

CANADA / JUDGMENT

Safdari v. Buckland

2020 BCSC 2019

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 2019 Safdari v. Buckland

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Safdari v. Buckland,

2020 BCSC 2019

Date: 20201218

Docket: M175087

Registry: Vancouver

Between:

Syed Hemat Safdari a.k.a. Vafa Safdari

Plaintiff

And

Leanne Buckland, John Doe, Jane Doe, and John Doe Corporation

Defendants

Before: The Honourable Justice Winteringham

Supplementary Reasons for Judgment (Application for deductions from future care award)

Counsel for the Plaintiff:

H. Faramarzi

Counsel for the Defendants:

C. Manning

Place and Date of Hearing:

Vancouver, B.C.

November 4, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 18, 2020

Table of Contents

I. OVERVIEW.. 3

II. TRIAL JUDGMENT - FUTURE CARE COSTS. 3

III. LEGAL FRAMEWORK. 7

IV. ANALYSIS. 13

I. OVERVIEW

[1] On May 25, 2020, following a trial about liability and personal injuries caused by a motor vehicle accident, the plaintiff was awarded \$202,266.47. My reasons for judgment are indexed at 2020 BCSC 769 ("Reasons"). The cost of future care portion of the award amounted to \$25,600. The defendants apply pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 (the "Act") and the provisions of Part 7 of the Insurance (Vehicle) Regulation, BC Reg 447/83 (the "Regulation") to deduct the entirety of the future care cost award. That is because, the defendants submit, the statutory objectives of the no-fault benefits are conceived such as to remove the burden of future care from the tortfeasor and place it on the insurance provider. Here, the insurance provider has undertaken to pay these benefits, as found by the court to be medically justified. As such, the defendants submit the statutory regime requires the deduction.

[2] The plaintiff disagrees that there be any deduction. The plaintiff submits firstly that the nature of the items awarded in this case do not fall within the category of mandatory deductions. Second, the plaintiff contends that the defendants have failed to satisfy their evidentiary burden because the affidavit on which they rely is deficient to remove the uncertainty regarding entitlement and future payment.

II. TRIAL JUDGMENT - FUTURE CARE COSTS

[3] After an 11-day trial and based on the evidence presented, I awarded future care costs as follows:

- [208] Mr. Safdari seeks \$740,613.82 for cost of future care expenses. He does not adjust this claim for present value. He submits that he is entitled to every item that was included in Simone Szarkiewicz's cost of future care report, without adjustment.
- [209] Insofar as is possible, Mr. Safdari is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition. When full restoration cannot be achieved, the court must strive to ensure full compensation by ensuring adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84 (S.C.); *Williams v. Low*, 2000 BCSC 345 at para. 48; *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55; and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- ...
- [211] I have reviewed Ms. Szarkiewicz's report and the costs she has assessed for each. I agree with the defendants that any future care award must be adjusted for present value. I also agree with the defendants' submission that some of the items found in Ms. Szarkiewicz's report were contrary to recommendations made by the medical experts. I agree that the plaintiff was taking a variety of medications prior to the MVA and that the defendants should only be responsible for an increase or new medication. I also note that Dr. McCann recommended against needle based therapies. In addition, a functional capacity evaluation was conducted in 2017 and there does not seem to be a basis for a second assessment. It may also be more appropriate for this evaluation to be conducted after WorkSafeBC determines Mr. Safdari's status. Finally, Dr. Grosch has not recommended any further neurological treatment and a neuropsychological evaluation is not established. I am not satisfied that a further attendance with an occupational therapist would be of any benefit, as the plaintiff has already participated in this programming. As for adaptive cleaning equipment, this has not been demonstrated to be medically justified. Finally, the plaintiff has had the benefit of vocational counseling through WCB and it has not been demonstrated that further vocational counseling is medically justified.
- [212] I am satisfied that Mr. Safdari may gain some benefit from attending the chronic pain clinic despite his historical lack of engagement and participation in treatment at Orion Health Pain Clinic in 2015. Attendance at this program is medically justified and reasonably necessary on the medical evidence to preserve and promote Mr. Safdari's health and will provide him with some assistance as he returns to the workforce. The amount estimated for a return to Orion Health is \$13,600 and I grant that amount.
- [213] I am also satisfied that the plaintiff has demonstrated that the following treatments/aids are medically justified but to a much lesser extent and duration than that claimed. As such, I have awarded an additional \$12,000 to allow for some active rehabilitation treatment, as recommended by Dr. Flaschner, some medication, counseling and gym membership is medically justified. In total, I would award \$25,600 for cost of future care.

