

CANADA / JUDGMENT

Tompkins v. Bruce

2012 BCSC 833

COURT

Supreme Court of British Columbia

DECIDED

6 June 2012

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2012 BCSC 833 Tompkins v. Bruce IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Tompkins v. Bruce, 2012 BCSC 833 Date: 20120606 Docket: M070137 Registry: Vancouver Between: Wayne Robert Tompkins Plaintiff And Tawnya Ley Bruce Defendant And Insurance Corporation of British Columbia Third Party Before: The Honourable Mr. Justice Curtis Reasons on Deductions from Trial Award and Costs Counsel for the Plaintiff: K. Munro L. Trach The Defendant: No One Appeared Counsel for the Third Party: G.S. Pun Place and Date of Hearing: Vancouver, B.C. May 14, 2012 Place and Date of Judgment: Vancouver, B.C. June 6, 2012

- [1] Wayne Robert Tompkins was badly injured in a motor vehicle collision June 3, 2006. In a judgment following trial, Mr. Tompkins was awarded the following: 1. General Damages \$200,000 2. Past Loss of Income \$215,000 3. Future Loss of Income \$425,000 4. Future Care Costs \$ 87,450 5. Special Damages \$ 35,771 6. Trust Claim for Beerstra \$ 7,500 7. Trust Claim for Larkin \$ 10,000 \$980,721 Part 7 Deductions
- [2] Section 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, provides: 83 (1) In this section and in section 84, "benefits" means benefits
- (a) within the definition of section 1.1, or
- (b) that are similar to those within the definition of section 1.1, provided under vehicle insurance wherever issued and in effect, but does not include a payment made pursuant to third party liability insurance coverage.
- (2) 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, is deemed to have released the claim to the extent of the benefits.
- (3) Nothing in this section precludes the insurer from demanding from the person referred to in subsection (2), as a condition precedent to payment, a release to the extent of the payment.

- (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 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.
 - (6) If, for the purpose of this section or section 84, it is necessary to estimate the value of future payments that the corporation or the insurer is authorized or required to make under the plan or an optional insurance contract, the value must be estimated according to the value on the date of the estimate of a deferred benefit, calculated for the period for which the future payments are authorized or required to be made. Part 7 Accident Benefits
- [3] The relevant Regulations provide as follows: 80 (1) Where, within 20 days after an accident for which benefits are provided under this Part, an injury sustained in the accident totally disables an insured who is an employed person from engaging in employment or an occupation for which the insured is reasonably suited by education, training or experience, the corporation shall, subject to section 85, pay to the insured for the duration of the total disability or 104 weeks, whichever is shorter, the lesser of the amounts determined under paragraphs (a) and (b): ... 84 (1) Subject to section 85 and subsection (2) of this section, where, within 20 days after an accident for which benefits are provided under this Part, an injury sustained in the accident substantially and continuously disables an insured who is a homemaker from regularly performing most of the insured's household tasks, the corporation shall compensate the insured for the period of the disability or 104 consecutive weeks, whichever is shorter, for reasonable expenses incurred by the insured to hire a person to perform the household tasks on the insured's behalf, subject to a maximum amount per week as set out in section 2 of Schedule 3.
- (2) No compensation is payable under this section in respect of household tasks performed by a member of the insured's family. 86 (1) Where an injury for which disability benefits are being paid to an insured under section 80 or 84 continues, at the end of the 104 week period, to disable the insured as described in the applicable section, the corporation shall, subject to subsections (1.1) and (2) and sections 87 to 90, continue to pay the applicable amount of disability benefits to an insured described in section 80 or 84
 - (a) for the duration of the disability, or
 - (b) until the insured reaches 65 years of age, whichever is the shorter period. ...

