

CANADA / JUDGMENT

Richmond v. Osztovits

2020 BCSC 1160

COURT

Supreme Court of British Columbia

DECIDED

7 August 2020

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2020 BCSC 1160 Richmond v. Osztovits

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Richmond v. Osztovits,

2020 BCSC 1160

Date: 20200807

Docket: M54252

Registry: Kamloops

Between:

Michelle Leanne Richmond

Plaintiff

And

Maximilian Osztovits

Defendant

Corrected Judgment: The text of the judgment was corrected at paragraph 28 on August 14, 2020.

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

Counsel for the Plaintiff:

C. Mack

Counsel for the Defendant:

B. Morrow

Place and Date of Hearing:

Kamloops, B.C.

July 22, 2020

Place and Date of Judgment:

Kamloops, B.C.

August 7, 2020

Introduction

- [1] In their application filed July 9, 2020 the defendants seek an order, pursuant to Section 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [Act] and Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 [Regulation], that the amount awarded at trial for costs of future care be deducted from the judgment.
- [2] In reasons dated November 20, 2019, the plaintiff Ms. Richmond was awarded \$17,000 for cost of future care comprised of \$1,548 for 19 immediate kinesiology treatments and ongoing kinesiology treatments and chiropractic treatments with potential massage therapy substituted from time to time.

Governing Law and Principles

- [3] Section 83(2) of the Act provides that a person who has a claim for damage and who received 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] Part 7 of the Regulation outlines the benefits available to an eligible insured person who has been injured in British Columbia in a motor vehicle accident, regardless who as it fault, which include medical and rehabilitative benefits.
- [5] Section 88(1) of the Regulation sets out the mandatory medical and rehabilitative benefits under Part 7 to which the plaintiff is entitled and s. 88(2) sets out permissive or discretionary medical and rehabilitative benefits.
- [6] Section 83(5) of the Act provides that after a plaintiff's tort damages have been assessed the amount of Part 7 benefits paid or payable must be disclosed to the court and taken into account. If the amount of benefit has not been ascertained, the court must estimate it and take the estimate into account. The plaintiff is entitled to judgment for the balance only, after Part 7 benefits are deducted.

Argument, Analysis and Reasons

- [7] The first step is to determine if there are Part 7 benefits which Ms. Richmond has received or is entitled to receive. I must then estimate the amount of the required deduction: *Jurczak v. Mauro*, 2013 BCSC 1370, at para. 53.
- [8] The onus is on the defendant to prove that Ms. Richmond is entitled to the benefits the defendant seeks to deduct: *Sangha v. Inverter Technologies Ltd.*, 2019 BCSC 1174 at para. 8.
- [9] The defendant submits that the \$1,548 awarded for 19 immediate kinesiology treatments and the balance of \$15,452 awarded for on-going chiropractic, kinesiology and possible massage therapy treatment should be deducted pursuant to s. 83 of the Act as Ms. Richmond is entitled to receive these benefits under Part 7 of the Regulation.
- [10] Alternatively the defendant submits that as the current fee limit for kinesiology treatments, set out in Table 1 of Schedule 3 of Part 7 of the Regulation, is \$80 per session, and given that I have awarded \$1,548 for a total of 19 immediate kinesiology sessions (which is equivalent to \$81.47 per treatment) that \$16,972 should be deducted (\$17,000 - (\$1.47 x 19)).
- [11] To deal with a concern that Part 7 benefits in respect of the relevant treatments will not be paid, the defendant has provided an affidavit sworn by Cory Becker, ICBC Insurance Claims Specialist, confirming that ICBC irrevocably, unequivocally, and unconditionally agrees to pay for the kinesiology, chiropractic and massage therapy treatments. In addition Mr. Becker confirms that ICBC waives the need for written certification from a medical advisor or practitioner, required under s. 88(1.01) of the Regulation, that these on-going treatments are required.
- [12] Ms. Richmond concedes that she is entitled to Part 7 benefits for the cost of kinesiology, chiropractic care and massage therapy and therefore that some deduction from her cost of future care award is required.
- [13] She contends that it is likely that the cost of obtaining these treatments will likely be higher than the fee limits set out in Part 7 of the Regulation. For example, Ms. Richmond says that ICBC caps fees for massage therapy treatments at \$80 per session but her cost of receiving this therapy in Kamloops is approximately \$100 per session - a 25% difference. Similarly, ICBC caps fees for chiropractic treatments at \$54 per session when her cost is between \$50 and \$90 - up to an 80% difference.
- [14] Ms. Richmond points out that any deduction of future benefits must be present valued, pursuant to s. 83(6) of the Act. She contends, relying on the decision in *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953, para. 116, that there should be a slight reduction to the amount deducted under s. 83 of the Act to offset the discount rate. Ms. Richmond says that such a deduction is required in her case as many of her costs of future care are likely to be "front-ended".

