
CANADA / JUDGMENT

Siverston v. Griffin

2020 BCSC 528

COURT

Supreme Court of British Columbia

DECIDED

3 April 2020

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2020 BCSC 528 Siverston v. Griffin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Siverston v. Griffin,

2020 BCSC 528

Date: 20200403

Docket: M164842

Registry: Victoria

Between:

Cheryl Siverston

Plaintiff

And

Jonathon Griffin, 0555653 B.C. Ltd. formerly known as

Farmer Construction Ltd.

Defendants

Before: The Honourable Madam Justice Jackson

Reasons for Judgment

Counsel for the Plaintiff:

E. Kahs

Counsel for the Defendants:

S. Osobik

Place and Date of Hearing:

Victoria, B.C.

February 7, 2020

Place and Date of Judgment:

Victoria, B.C.

April 3, 2020

INTRODUCTION

[1] As set out in their verdict rendered on December 18, 2019, the jury in this case awarded the plaintiff the following damages:

a) Non-pecuniary damages:

\$300,000

b) Loss of opportunity:

\$75,000

c) Special damage:

\$38,000

d) Cost of future care:

\$60,000

Total:

\$473,000

[2] The jury found that the plaintiff was 30% contributorily negligent, which reduced the award to \$331,100 (the "Judgment Award"). The questions put to the jury for their determination did not include particularization of either the special damages or the cost of future care awards. Neither the plaintiff nor the defendants proposed particularized questions on those issues. Instead, the jury awarded lump-sum amounts to the plaintiff for special damages and cost for future care that were not broken down by treatment or amount of expense incurred or forecast.

[3] Following the return of the Judgment Award, both parties asked to defer the entering of Judgment Award to a later date.

[4] The defendants now apply for an order that the Judgment Award be reduced pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 (the "Act"), to account for benefits they argue are and will be payable to the plaintiff under Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 (the "Regulation").

[5] The plaintiff opposes the application.

LEGAL FRAMEWORK

[6] Under the regime created by the Act and the Regulation, subject to certain exceptions and restrictions set out in the Regulation, the Insurance Corporation of British Columbia ("ICBC") must pay benefits as defined in Part 7 of the Regulation ("Part 7 Benefits") to an insured (as defined in Part 7 of the Regulation) in respect of injury arising out of a motor vehicle accident in Canada, regardless of who was at fault for the accident: Regulation, s. 79(1).

[7] Section 88 of the Regulation prescribes the type of medical and rehabilitation treatments covered, the number of treatment sessions ICBC will permit, and the fees that ICBC will cover as Part 7 Benefits. The type, frequency, and recoverable costs of eligible treatments are subject to change. The most recent change came into effect on April 1, 2019.

[8] ICBC is obliged to pay certain benefits (those set out in s. 88(1) of the Regulation) while others are discretionary (those set out in s. 88(1.01) and (2) of the Regulation). Discretionary benefits prescribed in s. 88(1.01) of the Regulation are only payable where either ICBC's medical advisor or the insured's physician is of the opinion the treatment is necessary. Discretionary benefits prescribed in s. 88(2) of the Regulation are only payable where ICBC's medical advisor is of the opinion treatment is likely to promote the plaintiff's rehabilitation.

[9] As part of the scheme created by the Act and the Regulation, Part 7 Benefits paid or payable to a plaintiff are to be deducted from a plaintiff's tort damages after those damages have been assessed at trial: Act, s. 83(5). If the amount of Part 7 Benefits has not been ascertained, for example where it involves a future cost of care, the court must estimate the amount and take that estimate into account by deducting it from a plaintiff's damage award: Act, s. 83(5). The plaintiff is only entitled to enter judgment for the balance after the Part 7 Benefits amount or estimate has been deducted. The purpose of this aspect of the legislative scheme is to prevent double recovery by a plaintiff: *Norris v. Burgess*, 2016 BCSC 1452 at para. 17, citing *Gurniak v. Nordquist*, 2003 SCC 59.

[10] A defendant who seeks a deduction under s. 83 of the Act has the onus of establishing a deduction should be made: *Lynn v. Pearson* (1998), 55 B.C.L.R. (3d) 401 (C.A.) at para. 18; *Sovani v. Jin*, 2005 BCSC 1285 at para. 32.

[11] Section 83(5.1) of the Regulation, which became effective May 17, 2018, dictates that in estimating the amount of benefits, the court may not consider the likelihood that the benefits will be paid or provided.

