IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bhardwaj v. Wang,*
2023 BCSC 1086

Date: 20230503
Docket: M206154
Registry: New Westminster

Between:

Rashpal Bhardwaj

Plaintiff

And

Jin Ming Wang

Defendant

- and -

Docket: M216368
Registry: New Westminster

Between:

Rashpal Bhardwaj

Plaintiff

And

Megan Zeleschuk

Defendant

- and -

Docket: M221366
Registry: New Westminster

Between:

Rashpal Bhardwaj

Plaintiff

And

Robert Zachary Muir, The Driving Force Inc. and Rolling T Ventures Inc.

Defendants

Before: The Honourable Mr. Justice Veenstra

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	J.S. Malik
Counsel for the Defendants:	R.B. Dul
Place and Date of Hearing:	New Westminster, B.C. April 27, 2023
Place and Date of Judgment:	New Westminster, B.C. May 3, 2023

[1] **THE COURT:** The plaintiff seeks an order for an advance consequent upon an adjournment of the trial in this matter. The issue on this application is whether an order for an advance would be just in the circumstances, and if so, what should be the amount of that advance.

[2] Three actions are before the court in which the plaintiff claims damages from motor vehicle accidents. The first occurred in 2016 and is the subject of action M206154. The second occurred in 2017, and is the subject of action M216368. The third occurred in 2018 and is the subject of action M221366. Liability has been admitted for the first two of these accidents.

[3] Orders were made in November 2021 and February 2022 pursuant to which all three actions were to be heard together. Trial was scheduled for November 28, 2022.

[4] On October 11, 2022, approximately six weeks before trial, the defendants in all three actions appointed new counsel, Lam Legal, to replace ICBC's litigation department, which had previously been representing all of the defendants. On October 13, 2022, new counsel submitted an application to the Workers' Compensation Appeal Tribunal ("WCAT") seeking a determination that the third action was subject to the worker-worker bar under the *Workers Compensation Act*, R.S.B.C. 2019, c. 1 [*WCA*].

[5] On November 1, 2022, the defendants applied to stay the third action pending a determination by WCAT, and to adjourn the trial as a consequence. The plaintiff opposed the application but, in the alternative, sought an order that, as a term of any adjournment, there be an advance to the plaintiff.

[6] Master Keighley ordered that:

(a) The third action be stayed;

(b) The trial of the other two actions be adjourned to a date mutually agreeable to the parties; and

(c) The plaintiff have leave to bring on this application for an advance in respect of the first two actions.

[7] Master Keighley also ordered that the defendants pay to the plaintiff $6,160 in respect of costs thrown away, which I understand reflects tariff items but not disbursements.

[8] At the time the application for the advance came on for hearing, proceedings before WCAT were still pending. Counsel for the parties had discussed available trial dates, and advised the court that the new trial date would likely be in 2025, but a specific date has not yet been identified.

Positions of the Parties

[9] The plaintiff submits that by the time the trial occurs in 2025, the plaintiff will have been subject to the injuries suffered in the first two actions for nine and eight years, respectively. The plaintiff argues that an advance is appropriate in this case, consequent upon the adjournment, particularly given the lengthy delay that will result from the adjournment.

[10] The plaintiff provided evidence, including several expert reports, his own summary of the symptoms he continues to suffer, and he expressed his disappointment at the adjournment of the trial. He gave evidence about how he is limited to working seven to eight hours a day with multiple breaks and is limited in the job opportunities available to him.

[11] The plaintiff has not tendered evidence of specific financial hardship. The plaintiff argues that hardship can be a factor on an application for an advance but is not a necessary pre-condition.

[12] The plaintiff has tendered several expert reports which he says establish significant injuries supporting his claims in respect of the first two accidents.

