

CANADA / JUDGMENT

Xu v. Balaski

2021 BCSC 1850

COURT

Supreme Court of British Columbia

DECIDED

22 September 2021

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2021 BCSC 1850 Xu v. Balaski

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Xu v. Balaski,

2021 BCSC 1850

Date: 20210922

Docket: M177531

Registry: New Westminster

Between:

Jing Xu

Plaintiff

And

Gail Katherine Balaski, Gary Martin Balaski, Kathryn Susan Porter and Bakhshish Singh Sandhu

Defendants

- and -

Docket: M180084

Registry: New Westminster

Between:

Jing Xu

Plaintiff

And

Sumir Paneswar

Defendant

- and -

Docket: M180083

Registry: New Westminster

Between:

Jing Xu

Plaintiff

And

Fook An Tan and Toyota Credit Canada Inc.

Defendants

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

S.L. Kovacs

Counsel for the Defendants:

K.J. Learn

Place and Date of Trial:

New Westminster, B.C.

February 12, 2021

Place and Date of Judgment:

New Westminster, B.C.

September 22, 2021

Background

- [1] This case involved claims for damages by the plaintiff against defendants in three motor vehicle accidents which occurred on June 16, 2014, October 12, 2014 and February 23, 2015, and which are described in detail in the agreed statement of facts filed as Exhibit 1 at trial. Damages were not apportioned among the three accidents because the defendants admitted liability and advised the Court there was no need to apportion liability. Damages were ultimately awarded under the following headings and in the following sums:

Non-Pecuniary Damages

\$145,000.00

Past Wage Loss

\$30,000.00

Loss of Future Earning Capacity

\$250,000.00

Cost of Future Care

\$280,000.00

Past Loss of Housekeeping

\$70,000.00

Future Loss of Housekeeping Capacity - House Cleaning

\$125,000.00

Future Loss of Housekeeping Capacity - Childcare

\$375,000.00

Special Damages

\$46,741.32

Total

\$1,321,741.32

- [2] On the present application, the defendants seek to deduct the sum of \$217,017.50 from the costs of future care awarded at trial in a judgment. The defendants also seek costs of this application.

Background Facts

- [3] The trial of the plaintiff's personal injury actions were heard over 15 days from August 12-16, 19-23, 26-30, 2019. Reasons for judgment were delivered on June 24, 2020 and are indexed as 2020 BCSC 940. Included in the awards of damages was an amount of \$280,000 for the cost of future care.
- [4] With respect to establishing the cost of future care award at para. 154 of the Reasons for Judgement, the following appears:
- [154] The plaintiff is entitled to full compensation for future care costs. The test for determining an appropriate award under this heading is an objective one based on the medical evidence of whether the claims are reasonable: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 22.
- [5] The sole occupational therapist who attended the trial was a Ms. Boniface, who gave evidence relating to the future care needs of the plaintiff. Those care needs were consistent with the unchallenged evidence of Ms. Xu. These recommendations were contained in Exhibit 42, Appendix C, pp. 19-25. Ms. Xu also noted that she had followed the recommendations of Ms. Boniface and Dr. Ting.
- [6] The plaintiff claimed the cost of medication until the plaintiff reached 80 years of age in 2057, was in the amount of \$347,701. The claim of the plaintiff for medication is, therefore, 38 times \$9,150 per annum, as specified in Ms. Boniface's report. See para. 159 of the reasons for judgment.
- [7] In the reasons for judgment, the Court noted that, the plaintiff sought \$400,000 as an award for this head of damages calculating the cost of non-medication items for future care as a range between \$58,055 and \$62,982.50, exclusive of the cost of medication. As counsel for the plaintiff noted the actual claim by the plaintiff was \$575,431 for the cost of future care but against that sum the plaintiff submitted that a 30% contingency should be reasonably applied leaving the claim for cost of future care at \$400,000.
- [8] In the submissions of the applicants, defendants herein, the purpose of s. 83 deduction, pursuant to the Insurance (Vehicle) Act, R.S.B.C. 1996 c. 231 [Act], is to determine the amount of damages that will be payable to the plaintiff at the time of the judgment; to prevent double recovery of Part 7 benefits and tort damages for the same loss; and to remove the claimant's option to pursue the recovery of expense and loss statutorily covered under Part 7 from the motorist responsible for the collision. In other words, s. 83 of the Act states that an estimated amount of benefits may, in some situations, be deducted from the damages awarded to the plaintiff in the tort action.
- [9] The version of s. 83 of the Act which applies to the three accidents in this case, June 16, 2014, October 12, 2014 and February 23, 2015, provides:
- (1) In this section and section 84, "benefits" means benefits

