

CANADA / JUDGMENT

Tench v. Sullivan

2025 BCSC 506

COURT

Supreme Court of British Columbia

DECIDED

13 March 2025

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2025 BCSC 0506 Tench v. Sullivan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tench v. Sullivan,

2025 BCSC 506

Date: 20250313

Docket: M212173

Registry: Vancouver

Between:

Leah Kathleen Tench

Plaintiff

And:

Eric Michael Sullivan

Defendant

And:

Insurance Corporation of British Columbia

Third Party

Corrected Judgment: The text of the judgment was corrected
at paragraph 25 on August 18, 2025.

Before: The Honourable Justice Morley

Oral Reasons for Judgment

(Disbursement Limit)

Counsel for the Plaintiff:

P. A. Venegas

G. L. Canniff

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R. Raymond

J. K. Dhami

K. A. Buecker

Place and Dates of Trial/Hearing:

Vancouver, B.C.

September 9 - 13, 2024

September 16 - 19, 2024

Place and Date of Judgment:

Vancouver, B.C.

March 13, 2025

OVERVIEW

- [1] This is an edited version of a decision originally given orally.
- [2] On September 9, 2024, the first day of this nine-day motor vehicle injury trial, the plaintiff, Leah Tench, applied to exclude her trial disbursements from the 6% cap under the Disbursements and Expert Evidence Regulation, B.C. Reg. 210/2020, as amended by B.C. Reg. 241/2023 [the DEER]. The third party Insurance Corporation of British Columbia ("ICBC") opposes excluding any disbursements from this cap.
- [3] I am satisfied that the exclusions the plaintiff is asking for were all incurred after the date of the application, which by agreement with ICBC, was the first day of trial (i.e., September 9, 2024). The plaintiff has demonstrated a "reasonable risk" that the total amount of disbursements would exceed the disbursement limit and that they were necessary to justly resolve the vehicle injury proceeding.
- [4] However, I do not think the plaintiff has established that prejudice as a result of having to pay for the incurred disbursements would outweigh the presumed benefits of the 6% limit in incentivizing a reduction in the complexity and cost of vehicle injury proceedings. This is because she has assets well in excess of the amount of the disbursements proposed to be

excluded. She has thus not demonstrated "undue hardship", except on the interpretation of the DEER that undue hardship exists whenever a motor vehicle injury plaintiff must use their recovery to pay for disbursements. Since I do not think this is a sustainable interpretation of the DEER, I dismiss the application.

Exclusions Sought

- [5] The disbursements sought to be excluded under s. 5(6) of the DEER were set out by counsel for the plaintiff in a September 4, 2024 letter to counsel for ICBC:
- a) Photocopy costs for trial binders and submissions. These are estimated to amount to \$3,657.50.
 - b) Trial prep meetings with experts that occur either during trial or that take place before trial but are invoiced at a date following the first day of trial.
 - c) Expert attendance costs. Together with trial prep meetings, these were estimated at \$13,000.
 - d) Disbursements incurred as a result of bringing the DEER application itself; and
 - e) Video court booking fees. These were \$150 for set up and \$150 hourly after that.
- [6] The total appears to be around \$17,000 or so it was estimated at the time of the application.

LEGAL FRAMEWORK

- [7] The starting point for the framework of s. 5 of the DEER is set out in s. 5(2), which provides that the most that can be allowed or awarded as disbursements in a "vehicle injury proceeding" is the total of disbursements up to the disbursement limit (which, under the relevant leg of the definition in s. 5(1) is 6% of the amount of damages awarded) plus "excluded disbursements".
- [8] A simpler way of saying this is that disbursements above 6% of total damages must be excluded from the cap to be recovered.
- [9] The definition of "excluded disbursements" in s. 5(1) includes six categories, of which the relevant one for our purposes is found in para. (f), namely "disbursements that the court has ordered as excluded disbursements under an application made under subsection (6)". Section 5(6), referred to here, provides that to succeed in such an application the court must be satisfied that the conditions in s. 5(8) are made out.
- [10] Subsection 5(8) is therefore the decisive provision for an application of this type, since it sets the necessary "conditions" for ordering that disbursements be excluded from the cap. There are two such conditions:

- a) The first, referred to in s. 5(8)(a), is the timing condition. Disbursements can only be excluded from the cap if the application is made before the disbursements are incurred. The purpose of this rule is to create a "permission first", rather than "forgiveness afterwards" regime with the aim of making the review of disbursements more robust.
- b) The second, referred to in s. 5(8)(b), is the balance of prejudice condition. The court must be satisfied that the party making the application (typically, as here, the plaintiff) would suffer prejudice and that the prejudice would be disproportionate to the benefit from applying the cap of "not increasing the complexity and cost of the vehicle injury proceeding". This obviously requires the court to engage in a weighing or balancing exercise, respecting the purposes both of the cap (incentivizing less complex and expensive motor vehicle injury litigation by requiring the party making those disbursements to bear some of the cost) and of the exception (avoiding unfairness/prejudice to the applicant if they cannot fairly advance their case for economic reasons).

[11] Section 5(9) sets out what an application under the DEER must contain. It must include:

- a) The nature and evidentiary value of each disbursement that is the subject of the application;
- b) Evidence of the prejudice the party would suffer were the disbursements that are the subject of the application not excluded. This evidence must include the following:
 - 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 the 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.

[12] Section 5(9) is both a rule for what must be in an application of this nature and an indicator of the primary prejudice the discretionary exemption from the cap under the DEER is concerned with: avoiding forcing a litigant (usually the plaintiff) who needs to expend money on disbursements to choose between justly resolving their dispute and suffering undue economic hardship.

[13] There are thus two ways in which the evidence required by s. 5(9)(b) can be relevant to the success of an application to exclude disbursements pursuant to s. 5(6):

- a) The threshold level of analysis. Section 5(9) uses mandatory language. Thus, if the application does not provide the kind of evidence set out in ss. 5(9)(a) and 5(9)(b)(i), (ii) or (iii) at all, the application is deficient. However, as has been repeatedly emphasized by justices and associate judges who have addressed these applications, this threshold must not be a high bar. The entire point of the cap set out in the DEER, as explained by the government, is to promote proportionality and lower litigation costs. To require applicants

(usually plaintiffs) to provide exhaustive evidence of the likelihood of success, the range of damages, the purpose of various kinds of evidence for the strategy of the case and a forensic audit of the plaintiff would not only be unfair to plaintiffs but would go against the point of the DEER. All that can possibly be required at the threshold stage is some evidence on each of the points set out in s. 5(9). At this stage, a court should not weigh how persuasive that evidence is, nor should a standard of full disclosure be imported.

- b) The ultimate balancing level of analysis. At this stage, the issue is not whether the application is procedurally deficient because it does not contain the necessary categories of evidence, but whether the evidence is sufficient to satisfy the justice or associate judge that the balance turns in the applicant's direction. The question here is reconciling the systemic imperative of incentivizing less costly motor vehicle litigation with fairness in the individual case. Evidence that is sufficient to meet the threshold of "some evidence" might not be sufficient to establish that it would in fact be unfair for the party expending the disbursements to pay part of the cost.

Issues

[14] I must address the following issues:

- a) Were some or all of the sought-for exclusions incurred before the application was brought, and therefore not excludable?
- b) Is there 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"?
- c) Has the plaintiff demonstrated "necessity to justly resolve the proceeding"?
- d) Has the plaintiff shown sufficient undue hardship to tilt the balance of prejudice in her favour?

Timing of Application

[15] In this case, ICBC argues that some or all of the disbursements sought to be excluded would be incurred after the application was brought. In its written materials, ICBC alleges the application was brought "mid-trial". I disagree and find that the application was not brought "mid-trial" but at the beginning of trial and so all disbursements incurred during or after the time of trial are excludable under s. 5(8)(a).

[16] As I have noted, counsel for the plaintiff wrote seeking agreement to the proposed exclusions on September 4, 2024. Counsel for ICBC responded on September 6, 2024, stating:

The Third Party [i.e., ICBC] is unable to agree that the subject disbursements ought to be excluded from the 6% limit on disbursements without information that addresses s. 5(8) and 5(9) of DEER. Kindly provide further information.

If you file an application returnable on the first day of trial, the Third Party will concede that the filing date is the operational date for the purpose of s. 5(8)(a), which requires an application to be made before the subject disbursements are incurred.

