

CANADA / JUDGMENT

Watson v. Fatin

2023 BCCA 82

COURT

British Columbia Court of Appeal

DECIDED

21 February 2023

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2023 BCCA 82 Watson v. Fatin

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Watson v. Fatin,

2023 BCCA 82

Date: 20230221

Docket: CA47614

Between:

Adam Watson and Canada Joint Ocean Sea Management Co. Ltd.

Appellants

(Defendants)

And

Maureen Anne Fatin

Respondent

(Plaintiff)

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Fitch

The Honourable Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated

June 21, 2021 (Fatin v. Watson, 2021 BCSC 1210, Victoria Docket M162885).

Counsel for the Appellants:

R.C. Brun, K.C.

J.J.L. Brun, K.C.

Counsel for the Respondent:

D.D. McKnight

Place and Date of Hearing:

Vancouver, British Columbia

November 23, 2022

Place and Date of Judgment:

Vancouver, British Columbia

February 21, 2023

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Justice Marchand

Summary:

After the respondent was awarded damages for the cost of future care following a motor vehicle accident, the appellants applied under s. 83 of the Insurance (Vehicle) Act to reduce the award by the amount of benefits provided by the Insurance Corporation of British Columbia. The judge deducted some mandatory benefits from the award, but applied a contingency reduction to the deductions, which the appellant challenged on appeal. Held: Appeal allowed. The contingency reduction was fatally speculative, as there was no evidence of a risk that the respondent would not receive the benefits to which she was entitled.

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] This appeal concerns the deduction made from a cost of future care damages assessment to reflect Part 7 benefits provided by the Insurance Corporation of British Columbia under the no-fault scheme established by the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231. The judge reduced the amount of the deduction by 20%, saying that this represented a contingency reduction.

- [2] The appellants are the defendants, Adam Watson and Canada Joint Ocean Sea Management Co. Ltd. They are liable to the respondent, Maureen Fatin, for personal injuries she suffered in a motor vehicle accident. They contend that the amount the judge deducted from the cost of future care award on account of the no-fault benefits scheme is insufficient for two reasons. First, and centrally, they say the judge erred in principle in reducing the deduction for no-fault benefits by 20%. Second, they say they should be credited with \$89.59 and \$509.51 paid to Ms. Fatin by ICBC post-trial.
- [3] In his reasons for judgment indexed as 2020 BCSC 1880, Mr. Justice Milman awarded \$55,000 for the cost of future care under the headings of: Botox treatment; aids and equipment; and physical rehabilitation (kinesiology, gym and pool membership, and physiotherapy and massage treatments).
- [4] After the judge released his reasons assessing damages, Mr. Watson and the Company applied under s. 83 of the Act to have the total amount of the future care award deducted from the formal judgment. They contended that all items listed by the judge were fully covered by the no-fault benefits that would be paid by ICBC under Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 and so must be deducted. Ms. Fatin contested the application.
- [5] By reasons for judgment indexed as 2021 BCSC 1210, the judge held that Botox, kinesiology, physiotherapy, and massage treatments came within s. 88(1) of the Regulation and reduced the award for those items, but only by 80%. He described the 20% not included in the reduction as "a 20% contingency reduction to the deductions from the cost of future care award". The judge did not reduce the award for aids and equipment or gym and pool membership. His decision reduced the damages assessment by \$37,400, bringing the award for cost of future care to \$17,600.
- [6] By this appeal, the appellants say that the total deduction from the award under the no-fault scheme should be \$47,349.10, bringing the award for cost of future care to \$7,650.90.

The Legislation and Legal Principles

- [7] For the purposes of his decision, the judge referred to the Regulation applicable after April 1, 2019, and the parties have made submissions on the premise of those provisions. I take the same approach. In describing the scheme, I refer to the person entitled to no-fault benefits as the "insured".
- [8] The legislative scheme applicable to the appeal, since largely revamped, provided in the Act for payment of defined benefits, and required the court to take account of the benefits in making its judgment:

83 ...

- (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.
- (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.

[Emphasis added.]

[9] The Regulation lists the benefits for purposes of s. 83 of the Act, and provides in its Part 7: 88 ...

