

---

CANADA / JUDGMENT

## Sharp v. Song

2022 BCSC 1752

---

COURT

Supreme Court of British Columbia

DECIDED

7 October 2022

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

---

2022 BCSC 1752 Sharp v. Song

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sharp v. Song,

2022 BCSC 1752

Date: 20221007

Docket: M172332

Registry: Vancouver

Between:

Russell Livingstone Sharp

Plaintiff

And

Mi Sun Song

Defendant

Before: The Honourable Mr. Justice Dley

Reasons for Judgment

Counsel for the Plaintiff:

J.A. Pankiw-Petty

M. Pankiw-Petty

Counsel for the Defendant:

J.P. Cahan

B. Devlin

Place and Date of Hearing:

Vancouver, B.C.

August 30, 2022

Place and Date of Judgment:

Vancouver, B.C.

October 7, 2022

## I. Introduction

[1] Mr. Sharp was injured in two motor vehicle collisions and awarded damages totalling \$1,708,266: *Sharp v. Song*, 2021 BCSC 1422 [Trial Judgment]. Pursuant to s. 83 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231 [Act], the defendants apply to have \$423,675.41 deducted from the award.

[2] For the reasons that follow:

- a) \$298,575.92 shall be deducted from the award;
- b) \$25,000 are awarded for management fees; and
- c) \$15,000 are awarded for tax gross-up.

## II. Background Facts

[3] Mr. Sharp's injuries included the following:

- a) mild traumatic brain injury;
- b) soft tissue injuries to the knee, neck, back, ribs and shoulder;
- c) tinnitus;
- d) post-traumatic stress disorder;
- e) depression; and
- f) anxiety.

[4] Mr. Sharp has permanent disabilities as a result of his injuries and his award included the following heads of damages:

- a) past wage loss - \$400,000;
- b) loss of earning capacity - \$920,000; and

- c) cost of future care - \$178,266.
- [5] The Insurance Corporation of British Columbia ("ICBC") has undertaken to pay all of Mr. Sharp's awards for rehabilitation up to the limits prescribed by the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 [Regulations]. ICBC accepts that all of the awards are reasonable and necessary.
- [6] ICBC has also undertaken to pay temporary total disability benefits up to Mr. Sharp's 65th birthday. ICBC has waived the requirement for medical certification and agrees to pay even though Mr. Sharp may return to some type of employment.
- [7] ICBC seeks to have the amounts it has undertaken to pay deducted from the damages award.
- [8] Mr. Sharp says that the deductions should be limited to what he has actually received for temporary total disability and rehabilitation expenses. He says that his condition will further deteriorate if he is required to deal with ICBC in any fashion, including contact for disability payments and submitting receipts for expenses incurred.
- [9] Mr. Sharp argues that the waivers and undertakings provided by ICBC are not adequate or exceed what ICBC is mandated to pay by statute.
- [10] Mr. Forster is a claims review officer with ICBC and provided an affidavit indicating ICBC's acceptance of the award and confirmation of waivers and undertakings to pay. Mr. Forster was cross-examined on his affidavit.
- [11] Mr. Forster confirmed that ICBC would not require Mr. Sharp to provide information about his employment, but ICBC would not pay benefits if Mr. Sharp was able to work full time. If he found employment, Mr. Sharp would be required to advise ICBC as part of an insured's obligation to act in good faith.
- [12] Mr. Forster confirmed that some of the costs awarded for future care were discretionary benefits under the Regulations. He stated that ICBC could not waive the requirements for preapproval as it related to discretionary benefits.

