

CANADA / JUDGMENT

Serginson v. Cook

2022 BCSC 1125

COURT

Supreme Court of British Columbia

DECIDED

5 July 2022

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2022 BCSC 1125 Serginson v. Cook

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Serginson v. Cook,

2022 BCSC 1125

Date: 20220705

Docket: M191593

Registry: New Westminster

Between:

Sheila Louise Serginson

Plaintiff

And

Micayla Cook, Jodie Cook and Devon Ingham

Defendants

And

Insurance Corporation of British Columbia, Dian Murrell,

Micayla Cook, Jodie Cook and Devon Ingham

Third Parties

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

S. Brooks

Counsel for the Defendant, Devon Ingham:

M. Wright

Place and Date of Hearing:

New Westminster, B.C.

February 17, 2022

Place and Date of Judgment:

New Westminster, B.C.

July 5, 2022

- [1] The plaintiff, Sheila Serginson, has settled a claim in this action for damages in negligence arising out of two motor vehicle accidents. She now seeks an order that she and her counsel, BTM Lawyers LLP ("BTM"), be permitted to release and make use of all settlement funds currently held in trust by BTM.
- [2] The defendant, Devon Ingham, opposes payment out of trust to, or on behalf of, the plaintiff. Under the terms of the settlement, the plaintiff agreed to re-allocate any portion of her settlement funds from the second accident which may be required to satisfy the claims of the plaintiff's two children, those claims both arising from the second accident.
- [3] Although the plaintiff's claims have been settled, the amounts required to resolve the claims of the children are unknown and as of the date of the hearing, the amount to be claimed on behalf of the children remains unknown.

FACTUAL SUMMARY

- [4] Ms. Serginson suffered injuries in two motor vehicle accidents, the first having occurred on July 18, 2015 (the "First Accident") and the latter on June 4, 2016 (the "Second Accident").
- [5] In the First Accident, Ms. Serginson was "rear-ended" while stopped at an intersection by a vehicle owned and operated by the defendant Dian Murrell, which in turn had been "rear-ended" by a vehicle owned and operated by Ahmed Aljuboori.

- [6] In the Second Action, Ms. Serginson was driving at mid-day on Lougheed Highway in Maple Ridge, B.C., when her vehicle was struck head-on by a vehicle owned and operated by the defendant, Devon Ingham, after Mr. Ingham's vehicle crossed the center line. Ms. Serginson's two children ("the children") were in the back seat of her vehicle and were also injured in the Second Accident.
- [7] On examination for discovery, Mr. Ingham admitted to using cocaine and drinking alcohol during the evening before the Second Accident. A report of the RCMP investigation into the Second Accident indicated Mr. Ingham advised authorities he had also consumed cocaine on the morning of the Second Accident.
- [8] The injuries suffered by Ms. Serginson in the Second Accident were much more severe and disabling than her injuries suffered in the First Accident. Her injuries were described in detail in the notice of application and I need not repeat the same since she has settled her claim for damages in both actions.
- [9] On April 30, 2019, counsel for Mr. Ingham delivered notices to proceed pursuant to s. 20 of the Limitation Act, S.B.C. 2012, c. 13 with respect to the claims of the children arising from the Second Accident. An action was then commenced by Leon Serginson, as Litigation Guardian, against Mr. Ingham on behalf of the children on April 19, 2021.
- [10] The Insurance Corporation of British Columbia ("ICBC") was served with the notices of civil claim issued on behalf of the children in November 2021. ICBC refused to accept service on behalf of Mr. Ingham, which resulted in personal service on Mr. Ingham on December 19, 2021. Mr. Ingham filed a response to civil claim to the actions commenced on behalf of the children in January 2022.
- [11] I now refer to facts relating to the settlement agreement reached by Ms. Serginson as described in the notice of application:
15. Ms. Serginson's claims in this proceeding were settled following a mediation on October 19, 2021 and the parties entered into a written settlement agreement (the "Settlement Agreement").
16. The plaintiff's claim against Murrell and Aljuboori in relation to the First Accident was settled for \$137,362.94, which was the remaining insurance coverage available under Mr. Aljuboori's third party liability insurance policy. with ICBC.
17. The plaintiff's claim against Mr. Ingham in relation to the Second Accident was settled for \$571,479.06 (the "Settlement Funds") plus costs and disbursements. After taking into account the settlement, there is \$1,406,941.30 of coverage remaining under Mr. Ingham's third-party liability insurance policy with ICBC. The children have the only remaining claims for personal injuries arising from the Second Accident.

