

CANADA / JUDGMENT

Sekhon v. McCullagh

2024 BCSC 595

COURT

Supreme Court of British Columbia

DECIDED

14 March 2024

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2024 BCSC 595 Sekhon v. McCullagh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sekhon v. McCullagh,

2024 BCSC 595

Date: 20240314

Docket: M169287

Registry: Vancouver

Between:

Jasbir Kaur Sekhon

Plaintiff

And:

David McCullagh, City of Vancouver and

Harman Tiwana

Defendants

Before: Associate Judge Nielsen

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

J. Malik

Counsel for the Defendants, David McCullagh and City of Vancouver:

K. Burns

Place and Date of Hearing:

New Westminster, B.C.

March 14, 2024

Place and Date of Judgment:

New Westminster, B.C.

March 14, 2024

- [1] THE COURT: This is an application for an order under s. 5(6) of the Disbursements and Expert Evidence Regulation that two reports be excluded, those reports being a functional capacity evaluation and cost of future care report, and an economist report.
- [2] By way of background, the plaintiff was involved in two motor vehicle accidents. The first occurred on December 2, 2014; and the second occurred on July 26, 2016. The trial of the action is currently scheduled for August 26, 2024, for nine days. The trial is to be a jury trial. The 84-day report deadline is May 31, 2024, and the plaintiff currently has a medical examination scheduled by an occupational therapist. It is to take place on March 26, 2024.
- [3] The plaintiff alleges in her notice of civil claim that she suffered a number of injuries, including headaches, injuries to her neck, back, shoulders, chest, legs, hands, feet, emotional distress, dizziness, nausea, sleep disturbance, driving phobia, anxiety and shock. The plaintiff is alleging that the consequences of the motor vehicle accidents have caused her non-pecuniary loss, past and future wage loss, a loss of future earning capacity, a loss of housekeeping capacity, and ongoing costs of future care.
- [4] It is the plaintiff's position that the occupational therapist IME goes directly to the losses pled, and in particular her functionality, cost of future care, and her ability to carry out the activities of daily living. The plaintiff submits that in the absence of such evidence, the court will be unable to assess these losses.
- [5] In *Le v. British Columbia (Attorney General)*, 2022 BCSC 1146, addressing the issue of functional capacity and losses, the court stated at para. 24:
- [24] In a typical case, proof of that head of damages alone requires the evidence of two experts -- a functional capacity evaluator to prove limitations on the plaintiff's ability to work and an economist to permit some assessment of what the plaintiff's future earnings might have been in the absence of the injury and the present value of what they are now able to earn. That is in addition to whatever medical evidence is necessary to prove the underlying injuries and their severity. Depending on the combination of injuries involved, that may require evidence of specialists in more than one area of medicine.

- [6] The plaintiff submits that the economist report will allow the court, in this case the jury, to draw conclusions about past wage loss, and to quantify the loss of future earning capacity and the cost of future care as advised by the occupational therapist.
- [7] In order to have the requested disbursements be excluded for the purposes of s. 5 of the regulation, s. 5(9) provides that the party must address the following:
- a) the nature and evidentiary value of each disbursement that is the subject of the application, and;
 - b) evidence of the prejudice the party would suffer were the disbursements that are subject of the application are 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 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.
- [8] The difficulty in ascertaining the prejudice, the nature and evidentiary value of each of the disbursements, and the likelihood of exceeding the 6% cap was commented on by Justice Blok in *Dhillon v. Nair*, Docket No. M205377, Registry: New Westminster at paras. 17 through 19, where the court states:
- [17] Evidence of prejudice is difficult here, well, for a variety of reasons. As with many cases involving claims for loss of capacity involving psychological components to the claims, the amount of damages could be significant if they are borne out through medical reports, and they may be relatively modest if they are not borne out by the reports, and so we are in a bit of a Catch-22 situation of not knowing the magnitude of this claim until the reports are made, yet the regulation requires us to examine the magnitude of the claim without having that information.
- [18] It is possible that the claims will not be borne out, and that the amount of the award will be relatively modest, despite these reports being inquiries that would have been unquestionably prudent absent the regulation because the result was not known. It is a possible result that the claims will not be made out, and therefore she would be obliged to bear or likely bear the cost. A \$200,000 award, for example, would limit disbursements to \$12,000, which these two disbursements alone would comprise.

