

CANADA / JUDGMENT

Tran v. Ozee

2024 BCSC 208

COURT

Supreme Court of British Columbia

DECIDED

11 January 2024

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2024 BCSC 208 Tran v. Ozee

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tran v. Ozee,

2024 BCSC 208

Date: 20240111

Docket: M202812

Registry: Vancouver

Between:

Jeannie Ngoc Bich Tran

Plaintiff

And:

Liam Connor Ozee

Defendant

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

C. Perry

Counsel for the Defendant:

K. Armstrong, KC

Place and Date of Hearing:

Vancouver, B.C.

January 11, 2024

Place and Date of Judgment:

Vancouver, B.C.

January 11, 2024

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, including reorganizing some of the text for ease of reading, without affecting the substance or final disposition.
- [2] The application before the Court today is with respect to a request for exclusion of disbursements in accordance with the newly enacted Disbursements and Expert Evidence Regulation, BC Reg 210/2020, as amended by B.C. Reg 241/2023 (the "Regulations"), as now applies with respect to trials that are occurring after February 27, 2024.
- [3] This matter involves a motor vehicle accident which occurred on February 19, 2019. At the time the plaintiff was 23 years old, such that by the time of trial, that being June 3, 2024, she will be 28 years old.
- [4] The 84-day deadline for expert reports falls on March 11, 2024. Based on that approaching deadline, the plaintiff brings today's application to have specific disbursements excluded from the 6% cap (the "Cap") prescribed under the Regulations.

Legal Framework

- [5] The legislative intention with respect to the enactment of the Regulations has been set out in the decisions, in which this legislation in its prior form was reviewed, such as *British Columbia (Attorney General) v. Le*, 2023 BCCA 200 ("Le"), where the court noted as follows at para. 128 as to personal injury litigation:

Several medical experts may be required to address a plaintiff's injuries and explain their prognosis for recovery. The substantive law for various categories of loss (for example, the cost of future care) requires some medical justification. Trial judges can attest to the frequency with which defendants argue that some aspect of a plaintiff's claim is not supported by medical evidence or ask the judge to draw an adverse inference because a plaintiff's personal physician or other caregivers, whose evidence may require an expert report, have not been called to give evidence. The reality is that, in personal injury litigation, plaintiffs typically carry the burden of proof to make out their claims.

- [6] As argued by the Attorney General in *Le*, the purpose of the Regulations is to promote the just, speedy and proportionate determination of personal injury claims, encourage the use of joint experts or independent experts to provide neutral expert opinions to assist the court, and manage the growing costs of litigation.
- [7] In order to address any prejudice that may be suffered by a litigant as a result of the Cap, the court is given the discretion to relieve a litigant from its effect by virtue of the following provisions of the Regulations:
- (6) On application by a party to a vehicle injury proceeding, the court may, if satisfied that the conditions set out in subsection (8) are met, order that the disbursements itemized in the order are excluded disbursements.
- (8) The following are the conditions for the purposes of subsection (6):
- (a) the application is made before the disbursements are incurred;
- (b) were the disbursements not excluded, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the vehicle injury proceeding.
- (9) In an application under subsection (6), a party must include the following:
- (a) the nature and the 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, which must include:
- (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.

[emphasis added]

Risk that Disbursements will Exceed Cap and Cause Hardship

- [8] In this case, the defendants do not dispute that there is a risk that the Cap will be insufficient to cover the disbursements being sought to be excluded, or that if called upon to pay them personally, the plaintiff would suffer hardship. As such, for the purpose of these Reasons, I am not considering those elements of the Regulations.