- [12] When determining what, if any, deductions should be made under s. 83, strict compliance with the statutory scheme is required: *Lynn* at para. 18; *Wiebe v. Wiebe*, 2018 BCSC 1062 at para. 29.
- [13] In *Jurczak v. Mauro*, 2013 BCSC 1370, Justice Silverman set out a two-step approach to follow when considering whether a s. 83 deduction is appropriate:
- [16] First, the Court must determine if there are some Part 7 benefits which the plaintiff has received or is entitled to receive. Second, the Court then must estimate the amount of the deduction.
- [14] It is important to note that at the first stage, the court's task is to determine whether the plaintiff who "has a claim" received or is entitled to receive Part 7 Benefits for services or treatments "respecting the loss on which the claim is based": Act, s. 83(2), (4) and (5); *Uhrovic v. Masjhuri*, 2007 BCSC 1096 at para. 11, cited with approval in *Li v. Newson*, 2012 BCSC 675 at para. 14; *Gurniak* at para. 31. In other words, the defendant must establish the plaintiff has a claim for which she is entitled to a corresponding benefit under Part 7.
- [15] However, s. 83 does not contemplate a second level of matching between a specific head of damage in a tort award and a specific head of Part 7 Benefits. If the defendant establishes an entitlement, the court must proceed to determine or estimate the amount of the plaintiff's Part 7 Benefits. The amount of the entitlement is to be deducted from the overall tort award: *Gurniak* at para. 47.

ANALYSIS

Special Damages

Is the plaintiff entitled to Part 7 Benefits for services or treatments she has already received?

- [16] The defendants seek a deduction under s. 83 of the Act for the medical and rehabilitative treatment the plaintiff has already undertaken, and the associated costs which she has incurred but not yet submitted to ICBC for reimbursement under Part 7 ("Special Damages"). The parties are in agreement the plaintiff has received treatments and services which qualify as Part 7 Benefits. The issue is what amount, if any, should be deducted from the Judgment Award for these treatments.

What amount should be deducted?

- [17] The defendants argue that while the plaintiff advanced a claim at trial for \$38,112.62 in Special Damages, and although counsel for the defendants was aware of the particularization of that claim included interest at a rate of 2%, the plaintiff's Special Damages claim should have been limited to exclude the accumulated interest. The defendants argue that only \$4,642.81 is payable by ICBC as Part 7 Benefits but that the entire sum awarded to the plaintiff as Special Damages should nonetheless be deducted from her Judgment Award because interest is not recoverable. The net effect of such a determination

would leave the plaintiff responsible for the roughly \$34,400 in interest that has accrued.

- [18] The plaintiff argues the quantum of the plaintiff's net Special Damages (being \$38,112.62) was the subject of an agreement between the parties. In support of that position, Affidavit #1 of plaintiff's counsel (not the counsel who argued this application) set out various excerpts from the proceedings as reflected in the court's monitoring and recording system (DARS). The plaintiff argues these excerpts evidence the agreement reached.
- [19] On the basis of the advice of counsel for both parties at the pre-charge conference, my directions to the jury included the following:
- [148] Special damages are the actual out of pocket expenses of the plaintiff as a result of the injury or loss up to the date of trial.
- [149] In this case the plaintiff claims the total sum of \$38,112.62 (a revised number agreed to by the plaintiff and the defendants) for the list of expenses you have been given in Exhibit 2, Tabs 4 and 5. The defendants have admitted those expenditures were incurred and as such the Plaintiff did not need to prove that with receipts. However, the plaintiff must prove on a balance of probabilities that the expenditures arose as a consequence of the accident.
- [150] For every item of expense you find to be satisfactorily proved, or for any item, which the defendants do not dispute, it is your duty to award the plaintiff an amount sufficient to compensate her fully for that item.
- [Emphasis added.]
- [20] At the s. 83 hearing before me, the defendants did not file any evidence denying the agreement or its terms, nor did they seek to be relieved of that agreement.
- [21] Beyond the fact that there was an agreement, the plaintiff relies on the decision of Harris J.A., writing for the Court, in MacKenzie v. Rogalasky, 2014 BCCA 446, as support for the propriety of her Special Damages claim including interest. Although those comments were obiter, the reasoning is sound.
- [69] Special damages essentially are the principal amount of monies paid out arising from a wrong. Pre-judgment interest is added to them, but not the cost (i.e., out-of-pocket interest expenses) of borrowing money to finance them.
- [22] As noted above, the purpose of s. 83 of the Act is to avoid double recovery by the plaintiff, not to deny a plaintiff recovery for legitimate expenses incurred in the course of pursuing treatments covered by Part 7, leaving them in a more financially disadvantaged position than the jury intended.
- [23] On the basis of the agreement reached by the parties, I find there is no basis for any amount to be deducted from the Judgment Award under s. 83 with respect to the plaintiff's Special Damages.

