

CANADA / JUDGMENT

Tompkins v. Meisters

2022 BCSC 1289

COURT

Supreme Court of British Columbia

DECIDED

29 July 2022

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2022 BCSC 1289 Tompkins v. Meisters IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Tompkins v. Meisters, 2022 BCSC 1289 Date: 20220729 Docket: M188663 Registry:

Vancouver Between: Maria Helena Tompkins Plaintiff And Maria Hendrina Meisters, Canstar Restorations GP Inc., Miranda Jean Tompkins, and Heath Troy Tompkins Defendants Before: The Honourable Madam Justice Lyster Reasons for Judgment Counsel for the Plaintiff, appearing via videoconference: T.R. O'Mahony Counsel for Defendants, appearing via videoconference: A. duPlessis Place and Date of Trial/Hearing: Vancouver, B.C. May 13, 2022 Place and Date of Judgment: Vancouver, B.C. July 29, 2022 Table of Contents INTRODUCTION.. 3 DEDUCTION FROM LOSS OF FUTURE EARNING CAPACITY AWARD.. 4 DEDUCTION FROM COST OF FUTURE CARE AWARD.. 9 CONCLUSION.. 10

INTRODUCTION

- [1] On October 25, 2021, I issued my reasons for decision in this personal injury case: 2021 BCSC 2080 (the "Decision"). I awarded Ms. Tompkins damages as summarized at para. 100 of the Decision: · Non-pecuniary damages (including loss of housekeeping capacity) \$190,000.00 · Past loss of earning capacity \$120,000.00 · Future loss of earning capacity \$255,000.00 · Cost of future care To be calculated · Special damages \$4,970.00
- [2] The defendants now apply to have certain amounts deducted from the damages award pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C 1996, c. 231 [Act]. In their notice of application, they sought to have a total of \$299,272.44 deducted. In oral submissions, the total deduction sought was reduced slightly to reflect the parties' agreement on certain issues.
- [3] Specifically, the defendants apply to have \$55,500.00 deducted from the award for past loss of earning capacity on account of temporary total disability ("TTD") payments paid to date, and \$170,726.40 from the award for future loss of earning capacity on account of TTD payments payable in future.

- [4] Ms. Tompkins agrees that \$55,500.00 should be deducted from the award for past loss of capacity on the basis of TTD payments received to date. She disputes the deduction from the award for future loss of capacity, on the basis of uncertainty about her entitlement to future TTD payments.
- [5] In the Decision, I directed the parties to calculate the net present value of the cost of future care award on the basis of the multipliers set out in Mr. Coleman's report. The parties have agreed that the present net value of the cost of future care award is \$136,968.32. The defendants apply to have \$71,816.29 deducted from the cost of future care award due to Part 7 benefits paid since trial and payable in future.
- [6] Ms. Tompkins accepts that a deduction should be made from the cost of future care award. She submits that the agreed upon figure of \$71,816.29 should be reduced by 20% due to uncertainties, to ensure the defendants do not receive a windfall at her expense.
- [7] As a result of the agreements reached by the parties, for which they are to be commended, there are only two issues requiring the Court's decision. First, should some or all of the \$170,726.40 sought by the defendants be deducted from the award for future loss of earning capacity on account of TTD payments payable in future? Second, should the \$71,816.29 deduction sought by the defendants for Part 7 benefits be reduced to reflect uncertainties in Ms. Tompkins' entitlement going forward? DEDUCTION FROM LOSS OF FUTURE EARNING CAPACITY AWARD
- [8] I awarded Ms. Tompkins \$225,000.00 for loss of future earning capacity. That award was made after a deduction to reflect the "10% possibility of her being able to return to paid employment": at para. 72.
- [9] There is no dispute that Ms. Tompkins is currently entitled to TTD payments pursuant to ss. 80 and 86 of Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg 447/83 [Regulation].
- [10] In his affidavit sworn in support of the application, Dave Wright, Claims Manager with ICBC, confirms that ICBC accepts the court's findings with respect to Ms. Tompkins' loss of future earning capacity. He states that he is "authorized on behalf of ICBC to confirm that ICBC will irrevocably, unequivocally and unconditionally continue to pay up to \$300.00 per week in TTD benefits to the Plaintiff until the Plaintiff's 65th birthday in accordance with sections 80 and 86 of the Regulation". Using the actuarial multiplier found in Mr. Benning's report, Mr. Wright calculates the present value of the TTD benefits payable from the date of trial to Ms. Tompkins' sixty-fifth birthday as \$170,726.40. This is the basis for the deduction sought by the defendants.
- [11] Ms. Tompkins submits that Mr. Wright's affidavit does not provide any certainty as to the amount of future TTD benefits ICBC will pay. Focusing on the language of "up to \$300.00 per week", she submits that ICBC has committed to pay between \$0 and \$300.00 per week, and that it is uncertain how much this means ICBC will actually pay.