- [214] As stated previously, in his notice of civil claim, the plaintiff claims damages for "loss of house maintenance capacity". In his closing submission, this claim was subsumed into the cost of future care award.
- [215] The defendants made submissions with respect to a discrete head of damages for loss of housekeeping capacity. They submitted that no such award should be made here or, in the alternative, it should be captured in the non-pecuniary damages award.
- [216] As I review the evidence and based on the findings I have made, I am not satisfied that the plaintiff has established that this claim is medically justified or that the amount sought is reasonable.
- [4] In summary and based on the evidence presented, I awarded \$13,600 for attendance at the Orion Health Pain Management Clinic. In addition, I awarded \$12,000 for ongoing active rehabilitation treatment, some medication, counseling and gym membership fees.
- [5] On this application, the defendants rely on an affidavit from the Insurance Corporation of British Columbia (ICBC), affirmed by Michaela Montgomery, an ICBC claims specialist, stating that ICBC:
- a) Accepts that the plaintiff is an insured under s. 78 of the Regulation as he was the driver of a vehicle involved in a motor vehicle accident with another vehicle described in an owner's certificate and that the plaintiff will remain an insured for the purpose of receiving benefits under the Regulation, including Part 7 benefits;
 - b) Will waive the requirement pursuant to s. 88(1.01) of the Regulation that ICBC's medical advisor or the Plaintiff's doctor provide in writing that the Plaintiff will require the treatment set out in the Reasons;
 - c) Will "irrevocably, unequivocally and unconditionally" agree to pay the Plaintiff, under Part 7, up to \$25,600 for ongoing future care costs for the Orion Health Pain Management Clinic, ongoing active rehabilitation treatment, some medication, counseling and gym membership fees; and
 - d) Will honour the new rate set out in Column C of Table 1 of Schedule 3.1 of Part 7 of the Regulation each April.
- [6] Ms. Montgomery affirmed, in a second affidavit, additional facts regarding ICBC's obligation and commitment to pay, stating that ICBC:
- a) Accepts that the Reasons satisfy the requirement under s. 88(1) of the Regulation that the items awarded as costs of future care are medically necessary and are reasonable expenses and, as such, will pay for all treatments provided by s. 88(1) of the Regulation, including those specified; and

- b) Accepts that the plaintiff's return to the Orion Health Pain Management Clinic and the gym membership are likely to promote the rehabilitation of the Plaintiff and that ICBC may pay these expenses under s. 88(2)(f) of the Regulation, and confirms her irrevocable exercise of that discretion.
- [7] In the Reasons, I allocated a specified sum for the attendance at the Orion Health Pain Management Clinic. I did not specify a sum to each of the other items awarded, nor was I asked to. To that end, the defendants submit that three of the five items awarded are non-discretionary items and must be deducted (active rehabilitation treatment, medication and counseling).
- [8] The defendants submit that the pain clinic and gym membership are Part 7 benefits that may either fall under ss. 88(1) or 88(2) of the Regulation. During the trial, the court was not asked to specify whether these were ss. 88(1) or 88(2) expenses.
- [9] The defendants contend that the plaintiff is entitled to receive the benefit of the active rehabilitation, medication and counseling pursuant to the mandatory provisions of s. 88(1) of the Act. The defendants say that arguably, the cost of the pain clinic could also be categorized as a s. 88(1) expense. However, if it is not, the defendants submit that Ms. Montgomery's affidavit removes any uncertainty associated to the pain clinic. Similarly, the defendants submit that Ms. Montgomery's affidavit removes any uncertainty regarding the gym membership.
- [10] As such, the defendants submit, the plaintiff will receive, or is entitled to receive, the entirety of these benefits. Therefore, the total amount should be deducted from the tort award.
- [11] The plaintiff contends that no amount should be deducted from the future care cost award. He submits firstly that the items awarded under this head of damage are discretionary expenses and Ms. Montgomery's assurance does not justify the court granting the deduction. Secondly, the plaintiff submits based on ICBC's historical conduct with the plaintiff on similar expenses demonstrates that ICBC will not fairly adjust his future claims, even with the Reasons in hand. To that end, the plaintiff relied on an affidavit setting out "ICBC's previous behaviour" delineating his efforts to have ICBC pay for such treatments as physiotherapy, massage therapy and gym membership. The plaintiff submits that ICBC's pre-trial refusal to reimburse him shows that the court should not rely on ICBC's assurance that they will pay in the future.
- [12] In sum, the defendant has undertaken to pay for the items identified in the future care cost award. The plaintiff submits that I should place little weight on the defendants' assurance because of the discretionary nature of the items awarded and the history of nonpayment.