Cost of Future Care

Does the plaintiff have a claim for which she is entitled to Part 7 Benefits in the future?

- [24] Based on the expert evidence at trial regarding future treatments recommended for the plaintiff, and the fees payable for them according to the applicable fee schedule, the defendants estimate the plaintiff is entitled to \$72,000 worth of Part 7 Benefits and seek a deduction of that amount from the plaintiff's Judgment Award under s. 83 of the Act. Relying on *Sovani v. Jin*, 2005 BCSC 1285, the defendants argue actual receipt of benefits is not a precondition for a deduction from the plaintiff's tort award under the Act and that it is sufficient for them to establish the plaintiff is entitled to Part 7 Benefits.
- [25] The plaintiff argues the defendants have failed to meet their burden to establish the plaintiff's entitlement to future Part 7 Benefits. She argues there is too much uncertainty with respect to what, if any, her future entitlement will be. She asserts uncertainty arises from ICBC's residual discretion to provide benefits, the plaintiff's prognosis, and the jury's verdict.

ICBC's Residual Discretion to Provide the Benefits

- [26] Virtually all of the future treatments the plaintiff may require are classified as discretionary Part 7 Benefits. The plaintiff argues it is open to the trial judge to infer from ICBC's past refusal of various benefits before trial, and its arguments against them at trial, that it will continue to take that position after trial: *Sangha v. Inverter Technologies Ltd.*, 2019 BCSC 1174 at para. 15.
- [27] However, ICBC is an agent of the government and the court may be reluctant to presume future conduct of ICBC would be other than honourable: *Norris* at para. 35. A deduction under s. 83(5) of the Act is based on a plaintiff's entitlement, not the possibility that claims may be unfairly adjusted by ICBC in the future: *Ayles v. Talastasi*, 2000 BCCA 87 at para. 33.
- [28] Further, in *Sangha*, Justice Riley found that an affidavit of an ICBC claims specialist accepting conclusions regarding a plaintiff's treatment needs carried considerable weight in overcoming any inference that ICBC would be reluctant to abandon its trial position which had been to deny the plaintiff's need for various services and treatments. In this case, there is an affidavit sworn by the plaintiff's claims adjuster which indicates he is "authorized on behalf of ICBC to advise that ICBC will irrevocably, unequivocally, and unconditionally agree to pay, under Part 7, for [the listed] items up to the amounts allowed pursuant to section 88(1.2) in schedule 3.1 of the Regulation", being most of the treatments recommended by the experts who testified at trial. Although the affidavit did not include counselling or a psychologist's services (which are also Part 7 Benefits, and which were recommended at trial and which ICBC agrees are necessary for the plaintiff's rehabilitation), counsel for ICBC advises that was simply an oversight. If those additional services had not been mistakenly overlooked, I expect ICBC would have sought an even greater deduction under s. 83.

- [29] The discretionary nature of the Part 7 Benefits at issue does not create uncertainty that impedes my ability to estimate any future entitlement the plaintiff may have to Part 7 Benefits.