- (a) Within the definition of s. 1.1, or
 - (b) That are similar to those within the definition of section 1.1, provided under motor vehicle insurance whenever issued and in effect, but does not include a payment made pursuant to a third-party liability 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 insured's 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.
- [10] The section of the Act quoted above was amended and the changes received royal assent on May 17, 2018, and the changes contained in the Insurance (Vehicle) Amendment Act, 2018 stated under s. 31, that the changes "apply in relation to a bodily injury or death caused by a vehicle or the use or operation of the vehicle after the date this Act received Royal Assent". That Royal Assent was granted on May 17, 2018, resulting in s. 83 above applying to the analysis of this case.
- [11] Section 88 of the Insurance (Vehicle) Regulation B.C. Reg. 447/83 [Regulation] stipulates:
- (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 Internet injury for necessary
 - (c) medical, surgical, dental, hospital, ambulance and professional nursing services, speech therapy, medication, prosthesis and orthoses.

- (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, except expenses referred to in subsection (1) (a) and (b).

[12] Section 88.01 of the Regulation provides:

- (1) If an accident occurs for which benefits are provided under section 88, the insured must provide to the corporation a receipt for the expenses incurred that will be compensated as benefits under that section no later than 60 days from the date that those expenses are incurred.
- (2) The corporation is not liable to an insured who, without reasonable excuse, fails to comply with this section.

[13] Section 90 of the Regulation provides:

- (1) If, in the opinion of the corporation's medical advisor or vocational advisor and in the opinion of the physician attending an insured who is receiving benefits under section 80, 84, 86 or 88,
- (a) any medical, surgical or similar treatment is likely to relieve in whole or part of the disability of the insured, or

the corporation may require the insured, at the expense of the corporation, to undergo treatment or complete the program.

- (2) Subject to subsection (3), where an insured refuses to comply with a requirement under this section, the corporation may, after giving the insured at least 60 days' notice in writing, by registered mail, postage prepaid, addressed to the insured at the insured's last address according to the corporation's records, terminate payment of benefits under section 80, 84, 86 or 88.
- (3) The insured may, within the period of 60 days mentioned in subsection (2), apply to a judge of the Supreme Court for an injunction against terminating the benefits on the grounds that
- (a) the treatment of the insured is required to undergo
- (i) is unlikely to relieve the insured's disability, or
- (ii) may injuriously affect the balance of the health of the insured, or
- (b) the program the insured is required to complete is not likely to assist in the rehabilitation of the insured.

[14] Section 98 of the Regulation states:

- (1) An insured must, on request of the corporation, promptly provide a certificate or report of an attending health care practitioner as to the nature and extent of the insured's injury, and the treatment, current condition and prognosis of the injury.

- (1.1) The certificate or report required by subsection (1) must be provided to the corporation
- (a) in any form specified by the corporation including, without limitation, narrative form, and
 - (b) in any format specified by the corporation including, without limitation, oral and written formats.

[15] Section 99 of the Regulation states:

- (1) An insured who makes a claim under this Part must allow a health care practitioner selected by the corporation, at the expense of the corporation, to examine the insured as often as it requires.
- (2) The corporation is not liable to an insured who, to the prejudice of the corporation, fails to comply with this section.