18. The Settlement Agreement provides that BTM Lawyers LLP is required to hold the Settlement Funds in trust until Ms. Serginson obtains approval of the Court, on notice to the children's Litigation Guardian and the Public Guardian and Trustee.
19. The Settlement Agreement also provides that if the children's claims for damages arising from the Second Accident exceed the remaining insurance coverage under Mr. Ingham's ICBC policy, Ms. Serginson will re-allocate any portion of her settlement from the Second Accident that may be necessary to satisfy the children's claims for damages.
- [12] As stated in Exhibit "A" to the affidavit of Rachael Maxwell made February 14, 2022, the insurance coverage available to Ms. Serginson consists of the basic \$1,000,000 statutory liability coverage to all B.C. motorists and an excess underinsured protection policy, also of \$1,000,000.
- [13] In her first affidavit made January 20, 2022, Ms. Serginson deposed, commencing at para. 9, regarding her financial situation since the accidents. That affidavit reveals that Ms. Serginson has not worked since the First Accident and has been receiving Long Term Disability payments of approximately \$2,200 per month. Ms. Serginson was previously employed as a part-time radiation technologist for Vancouver Coastal Health.
- [14] For the sake of Ms. Serginson's privacy, I will not in these reasons detail her financial situation as set out in her affidavit. After deposing as to her husband's income, the circumstances with their two children (who are now 12 and nine years old) attending school, as well as the assets and liabilities of the family, Ms. Serginson stated at para. 18:

Being off work since the First Accident has created financial pressure for me and my family. I would like to receive the Settlement Funds as soon as possible to help alleviate the financial burden my injuries and disability have put on me and my family. I would also like to invest the money for the benefit of myself and my entire family.

- [15] The defendant submits: there is insufficient evidence Ms. Serginson and her family are experiencing significant financial difficulties; Ms. Serginson now receives disability payments which approximate her income from her former part-time work; Mr. Serginson is employed in a well-paying job; they own their home with substantial equity and a relatively small mortgage debt; they have no other personal or credit card debt; and they are able to send the two children to private school.
- [16] The defendant's submissions on the Serginsons' financial status were not convincingly disputed, and I agree that there is insufficient evidence regarding any financial difficulties they are experiencing. As a result, I do not find the Serginson family to be experiencing a significant amount of financial pressure, although their situation would certainly be better once the Settlement Funds are paid out to Ms. Serginson.

- [17] The notices of civil claim filed on behalf of the children allege multiple significant injuries which have been identified in a medical report delivered to the defendant's counsel. Liability has been admitted. In the Application Response, the defendant submits, at para. 28:
28. Based on the records that are currently available, counsel for the defendant Ingham is unable to estimate the quantum of the Children's claims. The records that are currently available suggest that any neuropsychological injuries, if any, will need to be assessed at a later date.
- [18] As stated previously in this decision, as of the date of the hearing, the quantum of the claims for the children is unknown, specifically whether or not the amount of those claims may exceed the \$1,406,941.30 of coverage remaining under Mr. Ingham's third-party liability insurance policy with ICBC.
- [19] I refer again to para. 18 of the Settlement Agreement which requires BTM to retain the Settlement Funds in trust "until Ms. Serginson obtains approval of the Court, on notice to the children's Litigation Guardian".
- [20] Counsel for the Public Guardian and Trustee ("PGT") did not appear at the hearing but did submit a letter dated February 16, 2022, which I have attached as Appendix "A" to these reasons. I refer to portions of that letter commencing on the first page which describe the situation in the application before me:

The Public Guardian and Trustee has very limited information concerning the Minors' injuries and potential damages and has not attempted to quantify those damages, or assess whether the Minors' claims will exceed the available third party liability insurance coverage.

It is understood that the Insurance Corporation of British Columbia ("ICBC"), where there are multiple claimants and limited third party liability coverage, is obligated by statute to pay out the insurance proceeds on a pro rata basis, in proportion to the size of each claimant's claim. If it pays a claimant in excess of that claimant's pro rata share of the available insurance, ICBC remains obligated to pay the other claimant their pro rata share, unless those claimants have consented to the payment and released ICBC from any liability.