- [19] So I am satisfied that there is a reasonable risk that the total amount of the disbursements the party intends to incur to resolve the vehicle injury proceeding will exceed the disbursement limit. I am satisfied on the evidence that the disbursements that are the subject of the application are necessary to justly resolve the vehicle injury proceeding in light of its complexity and the importance of the issues in dispute.
- [9] The value that the reports would lend to the litigation will be a function of the reports themselves, and the weight, if any, placed upon them by the courts.
- [10] Turning to the issue of prejudice. First, whether there is a reasonable risk of that total amount of disbursements the plaintiff needs to incur to resolve the vehicle-injury proceeding will exceed the disbursement limit. Plaintiff's counsel has indicated that they see the range of damages anywhere between \$100,000 and \$1 million, and taking into context 6 percent of \$100,000, that would leave only \$6,000 towards disbursements before exceeding the cap`.
- [11] In *Le v. BC (AG)*, supra, the court references statistics provided by the Insurance Corporation of British Columbia. At para. 31, the court states:
- [31] The respondents have provided some broader statistical evidence on this point from Christopher Ryan, director of claims strategy and programs for ICBC. In 2019, ICBC resolved at total of almost 24,000 claims. The vast majority resulted in total awards or settlements of \$100,000 or less. In 72 percent of those cases, the plaintiff's disbursements were in an amount equal to or less than 6% of the award or settlement. The experience was similar at the other end of the spectrum. In cases where the award or judgment was more than \$1 million, a 6% cap would have been sufficient to cover all disbursements in 75 percent of cases. However, disbursements exceeded 6% of the award or settlement in approximately two thirds of the cases where plaintiffs received an amount between \$100,000 and \$1 million.
- [12] In other words, there is a 66 2/3 percent chance that in circumstances where the damages awarded are between \$100,000 and \$1 million, disbursements will exceed the 6 percent amount.
- [13] The plaintiff has indicated that, to date, there has been an offer made by the defendants to resolve the claim for an undisclosed amount under \$100,000. The defendants submit that without-prejudice communications ought not to be disclosed and cite *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, at paras. 12 through 13 where the court states:
- [12] Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a prima facie presumption of inadmissibility, exceptions will be found "when the justice of the case requires it" (*Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (H.L.), at p. 740).

[13] Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "'Without Prejudice' Communications -- Their Admissibility and Effect" (1974), 9 U.B.C. L. Rev. 85, at p. 88). The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in *Cutts v. Head*, [1984] 1 All E.R. 597, at p. 605:

. . . parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations . . . may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.

What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

[14] The defendants have provided further cases that echo this approach. I note, however, the case of *Domtar Inc. v. Univar Canada Ltd.*, 2012 BCSC 510, at para. 32, where the court found that the fact that an offer has been made is admissible in evidence, however the substance of the offer is not. The court states:

[32] In assessing this issue, I want to first note that the evidence of Mr. Krause does not disclose the substance of any settlement discussions. Rather, it simply discloses attempts made by various individuals within Univar to set down a mediation. There were no settlement discussions. As was stated in *Ruloff v. Rockshore Investments (1981) Ltd.*, 2004 BCSC 751 at para. 35, the protection of confidentiality does not extend to the fact that there have been without prejudice discussions; it extends to the substance of such discussions. There is nothing in this evidence that reveals anything that is subject to settlement privilege. Accordingly, it is not necessary to address Univar's submission that Mr. Krause's evidence is admissible as an exception to settlement privilege.

[15] In my view, the nature of the disclosure here does not breach the without-prejudice communication rule and falls within the exception outlined in *Domtar*, *supra*.

[16] Further, within a context with regulatory parameters, there is a need to try and quantify the claim within those parameters in order to meet the test of an excluded disbursement. The defendants strenuously submit that the plaintiffs have failed to do so. In this regard, I respectfully disagree. We have plaintiff's counsel putting the claim within a range, albeit a very broad range, between \$100,000 and \$1 million. We have the defendant's offer to settle the claim for an unknown amount of less than \$100,000. We also have the subjective evidence of the plaintiff herself who talks about the impact she has experienced on her abilities at home with respect to housekeeping, cleaning, and the kind of pain that results in her shoulders following that kind of work.