- (4) Where an insured is receiving other disability payments as defined in section 81 and under the terms of the contract for payment of those other disability payments the payments are reduced by any amount received under the Canada Pension Plan or the Quebec Pension Plan, the reduction of disability payments under subsection (2) shall be prorated.
- (5) Where an insured who is an employed person returns to work but, because of injuries suffered in the accident, is incapable of earning the amount of his present disability benefits, the corporation will pay the difference between his disability benefits and the amount the insured is presently earning through his employment. 88 (1) Where an insured is injured in an accident for which benefits are provided under this Part, the corporation shall, subject to subsections (5) and (6), pay as benefits all reasonable expenses incurred by the insured as a result of the injury for necessary medical, surgical, dental, hospital, ambulance or professional nursing services, or for necessary physical therapy, chiropractic treatment, occupational therapy or speech therapy or for prosthesis or orthosis.
- (2) Where, in the opinion of the corporation's medical adviser, provision of any one or more of the following is likely to promote the rehabilitation of an insured who is injured in an accident for which benefits are provided under this Part, the corporation may provide any one or more of the following:
 - (a) funds to the insured once during the lifetime of the insured for the acquisition by the insured of one motor vehicle equipped as necessary and appropriate to its use or operation by the insured, the choice of make or model of vehicle to be in the sole discretion of the corporation;
 - (b) funds to the insured once during the lifetime of the insured for alterations to the insured's residence that are necessary to make the residence accessible to and usable by the insured, the style and cost of the alterations to be in the sole discretion of the corporation and the alterations to be limited to necessary ramps, a necessary lift, necessary bathroom alterations and, where the insured is a homemaker or a person who lives alone, necessary kitchen alterations
 - (c) reimbursement to the insured for the costs of attendant care, other than care provided by a member of the insured's family, where the insured has returned to and is residing in the community but is not capable of performing some or all of the tasks necessary to sustain an independent lifestyle, the amount of the reimbursement to be limited to the lesser of
 - (i) the monthly cost of a group residence, including a long term care facility, that would be appropriate to the care needs of the insured as determined by the rehabilitation team, and
 - (ii) the monthly cost of attendant care required by the insured as a result of injuries from the motor vehicle accident, the level and type of which will be determined by the rehabilitation team using the same standards and criteria applied under the Long Term Care Program of the Continuing Care Division of the ministry of the minister responsible for the administration of the Continuing Care Act;

- (d) reimbursement to the insured for costs incurred from time to time by the insured for the purchase and reasonable repair, adjustment or replacement of one or more of the following items:
 - (i) a wheelchair; (ii) a medically prescribed bed for other than hospital use; (iii) bowel and bladder equipment; (iv) aids for communication, dressing, eating, grooming and hygiene;
 - (v) transfer equipment; (vi) a ventilator;
- (e) funds to the insured for vocational or other training that
 - (i) is consistent with the insured's pre-injury occupation and his post-injury skills and abilities, and (ii) may return the insured as nearly as practicable to his pre-injury status or improve the post-injury earning capacity and level of independence of the insured;
- (f) funds for any other costs the corporation in its sole discretion agrees to pay.
- (3) Before incurring an expense or obligation under subsection (2) for which the insured intends to request payment by the corporation, the insured shall obtain written approval from the corporation and the corporation may, before giving its approval, require the insured to submit such information as it considers necessary to assist it in making a decision.
- (4) The corporation is not liable to insure, repair, replace or maintain a motor vehicle acquired by an insured under subsection (2) (a) except in the course of an approved repair resulting from a subsequent claim for insured loss or damage to the vehicle.
- (5) The amount by which the liability of the corporation under this section is limited is the amount set out in section 3 of Schedule 3.
- (6) The corporation is not liable for any expenses paid or payable to or recoverable by the insured under a medical, surgical, dental or hospital plan or law, or paid or payable by another insurer.
- (7) The maximum amount payable by the corporation under this section for medical, surgical, dental, nursing or physical therapy services or for chiropractic treatment, occupational therapy or speech therapy listed in the payment schedules established by the Medical Services Commission under the Medicare Protection Act is the amount listed in the payment schedules for that service, treatment or therapy.
- (8) The corporation is not liable to pay for more than 12 physical therapy treatments for an insured for each accident unless, before any additional treatment is given, the corporation's medical advisor or the insured's medical practitioner certifies to the corporation in writing that, in his opinion, the treatment is necessary for the insured. 89 For the purpose of section 88 (1), any dispute between the corporation and an insured as to whether or not an expense is reasonable, shall be submitted to arbitration under the Commercial Arbitration Act.