Evidence from ICBC

- [16] Mr. Steven Sandhu swore an affidavit dated February 8, 2021. Mr. Sandhu is a claims manager with ICBC authorized to deal with issues in this case on behalf of the Corporation with respect to issues in respect to s. 83 of the Act and regulations thereunder.
- [17] In Exhibit A to the affidavit of Mr. Sandhu, there are six pages of what are represented to be payments for or on behalf of the plaintiff. Page 1 of the Exhibit covers a period from July 24, 2014 to August 27, 2020, with a total amount of \$2,985.93. Apart from the case number identifier at the top of the page there is no indication of the particular file to which these payments relate. Page 2 of Exhibit A refers to the time span from February 4, 2016 to July 8, 2017, with payments totaling \$415.13. Pages 3 to 6 appear as a single chart of payments for the period from the March 19, 2015 to March 27, 2018, in the amount of \$5,770.29. The Exhibit pages above total \$9,171.35.
- [18] These records, the six pages noted above, upon which Mr. Sandhu relies contain absolutely no factual detail about the nature of the expenditures recited there in except to classify payments under three headings "coverage" "cost type" and "cost category" with the two word phrase "Medical Payments". The medical payments vary from a low of \$6.75 (of which there are 133 examples in the six pages) to a high of two cheques in the amounts of \$2,275.65 and \$2,465; both payable to Caissie and Co., then counsel for the plaintiff. These latter cheques must represent advances made by the law firm on behalf of the plaintiff which were reimbursed by ICBC.
- [19] Curiously, although Mr. Sandhu notes that up to January 20, 2021, ICBC had paid \$9,171.35 on behalf of medical expenses, the payments for the prior year, 2020 are a total of \$126.16, with no additional payments in January 2021. The sum of \$126.16 is comprised of two payments of \$31.62 and two payments of \$31.46, but there is no descriptive information in Exhibit A which would alert the court as to the nature of these expenses except for the phrase "Medical Payments".

- [20] In the affidavit of Jing Xu, the plaintiff states that medication costs for a number of medications prescribed for her by doctors including cyclobenzaprine, zopiclone, Cymbalta, Lyrica, Cipralex and Amitriptyline, have all been claimed against the Pacific Blue Cross plan held by the plaintiff. She has now paid Pacific Blue Cross the sum of \$3,171.53 pursuant to the Reimbursement Agreement attached as Exhibit A to her affidavit.
- [21] It is noted that ICBC, in the past, failed to pay on a timely basis medical payments for the long schedule of special damages filed at trial as Exhibit 30 and awarded to the plaintiff which included prescriptions medications, physiotherapy, and massage therapy, this failure to make timely payments for medications and other treatments resulted in the award of \$46,741.32 for special damages at trial.
- [22] This historical failure makes it very difficult to appreciate the meaning of the statement "I am authorized on behalf of ICBC to irrevocably, unequivocally, and unconditionally agree to pay for all medication as incurred by the plaintiff and submitted by way of a claim for benefits under Part 7 as awarded by this court up to \$217,017.50". Payments for medication and medical treatment as incurred has not been reflected in the history of this file.

Case Authorities

- [23] There are a number of case authorities which have considered the amendments to the statute, including *Safdari v. Buckland*, 2020 BCSC 2019, where Madam Justice Winteringham summarized the purpose and legislative framework of s. 83 as follows:
- [14] Justice Thompson in *Quigley v. Jonsen*, 2020 BCSC 216 described the purpose underlying the deductibility of benefits where he stated at para. 3:

There are two purposes served by the deductibility of benefits that the plaintiff in a tort action is entitled to receive from ICBC. The first is to determine the sum that the plaintiff receives when her tort claims are adjudicated. (The amount of any deduction does not fix the amount of the future benefits to be paid by ICBC -- this is determined by the Insurance (Vehicle) Act and regulations; the amount ultimately paid may be greater than the amount estimated in the tort judgment.) The second purpose is to prevent the plaintiff from being compensated twice; she cannot receive a lump sum for future benefits, and also receive those benefits again as Part 7 benefits. See *Fisher v. Wabischewich* (1978), 5 B.C.L.R. 335 at 336 (C.A.); *Lindal v. Lindal* (1980), 25 B.C.L.R. 381 at 392 (C.A.); *Schmitt v. Thomson* (1996), 18 B.C.L.R. (3d) 153 at 159-160 (C.A.).