As the competing claimants here are minors, they are unable to consent to the payment of insurance proceeds to the applicant or to release ICBC from its obligations to them. The Public Guardian and Trustee does not have the capacity to provide a consent or release on the Minors' behalf, and indeed, she has not been asked to do so.

As such, any payment of limited insurance proceeds to the applicant cannot impact ICBC's obligations to the Minors to pay them their proportionate share of the available coverage. The risk of overpayment is ICBC's and/or the defendant's.

- [21] The PGT concluded she would take no position on the application and that the proposed order does not materially impact the minors' interests. Clearly and as stated in the quote above, the risk of overpayment belongs to ICBC and/or the defendant. ICBC is not prepared to take that risk unless security is provided by Ms. Serginson for the amount of any payment now to her from the Settlement Funds.

POSITION OF THE PLAINTIFF, MS. SERGINSON

- [22] Ms. Serginson submits that it was never a term of the settlement that the plaintiff would hold the funds in trust until the claims of the children are resolved or quantified, and the sole obligation of Ms. Serginson is to obtain approval of the court on notice to the children and to the Public Trustee and Guardian. Mr. Serginson has provided such notice.
- [23] Ms. Serginson referred me to *Bizovie v. Cornish*, 2004 BCSC 553, specifically paras. 34-35, as authority for me to grant the order sought:
- [34] I conclude that reliance upon this section is unnecessary to create the trust. The *parens patriae* jurisdiction of the court remains largely ungoverned by legislation. The court retains the jurisdiction - indeed, it has the duty - to dispose of the infant's funds in the best interests of the child. The settling of a trust out of such funds falls within the court's power to do so.
- [35] I find that the *parens patriae* jurisdiction of the court to act in the best interests of infants is not ousted by a permissive statutory scheme permitting infants' funds to be administered by the Public Guardian and Trustee. I am satisfied that in the circumstances pertaining here, where the estate of the infant plaintiff is to be administered by the guardians as co-trustees with a professional trust, subject to all of the statutory requirements and regulations concerning such trust funds, that avoiding the loss of approximately \$36,000 brings the order sought within the "best interests of the infant" principle.
- [24] Ms. Serginson also referred me to the decision of *Insurance Corporation of British Columbia v. Hamo*, 2008 BCSC 1700, the circumstances of which bear some resemblance to the issues before me now. In *ICBC v. Hamo*, there were two separate actions for damages incurred in a motor vehicle accident and a liability limit to ICBC of \$1,000,000. Mr. Hamo's claim had gone to trial before a jury and he obtained a judgment in an amount of \$705,891.70 plus pre-judgment interest and costs.
- [25] The application before the court in *ICBC v. Hamo* was for payment by ICBC of \$111,271.79 under a Certificate of Costs obtained by Mr. Hamo. The insured defendant in both actions was Mr. Khan.
- [26] The second plaintiff was Ms. Hamo, whose action had not proceeded to trial. At paras. 19-20, Justice Burnyeat stated:

- [19] ICBC does not wish to be in a position to seek to recover the difference from Mr. Hamo in order that it can satisfy its obligations to Mr. Khan by having part of its obligations to be paid to Ms. Hamo. ICBC wishes to have part of the \$111,271.91 available to satisfy its obligations to pay a portion of the assessable costs available to Ms. Hamo on the assumption that the total special and general damages available to Mr. and Ms. Hamo are in excess of \$1,000,000 where an offer pursuant to Rule 37B has been made for the full \$1,000,000.
- [20] I am satisfied that it would not be fair for Mr. Hamo to have to wait to see whether ICBC makes an offer to bring the total amount of the offers up to \$1,000,000 and to then await the outcome of a trial that has not been set for hearing and which may take as long as five weeks to be heard before he can receive from ICBC some or all of the \$111,271.79 found to be owing under his Certificate of Costs. I am also satisfied that it would not be fair to allow Mr. Hamo to commence proceedings against Mr. Khan to recover all of the \$111,271.79 when at least some of that sum will be payable by ICBC on behalf of Mr. Khan.
- [27] Justice Burnyeat then granted the sum of \$111,271.79 plus accrued interest be paid out of court for Mr. Hamo on conditions. The conditions included that Mr. Hamo pay to Ms. Hamo specific amounts, and that Mr. Hamo assign to Ms. Hamo the proceeds of his settlement or arbitration funds pursuant to his entitlement to Uninsured Motorist Protection Coverage as security for payment.

