

CANADA / JUDGMENT

Rocheleau v. Khokhar

2024 BCSC 228

COURT

Supreme Court of British Columbia

DECIDED

13 February 2024

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

2024 BCSC 228 Rocheleau v. Khokhar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rocheleau v. Khokhar,

2024 BCSC 228

Date: 20240213

Docket: M1810448

Registry: Vancouver

Between:

Orlaith Catherine Rocheleau a.k.a. Orlaith Ward and

Orlaith Ward-Rocheleau

Plaintiff

And

Resham Khokhar, Gantry Trucking Ltd.

and John Rocheleau

Defendants

Before: Associate Judge Hughes

Reasons for Judgment

Counsel for Plaintiff:

M. Caine

Counsel for Defendants Resham Khokhar and Gantry Trucking Ltd.:

L.G. Harris

Counsel for Defendant John Rocheleau:

J. Tang

Place and Date of Hearing:

Vancouver, B.C.

January 18, 2024

Place and Date of Judgment:

Vancouver, B.C.

February 13, 2024

- [1] The plaintiff applies, pursuant to s. 5(6) of the Disbursements and Expert Evidence Regulation, B.C. Reg. 210/2020 and amendments there to (the "Regulation") for an order that a number of disbursements she intends to incur be "excluded disbursements" as that term is defined in the Regulation. The application is opposed by all defendants.
- [2] The portions of the Regulation at issue are relatively new, having come into force on November 27, 2023, with only two reported decisions as at the date of hearing. I advised counsel at the hearing that I had another such application under reserve, which has subsequently been released as *Garcia v. Gill*, 2024 BCSC 108.
- [3] In the case at bar, the plaintiff was injured on October 8, 2016, when she was a passenger in a vehicle driven by defendant, John Rocheleau, which was rear-ended by a large commercial vehicle driven by the defendant, Resham Khokhar, and owned by the defendant, Gantry Trucking Ltd.
- [4] Liability for the accident is admitted on behalf of all defendants, but they dispute the plaintiff's claim for damages. A six day trial is scheduled to commence on May 13, 2024. The plaintiff anticipates tendering reports from the following three experts:
 - a) Dr. Finlayson, a physiatrist, whose report has already been served;
 - b) Edgar Emnacen, an occupational therapist, who has assessed the plaintiff with respect to her functional capacity and cost of future care but has not yet prepared a report; and
 - c) Dr. Fleetham, a respirologist, who has not yet assessed the plaintiff.
- [5] On this application, the plaintiff seeks an order that the following disbursements be excluded disbursements for the purpose of s. 5(2) of the Regulation:

- a) The expenses associated with the plaintiff attending an independent medical examination ("IME") with a respirologist, Dr. Fleetham, including the cost of Dr. Fleetham reviewing clinical records and preparing a report concerning the etiology of a right lung bullae and the need for any associated treatment;
- b) The expenses associated with speaking to Dr. Fleetham post-IME to clarify his opinions and get any corrections made to his report;
- c) The expenses associated with Mr. Emnacen preparing a report as to the plaintiff's functional capacity and cost of future care;
- d) The expenses associated with any court preparation, cancellation, and other associated and reasonable charges that may be paid to the plaintiff's experts as a result of being required for cross-examination at trial;
- e) Cost of subpoenas to witnesses for trial, including conduct money;
- f) Cost of process servers to serve subpoenas;
- g) Filing fees/agent's fees for filing documents in court, including but not limited to trial brief, trial certificate, trial record, requisition to adjourn trial in event of settlement; and
- h) Any disbursements incurred by the Plaintiff for the purpose of the present application.

[6] Section 5 of the Regulation, as amended, provides as follows:

Limits on amount of disbursements

5 (1) In this section:

"disbursement limit" means, in relation to a vehicle injury proceeding,

- (a) the amount that is 6% of the total award of damages assessed by the court in the vehicle injury proceeding or, if an offer to settle the vehicle injury proceeding is accepted, 6% of the amount offered, or
- (b) if the court dismisses the vehicle injury proceeding or, at the conclusion of the vehicle injury proceeding, does not make an award of damages, the amount determined by the court;

"excluded disbursements" means the following:

- (a) fees payable to the Crown under the Supreme Court Civil Rules;
- (b) fees payable to the sheriff for non-refundable deposits in civil jury trials under the Supreme Court Civil Rules;
- (c) disbursements incurred by a party if the court ordered the costs of the vehicle injury proceeding to be paid as special costs;
- (d) disbursements for expert evidence, or an expert report, on the issue of liability;