- [15] In *Ayles v. Talastasi*, 2000 BCCA 87, Justice Donald clearly stated that a deduction under s. 83(5) is based on entitlement and not on the possibility that the accident benefits claim will not be fairly adjusted in the future. He stated it this way at para. 33:

... The acknowledgment by I.C.B.C. that the plaintiff is entitled to the medication costs provides enough certainly to deduct the whole amount. My decision in that respect rests on I.C.B.C.'s acknowledgment that the correct interpretation of s. 88(1) is that the plaintiff's ongoing requirement for headache medication for headaches whose cause is rooted in this accident is a

requirement for reasonable expenses for necessary medical services within the meaning of s. 88(1). The possibility that there may be some disagreement in the administration of the individual claims as they are presented in the future is simply part of an ongoing entitlement. The deduction must be made on the basis of entitlement not on the possibility that claims may be unfairly adjusted in the future.

[Emphasis added.]

[16] Justice Riley, in *Sangha v. Inverter Technologies Ltd.*, 2019 BCSC 1174 commented similarly. In *Sangha*, the ICBC claims specialist deposed that they had reviewed the reasons for judgment and stated in a sworn document that ICBC accepted the court's conclusions regarding the plaintiff's treatment needs in connection with her collision-related injuries. Justice Riley stated at para. 15:

. . . In this context, the sworn evidence of an authorized ICBC representative attesting to ICBC's commitment to pay out certain benefits may carry considerable weight: *Norris v. Burgess*, 2017 BCSC 1452 at para 35; *Stanikzai v. Bola*, 2012 BCSC 1904 at para. 20-21.

[17] In my view, Justice MacDonald answered many of the plaintiff's concerns in *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953 at paras. 71-82. In *Aarts-Chinyanta*, MacDonald J. provided a lengthy and comprehensive review of the history of the Act and Regulation and the predecessor provisions, the legislative framework, the evidentiary issues and the jurisprudence. A summary of MacDonald J.'s recitation of principles applicable to post-trial applications such as this one follows:

- a) The legislative scheme is designed to move the burden of future care from the tortfeasor to the insurance provider;
- b) The defendants bear the onus of proving that the plaintiff is entitled to the Part 7 benefits which they seek to deduct;
- c) Regarding evidence and entitlement, an ICBC claims specialist cannot bind ICBC beyond the provisions of the Act and Regulation because the ICBC claims specialist cannot authorize deductions beyond what the statute permits;
- d) Once statutory entitlement is established, based on the award and the legislation, "the question is whether the Part 7 benefits are mandatory or discretionary."
- e) If the benefits are mandatory, the court must deduct. No further evidence is required. If the benefits are discretionary, in that, ICBC may pay the benefits or they are subject to ongoing medical certification, they are too uncertain and the court should decline to deduct the benefit amount from the award. Alternatively, the court may deduct a nominal amount to reflect the uncertainty of the plaintiff receiving the future benefits;
- f) An exception to the general rule regarding discretionary benefits is where ICBC, through affidavit evidence, undertakes or promises to pay discretionary benefits going forward;