- [17] The plaintiff has also given evidence concerning her declining ability to do her job since the two motor vehicle accidents. She provided evidence that prior to the accident, she was working approximately 15 to 20 hours a week. Whereas, subsequent to the accidents, she only works five hours a week.
- [18] I also note the fact that the plaintiff had shoulder surgery in 2019, and although we do not have all her clinical records, we do have clinical records up to 2020. The defendant objects to the admissibility of the clinical records on the basis that they are hearsay, and within a certain context, they are. However, in other contexts, they are not. For example, they plot her attendance at her family doctor and others, and can confirm her evidence in that regard. With respect to the contents of the records themselves, again, this is not a decision made at trial. In terms of the admissibility of those records, this is an interim application where hearsay evidence is often admitted, but cautiously relied upon.
- [19] We have evidence that the occupational therapist's IME will cost approximately \$3,000, and the economist's costs will run anywhere from \$2,000 to \$3,000. And, again, referring to Justice Blok's decision in Dhillon at paras. 17 through 19, I am satisfied here that there is a reasonable risk that the total amount of disbursements the parties intend to incur to resolve the vehicle-injury proceeding will exceed the disbursement limit. And, again, that does not have to be a certainty; there merely has to be a reasonable risk.
- [20] In terms of s. 5(9)(b)(ii), that the reports 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, I am satisfied that the OT IME would go directly to the losses that have been pled and will comment on the plaintiff's injuries, functionality, cost of future care, and her ability to carry out her activities of daily living. I am also satisfied that the economist's report will be necessary to draw conclusions concerning her past wage losses, quantifying the loss of her future earning capacity, and quantifying the cost of future care. This evidence is particularly of value given the fact that this will trial will proceed in front of a jury, not in front of a judge alone.
- [21] Turning to s. 5(9)(b)(iii), the final criteria being that the plaintiff would be unable, without undue hardship, to incur the disbursements that are subject of the application were those disbursements not excluded. In her affidavit sworn February 5, 2024, the claimant discusses her financial circumstances, and the defendants have also put together a helpful chart in their response, which canvasses the plaintiff's earnings.
- [22] The plaintiff lives with her husband and two children. Her husband is a truck driver, and he earns approximately \$4,000 a month. The plaintiff and her husband do own the house they reside in. Their fixed monthly expenses are approximately \$10,000 for groceries, mortgage, utilities, and insurance. They do also draw a rental income of \$6,000 a month. It is their evidence that on a monthly basis, they just break even each month.

- [23] The plaintiff's daughter is also in university studying to be an architect, and it is the plaintiff's evidence that they have been paying for her tuition on a line of credit. The most recent evidence of the plaintiff's income is in her 2021 income tax return. Her line 150 total income is \$23,474.
- [24] The plaintiff's income has varied over the years. However, it has consistently been on the lower side of the earning spectrum. From 2012 to 2021, her best years earnings was in 2015, when she earned \$31,835. Since 2017, her best years earnings were in 2021, when she earned \$20,895. Her earnings may have been negatively influenced by COVID restrictions, given the fact that she is a driving instructor.
- [25] In terms of the proposed reports increasing the complexity of the proceeding disproportionately to the cost, in my view they will not. Given the fact that we have a jury trial, and the plaintiff is self-employed, it is my view that the occupational therapist's opinion, and that of the economist, will be helpful to the proceeding and may, in fact, reduce the time necessary for trial.
- [26] I find that the functional capacity evaluation and cost of future care report, and the economist report, are excluded for the purposes of s. 5(6) of the Disbursements and Expert Evidence Regulation, and given my findings, I am also prepared to find the disbursements incurred by the plaintiff for the purpose of the present application are also excluded.

(SUBMISSIONS ON COSTS)

[27] THE COURT: The plaintiff will have their costs of the application in the cause.

"Associate Judge Nielsen"

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