- (e) disbursements that all parties to the vehicle injury proceeding have consented to allow as excluded disbursements;
- (f) disbursements that the court has ordered to be excluded disbursements on application made under subsection (6).
- (2) Only the following may be allowed or awarded to a party in a vehicle injury proceeding as disbursements:
 - (a) disbursements up to the disbursement limit;
 - (b) excluded disbursements.
- (3) repealed. [B.C. Reg. 241/2023, s. 1 (c).]
- (4) The limits set out in subsection (2) do not apply to a vehicle injury proceeding if the trial date set out in the notice of trial filed in relation to the vehicle injury proceeding is no more than 3 months after the coming into force of this subsection.
- (5) If the trial date set out in the notice of trial filed in relation to a vehicle injury proceeding is more than 3 months after the coming into force of subsection (4), the limits set out in subsection (2) do not apply to disbursements incurred by a party if the court is satisfied that the party necessarily or properly incurred those disbursements before the coming into force of subsection (4).
- (6) On application by a party to a vehicle injury proceeding, the court may, if satisfied that the conditions set out in subsection (8) are met, order that the disbursements itemized in the order are excluded disbursements.
- (7) If disbursements to be incurred for expert evidence or expert reports are the subject of an application under subsection (6) and the applicant is also making an application under section 12.1 (5) of the Act, the applicant must make both applications at the same time.
- (8) The following are the conditions for the purposes of subsection (6):
 - (a) the application is made before the disbursements are incurred;
 - (b) were the disbursements not excluded, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the vehicle injury proceeding.
- (9) In an application under subsection (6), a party must include the following:
 - (a) the nature and the evidentiary value of each disbursement that is the subject of the application;
 - (b) evidence of the prejudice the party would suffer were the disbursements that are the subject of the application not excluded, which must include

- (i) evidence that there is a reasonable risk that the total amount of disbursements the party intends to incur to resolve the vehicle injury proceeding will exceed the disbursement limit,
 - (ii) evidence that the disbursements that are the subject of the application are necessary to justly resolve the vehicle injury proceeding in light of the complexity of the vehicle injury proceeding or the importance of the issues in dispute, and
 - (iii) evidence that the party would be unable, without undue hardship, to incur the disbursements that are the subject of the application were those disbursements not excluded.
- [10] For certainty, this section applies to all vehicle injury proceedings, whether or not the proceeding was commenced before the coming into force of this subsection.
- [7] The court may only exercise its discretion to order that disbursements be excluded if the conditions in subsection (8) are met. There is no dispute as to subsection 8(a). In order for the court to determine, if the condition in subsection (8)(b) has been met, the application materials must include the items set out in subsection (9).
- [8] For the purpose of this application, the defendants' objections are twofold. First, they say that the test regarding the evidentiary value of Dr. Fleetham's report, being the test of necessity, has not been met. Second, the defendants say that the plaintiff has not proven undue hardship with respect to her financial circumstances and resulting inability to incur the disbursements at issue.

Dr. Fleetham's report

- [9] The decision to engage the services of Dr. Fleetham to prepare an expert medical report was made relatively recently. On a referral from her family doctor, the plaintiff consulted a thoracic surgeon, Dr. Anna McGuire, on April 20 and July 11, 2023. Dr. McGuire has diagnosed the plaintiff as having a lung bullae that may have been caused by seat-belt trauma from the subject accident. In early January 2024, Dr. McGuire declined the plaintiff's request to prepare an expert medical report for the purpose of this litigation. As a result, the plaintiff has now engaged Dr. Fleetham to prepare such report.
- [10] The plaintiff says that a report from a respirologist is necessary to opine on whether the plaintiff's lung bullae was likely caused by the accident. That report may add to the complexity of the case if Dr. Fleetham's opinion is that the bullae was caused by the accident. Conversely, if Dr. Fleetham's opinion is that the bullae was not caused by the accident, that should simplify matters.
- [11] The defendants' position is that such a report is unnecessary given that the plaintiff's clinical records show no complaint of chest injury or pain until nine months after the MVA. The defendants essentially invite the court to conclude, based on the clinical records, that the bullae could not have been caused by the MVA or that Dr. Fleetham will be unable to opine on causation.