### III. The Law

- [13] Section 83 of the Act has been described as a safeguard against a plaintiff receiving double recovery: *Norris v. Burgess*, 2016 BCSC 1452 at para. 17.
- [14] Subsections 83(4) and (5) of the Act highlight the considerations for the court after judgment:
- (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.
- [15] The disability, medical and rehabilitative benefits to which Mr. Sharp is entitled to are set out in Part 7 of the Regulations.
- [16] The principles and factors relevant to a s. 83 determination were neatly summarized in *Blackburn v. Lattimore*, 2022 BCSC 719 at para. 17 [Blackburn]:
- [17] In *Tench v. Bugnum*, 2021 BCSC 501 at para. 38, the Court summarized the legal principles discussed in *Aarts and Luck v. Shack*, 2020 BCSC 1074, that arise from the legislative framework surrounding s. 83 of the Act and from jurisprudence addressing post-trial representations and waiver evidence:
- a) The defendant bears the burden of proving that the plaintiff is entitled to the Part 7 benefits which they seek to deduct.
  - b) Entitlement refers to conditions precedent to receiving benefits not the discretionary granting of benefits by ICBC once entitlement is established.
  - c) Strict compliance with the statute is required in determining what deductions, if any, should be made.
  - d) Despite the principle of strict compliance, a precise matching between the heads of damage in the tort award and the categories under the benefit recovery scheme is not required.
  - e) When statutory entitlement is established based on the award and the legislation, the question becomes: are the Part 7 benefits mandatory or discretionary?
  - f) If the benefits are mandatory, the court must deduct. No further evidence is required.
  - g) If the benefits are discretionary, meaning, 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, or alternatively deduct a nominal amount to reflect the uncertainty that the plaintiff will receive the benefit(s).
  - h) An exception arises where ICBC, through affidavit evidence, undertakes or promises to pay discretionary benefits going forward.
  - i) The court must be satisfied by the affidavit evidence that the undertaking or promise is sufficient to overcome the uncertainty that benefits will be paid. If satisfied, the court should deduct the benefits from the damages award.

- j) However, the court must be cautious when assessing the amount to deduct from a cost of care award. Examples of uncertainties to be considered include: how long the plaintiff will need the service and the possibility of legislative changes that may take away or alter a plaintiff's eligibility for Part 7 benefits.
- k) Further, ICBC cannot undertake to do more than it is empowered to do under the legislative scheme, including broadening entitlement or paying more than the prescribed fee limits.
- [17] The court is to follow a two-step approach in determining whether a deduction is proper. First the court must decide what benefits the plaintiff has received or is entitled to, and second to estimate the amount of the deduction: Blackburn at para. 18.

#### IV. Deductions

##### A. Total Disability Benefits

- [18] At trial, Mr. Sharp argued that he was totally disabled and would remain so for the balance of his working life whereas the defence argued that he was not totally disabled. My conclusion was as stated in the Trial Judgment at para. 122:
- [122] It is reasonable to expect that Mr. Sharp will be able to secure some type of employment in the future as long as he receives and takes advantage of the assistance that will be provided for. He will not be able to enjoy his pre-collision array of job opportunities and will not be able to participate in a competitive job market. However, there is real optimism (as expressed by Dr. Ganesan that his condition has improved and will continue to some extent) that he will be able to generate some income.
- [19] Mr. Sharp argues that there should no deduction because any ongoing contact with ICBC will further traumatize him. His psychologist, Dr. Young says that ongoing contact will make "it less likely that he will ever be able to recover from his psychological injuries".
- [20] Mr. Sharp has been compensated for pain and suffering and loss of amenities of life. The award compensated him fully for past, present and future general damages. The award covered ongoing deficits. To now give Mr. Sharp the benefit of non-deduction would be tantamount to double recovery; that is not permitted.
- [21] Mr. Sharp has the assistance of his spouse who is quite capable of communicating with ICBC regarding any issues that might arise. The parties are encouraged to set up a direct deposit scheme so that the payments that are unconditionally represented by Mr. Forster can be made regularly and on time.
- [22] Mr. Sharp also argues that there is no certainty that the payments will be made based on the lack of payments in the past and the tardy nature of some of the monthly payments.

