again as Part 7 benefits. See *Fisher v. Wabischewich* (1978), 5 B.C.L.R. 335 at 336 (C.A.); *Lindal v. Lindal* (1980), 25 B.C.L.R. 381 at 392 (C.A.); *Schmitt v. Thomson* (1996), 18 B.C.L.R. (3d) 153 at 159-160 (C.A.).
- [4] The parties agree on the deductibility or non-deductibility of the various care items and services awarded, with the exception of the award of \$15,440 for ergonomic equipment, and \$2268 for occupational therapy services. I quote the paragraph from my judgment that addresses these claims, which were based on the recommendations of an occupational therapist, Byron Shier:
- [63] The ergonomic equipment expense totals \$15,440 and is not in issue. Mr. Shier also recommends a \$2268 allowance for the attendant cost of providing education to the plaintiff about the proper use of the equipment, as well as a functional assessment to assist her in performing home-based tasks. The defendants submit that this is excessive, but Mr. Shier worked closely with Ms. Quigley when doing his assessment and he is well positioned to estimate how long it will take to teach her how to maximize the benefits of this equipment. And, while Dr. Zaki's opinion is that the plaintiff is capable of doing domestic chores, I think it is reasonable that the plaintiff have an occupational therapist's advice on how to enhance her performance and productivity so that she can return to doing more of this household work. The claim for ergonomic equipment and services is allowed in full.
- [5] In deciding whether to make a deduction, the first consideration is whether the item or service under consideration is a benefit that is eligible to be claimed for under the Insurance (Vehicle) Act regulations. If it is not an eligible expense, it is not deducted from the tort judgment. If it is an eligible expense (and in this case it is common ground that the equipment and occupational therapy are eligible expenses), then the second consideration is whether ICBC is obliged to pay for the item or service. If so, it is deducted. If not -- for instance, if the item or service may or may not be paid for, depending on circumstances in the future or the exercise of discretion by ICBC -- then the deduction issue becomes more complicated.

- [6] This complication does not arise in this case, because I find that ICBC is obligated to pay for the ergonomic equipment and occupational therapy. ICBC has undertaken to pay for the occupational therapy, and Mr. Shier's cost estimate is based on the rates paid by ICBC for occupational therapy. ICBC has also undertaken to pay for the ergonomic equipment recommended in Mr. Shier's August 2018 report upon presentation by the plaintiff of receipts evidencing purchase. (The ICBC adjuster administering the plaintiff's Part 7 claims was cross-examined on her affidavit. She confirmed that ICBC's undertaking in relation to the equipment is specific to the equipment recommended by Mr. Shier.) The purpose of the ergonomic equipment is to promote the rehabilitation of the plaintiff, but reimbursement for the cost of this type of equipment is not within the class of benefits that ICBC is obligated to pay under s. 88(1) of the regulations. In making its decision whether to pay for the cost of this type of equipment, ICBC would ordinarily exercise its discretion under s. 88(2) of the regulations. However, the undertaking to pay removes its discretion and obligates ICBC to pay for this equipment.
- [7] The plaintiff argues that recently enacted s. 83(5.1) of the Insurance (Vehicle) Act prevents consideration of ICBC's undertaking to reimburse the plaintiff for the expense of the ergonomic items. She argues that the undertaking is directly relevant to the "likelihood that the benefits will be paid or provided" and the court is therefore prohibited from considering this evidence. I do not agree with this submission. The operation of this subsection is triggered where there is an "amount of benefits that has not been ascertained." This is not our case. The evidence on the cost of the ergonomic equipment is clear -- the amount of the benefit is ascertained. All that remains is for the plaintiff to purchase the equipment she testified she intends to buy, and I have no doubt that she will be promptly reimbursed if she does so.
- [8] At trial, the plaintiff testified that she intends to purchase the ergonomic equipment and make use of the occupational therapy services. She testified, and I accepted, that the reason she had not done so before trial was that she could not afford the cost of the equipment. It was urged upon me and I was satisfied that the plaintiff would purchase the equipment and make use of the occupational therapy services upon receipt of her damages award. In resisting the deduction of the cost of these items and services from her tort award on this application, the plaintiff submits that the tort award is hers to do with as she pleases, citing *Townsend v. Kroppmans*, 2004 SCC 10 at paras. 18 and 21. On general principles, this submission is undoubtedly sound. But the general principle must give way where the legislature enacts rules, such as s. 83 Insurance (Vehicle) Act, that limit its application.
- [9] The plaintiff also makes a submission based on the holding in *Briglio v. Faulkner*, [1999] B.C.J. No. 2377 at paras. 27-29 (S.C.). Justice Levine (then of this Court) refused to make the full deduction claimed by the defendant because, although she had assessed the cost of future care award with reference to specific items and services, ICBC's position would "effectively lock [the plaintiff] into those items and services whether or not they are actually available and appropriate almost four years after the trial." These cases turn on their facts,

and it was important to the result in Briglio that the deduction hearing occurred so long after the trial. The trial of the action in the case at bar occurred four months ago, and judgment was delivered three months ago. Mr. Shier's recommendations were made fairly recently and the plaintiff was actively involved in searching out the appropriate equipment. It cannot be sensibly suggested that the equipment and services recommended by Mr. Shier are either unavailable or inappropriate.

- [10] The plaintiff further submits that the only deductions that ought to be made are those that fit within s. 88(1) of the regulation (i.e., the non-discretionary benefits) because what falls to be deducted under s. 83 of the Insurance (Vehicle) Act are benefits to which the plaintiff is entitled and it is nonsensical to speak of entitlement where ICBC has a discretion whether to make the payment or not (as it does for items and services under s. 88(2) of the regulation). There is logic in this submission, but it runs contrary to longstanding and binding authority that deductions are liable to be made for both mandatory and discretionary benefits: *Ayles v. Talastasin*, 2000 BCCA 87 at para. 32. Moreover, the argument is rendered moot in this case by ICBC's commitment to pay for these s. 88(2) items and services (and thus forego any exercise of discretion).
- [11] In the circumstances of this case, I am satisfied that s. 83 of the Insurance (Vehicle) Act mandates the deduction of the expected expense of occupational therapy and the cost of the ergonomic equipment quoted in the Shier report. These deductions, plus other agreed-upon deductions, total \$39,558. The defendants are entitled to their costs of this application.
"Thompson J."

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