- [12] The court is not in a position, on this interlocutory application, to determine the etiology of the plaintiff's bullae in the absence of expert medical evidence. That determination should be made by the trial judge, who will have the benefit of a full evidentiary record. The plaintiff has the onus of proof with respect to her injuries, including whether they were caused or contributed to by the accident, their severity, prognosis and effects on her. She will likely require expert medical evidence to meet that burden of proof.
- [13] If the trial judge finds an expert report to be unhelpful, that can be addressed in costs. As this court recently noted in *Jabbal v. Venier*, 2024 BCSC 151 at para. 19, in relation to a similar application with respect to exclusion of the cost of an economist's report:

whether the economist report is an excluded disbursement would not preclude the defendants from arguing, pursuant to Supreme Court Civil Rule 14-1(5) after the case had concluded, that the particular disbursement was neither necessary nor properly incurred. If the court indicated an economist report wasn't useful or necessary, or the report wasn't utilized, the registrar could take that into account on an assessment of costs. The fact that a disbursement is excluded for the purpose of the regulation would not prejudice the position of the defendant at a subsequent assessment of costs.

- [14] I am satisfied that, for the purpose of this application, the plaintiff has provided sufficient evidence that the proposed report from Dr. Fleetham is necessary to justly resolve this vehicle injury proceeding.

Undue hardship

- [15] Of greater concern, in my view, is the issue of whether the plaintiff would suffer undue hardship, if required to incur the disbursements that are the subject of this application.
- [16] The Regulation requires the plaintiff to provide evidence that she would be unable to incur the disbursements without undue hardship if those disbursements were not excluded. On a plain reading, "undue hardship" is something more than ordinary hardship.
- [17] The plaintiff has provided very little evidence of the anticipated cost of the proposed disbursements. The only evidence provided by the plaintiff is that of a paralegal who states, without providing the basis for her knowledge, that the cost of Mr. Emnacen's assessment and report "is expected to be approximately \$7,000" and that Dr. Fleetham's report "is expected to be \$3,250 plus GST". There is absolutely no evidence of the estimated cost of any of the other disbursements that the plaintiff seeks to have excluded.
- [18] Further, there is limited evidence of the plaintiff's financial circumstances, and no evidence directly from the plaintiff. There is hearsay evidence, from the same paralegal, that paying the additional disbursement costs would cause the plaintiff financial hardship. The plaintiff says, through the paralegal, that she has no savings and is paying \$7,300 per month in mortgage payments. Her income is "down significantly in 2023 from 2022 and is expected to be the same for 2024". The paralegal's evidence is that the plaintiff is "barely getting by".

- [19] The plaintiff is a mortgage broker. From 2018 through 2022 her income has increased each year. In 2022, the plaintiff's gross commission income was just over \$163,000. It dropped to \$125,871 in 2023.
- [20] Although, there is evidence of the plaintiff's monthly mortgage payments, there is no evidence of contributions, if any, from her spouse who is a co-borrower. There is also a lack of evidence as to her other living expenses and contributions thereto from her spouse. The plaintiff says, that any assumptions regarding the spouse's contributions would be pure speculation. However, the converse is also true, any assumption regarding a lack of contributions from the spouse would also be speculative. Evidence regarding contributions from the spouse is within the knowledge of the plaintiff, and she has chosen not to provide such evidence to the court on this application.

Conclusion

- [21] The plaintiff has not attempted to quantify her claim in a such way that the court can assess whether there is a reasonable risk that the total disbursements to be incurred will exceed the disbursement limit. Further, the plaintiff has not provided sufficient evidence of the likely or estimated total cost of the disbursements. Without some evidence of the potential value of the plaintiff's claim, the court cannot know what the disbursement limit is likely to be. Without evidence of the expected total cost of disbursements, the court cannot know if the limit is likely to be exceeded.
- [22] Lastly, the evidence as to the plaintiff's financial circumstances does not allow the court to find that the plaintiff would suffer undue hardship if the disbursements were not excluded.
- [23] As noted in *Garcia v. Gill* at para. 27, "without evidence of the risk that the plaintiff faces, I am unable to undertake the balancing exercise required to determine whether the plaintiff would suffer disproportionate prejudice".
- [24] On the whole, I am unable to find that the plaintiff has met the condition set out in subsection 8(b) of the Regulation.
- [25] Accordingly, the plaintiff's application is dismissed.

"Associate Judge Hughes"

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/24/02/2024BCSC0228.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/rocheleau-v-khokhar-2024>

Prepared on 26 October 2026 · Esheria