- [23] It is difficult to understand why monthly payments should be routinely late as Mr. Sharp has experienced. A corporation with the resources of ICBC should not be guilty of the pattern of late payments as is the case with Mr. Sharp.
- [24] Past conduct can be a reliable predictor of future behaviour. To ignore past conduct would be to ignore relevant evidence; that would not be in the best interests of justice. ICBC's prior conduct is a relevant factor to consider: *Boota v. Dhaliwal*, 2009 BCCA 586 at para. 85, see also *Luck v. Shack*, 2020 BCSC 1074 at para. 27.
- [25] Mr. Sharp also says that there is a bias in favour of denying his claim to benefits because the same adjuster who handled his tort claim will also administer his ongoing benefits. Mr. Sharp complains that the same adjuster who denied his prior claims cannot be relied upon to provide future benefits.
- [26] The reality is that when it comes to auto insurance in this province, ICBC will always wear a number of hats. ICBC conducts the defence even though the actual tortfeasor is the named defendant. ICBC also provides benefits to an insured plaintiff. The apparent conflict cannot be avoided.
- [27] Mr. Sharp also complains that ICBC has not been diligent in making disability payments in the past and that should create enough uncertainty that no deduction should be made.
- [28] I am mindful that ICBC has not always been timely in making the disability payments. No reason has been provided for the tardiness. Prior to trial, there may have been justification to refuse payment, but there was no reason to delay payments after judgment had been rendered, particularly where ICBC has accepted the Court's findings regarding loss of earning capacity.
- [29] An insured person should not have to worry if or when the next disability payment might be forthcoming. An institution, the size of ICBC, with the resources available to it, has an enormous advantage over someone like Mr. Sharp who does not have the motoring public's largess at his disposal. In some circumstances, the past history would be relevant and sway the decision as to whether future payments can be viewed with certainty.
- [30] The comfort to Mr. Sharp is that in these circumstances, ICBC has committed to conducting itself in a way that is expected to support the award he received at trial. Mr. Forster's affidavit and his evidence make that commitment.
- [31] It is based upon the irrevocable, unequivocal, and unconditional representations and commitments made by Mr. Forster that a deduction will be made from the future income loss award.
- [32] There is no suggestion that Mr. Sharp has returned to or made any progress in securing some type of employment since the trial. I conclude that he is at present, totally disabled and entitled to ongoing disability benefits. However, there is a reasonable possibility that he will return to some type of employment and, therefore, does not meet the threshold of

certainty for total disability to age 65. As a result, the deduction of disability benefits will be less than what would be the case for total disability. I am satisfied that a reasonable contingency by which to reduce the disability benefits should be based at 25%. The deduction is an estimate.

- [33] The defence says that the present value of future disability benefits should be based on the multiplier set out in Appendix E - Present Value Table of the CIVJI: Civil Jury Instructions, 2nd ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2020), which results in a value of \$193,760.64 to age 65. Mr. Sharp says that the proper approach is to consider the effects of future price inflation with the result that the present value is \$156,500.
- [34] I prefer the approach as urged by Mr. Sharp and as approved of in Blackburn at paras. 43-45. Using a discount rate without factoring future inflation will overstate the present value of future disability payments.
- [35] As a result, I conclude that the present value of the disability benefits from the trial until Mr. Sharp's 65th birthday is \$156,500. Mr. Sharp has received \$14,080.56 since the trial and that is subtracted leaving a present value of approximately \$142,419.
- [36] A 25% contingency would result in a reduction of \$35,604. Since this is an estimate, I have rounded off the net deduction from the award for future income loss to \$106,800.
- [37] ICBC had paid \$88,551.77 in disability payments prior to trial. That amount is to be deducted from the past income loss award.

## **B. Mandatory and Discretionary Benefits**

- [38] ICBC is mandated to pay certain medical and rehabilitative benefits; others are discretionary and require medical certification. Section 88(1) of the Regulations sets out the specifics of what is mandatory or discretionary.
1. Mandatory Benefits
- [39] Mr. Forster commits ICBC to paying all of the mandatory benefits. Mr. Sharp simply has to provide a receipt for the expenditure for reimbursement up to the limits prescribed by statute.
- [40] ICBC has waived the following for Mr. Sharp:
- a) the requirement to undergo treatment under s. 90 of the Regulations;
  - b) the need for continued certification under s. 98 of the Regulations; and
  - c) the requirement to submit to a medical examination under s. 99 of the Regulations.