- [4] The parties have agreed that the amount of \$75,552.33 is to be deducted for past wage loss benefits already paid, and \$84,587.73 for benefits payable for future loss of income. The parties have also agreed that the \$40,000 advanced before trial shall be deducted from the judgment to be entered.
- [5] The deductions for Part 7 benefits sought by the Third Party are set forth as follows: Item Award Basis to Deduct Deduction Post surgery physiotherapy for potential knee and hip replacements \$1,200 88(1) \$1,200 Post surgical care \$1,500 88(1) \$1,500 Fitness program including consultations with a personal trainer or kinesiologist \$5,000 88(1) \$1,250 Psychological Counseling \$15,000 88(1) \$12,428 Assistance with household chores \$35,000 84 86 \$15,080 \$60,320 Assistance with yard work \$20,000 n/a \$0 Mobility aids, such as canes, walkers \$500 88(1) \$500 Knee braces \$2,000 88(1) \$2,000 Personal Care aids \$500 88(1) \$500 Heating pads, ice packs \$150 88(1) \$150 Installation of hand controls in future vehicles \$850 88(2)(a) \$850 Non-prescription Medications \$750 88(1) \$750 Prescription Medications \$5,000 88(1) \$5,000 \$87,450.00 \$101,528.00
- [6] It is agreed that the \$850 awarded for installation of hand controls in a future vehicle is not deductible as the benefit is payable only once and was paid before trial. It is also agreed there is no deduction from the award for yard work because there is no benefit payable for yard work.
- [7] Section 83 of the Act requires a deduction where the claimant "receives or is entitled to receive benefits respecting the loss". Subsection (5) requires that "if the amount of benefits has not been ascertained, the court must estimate it ..." and subsection (6)requires that "If ... it is necessary to estimate the value of future payments ... the value must be estimated according to the value on the date of the estimate of a deferred benefit, calculated for the period for which the future payments are authorized or required to be made."
- [8] In determining the award to be made at trial, the Court does not of course know what will happen in the future and a judgment may include awards for amounts that are not necessary or perhaps advisable but never incurred. For example, a court may award a sum for counselling because in the opinion of the court, counselling would be an appropriate and reasonable care expense in the future, but if the plaintiff having received the award chooses not to take counselling, no amount would be recovered under the Part 7 benefits. What appears to be a reasonable and necessary expense at the date of trial may prove to be unnecessary in the future. What the court is instructed to deduct are benefits received or to which there is an entitlement.
- [9] Mr. Tompkins, in this case, carries extended health insurance through the Public Education Benefits Trust. That plan appears to cover the following items in the trial award: Post surgery physiotherapy for potential knee and hip replacements \$12,000 Post surgical care \$ 1, 500 Psychological counselling up to \$500/year \$12, 850 Prescription medication to 80% \$ 4,000 \$20,550