III. LEGAL FRAMEWORK

- [13] Section 83 of the Act 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.

...

[14] Justice Thompson in *Quigley v. Jonsen*, 2020 BCSC 216 described the purpose underlying the deductibility of benefits where he stated at para. 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.).

[15] In *Ayles v. Talastasi*, 2000 BCCA 87, Justice Donald clearly stated that a deduction under s. 83(5) is based on entitlement and not on the possibility that the accident benefits claim will not be fairly adjusted in the future. He stated it this way at para. 33:

... The acknowledgment by I.C.B.C. that the plaintiff is entitled to the medication costs provides enough certainly to deduct the whole amount. My decision in that respect rests on I.C.B.C.'s acknowledgment that the correct interpretation of s. 88(1) is that the plaintiff's ongoing requirement for headache medication for headaches whose cause is rooted in this accident is a requirement for reasonable expenses for necessary medical services within the meaning of s. 88(1). The possibility that there may be some disagreement in the administration of the individual claims as they are presented in the future is simply part of an ongoing entitlement. The deduction must be made on the basis of entitlement not on the possibility that claims may be unfairly adjusted in the future.

[Emphasis added.]

[16] Justice Riley, in *Sangha v. Inverter Technologies Ltd.*, 2019 BCSC 1174 commented similarly. In *Sangha*, the ICBC claims specialist deposed that they had reviewed the reasons for judgment and stated in a sworn document that ICBC accepted the court's conclusions regarding the plaintiff's treatment needs in connection with her collision-related injuries. Justice Riley stated at para. 15:

... In this context, the sworn evidence of an authorized ICBC representative attesting to ICBC's commitment to pay out certain benefits may carry considerable weight: *Norris v. Burgess*, 2017 BCSC 1452 at para 35; *Stanikzai v. Bola*, 2012 BCSC 1904 at para. 20-21.

[17] In my view, Justice MacDonald answered many of the plaintiff's concerns in *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953 at paras. 71-82. In *Aarts-Chinyanta*, MacDonald J. provided a lengthy and comprehensive review of the history of the Act and Regulation and the predecessor provisions, the legislative framework, the evidentiary issues and the jurisprudence. A summary of MacDonald J.'s recitation of principles applicable to post-trial applications such as this one follows:

- a) The legislative scheme is designed to move the burden of future care from the tortfeasor to the insurance provider;
- b) The defendants bear the onus of proving that the plaintiff is entitled to the Part 7 benefits which they seek to deduct;
- c) Regarding evidence and entitlement, an ICBC claims specialist cannot bind ICBC beyond the provisions of the Act and Regulation because the ICBC claims specialist cannot authorize deductions beyond what the statute permits;
- d) Once statutory entitlement is established, based on the award and the legislation, "the question is whether the Part 7 benefits are mandatory or discretionary."

- e) If the benefits are mandatory, the court must deduct. No further evidence is required. If the benefits are discretionary, in that, ICBC may pay the benefits or they are subject to ongoing medical certification, they are too uncertain and the court should decline to deduct the benefit amount from the award. Alternatively, the court may deduct a nominal amount to reflect the uncertainty of the plaintiff receiving the future benefits;
 - f) An exception to the general rule regarding discretionary benefits is where ICBC, through affidavit evidence, undertakes or promises to pay discretionary benefits going forward;
 - g) Once presented with such evidence, the court must be satisfied the undertaking or promise is sufficient in that there is no significant uncertainty the benefits will be paid: Sangha; and
 - h) If the court is satisfied with the undertaking or promise, the court should deduct the benefits from the damages award because the uncertainty has been removed.
- [18] Justice MacDonald concluded, once entitlement is established, the court can consider ICBC's post-trial representations regarding ongoing access to benefits including whether the conditions subsequent to ongoing entitlement (e.g., 12 month reviews) will be waived or enforced. ICBC can provide assurances with respect to discretionary conditions, which ICBC controls.
- [19] I agree with MacDonald J.'s conclusion that ICBC cannot undertake to do more than it was empowered to do under the legislative scheme, consistent with the findings at trial. ICBC representations cannot broaden entitlement at the outset: *Andrews v. Roffel* [1998] B.C.J. 631 at para. 25. However, as stated by MacDonald J., once entitlement is established, ICBC can reduce or eliminate any contingencies associated with its exercise of discretion. Post-trial affidavit evidence is admissible for this purpose.
- [20] Before turning to the application of those principles here, I wish to address the issue of the Orion Health Pain Management Clinic and whether it is properly constituted as a benefit captured by either (or neither) of ss. 88(1) or (2) of the Regulation. The plaintiff relies on *MacDonald v. ICBC*, 2014 BCSC 2155. In *MacDonald* and in the context of a Part 7 claim, Justice Fitzpatrick considered whether the referral to the pain clinic which included treatment for addiction support, constituted a benefit pursuant to s. 88(1). In response to the plaintiff's reliance on *MacDonald*, I am guided by Justice Fitch's decision in *Park v. Targonski*, 2015 BCSC 1531 where he addressed the pain clinic benefit in this way:
- [41] In case law decided prior to *Raguin*, there is substantial support for the proposition that the cost of a pain clinic is a mandatory benefit payable under s. 88(1) of the Regulation (see: *Klonarakis v. Gregg*, [1999] B.C.J. No. 2255, varied on other grounds 2001 BCCA 69; *Briglio v. Faulkner*, [1999] B.C.J. No. 2377 (S.C.); *Ballen v. Ballen*, 2000 BCSC 1264; *Wong*).
- [42] As a result of *MacDonald*, some doubt has been cast on the issue of whether a pain clinic falls within the ambit of s. 88 (1).