- [17] Plaintiff's counsel appears to have taken this as an invitation to bring the application without a notice of application on the first day of trial. ICBC points out that it does not say that, but rather that if an application is brought returnable on the first day of trial, then the date of the filing of the application would be the operational one for the purposes of s. 5(8)(a) of the DEER.
- [18] While I accept ICBC's point about the interpretation of counsel's letter, I still find that the application was properly brought on the first day of trial. At that point, I was informed by both counsel that ICBC was not ready to respond and needed more time, so the DEER application could be heard by the end of the trial. I accepted this approach on the basis that the date of the application would be the first day of trial (i.e., September 9, 2024). Unless the trial judge directs otherwise, it is not necessary to have notices of application for applications heard during the course of a trial, and I consider that if ICBC objected to having the application heard this way, it should have done so on September 9.
- [19] I therefore accept that the date of the application is the beginning of the trial and so disbursements that are "incurred" after the beginning of trial are potentially excludable within the rule set out in s. 5(8)(a).

There Is a Demonstrated Risk Disbursements Will Exceed Cap

- [20] ICBC argues that the plaintiff has failed to provide 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". It points to the fact that in her trial brief, the plaintiff asked for \$1.2 million in damages, but if she had received that much, she would not have exceeded the cap. ICBC says this is a contradiction, although, as I will explore, I conclude the contradiction is ICBC's.
- [21] (In this case, I am providing these reasons after giving judgment in the trial, but I exclude my knowledge of what the damages actually were, since an application of this nature must be resolved based on the evidence at the time the application is made.)
- [22] Since the disbursement cap is 6%, it is possible to calculate the amount of damages that would have to be reached in order to cover an estimated cost for disbursements by multiplying by the reciprocal of 6%, which is 16 2/3.
- [23] Lori Lothan, a legal assistant with the plaintiff's law firm, submitted an affidavit. She deposed that as of September 6, 2024, disbursements were approximately \$39,000, which would imply some non-recovery of even those disbursements already accrued unless damages exceeded \$650,000. Ms. Lothan provided a detailed anticipation of what disbursements would likely be, including rates for all the experts. The estimate was just

under \$17,000, which would imply disbursements would exceed the cap unless recovery was substantially over \$900,000.

- [24] ICBC points out that in the trial brief, the plaintiff quantified damages at \$1,217,726. It argues, "If the plaintiff believes an award of roughly \$1.2 million is appropriate and even 1 million covers the cap, where is the evidence that there is a real risk this award will not cover the costs? The plaintiff's argument defeats itself."
- [25] The fallacy is that all the plaintiff has to demonstrate is a "reasonable risk". However, it is a matter of ordinary experience that, in any kind of personal injury litigation, there will inevitably be a range of damages. The point of the DEER was not to put plaintiffs in a Catch-22 in which they could not ask for damages above 16 2/3 (i.e., the reciprocal of 6%) times their estimated disbursements without thereby losing the possibility of getting disbursements exempted. In some cases, perhaps, the minimum reasonable amount of damages, presuming liability is established, will be such that there is no reasonable risk that the cap will be exceeded, but an inspection of the trial brief demonstrates that this was not one of those cases.

"Necessity to Justly Resolve the Proceeding"

- [26] ICBC accepts that "necessity to justly resolve the proceeding" has been established for the photocopying expenses and the expert trial costs. Indeed, I already found the conditions for exceeding the presumptive limit of three experts as set out in s. 12.1(6) of the Evidence Act, R.S.B.C. 1996, c. 124 [Evidence Act].
- [27] However, ICBC disputed this with respect to the video fees. I see no merit in ICBC's argument on that point. Clearly, the video fees for the plaintiff's psychiatrist diminished the overall amount of disbursements substantially, relative to having him appear in person.

"Undue Hardship"

- [28] Since I have found a reasonable risk of exceeding the cap and that the proposed disbursements are necessary to justly resolve the proceeding, the decisive issue in this application is whether and to what extent the plaintiff could pay the disbursements over 6% of the total without "undue hardship".
- [29] ICBC argues that even at the threshold level of analysis under s. 5(9), there is insufficient evidence of undue hardship. I reject this argument.
- [30] The plaintiff set out her income, including her most recent T4. She made \$67,241.40 in employment income in 2023. She set out her husband's income, which was \$41,197.50 in 2023. She set out her investment income, the amount she purchased her home for and its current assessed value. She says she has approximately \$300,000 in investments, all of which comes from the proceeds of the award in Tench #1. She also provides expenses.