- g) Once presented with such evidence, the court must be satisfied the undertaking or promise is sufficient in that there is no significant uncertainty the benefits will be paid: Sangha; and
 - h) If the court is satisfied with the undertaking or promise, the court should deduct the benefits from the damages award because the uncertainty has been removed.
- [18] Justice MacDonald concluded, once entitlement is established, the court can consider ICBC's post-trial representations regarding ongoing access to benefits including whether the conditions subsequent to ongoing entitlement (e.g., 12 month reviews) will be waived or enforced. ICBC can provide assurances with respect to discretionary conditions, which ICBC controls.
- [19] I agree with MacDonald J.'s conclusion that ICBC cannot undertake to do more than it was empowered to do under the legislative scheme, consistent with the findings at trial. ICBC representations cannot broaden entitlement at the outset: *Andrews v. Roffel* [1998] B.C.J. 631 at para. 25. However, as stated by MacDonald J., once entitlement is established, ICBC can reduce or eliminate any contingencies associated with its exercise of discretion. Post-trial affidavit evidence is admissible for this purpose.
- [24] In the case of *Jurczak v. Mauro*, 2013 BCSC 1370 [Jurszak], a caution was stated as follows: in conducting the exercise of determining the estimated amount of benefits to which the plaintiff is entitled trial judges should be "cautious in their approach" since any reduction results in the lessening of the award in the tort action: *Schmitt v. Thomson* (1996), 132 D.L.R. (4th) 310. In *Jurszak*, the Court also explained two required conditions must be met to satisfy the requirements of s.83. The first requirement is that "the Court must determine if there are some Part 7 benefits which the plaintiff has received or is entitled to receive". "Second, the Court must then estimate the amount of the deduction".
- [25] The authorities are further agreed that the defendant bears the onus of proving that a deduction should be made and uncertainty as to whether benefits will be paid must be resolved in favour of the plaintiff (see *Lynn v. Pearson*, 1998 CanLII 5518 (BC CA) at para. 18).
- [26] In addition, where the plaintiff is covered by another insurance plan, s. 88(6) of the Regulation impacts the availability of deductions under s. 83. S. 88(6) directs ICBC to assume the role of primary payer for s. 88(1)(a) and (b) payments to the plaintiff. However, where the plaintiff has other insurance that would provide coverage, ICBC is not the primary payer with respect to benefits which fall under s. 88(1)(c).
- [27] Where ICBC is not the primary payer, the plaintiff is only entitled to Part 7 benefits after the benefits provided by the primary payer have been exhausted. The Court will not make deductions where ICBC is a second payer (*Tompkins v. Bruce*, 2012 BCSC 833, and *Kelly v. Kotz*, 2014 BCSC 1022, *Rix v. Koch*, 2021 BCSC 1526 [Rix]).
- [28] Finally, this Court has previously addressed the issue of whether ICBC assurances to pay have the effect of waiving the s. 88(6) requirement. In *Rix*, MacDonald J. considered whether assurances on the part of ICBC very similar to those made in the present case constituted a

waiver of s. 88(6) such that deductions under s. 83 were possible. In *Rix*, an ICBC representative swore that ICBC would "irrevocably, unequivocally, and unconditionally" pay the plaintiff's medications (at para. 52) and waived the requirements for the plaintiff to receive Part 7 benefits under ss. 98, 90, and 99 of the Regulation (at para. 49). However, MacDonald J. noted that to establish a waiver, the defendant's evidence must be precise (*Luck v. Shack*, 2020 BCSC 1074 at paras. 56-58). MacDonald J. therefore held that ICBC did not specifically waive s. 88(6) with respect of the other insurance benefits available to the plaintiff, and was not satisfied that ICBC had made a representation which would allow her to deduct Part 7 benefits from the damages award (at para. 53).

Part 7 Benefits Available to the Plaintiff

- [29] As noted in the reasons of this Court, there were three lawsuits and, therefore, three insurance policies involved which could potentially provide benefits to the plaintiff in the amount of \$440,828.65 for the cost of future care. The cost of future care in this case was \$280,000.
- [30] Following MacDonald J.'s reasoning in *Rix*, the ICBC's undertaking that it "irrevocably, unequivocally, and unconditionally" agreed to pay for the all plaintiff's medication up to \$217,017.50 did not specifically waive s. 88(6) of the Regulation with sufficient certainty to allow me to deduct Part 7 benefits from the cost of future care. Therefore, I will only deduct those Part 7 benefits that Ms. Xu is entitled to after her Pacific Blue Cross plan has been exhausted.
- [31] Evidence was entered that Ms. Xu has 80% coverage for her medications under Pacific Blue Cross, leaving a remaining 20% that is deductible from the \$217,017.50 in total medication expenses.
- [32] On that basis, I have determined that the amount of \$43,403.50 will be deducted from the cost of the future care award to be held pursuant to the irrevocable, unequivocal, and unconditional undertaking of ICBC to pay for all medications as incurred by the plaintiff. On relation thereto, ICBC waives the requirement that the plaintiff must provide the corporation a receipt for medication not later than 60 days from the date the expense was incurred under s. 88.01 of the Regulation.
- [33] Further, ICBC waives the requirement for any further medical certification or examination as a condition of the cost of reimbursement for necessary health services under s. 98 or 99 of the Regulation and also waives the application of s. 90 of the Regulation and if the Regulation entitles the plaintiff to further benefits than the amount awarded by this Court, ICBC is obliged to provide those benefits in accordance with the obligations under the Regulation.
- [34] Given the divided success of the parties, there will be no order as to costs.

"Ball J."

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