- [10] Under s. 88(6) of the Regulations, ICBC is not liable to pay any amount payable by another insurance company. Amounts that are payable by other insurance companies are therefore not deductible as benefits payable under Part 7. I accept the plaintiff's position that the \$20,550 is payable under Mr. Tompkins' extended benefits plan and find therefore there is no amount to be deducted for that figure as a benefit payable under Part 7.
- [11] With respect to the award for \$35,000 for assistance with household chores, the Corporation provided housekeeping services for a period of time but terminated that assistance prior to trial and has not paid for or provided any such assistance since. It is not known whether Mr. Tompkins will actually pay for housekeeping services in the future, nor whether he would be reimbursed under Part 7 if he did. In my estimation, no amount will be paid or payable to Mr. Tompkins in the future for assistance with housekeeping under Part 7 and accordingly, I make no deduction from that award.
- [12] I accept the plaintiff's submission that ICBC is unlikely to choose to make voluntary payment as it may under Part 7 toward the services covered by the \$5,000 award for a fitness program, including consultation with a personal trainer or kinesiologist and make no deduction for a Part 7 benefit from that amount.
- [13] The plaintiff concedes that Part 7 benefits will be payable in the future for the following:
Psychological counselling \$2,150 Mobility aids \$ 500 Knee braces \$2,000 Non-prescription medications \$ 750 Prescription medications \$1,000 \$6,400
- [14] I agree with the plaintiff's submission that neither the personal care aids, nor the heating or ice packs are likely to be payable as expenses for medical services or treatment and make no deduction for those amounts.
- [15] Estimating the amount of the \$6,400 that will be received in benefits and the present value of the payment of those benefits over time, I fix the deduction for Part 7 benefits paid or payable in this case at \$5,000. COSTS
- [16] Liability in this case was found against the defendant and Mr. Tompkins has succeeded in being awarded substantial damages.
- [17] Rule 14-1(9) states: Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.
- [18] The Third Party in this case seeks an order that costs be awarded to ICBC from October 6, 2011 when an Offer to Settle that it submits ought reasonably to have been accepted was delivered. The trial commenced November 28, 2011.
- [19] The October 6, 2011 Offer states in part as follows: The Third Party ICBC offers to settle this action in its entirety on terms that upon acceptance of this offer to settle:
- (a) the plaintiff will be entitled to payment by the Third Party of \$950,000.00 new money (the "Settlement Payment"); and

- (b) the parties will be entitled to costs in accordance with this offer to settle (the "Settlement Costs"). The Settlement Payment (a) is offered after taking into account Part 7 benefits paid or payable, pursuant to section 25 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231 (in respect of policies in force before June 1, 2007) and/or pursuant to section 83 of the Insurance (Vehicle) Act R.S.B.C. 1996, c. 231 (in respect of policies in force on or after June 1 2007); (b) is offered after taking into account any advances paid to date (which includes tort advances in the amount of \$40 000 00, special damages in the amount of \$8,041.72 Part 7 medical and rehabilitation benefits in the amount of \$90,618.79, Part 7 homemaking costs in the amount of \$15,154.40 and temporary total disability payments in the amount of \$77,159.94; (c) includes court order interest, and (d) excludes the Settlement Costs. On acceptance of this offer, the parties agree that subject to the terms and conditions of Appendix A:
1. The plaintiff is entitled to his costs of the action at Scale B and necessary and reasonable disbursements to the date of delivery of this offer assessed in accordance with Rule 14-1 of the Supreme Court Civil Rules, B.C. Reg. 168/09 (the "Civil Rules"); and
 2. The Third Party is entitled to its costs of the action at Scale B and necessary and reasonable disbursements from the date of delivery of this offer assessed in accordance with Rule 14-1 of the Civil Rules.
- [20] The amount awarded to the plaintiff after deduction is as follows, (subject to some minor adjustments for the gross up and management fees): Judgment at trial \$980,721 Pension loss award \$ 34,856 Pre-judgment interest \$ 1,127.52 \$1,016,577.52 Deductions: \$75,552.33 \$84,587.73 \$ 5,000.00 \$165,140.06 Net Judgment \$851,437.46
- [21] The \$950,000 Offer was in addition to the \$40,000 advanced; the \$75,552.33 paid for past wage loss; the \$84,437.36 payable for future wage loss and the \$5,000 payable for Part 7 benefits consequently to compare the results, the value of the offer was: \$950,000 Advance \$ 40,000 Past Wage Loss Benefits \$75,552.33 Future Wage Loss Benefits \$84,587.73 \$1,140.140.06
- [22] In the result, the plaintiff turned down an offer of \$1,140,000 and recovered \$851,000 net after trial.
- [23] Rule 9-1 concerning the cost consequence of offers to settle provides as follows:
- (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.
 - (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
 - (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;