- [31] ICBC points out that assessed values are not necessarily accurate for market value, implying that applicants under s. 5 of the DEER who own homes must submit appraisal evidence. I consider this an unreasonable and disproportionate demand for an application of this nature.
- [32] However, while I accept that the plaintiff has put in sufficient evidence to make this application as a threshold matter, I am ultimately not satisfied that the balance supports exclusions above the cap. This is because I am not satisfied that the plaintiff would suffer "undue hardship" as this phrase is meant in the DEER.
- [33] It is clear that the disbursements above the cap would likely exceed 25% of the plaintiff's gross annual income. I agree with the plaintiff that this would be "undue hardship" if the plaintiff did not have assets: see *Kwiatkowski v. Russo*, 2024 BCSC 278 at para. 27. However, as ICBC points out, assets and income are both considered in determinations of undue hardship: see *Mandair v. Sandhu*, 2024 BCSC 246 at para. 21.
- [34] Between her investments and home equity, Ms. Tench has substantially more assets than would be necessary to pay the disbursements over the cap. Since this is undeniable, the real issue arises because these assets, including both Ms. Tench's investments and the equity in her home, derive from her recovery in *Tench #1*. This raises the question of whether, as the plaintiff says, it is "undue hardship" to pay for disbursements from monies meant to compensate her for her injuries arising out of either the subject or past collisions.
- [35] While I accept the premise that failing to exclude the disbursements would mean Ms. Tench would have to dip into her recovery either from this trial or the last, I do not accept the conclusion that this would be "undue hardship". In my view, a categorical rule excluding such monies from being among those that could be available to pay for disbursements is not consistent with the text, context or purpose of the DEER.
- [36] With respect to the text, the DEER would have no effect at all unless a successful plaintiff sometimes has to pay for disbursements over 6% of the amount recovered, even if these disbursements are necessary to resolve the proceeding. Indeed, the presumptive situation under the DEER is that successful plaintiffs will not recover those disbursements. Since money is fungible, it would always be possible to characterize unexcluded disbursements as reducing the recovery. If this were "undue hardship" by definition, then the exception would swallow the rule.
- [37] It might be argued that this is not a decisive argument against finding that the use of past awards or settlements is "undue hardship". On this view, while the DEER does not appear to anticipate pre-financing disbursements, whether through plaintiff's counsel or otherwise, it does require a person with a sufficient income or accrued wealth attributable to something other than a past award or settlement to pay for disbursements over the cap.

- [38] But while this distinction is a possible one, it is not one that makes sense in light of the scheme of the DEER. It is not clear what the relevant difference is between a person whose wealth derives from earned income and someone who received a settlement or award for a prior accident that includes compensation for lost income or income-earning capacity. In both cases, the person is expected to pay from income they either did earn or would have earned but for a tort.
- [39] I believe the conclusion that dipping into prior settlements or awards cannot inherently be "undue hardship" is also supported by the purpose of both the cap itself and the exemption provision.
- [40] Before the DEER was enacted (and still in areas of litigation to which the DEER does not apply), the presumptive rule was that a successful party in civil litigation is entitled to a partial indemnity of lawyer fees as set out in the tariff, but full indemnity of disbursements. An animating concern about the previous 100% indemnity for disbursements was that it did not provide the kind of balance a partial indemnity does between making the successful party whole and giving the successful party "skin in the game" so as to manage its disbursements. At least in cases where liability is not seriously in issue, without a cap, a plaintiff could assume that disbursements will be fully indemnified, creating no incentive for minimization either by the experts or by the parties and lawyers that retain them since the ultimate payor would be ICBC and it, of course, could not dictate what disbursements should be charged. The only limitation came from taxing disbursements as unreasonably incurred, which is difficult and which the government concluded was not sufficient in light of what it perceived to be a crisis in auto insurance premiums.
- [41] In its original form, the DEER provided that parties awarded costs in vehicle injury proceedings could never receive more than 6% of the total award of damages assessed by the court (in the case of the plaintiff) or 6% of an amount determined by the court to represent what was really at stake (in the case of the defendant or third party). The asserted purpose of this cap was to incentivize parties to reduce their disbursements, particularly on adversarial damage experts, something accomplished with respect to lawyer fees by the "Canadian rule", which lies between the "American rule" of no recovery and the "English rule" of a full indemnity.
- [42] In *British Columbia (Attorney General) v. Le*, 2023 BCCA 200 [Le], the Court of Appeal held that while this purpose was consistent with the DEER's authorizing statute, an inflexible rule disregarded the more multidimensional principle of proportionality actually underlying s. 12.1 of the Evidence Act. The lack of the possibility of a discretionary exception to the cap was thus unreasonable and ultra vires.
- [43] The Court of Appeal accepted that part of the concept of proportionality is a relationship between the amount spent on litigation and the amount at stake, but it also concluded that viewing proportionality solely in this way was more impoverished than the concept revealed by an analysis of s. 12.1 in its entirety. Thus, while a 6% limit would in many cases be