- (1) If an insured is injured in an accident for which benefits are provided under this Part, the corporation must, subject to this section, pay as benefits all reasonable expenses incurred by the insured as a result of the injury for necessary
 - (a) health care services listed in Column A of Table 1 or Table 2, as applicable, of Schedule 3.1 and provided by the applicable health care practitioner,
 - (b) occupational therapy provided by an occupational therapist, and
 - (c) medical, surgical, dental, hospital, ambulance and professional nursing services, speech therapy, medication, prostheses and orthoses.

(1.01) For the purposes of subsection (1) (a), a treatment

- (a) that is in addition to the number of treatments listed in Column D of Table 1 of Schedule 3.1 corresponding to that health care service, or
- (b) that is provided more than 12 weeks after the date of the accident

is not a necessary health care service unless the corporation's medical advisor or the insured's physician certifies to the corporation in writing that, in the opinion of the medical advisor or physician, the treatment is necessary for the insured.

- (2) Where, in the opinion of the corporation's medical advisor, 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:

(d.1) reimbursement to the insured for costs incurred from time to time by the insured for the purchase of health care supplies or of health care services not referred to in subsection (1), not exceeding the amount set out in section 3 (3) of Schedule 3;

(f) funds for any other costs the corporation in its sole discretion agrees to pay.

[Emphasis added.]

[10] The current maximum amount that may be paid by ICBC under Part 7 for accidents prior to 2018 is \$150,000.

[11] These provisions address the risk of over-compensation, as receipt of benefits with no deduction from the damages award for corresponding items would lead to double compensation. But there is also a converse risk. Where it is uncertain that the benefit will be received, deducting an amount from the judgment runs the risk of short-changing the insured; non-payment of a benefit where it has been deducted from the award denies the full measure of damages assessed by the judge. The criterion for the reduction addressed in s. 83(5) of the Act is, accordingly, entitlement to a benefit for an item of care under Part 7 respecting the loss on which the claim is based, with the insured receiving the entire entitlement and no more.

[12] But it is not always possible to be certain that a particular benefit will be paid in the future as circumstances change. This uncertainty is to be resolved in favour of the insured, and a court may conclude that only a nominal deduction is appropriate, or make no deduction for the uncertain amount. These principles are discussed in the cases relied on by the judge: *Boparai v. Dhami*, 2020 BCSC 1813 at para. 30; *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953 at paras. 78-81.

[13] More recently, after the judge delivered his reasons here, this court discussed the history of no-fault insurance in British Columbia in *Del Bianco v. Yang*, 2021 BCCA 315. Mr. Justice Frankel for the court applied the purpose of the deduction articulated by Chief Justice Farris in *Fisher v. Wabischewich* (1978), 5 B.C.L.R. 335 (C.A.) at 336:

The purpose of the deduction is two-fold:

- (1) It is to determine the sum that the plaintiff shall receive at the time of the judgment. It is not to fix the amount of the future benefits. The amount of benefits that the plaintiff will receive in the future is determined by the provisions of the Act. These may well be in excess of the amount estimated by the trial judge in his award. However, by deducting the amount that the trial judge has estimated, the amount that is immediately payable to the plaintiff is determined; and
- (2) It is to prevent the plaintiff from being compensated twice. He cannot receive a lump sum in respect of future benefits and also receive the benefits.