- [12] Ms. Tompkins submits that an example of a circumstance in which her TTD benefits could be reduced would be if she attempts to return to work, resulting in a decrease in her payments, and then finds she is unable to continue working. She says that the language contained in the affidavit means that ICBC retains the ability to pay her \$0 if, in ICBC's judgment, she has recovered to the point that she is not totally disabled.
- [13] Ms. Tompkins contrasts the language found in the affidavit with that in the cases relied upon by the defendants in which deductions were made. For example, in *Kingston v. Mann*, 2021 BCSC 426 [Kingston] at para. 6, ICBC agreed to pay TTD payments of \$31,200.00 representing wage replacement for a further 104 weeks. At para. 9, Justice Duncan found that she was satisfied that there was no uncertainty regarding whether or not the payments would be made. She agreed that in the unlikely event the plaintiff did start working within that two-year period, there could be an issue with reduction in TTD payments. The solution to that problem was to apply a 25% contingency to the deduction sought by the defendants.
- [14] In *Skinner v. Dhillon*, 2021 BCSC 1992 [Skinner], at para. 13, ICBC asserted that it would pay "a further \$9,829.88 in TTDs over the next two years". At para. 31, Mr. Justice Branch accepted that there was only a possibility that the requirements of the Regulation would not be met, not a certainty. At para. 32, he found that the proper way to address the plaintiff's argument was through the application of a contingency of 50%. This higher percentage than in *Kingston* was intended to take into account the much higher possibility of the plaintiff in *Skinner* working in the next two years.
- [15] In *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953 [Aarts-Chinyanta] at para. 10, ICBC committed to "continue to pay TTD benefits to Ms. Aarts-Chinyanta in the annual amount of \$7,487.16 until age 65". This commitment was sufficiently certain to entitle the defendants to deduct the entire amount sought: at para. 118.
- [16] As stated in *Aarts-Chinyanta* at paras. 39 and 72, the onus is on the defendants to establish which deductions should be made under s. 83 of the Act. The defendants bear the burden of proving that Ms. Tompkins is entitled to the benefits which they seek to have deducted. Strict compliance with the statute is necessary, and uncertainty about whether a benefit will be paid must be resolved in favour of the plaintiff: *Boparai v. Dhami*, 2020 BCSC 1813 at para. 30, cited in *Skinner* at para. 16.
- [17] In my view, the language employed in Mr. Wright's affidavit does introduce an element of uncertainty as to how much TTD benefits ICBC will pay Ms. Tompkins going forward. ICBC will pay "up to" \$300.00 a week. This stands in contrast to the much more certain language seen and relied on in *Kingston*, *Skinner* and *Aarts-Chinyanta*, where ICBC committed to pay specific amounts for specific periods of time.
- [18] Even with much more certain language, the courts in *Kingston* and *Skinner* applied a contingency to address the possibility the plaintiff might return to work during the period during which ICBC committed to pay TTD benefits.

- [19] In the present case, the possibility Ms. Tompkins will return to work is not high, given the 10% contingency I applied to the award for loss of future earning capacity at para. 72 of the Decision. It is not, however, non-existent, particularly when one considers that Ms. Tompkins was 52 years of age at trial, and ICBC has committed to paying TTD benefits of up to \$300.00 per week to age 65. That is a substantial period of time in which Ms. Tompkins' condition could change, and she could attempt to return to work, with unpredictable potential chances of success.
- [20] Ms. Tompkins submits that the degree of uncertainty about how much ICBC will pay her in future TTD payments is so great that it renders it impossible for the Court to determine how much the deduction should actually be, meaning that the Court should deduct nothing. In the alternative, she submits that the deduction should be reduced, first, to reflect the 10% contingency already applied to the award; second, to reflect a potential return to part-time employment; and third, to reflect the uncertainty engendered by the "up to" language. Taken together, she submits that the appropriate reduction would be 75%.
- [21] In reply, the defendants rely on s. 81.1 of the Regulation. It provides: 81.1(1) If an insured who is entitled to disability benefits under section 80 becomes capable of engaging in employment or an occupation but, because of injuries suffered in the accident is incapable of earning an amount that exceeds 125% of the disability benefits determined under sections 80 and 81, the insured may keep earnings from that employment or occupation, without deduction from disability benefits, in an amount that does not exceed 25% of those disability benefits, but any amounts earned in excess of 25% of the disability benefits will be deducted from the disability benefits payable by the corporation.
- (2) No disability benefit is payable under section 80 if the application of subsection (1) would result in a payment of less than \$5 a week.
- [22] The defendants submit that any uncertainty arising from the possibility that Ms. Tompkins may attempt to return to work can be addressed through the application of s. 81.1, which they note was not considered in Kingston. They say that s. 81.1 determines what will happen and what she would be paid if Ms. Tompkins is able to return to work. They submit that if she is deemed totally disabled, Ms. Tompkins could work and earn \$300.00 a week plus 25%. If she were to earn more than that, the difference would be deducted. They submit that given the 10% contingency I applied to the award for loss of future capacity, there is no uncertainty, as she would continue to receive \$300.00 in any event. In the alternative, if the court still has any concerns, the defendants submit that a reduction of 10%, as in the trial award, would be appropriate.
- [23] Ms. Tompkins disagrees with the interpretation of s. 81.1 offered by the defendants. Neither party came prepared with any caselaw interpreting s. 81.1, but in response to my request, counsel for Ms. Tompkins did provide two cases: *Cai v. Insurance Corporation of British Columbia*, 2013 BCSC 2213 [Cai], and *Prato v. Insurance Corporation of British Columbia*, 2003 BCSC 76 [Prato]. Prato is of limited assistance, as all the court appears to do in that case