[13] The plaintiff argues that the advance should be in the amount of $200,000. He argues that his claim is for $358,878, made up of $110,000 for non-pecuniary

damages; $95,505 for loss of future earning capacity; $128,914 for cost of future care; $6,772.04 for special damages; and $10,722.95 for costs thrown away. He says that an appropriately conservative basis for an advance would be 60% of the non-pecuniary claim, 52% of the future loss of earning capacity claim, 54% of the cost of future care claim, 100% of the special damages, and 100% of the costs thrown away.

[14] The plaintiff has provided recent (2019-2022) cases that he says are comparable and that would support an award of non-pecuniary damages in the range of $100,000- $110,000. The claim for future loss of earning capacity is supported by an economist's report, and the claim for cost of future care is supported by a report quantifying those claims. The two largest components of the cost of future care claim are claims for physiotherapy, present value approximately $48,000; and registered massage therapy, present value approximately $46,000.

[15] The claim for costs thrown away reflects the costs incurred to date for reports of three experts: a report of a physiatrist, a functional capacity evaluation and cost of future care report, and two economist’s reports, all of which were prepared in August and September 2022. The plaintiff submits that all of these experts will have to re-do their reports given that the trial date will now be two and a half to three years after the dates of those reports. It appears to be accepted by the parties that Master Keighley's order did not deal with these specific disbursements.

[16] The plaintiff submits that the injuries suffered in the three accidents are indivisible injuries, and that the defendants in the first two accidents will be jointly and severally liable for all of those injuries, even if the third accident is found to be subject to the *WCA*. The plaintiff relies on the comments of Justice Kent in *Kallstrom v. Yip*, 2016 BCSC 829, at paras. 368-375.

[17] The defendants argue that no advance should be made. The defendants say the circumstances of this case are not exceptional, and that advances should generally only be granted where the plaintiff's circumstances are "financially tenuous."

[18] The defendants say that the plaintiff has actually been involved in seven additional motor vehicle accidents subsequent to the 2016 accident, and that not all of these accidents were reported to all of the experts. The defendants say that as a result, the court should place little weight on those reports and that the plaintiff might not have been able to recover those disbursements in any event.

[19] The defendants note that the plaintiff is not, for purposes of this application, seeking an advance in respect of past income loss. The defendants note that the plaintiff's tax returns show no reduction in net income in the years immediately following the accidents. His taxable income increased from just over $15,000 in 2016 to just over $24,000 in 2018, then dropped back to the $15,000 range for 2019. The defendants say that the various changes in the plaintiff's past income call into question whether the plaintiff has suffered any loss of future earning capacity as well.

[20] The defendants say that a more appropriate range for an award of non-pecuniary damages in this case will be $35,000-$60,000, with the $35,000 figure being supported by a judgment from 2014.

[21] The defendants oppose including costs thrown away in any advance, arguing that they reflect the cost of expert reports for which the plaintiff did not fully disclose interim and the subsequent accidents, and argue that the costs of those reports can be effectively dealt with after trial, once an overall view of the evidence can be assessed.

[22] The defendants do not object to the payment of special damages of $6,772.04.

[23] The defendants argue that, if the third accident is found to be subject to the *WCA*, then any claim for damages arising from that accident are statute-barred. The defendants rely on the judgment of Justice Burnyeat in *Pinch v. Hofstee*, 2015 BCSC 1888, at paras. 53-61. The defendants acknowledge that Justice Kent in

Kallstrom declined to follow *Pinch*, but say that this is an open question that will ultimately have to be resolved by the Court of Appeal.

[24] Finally, the defendants argue that where there are inconsistent stances on liability between defendants in three joined actions, an advance should not be ordered, citing for that purpose *Gill v. West*, 2011 BCSC 1423.

Legal Principles

Jurisdiction to Order an Advance

[25] The parties put before me a series of cases dealing with the jurisdiction of the court to order an advance of damages: *Serban v. Casselman* (1995), 2 B.C.L.R. (3d) 316, 1995 CanLII 2291 (C.A.); *Rogers v. Anderson*, 2000 BCCA 336; *Tieu v. Jaeger*, 2003 BCSC 906; *Gill*, cited above; *Wood Atkinson v. Murphy*, 2011 BCSC 1766; *Estey v. Bateson*, 2012 BCSC 1515; and *Barrie v. British Columbia*, 2020 BCSC 2272.