- [14] Mr. Justice Frankel observed in *Del Bianco* that the objective of avoiding double recovery is the same principle recognized in *Gurniak v. Nordquist*, 2003 SCC 59, a case addressing Quebec's no-fault insurance scheme.
- [15] It is for the defendants to apply under s. 83(5) for a reduction in the judgment. The onus is on them to establish that the plaintiff is entitled to Part 7 benefits in the amount they say should be deducted from the judgment.
- [16] In *Lynn v. Pearson* (1998), 55 B.C.L.R. (3d) 401 (C.A.), Mr. Justice Finch (later C.J.B.C.) explained:
- [18] ... The defendant bears the onus of proving that the plaintiff is, or will be, entitled to the benefits which it claims to have deducted from the award for the cost of future care. Strict compliance with the requirements of the statute is called for. ...
- [17] Conditions attaching to certain care items under Part 7, such as requiring the approval of a medical officer to exceed prescribed limits, add an element of uncertainty as to their future payment. To negate this uncertainty, the applicant may seek to adduce evidence that the condition creating the uncertainty is waived. Typically, this is accomplished by an affidavit from an appropriately authorized person for ICBC, irrevocably waiving the requirement and committing to pay the item in question. While the scope of ICBC's authority to waive conditions under s. 85(1) of the Act may be unsettled, that question does not arise here. In *Del Bianco*, Justice Frankel, referring to s. 85(1) of the Act, said:
- [66] I agree with Fleming J. that in determining whether a plaintiff is entitled to a benefit listed in Table 3.1/Table 1 in excess of the pre-authorized number of treatments, ICBC's waiver of the need for a medical certificate is a relevant factor. Whether ICBC also has authority to waive the condition under s. 88(2) of the Regulation that a discretionary benefit is likely to promote rehabilitation is something that does not need to be decided in this case.
- [18] In *Schmitt v. Thomson* (1996), 18 B.C.L.R. (3d) 153 (C.A.), Mr. Justice Hollinrake said, for a five-judge division considering a review of a benefit provision that provided discretion to terminate a benefit:
- [24] I should add here that in my opinion there is nothing to stand in the way of the Corporation waiving for a specific period of time its discretion under s. 87 of the regulations to review benefits payable every 12 months under Regulations 80, 84 or 86.
- [19] Assuming the necessary correspondence between the benefit and the damages award, evidence of a waiver is not the end of the reduction question. It remains for the judge to determine the amount of the reduction that will be applied taking into account the value of the benefits the insured is certain to receive. Factors that will erode the certainty required include the benefit room available considering the presumptive ceiling of \$150,000 and the likelihood that the tariff for the benefit is less than the cost to the insured for the item. *Halliday v. Sanrud* (1979), 15 B.C.L.R. 4 (C.A.) at 15-18 is an example of the former; *Del Bianco* at para. 58 is an example of the latter. In such circumstances, it will not be

established that the Part 7 benefits will pay for all of the award for the corresponding care. On some occasions, diminution of the reduction may be handled by applying a percentage contingency discount to the value of the benefit to account for uncertainty.

The Decision

- [20] The evidence adduced for the s. 83(5) hearing included an affidavit containing an irrevocable waiver of the sort described above. After considering the applicable principles and accepting the evidence, the judge considered the nature of the benefits that the applicants said should be deducted from the damages award. He then determined whether, in the words of s. 83, they were paid or were ones to which the insured "would have been entitled", using an estimate of the value of the amount of benefits not paid. This analysis required the judge to determine whether the care items attracted mandatory or discretionary payment under s. 88 of the Regulation.
- [21] Although the ICBC representative's affidavit agreed that all the items sought to be deducted required payments, the judge did not make all of the requested deductions. He found that the cost of Botox, kinesiology, physiotherapy, and massage treatments were care items that were mandatory under s. 88(1) and (1.01) and should be deducted from the award. He noted that ICBC had undertaken to pay for the aids and equipment and gym and pool membership as it accepted that these were "likely to promote the rehabilitation" of the insured, but he had doubt that the items were rehabilitative and not pain management so as to come within s. 83(5) of the Act. The judge also observed that there was a conflict in the jurisprudence regarding ICBC's ability to waive its s. 88(2) discretionary authority. Giving the benefit of the doubt to Ms. Fatin, he found the value of those items should not be deducted. This conclusion is not contested in this appeal.
- [22] The next question for the judge was whether there was risk of non-payment of all or a part of the benefits the judge found came within s. 88(1) and (1.01) of the Regulation, namely Botox, kinesiology, physiotherapy, and massage treatments. Ms. Fatin contended there was such a risk because ICBC could not be trusted to keep its promises. The judge did not accept that submission and found that the evidence adduced by Ms. Fatin did not undermine the presumption described in *Norris v. Burgess*, 2016 BCSC 1452, that ICBC can be relied on to keep its promises. The judge observed there was no evidence that there would be a shortfall between the amount allowed for payment for benefits under Part 7 and the cost to the insured for items the court had found necessary in making the future care award. He then said, as to a contingency reduction:
- [53] On the other hand, the undertakings that Ms. McCormick has provided on behalf of ICBC are predicated on the assumption that all of the deductions sought by the defendants on this application would be granted. Because I have allowed most but not all of those deductions, it is not clear how ICBC will allocate Ms. Fatin's remaining Part 7 entitlement. In order to account for that uncertainty, I am applying a 20% contingency reduction to the deductions from the cost of future care award that I am making. This leads to a net deduction of \$46,750

less 20% (\$9,350) = \$37,400.

[Emphasis added.]