- (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
 - (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.
- (6) In making an order under subrule (5), the court may consider the following:
- (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;
 - (d) any other factor the court considers appropriate.
- [24] The Third Party estimates its costs and disbursements to be \$73,221 and the plaintiff estimates his costs and disbursements at \$86,373.97.
- [25] In the case of *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27, the court held: The first factor - whether the offer to settle was one that ought reasonably to have been accepted - is not determined by reference to the award that was ultimately made. Rather, in considering that factor, the court must determine whether, at the time that the offer was open for acceptance, it would have been reasonable for it to have been accepted: *Bailey v. Jang*, 2008 BCSC 1372, 90 B.C.L.R. (4th) 125 at para. 24; *A.E. v. D.W.J.* at para. 55. As was said in *A.E. v. D.W.J.*, "The reasonableness of the plaintiff's decision not to accept the offer to settle must be assessed without reference to the court's decision" (para. 55). Instead, the reasonableness is to be assessed by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided. We do not intend this to be a comprehensive list, nor do we suggest that each of these factors will necessarily be relevant in a given case.
- [26] In the case of *Fan (Guardian ad Litem) v. Chana*, 2009 BCSC 1497, McEwan J. stated at para. 19: The reintroduction of judicial discretion in costs certainly serves the ends of justice. Costs should be a penalty for unreasonable conduct in the litigation, not a penalty for failing to guess the outcome. In this regard, Courts must, I think, extend some leeway to litigants holding honest but, ultimately, mistaken views of their claims. It is generally better that such expectations be disposed of at law, rather than discouraged. The public should not be

given the impression that there is no reasonable access to a legal resolution. It must be recognized that some people will only be comfortable if they "hear it from the judge." This should be a valid option for those who seek it, not a form of deemed unreasonableness. As such, inducements to settle, and to avail oneself of alternate dispute resolution, ought to complement rather than obstruct judicial determinations.

- [27] In the Fan case, however, McEwan J. found, "It is disturbing to find that a matter has come to trial on a costly series of opinions, founded on premises that a rudimentary effort at fact checking would reveal to be dubious." The award in the Fan case was \$31,721.42 and the offer of settlement \$75,000. The plaintiff was allowed costs to the date of the offer and the defendant thereafter (with some adjustments).
- [28] When the offer in this case was received on October 6, 2011, the plaintiff and his counsel were in possession of the information necessary to make a realistic assessment of the potential recovery. Naturally, there is no mathematical certainty in those matters and differing courts may give differing amounts. The plaintiff and his counsel would clearly have contemplated a range of possible recoveries. The plaintiff, of course, hopes for the high end of the range and the paying party the low – settlements are often made somewhere in between.
- [29] The offer in this case was reasonable on the facts of the case as they were known to the parties. It could reasonably have been accepted as being within the range of possible recovery, although likely it would not have been thought by either party at the high end of the range. The amount of the Offer was reasonable as was its timing: the information necessary to assess the claim was in the possession of the parties, yet there was plenty of time to give careful consideration to the matter before the November trial date. On the other hand, Mr. Tompkins was seriously injured. He and his counsel's view of the matter was that it was worthwhile going to court in the hope of getting a significantly higher award. It cannot be said that such a decision was unreasonable at the time.
- [30] The purpose of cost consequences of reasonable offers is to encourage settlement. On the other hand, onerous cost penalties should not discourage the seriously injured from a proper hearing and a chance to obtain a higher award, nor should they seriously subtract from what the court has found is appropriate compensation for the injury.
- [31] Considering the factors set out in the Rules, it is my opinion that the interests of justice are best served in this case by awarding Mr. Tompkins his costs and disbursements up to and including October 31, 2011, but disallowing them after that date, with the Third Party to bear its own costs. There is then a consequence for not accepting a reasonable Offer, but the consequence is not unduly punitive in the circumstances. "V.R. Curtis J."

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