- [41] ICBC has also waived the need for continued certification under s. 88(1.01) of the Regulations with respect to expenses incurred for massage therapy, psychological counselling, kinesiology, and marriage counselling.
- [42] On behalf of ICBC, Mr. Forster commits that ICBC will irrevocably, unequivocally, and unconditionally agree to pay, under Part 7, as incurred and submitted to ICBC for reimbursement, for the items up to the limits set out in the table in this paragraph up to the amounts allowed pursuant to s. 88(1.2) and Schedule 3.1 of the Regulations as applicable.
- [43] The mandatory benefits must be deducted from the damages award. I am further reassured in doing so by ICBC's commitment to pay these benefits.
- [44] ICBC has paid some mandatory benefits since trial. Rather than itemize each payment that has been made, the amount of the deductions will include any payments already made. If there are issues with respect to payments made, counsel are at liberty to apply for a correction.
- [45] ICBC seeks a deduction of the \$73,242 award for psychological counselling. This is a mandatory benefit that ICBC has committed to paying and accordingly, the sum of \$73,242 is to be deducted.
- [46] ICBC seeks a deduction of the \$12,846 award for occupational therapy. ICBC has committed to paying this amount and it is to be deducted.
- [47] ICBC has sought to deduct reduced sums from certain items because it is limited as to the amount it may reimburse for costs per session. In those instances, Mr. Sharp will still receive the entire amount of the award, partly paid by ICBC while the balance is paid under the judgment.
- [48] ICBC seeks to deduct \$1,524 from the \$2,565 award for marriage counselling. ICBC's number reflects its limited rate for each session. ICBC has committed to paying the limited amount and the sum of \$1,524 shall be deducted.
- [49] ICBC seeks to deduct \$3,060 from the \$4,700 award for massage therapy. The reduced amount is as a result of ICBC's lower payment per session. ICBC has made a commitment to pay and \$3,060 shall be deducted.
- [50] ICBC seeks to deduct the \$780 award for kinesiology. Mr. Sharp has not used this facility yet and seeks a reduction of \$19.50 because the high-end cost of the service will be slightly more than the maximum payable by ICBC. If Mr. Sharp accesses the service at anything less than the highest fee, he will be reimbursed entirely. The position taken by ICBC is reasonable and the sum of \$780 will be deducted.

[51] ICBC seeks to deduct the \$10,000 award for medications. Mr. Sharp has extended health coverage which provides for 90% reimbursement of the prescribed medications. As a result, ICBC is a second payor and not liable to provide reimbursement: Regulations at s. 88(6); Rix v. Koch, 2021 BCSC 1526 at para. 26. ICBC is able to deduct the 10% of the medication cost that is not covered by Mr. Sharp's own insurance. As a result, the sum of \$1,000 is deducted from the medication award.

[52] Since the trial, ICBC has paid \$10,772.15 in medical benefits, including hearing aids as discussed below. That amount is to be deducted from the award.

## 2. Discretionary Benefits

[53] ICBC has the discretion to pay for benefits that its medical advisor opines are "likely to promote rehabilitation of an insured": s. 88(2) of the Regulations.

[54] Mr. Sharp was awarded \$21,571 for hearing aids. The purpose of the hearing aids was to assist with masking tinnitus. In these circumstances, the hearing aids were not for a rehabilitative purpose. ICBC cannot create facts contrary to the evidence so as to claim a deduction: Purewal v. Uriarte, 2021 BCSC 1935 at para 48. ICBC has paid \$6,800 for hearing aids and that amount is to be deducted (as included in the amount paid for medical expenses since trial).

[55] Mr. Forster accepts that transcranial magnetic stimulation, vocational rehabilitation with a vocational counsellor, addiction counselling, and static noise maskers are likely to promote Mr. Sharp's rehabilitation. Mr. Forster seeks to waive the need for an opinion of its medical advisor as required in s. 88(2) of the Regulations.

[56] Mr. Forster concedes that ICBC cannot waive the requirements of s. 88(3) of the Regulations. Therefore, the payment of the expenses incurred under s. 88(2) of the Regulations are not certain and, accordingly, there will be no deduction for those items.

## C. Summary of Deductions

[57] The following deductions, totaling \$298,575.92, are to be made from the award:

- a) disability benefits:
  - i. past income loss: \$88,551.77;
  - ii. future income loss: \$106,800;
- b) psychological counselling: \$73,242;
- c) occupational therapy: \$12,846;
- d) marriage counselling: \$1,524;
- e) massage therapy: \$3,060;

- f) kinesiology: \$780;
- g) medications: \$1,000; and
- h) medical benefits paid since trial (including hearing aid): \$10,772.15.