POSITION OF ICBC

- [28] ICBC opposes payment out of trust of the Settlement Funds until the claims of the children have been resolved or litigated. Alternatively, ICBC proposes the plaintiff and her counsel be permitted to release and make use of \$100,000 of the Settlement Funds currently held in trust, provided the plaintiff provides in advance good security approved by this Court for the return of whatever portion of the said \$100,000 as may be required to satisfy the infant claims.
- [29] I have been referred to the decision of *Gill v. West*, 2011 BCSC 1423 at para. 18:
- [18] The question is always whether the circumstances of the primary order, in conjunction with which the advance payment order is sought, are sufficiently compelling to justify an advance payment of damages. The authorities make clear that a payment of damages in advance of trial is only to be made in exceptional circumstances arising from the making of the primary order. For example, where the defendant applies for an adjournment of a personal injury trial and the plaintiff's circumstances are financially tenuous, it may be just in the circumstances to order an advance payment of damages in conjunction with the order for an adjournment. However, such an advance payment order will not be made unless the judge is completely satisfied there is no possibility the assessment of damages at trial will be less than the amount of the advance payment: *Serban v. Casselman*. Further, the court will exercise its discretion to order an advance payment only where liability is not an issue: *Andruschak v. Helina* (1993), 89 B.C.L.R. (2d) 320 (S.C.); *Wilkinson v. Martin*, 2010 BCSC 113.

- [30] I agree with the findings in Gill, however, in the case before me it is not a question of making a payment of damages in advance of a trial. The parties have agreed that a fair settlement in Ms. Serginson's case is the amount of the Settlement Funds now in trust with BTM.

ANALYSIS AND CONCLUSION

- [31] Firstly, and most importantly, as stated in Bizovie at para. 34, "The parens patriae jurisdiction of the court remains largely ungoverned by legislation. The court retains the jurisdiction - indeed it has the duty - to dispose of the infant's funds in the best interests of the child."
- [32] Secondly, although it would appear unfair to Ms. Serginson that the compensation to which she is entitled cannot be paid to her, unlike the facts in ICBC v. Hamo, the case before me is not awaiting an offer from ICBC to the children. Rather, being required to wait months for a trial or settlement, the claims for the children have not yet been advanced and there is a reasonable possibility that the claims could easily exceed the remaining liability coverage. This is not a case of the insurer delaying the resolution of the claims of the children.
- [33] In exercising my discretion, I do not find significant hardship on the part of Ms. Serginson or her family should payment out of trust be delayed. The children are growing in a loving household able to provide for their needs and benefits which include attendance at a private school for the children. No doubt, payment out of trust to Ms. Serginson could ease the family's finances, but their standard of living is not being impacted.
- [34] If payment out of trust of the full amount of Settlement Funds is made, depending on the amount of the claims of the children, any eventual judgment or settlement approved by the Court could result in payment by the defendant and ICBC up to the policy limits only, leaving the children to pursue any shortfall, which, based on the circumstances of Mr. Khan, would appear to be fruitless.
- [35] Payment out of trust of the Settlement Funds could prejudice ICBC and the defendant, should the claims of the children ultimately exceed the remaining insurance coverage.
- [36] I conclude, after consideration of all factors, that a proposal as submitted by ICBC, i.e. an advance of the Settlement Funds upon providing adequate security as determined by the court, will be fair not only to the children but also to Ms. Serginson and ICBC. The security could be in the form of a second mortgage of the family property (in which there is substantial equity), with the mortgage securing the principal amount of the advance, or any other form of security approved by the Court. Regardless of form, the security should be interest free and payable on settlement or payment of all claims in favour of the children. As well, I see no reason, if adequate security is provided, for there to be an advance in an amount greater or less than the proposed \$100,000, but leave a decision on the amount of the advance to the parties.

COSTS

[37] I make no order as to costs.

"Jenkins J."

Appendix A

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