[26] It is clear from the cases that there is no standalone jurisdiction to make an advance: *Rogers*. Rather, an advance is typically sought pursuant to Rule 13-1(19) of the *Supreme Court Civil Rules* as a term of an adjournment.

[27] The order must be just in all of the circumstances: *Serban*, at para. 9.

[28] The cases repeatedly comment that an order for advance payment should only be made in "special circumstances": *Serban*, at para. 11.

[29] The judge making an order for an advance should be completely satisfied that the amount ordered will be less than the amount eventually awarded for damages: *Serban*, at para. 11. As a result, such orders are typically made in cases in which liability has been either admitted or previously determined: *Gill*, at para. 18.

[30] While such orders are often made when the adjournment was brought about through the fault of one party, or where the conduct of the litigation demands such an order, the rule is not restricted to matters of that kind: *Serban*, at para. 11.

[31] While such orders are often made in circumstances where "the plaintiff's circumstances are financially tenuous" (*Gill*, at para. 18), that is not in and of itself a requirement. The circumstances of a lengthy delay also impact on the justness of such an order. As noted by Master Barber in *Tieu*, at para. 17:

> [17] ... With liability not being in issue, the plaintiff should be put in funds at the earliest possible time. That is a reasonable thing for the plaintiff to ask for. The only thing that is stopping her from getting this money is not a determination of whether she is entitled to it, but as to how much. When it has been conceded that the sum of $20,000 is probably going to be less than or at least one-half of what the future amount she will obtain of $40,000 plus is, I can see no reason not to give her at least $20,000 at this time. To keep her out of pocket means that, especially when need is shown, as it has been in her affidavit, would be a refusal of justice.

[32] These comments were cited with approval by MacKenzie A.C.J., as she then was, in *Wood Atkinson* at para. 43.

[33] Other circumstances to be considered in determining whether it is just to make an award include the length of time which will pass until trial: *Estey*, at para. 6.

[34] In *Gill*, Justice Wedge commented at para. 21 that:

> [21] In addition, with seven of the ten defendants denying liability, I am not persuaded it would be just in the circumstances to order that the defendants in all actions be jointly and severally liable for the advance payment of damages. Whether there ought to be joint and several liability on the part of the defendants is an issue that must be determined at trial and should not be determined on an application for advance payment.

Joint and Several Liability – Tortious and Statute-Barred Causes

[35] As noted above, the plaintiff relies on *Kallstrom*, and the defendants rely on *Pinch* with respect to the proper approach to be taken by the court where one in a series of accidents is or may be subject to the worker-worker bar under the *WCA*.

[36] The usual rule is that where there are multiple accidents giving rise to indivisible damages, the persons responsible in tort for those accidents are jointly and severally liable for the damages arising. The tortfeasors can still seek apportionment (contribution and indemnity) from each other, but absent contributory

negligence, the plaintiff can claim the entire amount from any of them: *Bradley v. Groves*, 2010 BCCA 361, at para. 32.

[37] In *Pinch*, Justice Burnyeat concluded that the worker-worker bar relieves a non-employer defendant from any liability for damages that can be attributed to the accident that was subject to the bar, that there is no right of contribution and indemnity from the driver in the accident that is subject to the *WCA*, and that as a result, he dealt with the damages suffered by Mr. Pinch in the first accident as if the second accident (which was subject to the MVA) had not occurred and had not aggravated the injuries.