- [43] In MacDonald, the plaintiff suffered from an addiction in addition to her chronic pain. Multi-disciplinary treatment for her addiction formed an important part of the therapy the plaintiff was to receive. Relying on Raguin, the Court in MacDonald found that multi-disciplinary programs offering services not specifically enumerated cannot be read into the language of s. 88(1). The Court also acknowledged (at para. 96) that this strict interpretation presents difficulties as it is unlikely the Legislature intended to adopt a "rehabilitation-in-pieces approach to legislation that exists to promote reasonable and necessary benefit coverage to injured persons".
- [44] In the case at bar, there are no addiction concerns analogous to the situation in MacDonald. In this respect, MacDonald is factually distinguishable from this case. The narrow issue before me is whether a pain clinic that is focussed on "necessary physical therapy" is a mandatory benefit as contemplated by s. 88(1).
- [45] The mere fact that psychological and/or cognitive obstacles to optimal physical rehabilitation are likely to arise in the administration of what amounts, at its core, to a physical rehabilitation program does not negate the fact that the program is designed to achieve "necessary physical therapy." The law must take cognizance of our growing awareness of the intersection between physical and mental therapy. Indeed, it is difficult to envision aggressive implementation of the sort of active rehabilitation Back in Motion has in mind without necessarily engaging psychological and/or cognitive issues, particularly for an individual in the plaintiff's situation. Looking at the issue this way, it is unnecessary and unrealistic to hold that a physical therapy program that incidentally engages psychological and/or cognitive issues ought not to be characterized as a s. 88(1) benefit in circumstances where the language of the provision does not dictate this result. Further, it is undesirable for courts to embark upon the impossible task of deciding which discrete components of a holistic pain program constitute s. 88(1) benefits because they are purely given to physical therapy, and which components fall outside the scope of s. 88(1) because they engage psychological issues that stand as barriers to the successful implementation of an active rehabilitation program. Such an approach is not only artificial, it is one that would breed uncertainty and spawn further litigation in an area already beset by what the Court of Appeal in Raguin charitably described as "jurisprudential inconsistencies".
- [46] As is evident from the foregoing, I favour the result reached on this point in Klonarakis. In the result, I am of the view that a pain clinic focused on "necessary physical therapy" is a mandatory benefit; one that shall be paid by ICBC even in circumstances where it is anticipated that psychological issues may arise in the implementation of the program.
- [47] As noted in *Ayles v. Talastasi*, 2000 BCCA 87 at para. 32:

As a claim covered by s. 88(1) I.C.B.C. is obliged to pay the benefits. It is not a matter of discretion under s. 88(2) where entitlement depends "on the opinion of the corporation's medical adviser". The risk in deducting too much from the tort award for discretionary benefits is that I.C.B.C. may ultimately refuse to pay on items which although found to be compensable in the tort claim were

deducted on the assumption that they would be paid as a no fault benefit. In that instance the claimant is out of pocket for the expense and I.C.B.C. enjoys a windfall. But here the class of future expense is obligatory, not discretionary, and so the plaintiff does not stand to lose anything by the deduction. It is only in circumstances where the classification of the future cost is unclear or an issue arises whether the item is covered by Part 7 at all, that some caution is required.

