IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tomanik v. Brunet,*
2024 BCSC 1669

Date: 20240910
Docket: M225863
Registry: New Westminster

Between:

Malgorzata Tomanik

Plaintiff

And

Youri Brunet

Defendant

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Plaintiff:	C. Coakley
Counsel for the Defendant:	H. Nirwan
Place and Dates of Trial:	New Westminster, B.C. September 6, 2024
Place and Date of Judgment:	New Westminster, B.C. September 10, 2024

[1] On August 29, 2023, judgment was given in favour of the plaintiff as follows:

Non-pecuniary damages:	$150,000.00
Past wage loss (net):	$80,285.00
Loss of future earning capacity:	$790,000.00
Cost of future care:	$181,239.00
Special damages:	$37,982.67
Total:	$1,239,506.67

[2] That judgment may be found at 2023 BCSC 511.

[3] The parties have now returned to address the matter of certain deductions under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 [the *Act*].

[4] The scope of these deductions was expanded considerably with the coming into force of the *Insurance (Vehicle) Amendment Act*, 2018, S.B.C. 2018, c. 19, which made changes for accidents occurring after May 17, 2018. In the present case, the accident occurred on May 30, 2018. Now, the “benefits” to be deducted include amounts paid or payable “under insurance, wherever issued and in effect”. Other provisions eliminate the right of subrogation by other insurers.

[5] Here, the defendant seeks the deduction of future benefits that will be paid to the plaintiff as long-term disability (LTD) benefits and Canada Pension Plan (CPP) disability benefits. The defendant says these are readily quantified because the present value of these future benefits were quantified at $316,436 by the plaintiff’s economist in a report submitted at trial.

[6] The plaintiff raises two points of objection. First, the plaintiff says the defendant has failed to adduce any direct evidence from the LTD insurer (here, Canada Life) or from Service Canada (in the case of the CPP disability pension)

showing the plaintiff's eligibility for those benefits, the duration of the benefits and the value of the benefits.

[7] Second, the plaintiff says that longstanding authority requires the Court to consider any uncertainty associated with the payment of future benefits when quantifying the amount of the s. 83 deduction. When payment of a benefit is uncertain, a plaintiff is at risk of being shortchanged if a deduction is made for benefits that are never received.

[8] I will first address the evidentiary objection. In my view, the defendant satisfied his evidentiary burden by demonstrating Ms. Tomanik receives both LTD and CPP benefits, as she said so at trial, and the quantification of the present value of those benefits was provided by the plaintiff's economist. Having presented evidence concerning both the plaintiff's apparent entitlement to those benefits and their present value, the defendant met his evidentiary burden and it then fell to the plaintiff to contest that evidence by leading evidence to the contrary. The plaintiff did not lead any contrary evidence.

[9] At the hearing of this matter there was a modest debate about how defendants could satisfy the evidentiary burden in the case of an uncooperative plaintiff. This question was answered in *Chawla v. Gebert*, 2024 BCSC 1502, a decision released within the last few weeks. There, Justice Gibb-Carsley said:

> [36] Section 83(5) provides that after the award of damages is assessed, the amount of benefits the plaintiff received must be disclosed to the court, and taken into account:
>
> > (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.
>
> [37] Section 83(5) of the *Act* is unambiguous. Disclosure must be made to the court of "the amount of benefits paid or provided". The *Act* is clear that the amounts of the benefits – which includes amounts paid or payable - must be disclosed.
>
> [38] In my view, the plaintiff's Pacific Blue Cross, Canada Life, and salary indemnity plan fall under the definition of benefits contemplated by s. 83

> which are to be deducted from the awards for wage loss and special damages at trial. Clearly the Second Accident occurred after the time of the amendment. As such, pursuant to the *Act*, the plaintiff must disclose what is now requested by ICBC.
>
> [Emphasis in original.]

[10] So, even if I am wrong that the defendant met his evidentiary burden of showing benefits to which the plaintiff was entitled and their quantification, it was, in any event, the plaintiff's statutory obligation to disclose the benefits she received.