## V. Management Fees

- [58] Mr. Sharp seeks management fees in excess of \$300,000. He relies upon the Level 3 management fees outlined by his economist, Mr. Wickson wherein \$220,000 is allocated to management of the future earnings loss award and an additional \$85,000 related to the cost of care component.
- [59] I find that the fees sought are wildly excessive and not supported by the evidence.
- [60] The purpose of a management fee is to provide an injured person with investment management services required to obtain a return at least equal to the discount rate and as summarized in *Lines v. W & Defendant Logging Co. Ltd.*, 2009 BCCA 106 at paras.108-109:
- [108] A management fee is intended to compensate for the cost to the plaintiff of management and investment of the lump sum damage awards for future care and loss of future earnings. It is a sum that may be given to ensure those awards fully compensate the plaintiff as was intended by the court, without erosion by expenditures for professional management.
- [109] A party seeking to recover a management fee must provide evidence of the necessity for the service: *Mandzuk v. Insurance Corporation of British Columbia*, [1988] 2 S.C.R. 650, 53 D.L.R. (4th) 606. In *Bystedt v. Hay*, 2007 BCCA 84, 66 B.C.L.R. (4th) 16, this Court observed that in order to receive an award for the cost of management services the plaintiff must adduce evidence of the management services required to provide a rate of return equal to the discount rate.
- [61] I am not satisfied that Mr. Sharp needs so much assistance as to require the magnitude of management fees he seeks. Although it is clear that Mr. Sharp has disabilities and challenges, he is not a person who is incapable of managing his money. Mr. Sharp intends to return to some type of employment and has been provided with a number of resources that will optimize his rehabilitation to some degree. He has the assistance of his wife.
- [62] Mr. Sharp will never be the same person as he was before the collisions, but he is also not disabled to the extent that he requires the level of management fees outlined by Mr. Wickson.
- [63] The position articulated by defence counsel is reasonable and practical in these circumstances. Mr. Cahan states:

It is important to consider the magnitude of the plaintiff's excessive position on investment management fees. There is a duty on a plaintiff to be reasonable. An award must be moderate. There is no evidence to support the plaintiff's position that it will cost over \$300,000 to obtain a 2% return over the plaintiff's lifetime. It is unrealistic to propose that a person would ever spend \$300,000 on investment management fees on a capital sum of approximately \$1.1 M for the purposes of providing a 2% return.

[64] Most of the investment advice that Mr. Sharp needs can be accessed for free by bank officers. There may be some additional advice that will assist Mr. Sharp in placing the funds in a secure investment so that he is unable to unwisely or inadvertently deplete them. For that, there should be some compensation. I award the sum of \$25,000 for management fees.

## VI. Income Tax Gross-Up

[65] An award for income tax gross-up is to provide an amount with respect to the cost of care fund to ensure that there is no erosion through tax on the fund's earned investment income: *Townsend v. Kroppmanns*, 2004 SCC 10 at para. 6.

[66] Mr. Sharp originally sought a gross-up of \$65,000 based on Mr. Wickson's report. However, Mr. Wickson provided no data or explanation as to how he arrived at that amount. Mr. Sharp now says that the gross-up should be \$30,000.

[67] The defence counters by arguing that the proper amount is \$15,000 which is explained in evidence tendered by their expert.

[68] The appropriate approach when assessing tax gross-up is to use "the survival probability method": *Cikojevic v. Timm*, 2012 BCSC 1688; see also *Riding-Brown v. Jenkins*, 2015 BCSC 1751 at paras. 20-21.

[69] The tax gross-up is not intended to be a windfall for a plaintiff nor a penalty to the defendant. It is simply to ensure that the plaintiff's award is not reduced by tax obligations. The amount also accounts for any compromise in the plaintiff's ability to access the Guaranteed Income Supplement.

[70] I am satisfied that the amount proposed by the defence, using the survival probability method is the proper assessment of money to guard against tax erosion. The result is that \$15,000 is awarded for tax gross-up.

"S.D. Dley J."

DLEY J.

## 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/22/17/2022BCSC1752.htm>

**CASE PAGE**                <https://chat.esheria.ai/case-law/canada/sharp-v-song-2022>

Prepared on 26 October 2026 · Esheria