Necessity of Disbursements to Justly Resolve Proceedings

- [9] The defendants oppose the order sought, other than with respect to one aspect, on the basis that the plaintiff has failed to meet the onus upon her to establish that the disbursements sought to be excluded are necessary.
- [10] The specific disbursements that the plaintiff seeks to have excluded are for the retainer, report preparation and possible trial preparation and attendance of a psychiatry expert, a psychology expert, and an occupational therapy expert, none of whom are named or specifically identified. The defendant does not oppose the exclusion for the purposes of the psychiatry expert, taking no position on the question of whether that evidence meets the necessity requirement, but does argue that the plaintiff does not establish on the evidence that the psychology and occupational therapy experts do meet the test.
- [11] That the party making the application has the onus to establish such necessity has been confirmed by this court: para. 14 of *Nagra v. Prasad*, 2023 BCSC 2297 ("*Nagra*"). While it is incumbent upon the applicant to put sufficient evidence to meet that onus, namely to establish that the disbursement is necessary to "justly resolve" the issues in the proceeding having regard to the complexity of the matter, the test for such necessity is unclear.
- [12] Counsel for the plaintiff argued that the matter ought to be considered on a similar standard to that applied when a disbursement is being considered as reasonable at a bill of costs assessment, given that one of the tests or questions that the court asks in that respect is whether or not it was reasonably necessary at the time it was incurred. In this respect the case relied upon by the plaintiff for the proposition as to the relatively low threshold in terms of establishing necessity based on a decision involving an assessment of costs is *Zaenker v. Kirk*, 2008 BCSC 1460:
- [23] In approaching this particular appeal regarding the substantial expense incurred by the plaintiffs for these appraisals, the majority of which they now seek to pass on to the defendants, I am mindful of three things. First, experts' reports properly obtained in furtherance of litigation may be of a wider breadth and scope than are actually required if the matter proceeds to trial, or may be deficient in one way or another, and still be legitimate expenses. Second, the time to assess the necessity of obtaining such reports is prior to the trial when the case is being prepared, and not after the lawsuit has been decided. Third, the "necessity" of a party obtaining such reports (as that necessity is to be considered in the context of Rule 57(4)), ought not to be considered in an overly stringent manner so as to impair counsel's proper assessment of his or her client's case prior to trial.
- [24] On the other hand, "necessary" disbursements are essential disbursements, which means that they are outlays that could not be avoided in the conduct of the proceeding, whereas "proper" disbursements are those reasonably incurred in the conduct of the proceeding but are, strictly speaking, avoidable: *McKenzie v. Darke* (2003), 120 A.C.W.S. (3d) 380 (B.C.S.C. Registrar) at para. 18.

- [13] The defence argues that it is a more stringent test than that at a bill costs assessment, and that it ought to be similar to that applied in considering the necessity of an independent medical examination. In particular, that there must be some evidence that the disbursement being sought is necessary to prove a specific issue for resolution to ensure that there can be a fair trial on the merits, and not for the purpose of bolstering expert evidence, with an emphasis on proportionality.
- [14] In this respect, the 2010 amendments to the Rules specifically provide that one of the objects of the Rules is to apply them in a proportionate way to the amount involved, importance of the issue in dispute, and complexity of the proceeding. By the words "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" it is clear that the legislature intended that a similar proportionality analysis apply to these applications.
- [15] Given the infancy of the Regulations, there has been little analysis of what ought to be considered by the court on applications for an exclusion.
- [16] In *Nagra* the court said this at para. 14:
- [14] Also, there has to be evidence that the disbursements that are subject of the application are necessary to justly resolve the proceeding. The plaintiff has the onus of proof with respect to his injuries and their alleged effects. There is the allegation in the notice of civil claim that he suffered a loss of future income and a cost of future care, and in my view, the report of the occupational therapist is necessary in order to prove that -- the necessary causation, the causal link between his alleged injuries and his ability to earn income, and medical costs, into the future.
- [17] Further, the court noted at para. 18:
- [18] I agree with the submissions of the plaintiff that the court's order should address the particular experts, not the individual report in a piecemeal approach to each expert .
- [18] In *Kundan v. Hoogstra*, 2024 BCSC 57, where there was no evidence of a diagnosis of a psychological injury, or symptoms consistent with a psychological injury pled in the notice of civil claim, the court did not find the test to be met in respect of a psychiatry report, noting:
- [27] I agree with the defendants that it appears the thrust of the plaintiff's claim based on her pleadings, the clinical records, and from her discovery, are related to her physical injuries. I am prepared to find that there is a reasonable risk that the total amount of the disbursement would exceed the cap and that the plaintiff would be unable, without undue hardship, to incur the disbursement if it were not excluded. However, as I am required to do pursuant to s. 5(8) of the Regulation, in applying the test of proportionality, I do not find that the plaintiff will suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding.