is repeat counsel's submissions with respect to the meaning and effect of s. 81.1 at para. 4, which was that if a person becomes capable of employment, but "is incapable of earning an amount that exceeds 125 per cent of the TTDs, [they are entitled] to keep any earnings to a maximum of 25 per cent of the benefits. Any earnings in excess of 25 per cent are then deducted dollar for dollar from the benefits calculated under s. 80." The court did not make any determination of the proper interpretation of s. 81.1.

[24] Cai is of more assistance. At para. 36, Justice Bruce stated:

[36] Wage loss benefits are still payable under s. 80 of the Regulation if the insured recovers sufficiently to engage in some type of work but their earnings are deducted from the amount payable if the amount earned is less than 25% of the benefits. If the amount earned is more than 25%, then the amount in excess of that percentage is deducted from the benefits payable to the insured (s. 81.1(1)).

[25] It is not necessary for me to determine the meaning and effect of s. 81.1. That is because it applies, on its face, where a person is receiving benefits under ss. 80 and 81. Those sections apply to TTD benefits payable within the period of total disability, or 104 weeks, whichever is shorter. Ms. Tompkins is receiving TTD benefits under s. 86, which applies where a person continues to be disabled after the 104 week period. Section 86(5) provides that if a person returns to work but is incapable of earning the amount of their disability benefits, ICBC will pay the difference. It appears to me that this is the provision that would apply if Ms. Tompkins were able to return to work and be unable to earn \$300.00 a week.

[26] I find that s. 81.1 does not assist in resolving the uncertainty inherent in the language of Mr. Wright's affidavit.

[27] I note that, in his affidavit, Mr. Wright confirms that ICBC accepts the court's findings with respect to Ms. Tompkins' loss of future earning capacity. He does not say that ICBC accepts that Ms. Tompkins will continue to be totally disabled until age 65. It is possible that ICBC will, at some point in the future, determine that Ms. Tompkins is no longer totally disabled, and disentitled to further TTD payments. Considering the language in Mr. Wright's affidavit and the possibility that Ms. Tompkins could return to work, and the uncertainty about what benefits Ms. Tompkins would receive in that event, I find it appropriate to reduce the deduction sought by the defendants by 50%. Applying that contingency to the deduction sought by the defendants of \$170,726.40, I deduct \$85,363.20 from that amount, for a total deduction from the future loss of earning capacity award of \$85,363.20. I note that \$16,800.00 has already been paid from this amount since the conclusion of the trial. DEDUCTION FROM COST OF FUTURE CARE AWARD

[28] The parties agree that the present net value of the cost of future care award is \$136,968.32. The defendants apply to have \$71,816.29 deducted from this amount to reflect Part 7 benefits paid and payable to Ms. Tompkins. Of this amount, \$2,774.30 has already been paid since the conclusion of the trial.

- [29] Ms. Tompkins agrees with the \$71,816.29 figure, but submits that it should be reduced by 20%. In support of this position, she submits that she may exceed the maximum benefits payable to her under her Part 7 policy. She says that after the deductions sought by the defendants, there would only be about \$40,000.00 left in her Part 7 policy. In this regard she refers, for example, to the fact Dr. Shuckett recommended she attend a pain clinic, which should be funded under Part 7, and that was not ordered as part of the tort award. She also submits that the amount that ICBC pays for particular treatments could change over the next two decades, and that some of the items ordered may be considered ameliorative rather than restorative, and thus not compensable under Part 7.
- [30] In this regard, Ms. Tompkins relies on Aarts-Chinyanta, in which the deduction for future cost of care was reduced by 25% at para. 117 to take into account various contingencies. She also relies on Richmond v. Osztovits, 2020 BCSC 1160, in which the deduction for cost of future care was reduced by 20% at para. 24.
- [31] I agree with Ms. Tompkins that a 20% reduction of the deduction for the cost of future care is appropriate. Applying that reduction to the amount sought of \$71,816.29, I conclude that the deduction from the cost of future care award should be \$57,453.03.

CONCLUSION

- [32] Pursuant to s. 83 of the Act, the following amounts are to be deducted from the award: · by consent, \$55,500.00 from the award for past loss of earning capacity; · \$85,363.20 from the award for future loss of earning capacity; and · \$57,453.03 from the award for future cost of care,
- [33] This results in a total deduction of \$198,316.23.
- [34] Should the parties be unable to agree on the costs of this application, they are to contact Supreme Court Scheduling within 30 days to arrange a hearing to speak to costs. "Lyster J."

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Prepared on 27 October 2026 · Esheria