proportionate, it would not be in all cases. The proportionality that is an animating principle of the Evidence Act and other enactments relating to civil procedure is not the purely mathematic proportionality of a fractional relationship to the amount at stake, but must also consider prejudice and the importance or complexity of the issues in the case.

[44] As explained by the Court of Appeal in *Le* at para. 153:

Section 5 of the Regulation does not reflect any reasonable interpretation of proportionality incorporated within the Act. Rather, to the extent it reflects a possible meaning of what is "proportionate" it is fundamentally different from and in conflict with the meaning of proportionate embedded in the Act. The meaning of "proportionate" found within the Regulation more closely resembles the dictionary definition of proportionality, one based on a linear relationship between the award a plaintiff obtains and 6% of that award. It contemplates an inflexible relationship that is based on two numeric values. It does not allow for any consideration of prejudice, or the importance or complexity of the issues in a case. It has nothing to do with the specifics of a particular case or particular plaintiff. It applies the same 6% figure in circumstances where a plaintiff has adhered to the presumptive three-expert report limit in s. 12.1(2) and in cases where a judge has determined the presumptive limit does not, by virtue of s. 12.1(5) and (6), advance proportionality. In our view, to the extent the Regulation incorporates proportionality within its terms, it does so in a manner not reasonably supported by or consistent with any reasonable interpretation of proportionality within the enabling statute. To the contrary, it conflicts with the meaning of proportionality in the enabling statute and in fact undermines the statutory object or purpose in many cases.

[45] The language found in para. 153 of *Le* is echoed in s. 5 of the DEER, as it was subsequently enacted. The current s. 5 makes mathematical proportionality the starting point, but also provides for departure in the direction of proportionality to "importance and complexity" and to avoid prejudice, principally prejudice to plaintiffs unable to prove their case without incurring disbursements that cause undue hardship.

[46] Like many statutory or regulatory compromises, s. 5 of the DEER, as ultimately enacted, must balance purposes that are in tension with each other. Exemptions must not become so routine that the "skin in the game" rationale for a partial indemnity is lost, but nor should prejudice in complex and important cases be permitted. Section 5 tries to strike that balance.

[47] In my view, that balance would be upset if using past awards or settlements to pay disbursements over the cap is considered per se undue hardship. As with all lawfully acquired property, there is a real sacrifice that is being demanded if there is not a full indemnity for the substantially successful party. But that full indemnity has never been the norm in Canadian costs law.

[48] The plaintiff points to *James v. Riar*, 2024 BCSC 605 at para. 49 where Justice Wilkinson stated, "Being put in a position to go unremedied or under-remedied for actual losses pertaining to one's quality of life is to suffer undue hardship." In order to reconcile this

dictum with the principle that sometimes disbursements over the cap will have to reduce the effective award, I take "actual losses pertaining to one's quality of life" to refer to special damages and costs of future care, rather than the award as a whole, which would include non-pecuniary losses, past earning loss and loss of future earning capacity.

- [49] If the unexcluded portion of disbursements effectively has to come out of the award for special damages and costs of future care, then it would imply that the burden of these direct financial costs of the accident would no longer be remedied. I take that to be what Justice Wilkinson meant by "actual losses pertaining to one's quality of life" and I agree that a lack of remedy here can be taken to be "undue hardship". However, other heads of damages compensate for losses of well being or income relative to the situation in which the accident had not occurred. If wealth acquired from the factual ability to earn income can be tapped, then so must wealth representing compensation for income that would have been earned but for the tort.
- [50] If there is no complete bar on using assets traceable to awards or judgments for appropriately incurred disbursements over the cap, then it is difficult to reconcile the existence of \$300,000 in investments with "undue hardship" of paying \$17,000 for disbursements.

ORDER

- [51] I therefore dismiss the application.
- [52] I recognize that ICBC was substantially successful on this application. However, it took some aggressive positions. In my view, costs of this application should be in the cause.

"J. G. Morley, J."

The Honourable Justice Morley

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