The Plaintiff's Prognosis

- [30] The plaintiff argues there is considerable uncertainty with respect to what, if any, treatments she will require in the future. At trial, Dr. Ingrid Friesen, registered psychologist, recommended the plaintiff would benefit from having psychological treatment available to her "to use at her discretion". Similarly, Cheryl Black, occupational therapist, recommended the plaintiff would benefit from access to therapy for "management of symptom flare-up in response to exposure to functional stressors during her participation in activities of daily living as well as work tasks" and that the plaintiff's "level of future usage [of treatments] is uncertain".
- [31] As a general principle, the plaintiff argues the court should exercise caution when estimating the value of Part 7 benefits a plaintiff will receive for future care, and that the benefit of any uncertainty should be resolved in favour of the plaintiff: *Schmitt v. Thomson* (1996), 132 D.L.R. (4th) 310 (B.C.C.A.) at para. 19; *Paskall v. Scheithauer*, 2012 BCSC 1859 at para. 14; *Jurczak* at para. 10; *Cikojevic v. Timm*, 2012 BCSC 574 at paras. 12-18.
- [32] The defendants argue any uncertainty that may result from the plaintiff's prognosis is assuaged by the affidavit of the claims specialist, which provides a commitment to provide Part 7 Benefits for all the treatments and services forecast by the experts at trial.
- [33] Further, they rely on s. 83(5.1) of the Regulation, which states the court is not to consider the likelihood that the benefits will be paid or provided in the future when estimating the amount of unascertained benefits. They argue this provision removes uncertainty about whether the plaintiff will actually undertake future treatments from the court's consideration.
- [34] There will frequently be uncertainty involving what service or treatments a plaintiff may require in the future. An award for cost of future care only requires there to be a real and substantial possibility such care will be undertaken and costs incurred, in recognition of this inherent uncertainty.
- [35] The cases relied on by the plaintiff predate the amendment of the Act which added s. 83(5.1). The language of s. 83(5.1) is clear. In estimating an amount of benefits to be deducted under s. 83, the court may not consider the likelihood that the benefits will be paid or provided.
- [36] I agree with the defendants that the intention of s. 83(5.1) is to remove consideration of that inherent uncertainty from the estimating exercise. If a plaintiff's cost of future care award reflects services or treatments that fall within Part 7 Benefits, the estimated amount of the plaintiff's entitlement to Part 7 Benefits is to be deducted from the plaintiff's overall award: *Li* at para. 14.

- [37] The plaintiff's prognosis does not create uncertainty that impedes my ability to estimate any future entitlement the plaintiff may have to Part 7 Benefits.

The Jury's Verdict

- [38] The plaintiff argues the lump sum nature of the jury's award for cost of future care renders it impossible to know the basis of its award. She argues this uncertainty in turn makes it impossible to determine whether the plaintiff is entitled to Part 7 Benefits respecting the loss on which the claim she has, is based. Relying on Sangha, the defendants argue the affidavit of the claims specialist establishes the plaintiff can expect to receive the Part 7 Benefits to which the affiant deposes.
- [39] The defendants argue the plaintiff is an "insured" person under s. 78 of the Regulation and "ICBC has concluded" she remains an insured "for the purposes of receiving Part 7 Benefits" and that, therefore, s. 83(5) only requires them to establish the amount of Part 7 Benefits the plaintiff has received or can be expected to receive in order for a deduction under s. 83(5) to be made. They have based their estimate of the plaintiff's future Part 7 Benefits on the claim the plaintiff advanced at trial.
- [40] The plaintiff's advocates for a different interpretation of s. 83(5). She argues s. 83(5) requires the defendants to establish a correlation between her costs of future care claim as determined by the court and the benefits available under Part 7. She argues it is only that entitlement--an entitlement to Part 7 Benefits "respecting the loss on which the claim [as determined by the court] is based"--that can form the basis of any deduction under s. 83(5). The plaintiff argues that because the jury did not particularize the basis of the plaintiff's future care claim, it is not possible for the defendants to establish the necessary correlation between her claim as determined by the jury and Part 7 Benefits she may receive in the future respecting that claim. Accordingly, she argues the defendants have failed to establish any entitlement to Part 7 Benefits for deductibility purposes.
- [41] Section 83(5) of the Act must be interpreted by applying the modern principle of statutory interpretation. As noted by Butler J.A., writing for the Court, in *Doukhobor Heritage Retreat Society #1999 v. Vancouver Foundation*, 2020 BCCA 80 at para. 42:
- [42] That principle is clearly described in the dissent (but not on this point) in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at paras. 111-112:

- [11] The modern principle of statutory interpretation is well-established:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)