- [15] In addition, Ms. Richmond contends that she may choose to allocate the amount of her award for costs of future care to alternative therapies, medication or equipment. On this basis, she says that there should be a further reduction of the amount to be deducted under s. 83 of the Act.
- [16] Finally, Ms. Richmond submits that the current legislative climate has created significant uncertainty regarding the future administration of motor vehicle claims and payment of Part 7 benefits. This she contends, justifies a further reduction to the amount to be deducted.
- [17] Ms. Richmond submits that taking these factors into consideration, a maximum of 50% of her cost of future care award, or \$8,500, should be deducted under s.83 of the Act.
- [18] As set out above there is no disagreement that Ms. Richmond is entitled to Part 7 benefits for the cost of kinesiology, chiropractic and massage therapy sessions. I find this to be the case.
- [19] The purpose of s.83 of the Act is to avoid double recovery by a Plaintiff: *Norris v. Burgess*, 2016 BCSC 1452 at para. 17.
- [20] Deducting the full amount the award made for the cost of obtaining the required therapies, given Ms. Richmond's submissions and evidence that she will likely pay more than ICBC is likely to cover under the fee cap for such service - which I accept, will have the effect of reducing the quantum of my award for cost of future care.
- [21] In my reasons for judgment indexed at 2019 BCSC 1984, I did not break down what portion of the award for cost of future care was attributable to the cost of obtaining massage and chiropractic treatments or kinesiology - other than my finding that 19 kinesiology treatments would be provided relatively soon. As a result, it is not possible to calculate what reduction should be made and an estimate is required. In my view, a reduction of 15% is appropriate in the circumstances.
- [22] As submitted by Ms. Richmond, s. 83(6) of the Act provides that any deduction of future benefits must be present valued.
- [23] In a somewhat similar situation, Justice MacDonald found at para. 116 of *Aarts-Chinyanta* that where a plaintiff will likely benefit from some treatments shortly after trial there should be a slight reduction to the deduction amount to offset the discount rate.
- [24] In the circumstances, I find that a global reduction of 20% from the deduction for Part 7 benefits is appropriate. This both addresses the contingency that Ms. Richmond will incur greater cost for therapies than she will recover as Part 7 benefits, and reflect the present value of the deduction for future benefits. This results in a reduction of \$3,400.
- [25] I do not find that a further reduction is warranted because Ms. Richmond may choose to allocate the amount of her award for cost of future care to alternative therapies, medication or equipment. That would in fact be allowing Ms. Richmond to open up her case with respect to costs of future care. At trial, I awarded Ms. Richmond damages for the cost of

obtaining chiropractic and massage therapy and kinesiology treatments - not other treatments. Even if I could consider alternative treatment, which I decline to do, I do not have any evidence with respect to cost.

- [26] In addition, I do not find that a reduction is warranted to reflect the possibility that ICBC will not pay Ms. Richmond the Part 7 benefits to which she is entitled. Similar to the reasoning of the court in Norris, at para. 35, I will not second guess ICBC and assume that they will not honour their obligation to provide Ms. Richmond her Part 7 benefits. In any event, the court is not to consider the likelihood that the benefits will be unfairly adjusted in the future: *Ayles v. Talastasi*, 2000 BCCA 87 at para. 33. In addition, s. 83(5.1) of the Act prohibits consideration of the likelihood that benefits will be paid or provided.
- [27] As well, I do not find that a reduction is warranted to reflect the legislative uncertainty surrounding payment of Part 7 benefits. The possibility that ICBC will decide to reduce or eliminate Part 7 benefits in the future is entirely speculative. Again s. 83(5.1) of the Act applies.

Conclusion

- [28] Pursuant to s. 83 of the Act and Part 7 of the Regulation, the amount of \$13,600 should be deducted from Ms. Richmond's award.

"Mayer J."

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