- [19] In exercising discretion on applications such as this, the court must ensure that the result is in the overall interests of justice. In the context of these applications under the Regulations, that equates to balancing the legislative goal of ensuring a fair trial on the merits based on what will form the evidentiary record before the court, without increasing costs in a way that is disproportionate to the matter's complexity.
- [20] As to that evidentiary record, it is somewhat circular to suggest that a party needs to put volumes of evidence before the court, which may cost as much to obtain as the Cap itself, to establish that a disbursement over the Cap is warranted. There is also some inherent risk that in making an application the applicant must, to some extent, tip its hand by possibly highlighting the flaws in its case to establish their risk that the Cap will not be sufficient, which will have to be balanced by the applicant. I would also not expect that the legislature intended to interfere with the right of the applicant to withhold its expert evidence until it is required to disclose it in accordance with the Rules by requiring expert evidence to be tendered on an interim application such as this.
- [21] Taking all of these factors into account, as well as the role of the court as a gatekeeper to ensure that the legislative goals are met, an appropriate test as to necessity is somewhere between that used on a cost assessment, and that used for an application under R. 7-6.
- [22] In particular, in order to establish that the disbursement is necessary there must be some evidence that the proposed disbursement will enable the party to address a specific issue in dispute which may not be addressed if it is not excluded from the Cap, and that a failure to obtain that evidence will prejudice the applicant to a degree that is disproportionate to complexity of the matter. That will require some evidence, but not necessary expert evidence, that shows that the issues to be addressed are sufficiently material based on the pleadings, having regard to the complexity of the case. That may be, as is the case here, by way of a combination of clinical notes and discovery evidence.
- [23] Further, where possible, the applicant should seek to address as much as possible, rather than consider disbursements on a piecemeal basis, so as to ensure that the full proposed evidentiary record can be considered in the analysis.

Analysis

- [24] The costs for the initial examination and reports by a psychiatrist and occupational therapist are \$6,000 to \$7,000, and \$5,000 to \$7,000, respectively, with a further \$5,000 to \$7,000 each relating to the preparation and trial attendance.
- [25] The defendant is not taking any position today on those estimates as to costs, or the sufficiency of the evidence in that respect. Ideally, however, the evidence to support the costs will be fee sheets or general quotes from experts within that field.

- [26] However, as to the evidence as a whole, the plaintiff relies on hearsay affidavit evidence of their principal counsel. The defendant took issue with the nature of this evidence. While there is no dispute that hearsay evidence is admissible on an interlocutory application, counsel for the defendant argued that this affidavit material, which notably was just filed yesterday and handed up to the court at the commencement of the matter, contains unattributed hearsay, which is not admissible.
- [27] Leaving aside that this evidence ought to have been in the supporting affidavit from the outset as it directly addresses the test set out in the Regulations, in my view the flaws are more in the nature of sloppy drafting than lack of attribution. In particular, the evidence is that "the plaintiff confirmed" the information, rather than the deponent swearing that the plaintiff advised them as to that specific information on any specific date. In the overall context of the affidavit, it is clear that the source of the information was the plaintiff. As such, I am prepared to proceed on the basis of the affidavit evidence as filed. In addition, much of that evidence went to those portions of the test to which the defendant no longer takes issue.
- [28] Turning then to the evidence that is before the Court as to the necessity for the psychiatry and occupational therapy expert retainers, the affidavit evidence includes summaries of what the plaintiff deposed at her examination for discovery, specifically with respect to the psychological injuries as follows:
- a) She continues to have poor sleep and she experiences nightmares about the accident;
 - b) She suffered a depression following the accident, was prescribed antidepressants;
 - c) Her anxiety has improved, but she has not recovered; and
 - d) That she continues to experience driving anxiety while driving in certain conditions.
- [29] With respect to the difficulties in performing her employment tasks, which the plaintiff argues gives rise to the necessity of the functional capacity evaluation ("FCE") or occupational therapist retainer, the plaintiff's evidence at discovery was that:
- a) She continues to have trouble pushing wheelchairs and lifting objects;
 - b) She requires help from other staff to complete her physical duties; and
 - c) She continues to call in sick two to three times per month due to her accident-related injuries.
- [30] Further discovery evidence with respect to her housekeeping chores included:
- a) That she performs her pre-accident chores but only with pain; and
 - b) She has particular trouble vacuuming or sweeping as those tasks require to look at the floor, which aggravates her neck pain.