- [112] This principle requires that statutes "be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur": *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21-22. The plain and ordinary meaning of a statutory provision is the "natural meaning which appears when the provision is simply read through": *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735. In our view, the plain and ordinary meaning of s. 6(4) of the FRA, which accords with the purpose and context of the Act, is this: the licence holder is entitled to receive compensation for the improvements on a basis that reflects its limited interest in the improvements as a licence holder.
- [42] Section 83(5) applies to a person described in s. 83(2), namely "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". Therefore, in interpreting s. 83(5), I must also interpret s. 83(2), and in particular the meaning of "has a claim" and "benefits respecting the loss on which the claim is based". Since the meaning attributed to "has a claim" influences the interpretation of the remainder of s. 83(2), I begin my analysis by considering that phrase.
- [43] The most obvious ordinary meaning of the words "has a claim" is that the claim has been determined and assessed. Such an interpretation accords with the context within which the words are placed; s. 83(5) applies following the conclusion of the trial and the court's assessment of damages. It follows the claim a plaintiff "has" is the claim as determined and assessed by the court. Further, the purpose of s.83(5)--avoiding double recovery by a plaintiff--is served by interpreting "has a claim" as meaning a claim the court has determined to be valid and for which it has awarded damages.
- [44] The following hypothetical illustrates the logic of that interpretation. Consider the situation of a plaintiff who at trial argues their claim for non-pecuniary loss is \$100,000 and their claim for cost of future care is \$300,000, based on what they assert is their future need for a number of different treatments. Assume the court awards \$100,000 in non-pecuniary damages but only \$10,000 for future care because it determines the plaintiff has only established a claim for one type of treatment in the future. If s. 83(5) was interpreted as meaning the claim as advanced by the plaintiff at trial, ICBC could claim a \$300,000 deduction from the plaintiff's overall award, leaving the plaintiff with nothing, even though the court rejected much of the plaintiff's cost of future care claim. Such a consequence goes well beyond the purpose of avoiding double recovery by the plaintiff.
- [45] I turn now to consider the words "benefits respecting the loss on which the claim is based". Section 83(5) does not provide for a deduction of all Part 7 Benefits a plaintiff may receive in the future; a deduction is only available for Part 7 Benefits respecting the loss on which a plaintiff's claim is based. As noted by Justice Pearlman at para. 91 of *Huckleberry Mines Ltd. v Her Majesty the Queen in Right of the Province of British Columbia*, 2018 BCSC 1481, citing *R. v. Nowegijick*, [1983] 1 S.C.R. 29 at para. 30, the phrase "in respect of" means "in relation to", "with reference to" or "in connection with", and is "probably the widest of any expression

intended to convey some connection between two related subject matters".

- [46] For deductibility purposes under s. 83(5), entitlement to Part 7 Benefits is not to be determined based simply on a plaintiff "making" or "advancing" a claim. Something more is required. Section 83(5) reduces a defendant's liability by the amount of the Part 7 Benefits to which a plaintiff is entitled that correlate to the claim as determined and assessed by the court.
- [47] To establish a basis for a deduction under s. 83(5), the defendants have the burden of establishing a correlation between the plaintiff's claim (as determined by the court) and treatments and services available as Part 7 Benefits. It is the quantum of that entitlement that is relevant for deductibility purposes.
- [48] The defendants rely on Sangha as support for the proposition that an affidavit from an ICBC claims specialist deposing ICBC accepts the court's findings is sufficient to establish the plaintiff can expect to receive correlating Part 7 Benefits. However, Sangha was not a jury trial. The affidavit of the claims specialist in this case states "ICBC accepts the Court's implicit finding that the future care treatments and medications set out in the reports are necessary" [emphasis added]. In Sangha, Riley J. particularized the basis of the plaintiff's cost of future care damage award in the trial reasons. While a judge's reasons for judgment setting out precise factual findings may not be the exclusive pathway for establishing whether and to what degree a cost of future care award reflects services or treatments that are available as Part 7 Benefits, in this case, the lump sum nature of the jury's cost of future care award makes it impossible for me to ascertain whether and to what degree there is a correlation.
- [49] The Supreme Court of Canada's observation at para. 47 of Gurniak that "a second level of matching between a specific head of damage in a tort award and a specific head of damage under the insurance scheme in question" does not obviate the need for the correlation s. 83(5) requires. That first stage of "matching" is still required. In Gurniak, the Court was able to assess whether there was a match between the accident benefits paid under Quebec's no-fault insurance scheme and those paid under the British Columbia Insurance Act, because both were ascertainable: Gurniak at para. 54. That is not the case here. The basis of the jury's cost of future care award is unknown.
- [50] Accordingly, I find the defendants have failed to discharge their burden to prove the plaintiff has any entitlement to Part 7 Benefits respecting the loss on which the jury determined her claim is based.

What is the estimate amount of the deduction?

- [51] Given my conclusion that the defendants have failed to discharge their burden to prove the plaintiff has any entitlement to Part 7 Benefits that are to be deducted under s. 83, it is not necessary for me to estimate any such deduction and I decline to do so.

CONCLUSION

[52] For the reasons set out above, the defendants' application is dismissed. The plaintiff is entitled to her costs of the application.

"Jackson J."

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