- [48] As I am satisfied in this case that the pain clinic is a mandatory benefit and that ICBC is obliged to reimburse the plaintiff for all reasonable expenses associated with her attendance at the clinic, there is no uncertainty as to whether this benefit will be paid.
- [49] Even if I am wrong in this, and a pain clinic of the sort Back in Motion proposes is properly characterized as a discretionary benefit under s. 88 (2), the issue is academic in this case since ICBC has agreed to pay the full amount of the expenditures that can reasonably be expected to arise. As I understand ICBC's position on this point, the corporation will not disqualify from payment any portion of the plaintiff's participation in a pain clinic program up to a maximum of \$8,500. The assurance given by ICBC has no temporal limitations. ICBC has, through its authorized representative, Ms. Muzzin, provided its guarantee of payment to this extent. As I have found there is no risk of non-payment for any expense that might reasonably arise in connection with the plaintiff's attendance at a pain clinic, I deduct the fixed amount of the pain clinic (\$8,500) from the tort award in accordance with s. 83 of the Act.
- [21] I have quoted Park at length because in my view, Fitch J. answered the plaintiff's submission about the pain clinic assessment. Relying on Park and taking into account the evidence presented at trial, including Ms. Szarkiewicz's testimony and report, there is support for finding that the pain management clinic constitutes a mandatory benefit and ICBC is obliged to reimburse the plaintiff for all reasonable expenses associated with his attendance. However, similar to Fitch J.'s approach, if I am wrong in this determination, Ms. Montgomery has provided an assurance regarding payment of this item in the future. I will address this below.

IV. ANALYSIS

- [22] In the tort action, the plaintiff sought an award that would best restore him to pre-accident functioning and sought a substantial award. I granted that award based on the evidence presented and based on my findings regarding Ms. Safdari's prognosis for improvement assuming participation in the various modalities recommended. Mr. Safdari tendered a lengthy and comprehensive cost of future care report from Ms. Szarkiewicz. In addition, Ms. Szarkiewicz testified at trial about the items recommended and the basis for the recommendations. Based on the evidence tendered at trial, I was satisfied that Ms. Szarkiewicz's recommendations for future care were based on the assessment of what was required to assist Mr. Safdari's recovery and to restore him as closely as possible to his pre-accident functioning. It was in that context that I examined Dr. Flaschner's recommendation for the pain clinic.

- [23] I turn then to the items at issue on this application. Since parts of the future care cost award could be characterized as discretionary benefits, I have carefully considered Ms. Montgomery's affidavit. In particular, I am satisfied that the evidence is not equivocal on this point.
- [24] I am satisfied, based on the evidence presented at trial and the submissions made on this application that the defendants have established that the pain management clinic and gym membership are properly deducted. Though I appreciate the plaintiff's concern about ICBC's pre-judgment response to his claims, I am bound by the jurisprudence: *Ayles v. Talastasin*, 2000 BCCA 87 at para. 32. Moreover, the plaintiff's submission is answered in this case by ICBC's commitment to pay for these items and services. No exercise of discretion is thus in play.
- [25] I have considered Mr. Safdari's evidence about historical issues relating to nonpayment of his out-of-pocket expenses such as the massage therapy and chiropractic treatments. However, as I consider the authorities, I am not satisfied that ICBC has failed to meet its onus and burden. In my view, ICBC's decision regarding pre-judgment treatment of expenses must be viewed in that context. That is, decisions were made without the benefit of the court's determination about causation, prognosis and the findings of fact relevant thereto.
- [26] In short, 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 Act. If it is not an eligible expense, it is not deducted from the tort judgment. If it is an eligible expense 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, in the words of Thompson J. in *Quigley*, the deduction issue becomes more complicated.
- [27] This complication does not arise in this case, because I find that ICBC is obligated to pay for the pain management clinic and gym membership. ICBC has undertaken to pay for the pain management clinic, ongoing active rehabilitation treatment, some medication, counseling and gym membership fees as recommended in the cost of future care report. In making its decision whether to pay for the cost of some of these items, ICBC would ordinarily exercise its discretion under s. 88(2) of the Regulation. However, the undertaking to pay removes its discretion and obligates ICBC to pay for these items.
- [28] In the circumstances of this case and based on the evidence and undertaking tendered, the defendants have met their burden. I am satisfied that s. 83 of the Insurance (Vehicle) Act mandates the deduction of the active rehabilitation expenses, medication, counseling, the pain clinic and gym membership. I am satisfied that the amount of the deduction should be \$25,600. The cost of the award will be reduced accordingly.

[29] The defendants are entitled to their costs of this application.

"Winteringham J."

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