- [31] In addition, the plaintiff has put into evidence counselling clinical records which detail certain difficulties with respect to her psychological injuries since the accident happened and more importantly since she has returned to work. In this respect, the plaintiff was off work for approximately a year or so after the motor vehicle accident but has since returned to work. However, she states that has had to change her employment because of reasons not necessarily associated with this motor vehicle accident. She currently works with children but does have some higher aspirations to further her education in that respect.
- [32] The clinical records include a July 28, 2023 visit where the plaintiff reported improvements in her neck, upper back, lower back pain, although noted that neck pain was still present. She stated that her mood and anxiety had improved and that she was working one full-time job and one part-time job with plans to change jobs in September and no plans to attend school in September. The assessment at that time was that there was chronic neck pain with reported improvement in upper and lower back pain and improved mood and anxiety.
- [33] Thus, what the defendant says distinguishes this case to some degree from the few cases that have considered applications under the Regulations to date is the proportionality analysis. Specifically, in this case we do have a plaintiff who is working. While, the clinical records do show ongoing complaints of depression or symptoms of depression, such as anxiety and sleep problems, continuing she has been able to work.
- [34] The plaintiff argues that notwithstanding that there seems to be an ability to continue work, the fact is that she does so with pain and in that respect, that a functional capacity evaluation is necessary in order to establish exactly how this will impact her future career goals and overall capacity given that the future income loss will be the basis for a loss of capacity claim.

Conclusion and Orders Made

- [35] With respect to the psychological injuries while it is one thing for a general practitioner or counsellor to comment on the injuries, it is another for an expert to comment on the causation and proper diagnosis of these injuries and future prognosis in that respect. The plaintiff argues that in this case, given that there are some pre-existing psychological injuries, and that the defendant has raised causation as an issue, that it is a necessity that those issues be resolved by a psychiatrist, in order to ensure that the plaintiff can fully present her case.
- [36] I am satisfied that the plaintiff has met that the burden upon her to establish that the psychiatric assessment is necessary, in that it will assist with the overall assessment, diagnosis, prognosis of the plaintiff's injuries as may be necessary to resolve the issues in dispute in the proceedings, including as to causation, and that doing so is proportionate to the complexity of this matter.

- [37] While I was initially concerned here that there is not an identified expert who will be retained, I am satisfied that sufficient detail has been provided to know the specific modality and expertise. Given that these applications must be brought before the cost is incurred, it is not unreasonable that the precise expert will not yet have been engaged.
- [38] I do not, however, find that the plaintiff has established that it is necessary, or proportional, for a FCE or cost of future care evaluation to be done at this time by an occupational therapist.
- [39] The defendant argued that the psychiatrist will comment on the same issues and therefore the report is not necessary as it is duplicative or "bolstering" of evidence that will otherwise be obtained. I am reluctant to say too much on this topic. As counsel noted, there is some inconsistency in how the court addresses the overlap between the findings as to capacity as made by psychiatrists and occupational therapists conducting a FCE. I acknowledge that they may each have their own function and role, and by making this decision where an exclusion for one has been approved, albeit by consent, and not the other, I do not intend to lead to that ongoing debate. Suffice it to say in this case, where the plaintiff is working, a FCE is not necessary having regard to the proposed evidentiary record and considerations of proportionality.
- [40] Therefore, I make the orders as sought in paras. 1(a) and (b). Rather than dismiss para. 1(c), that will be adjourned, as it may be that the necessity becomes more obvious once the psychiatrist report is received.
- [41] Finally, there is a dispute as to whether or not any disbursements incurred by the plaintiff for the purposes of bringing this application ought to also be excluded. The costs are relatively nominal. It is an \$80 filing fee and whatever photocopying costs there are for putting together the binders. However, the plaintiff argues that there is some principle to excluding the costs for these steps being taken as well, noting the "death of a thousand cuts" by which even incremental increases in disbursements can cause the Cap to be insufficient at the end of the day. The plaintiff argues that if they are put to the cost of having to bring an application to seek an excluded disbursement, the costs for doing so should be part and parcel of that overall exclusion even though the legislation does not say anything specific in that respect.
- [42] Subsection (6) references disbursements as itemized, without limiting it as to any specific disbursement.
- [43] If there is opposition to an exclusion, then an application must be brought. As such, the disbursements incurred in filing the application in order to obtain an exclusion are also necessary and subject to the exclusion as well.
- [44] As such, I also make the order as sought that the disbursements incurred by the plaintiff for the purposes of this application are excluded for the purposes of s. 5(2) of the Regulations.

[45] As to costs of this application, I am advised that liability is in dispute. As there has been divided success, costs will be in the cause.

"Associate Judge Robertson"

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Prepared on 24 October 2026 · Esheria