Discussion

- [23] On the main point on appeal, the appellants contend that the judge erred in principle in making a contingency reduction that was untethered from care items compensated in the damages award. In the alternative, they say that should the reasons for judgment mean that the contingency is attached to the care items of Botox, kinesiology, physiotherapy, and massage treatments, discounting their value by 20% results in a measure of double recovery because there was ample room in the \$150,000 ceiling for the mandatory payment of all of the s. 88(1) and (1.01) benefits that correspond to items compensated in the damages award.
- [24] The respondent refers to a number of cases in the Supreme Court of British Columbia. In some, a discount of the deduction to the damages award has been made to allow for uncertainty in full payment of Part 7 benefits by reason of the \$150,000 cap. In others, a discount of the deduction has been made because the actual cost of the care item is discrepant with the amount ICBC is or will be allowed to pay, thereby resulting in a shortfall: *Rab v. Prescott*, 2021 BCSC 1206; *Sidhu v. Alton*, 2021 BCSC 265; *McColl v. Sullivan*, 2020 BCSC 2041; *Kim v. Sodhi*, 2020 BCSC 2023; *Norris*; *Richmond v. Osztoivits*, 2020 BCSC 1160; *Aarts-Chinyanta*. The latter case also justified the application of a contingency by reference to use of the available pool to pay for items that were not strictly speaking future care items, and to the 1.5% discount rate used in determining the present value of benefits.
- [25] Ms. Fatin further says that the reliability of the affidavit containing the waiver is to be doubted as certain factual averments were inaccurate. She says that the judge would have known that the Part 7 scheme was susceptible to legislative action or judicial interpretation. And she says that more care items could be added to the Part 7 benefits accepted for payment, which would reduce the monies available under the \$150,000 ceiling for the items included in the damages award. This, she says, could create a potential future shortfall in paying for the Botox, kinesiology, physiotherapy, and massage treatments.
- [26] In my respectful view, the appeal must be allowed.
- [27] In his para. 53, the judge linked the 20% contingency discount to his conclusion that some but not all of the deductions advanced were allowed. Respectfully, I conclude that there is no connection here between the judge's conclusions on deductibility and the application of a contingency discount for the care items that he found were mandatory under Part 7.
- [28] The relevant question in determining whether the deduction itself can be reduced is whether there is a risk that Ms. Fatin will not receive the benefits she is entitled to. On the evidence, there is no basis apart from speculation to say that Ms. Fatin would, or could, be short-changed under Part 7 for the benefits. Here, the judge was satisfied that any conditions that could apply to the four items of care he found are mandatory benefits were waived by

ICBC. He rejected a discount for uncertainty that ICBC would keep its promises and he found there was no evidence to support a contingency reduction for a discrepancy between a Part 7 benefit and the actual cost of the care items. He did not find other Part 7 benefits, such as counselling, might be paid so as to escalate the pay-out of Part 7 benefits past the presumptive ceiling of \$150,000.

- [29] What is missing here for the application of a discount is some connection to the evidence plausibly supporting the view that there is the required realistic risk that the insured will not be fully compensated for future care in the event the award is reduced by the present value of the identified Part 7 care items. I conclude that the 20% contingency deduction applied by the judge is untethered to the evidence, and so is fatally speculative.
- [30] On these findings, I see no basis in principle or fact for a discount from the required deduction for Part 7 benefits for Botox, kinesiology, physiotherapy, and massage treatments. I conclude that such a deduction represents impermissible double recovery.
- [31] For these reasons, I would allow the appeal in respect of the 20% contingency reduction applied to the deduction of the award for cost of future care.
- [32] As a loose end, the appellants also contend that the two sums of \$89.59 and \$509.51, paid post-trial for aids and equipment and gym and pool membership, should be deducted from the award to avoid double compensation.
- [33] I agree and would deduct these amounts from the award for future care.

Costs

- [34] Ms. Fatin requests that she not bear an adverse order of costs in the event the appeal succeeds. That request is well founded; this appeal was brought to provide greater certainty and guidance for the practice on the application of a contingency discount under s. 83(5) of the Act.
- [35] I would make no order of costs.

Conclusion

- [36] In my view, the appeal must be allowed. I would set aside only the order for payment of \$17,600.00 in damages for cost of future care and substitute therefor an order that the appellants pay to Ms. Fatin the sum of \$7,650.90 for cost of future care.
- [37] I would make no order of costs.

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Fitch"

I agree:

"The Honourable Justice Marchand"

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