[38] In *Kallstrom*, Justice Kent distinguished *Pinch* on multiple grounds. In the course of that discussion, he commented at paragraph 373 that:

> [373] In any event, *Pinch* neither applies to nor governs the present claim. It was the subject matter of an appeal and cross-appeal, but the case was settled and thus no definitive ruling on this interesting (and highly debatable) point of law has yet been made by the Court of Appeal. It must be noted that other decisions of this Court have treated a subsequent workplace accident aggravating a pre-existing injury as a situation of indivisible injury for which the defendant in the first accident remains 100% liable: See e.g., *Kaleta v. MacDougall*, 2011 BCSC 1259.

[39] Justice Kent concluded that the "WCB defence" did not apply, and no reduction in damages was required on that account: *Kallstrom*, at para. 375.

Analysis

[40] I am satisfied that in this case, the application was made consequent upon an adjournment, having been initially advanced before Master Keighley, who directed that it be made by way of a further application.

[41] In my view, it is just to order an advance in the present case. I agree with the plaintiff that while hardship is often a factor in cases involving an advance, it is simply one factor to be considered and not an essential pre-condition.

[42] I see the fact that the adjournment of the trial in this case was a result of the defendants' failure to consider, until nearly the last minute, the possibility of a *WCA*

issue with respect to the third accident, as bearing significantly on the equities of this case.

[43] The adjournment that has been granted will be lengthy. While the plaintiff has not tendered specific evidence of hardship, he has tendered evidence of impacts on his ability to work. He is now 63 years old and could well be 65 by the time of trial. The only thing that is stopping him from being put in the funds to which he is entitled is the determination as to how much he is owed.

[44] In my view, the facts that have been put before me are sufficient to meet the threshold of "special circumstance." I do not see the fact that liability has not been admitted in the third action as impacting on whether it would be just to order an appropriately conservative advance to be funded by the defendants in the first two actions.

[45] I turn now to the quantum of the advance.

[46] I am not required for purposes of this application to choose between the approaches in *Pinch* and *Kallstrom* with respect to indivisibility in circumstances involving the worker-worker bar. Given that the accident that may be subject to the *WCA* is the third in time, it appears that even if the defendants were successful in obtaining a determination from WCAT that the bar applies to that accident, there at most would be an adjustment to any award in the other actions in respect of that third accident.

[47] In my view, income loss claims in cases like this, where the plaintiff has continued to work and at least for some years has earned income exceeding what he earned before the first accident, give rise to complex issues. I am not comfortable given the evidence before me that I can quantify an appropriately conservative amount for an advance in respect of a claim for future income loss.

[48] With respect to non-pecuniary damages, I note the age of the cases that the defendants say are comparable, and that a $35,000 award in 2014 would be equivalent to approximately $45,000 by the time this matter gets to trial.

[49] I was taken to excerpts from the plaintiff's examination for discovery evidence that relate to what are said to be seven other accidents subsequent to the 2016 accident. It is not clear to me that those accidents will be of any significance in terms of changing the course of the plaintiff's medical symptoms.

[50] In my view, the fact that the later medical reports may include additional information is not a basis to conclude that the costs of the reports prepared for a 2022 trial would not be recoverable. In my view, ordering payment for a significant portion of the costs of those reports would be appropriate.

[51] With respect to the cost of future care, I see the useful purpose of an award in the context of a two-to-three-year adjournment as providing an ability to fund otherwise unfunded care costs until the date of trial.

[52] In my view, an appropriately conservative advance will be $60,000. The basis for this number is as follows:

(a) $40,000 in respect of non-pecuniary damages;

(b) just over $6,000 in respect of cost of future care;

(c) approximately $7,000 in respect of the reports prepared for the trial that did not proceed; and

(d) just under $7,000 in respect of special damages.

[53] I thus order that the defendants in the first two actions pay to the plaintiff an advance of $60,000.

[54] Pursuant to Rule 14-1(12), the plaintiff as successful party would ordinarily be entitled to its costs of the application in the cause. Is there any reason to depart from that rule on this application?

[55] CNSL J. MALIK: No, I don't think there is any reason to depart from that.

[56] CNSL R. DUL: I agree.

[57] THE COURT: Okay. Thank you.

"Veenstra J."