[11] The second issue – whether to consider uncertainty in the payment of future benefits – turns on the applicability of authorities decided under the former version of the *Act* in light of another new statutory provision, s. 83(5.1) of the *Act*.

[12] I will reproduce both subsections (5) and (5.1), as they are connected:

> 83 (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.
>
> (5.1) In estimating, under subsection (5), an amount of benefits that has not been ascertained, the court may not consider the likelihood that the benefits will be paid or provided.
>
> [Emphasis added.]

[13] The plaintiff cites *Meisters v. Tompkins*, 2023 BCCA 335, which in turn quotes from *Blackburn v. Lattimore*, 2023 BCCA 224. I will take the more direct route and quote from *Blackburn*:

> [4] Under s. 83 of the *Act*, a defendant may apply to deduct from the amount of the judgment certain mandatory Part 7 benefits that correspond to sums compensated in the tort damages award. It provides:
>
> 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.

[5] The purpose of the s. 83 deduction is two-fold: to determine the amounts that will be paid to the plaintiff immediately, and to prevent double compensation: *Fisher v. Wabischewich* (1978), 5 B.C.L.R. 335 (C.A.) at 336; *Del Bianco v. Yang*, 2021 BCCA 315.

[6] The requirement for deduction under s. 83 is that the benefits are "respecting the loss on which the claim [for damages] is based". There must therefore be correspondence, sometimes referred to as correlation, between the damages sought to be reduced and the mandatory Part 7 benefit. This requirement ensures that the deduction addresses the risk of overcompensation.

[7] As noted in *Watson v. Fatin*, 2023 BCCA 82, there is also a converse risk. When payment of a benefit is uncertain, the plaintiff is at risk of being short-changed if a deduction is made for benefits that are never received. In *Watson*, this court observed:

> [11] ... 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.

[8] To alleviate the risk of a short-change, the onus is on the defendants to establish that the plaintiff is entitled to Part 7 benefits in the amount they say should be deducted from the judgment: *Watson* at para. 15. Uncertainty as to entitlement may derive from mere procedural requirements, such as the requirement for a periodic certificate from a medical practitioner. Such uncertainty may be eliminated by an appropriately authorized person irrevocably waiving the requirement and committing on behalf of ICBC to

> future payments of the benefit in question: *Watson* at para. 17. A waiver, however, cannot create an entitlement not provided in the legislation – that is, it cannot expand the entitlements set out in Part 7.
>
> [9] Uncertainty in the benefits that an insured will receive may be addressed by applying a contingency reduction to the amount of the deduction from the tort damages award. In *Watson*, this court explained:
>
> > [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.
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> [Emphasis in original omitted.]

[14] The plaintiff also relies on *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953, where the Court said:

> [56] Entitlement refers to conditions precedent to receiving benefits, not the discretionary granting of benefits by ICBC once entitlement is established. When determining entitlement, the court should not concern itself with disputes between the plaintiff and ICBC: *Sovani* at paras. 36–40. When estimating an amount of benefits that has not yet been determined, the court is not to consider the likelihood the benefits will be unfairly adjusted in the future: *Ayles v. Talastasi*, 2000 BCCA 87 at para. 33 [*Ayles*]. The prior conduct of the insurer in denying benefits should not preclude a deduction from an award: *Sovani* at para. 46.
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> [Footnote omitted.]

[15] The plaintiff submits this excerpt from *Aarts-Chinyanta* means that subsection 5.1 "simply codifies the common law under s. 83 that this court is not to consider whether an insurer will *unfairly* adjust the plaintiff's entitlement to benefits in the future" (my emphasis). The plaintiff says that subsection 5.1 does not relieve the Court from applying the general principles concerning adjustments for uncertainty set out in *Blackburn*.

[16] In reply, the defendant says the plaintiff's authorities do not apply because those cases all involved motor vehicle accidents that predated May 17, 2018, the effective date of the amended *Act*. For that reason, none of those cases discussed subsection 5.1 of the *Act*. The defendant says subsection 5.1 means what it says, that "the court may not consider the likelihood that the benefits will be paid or provided."

[17] To begin my analysis, I note that the post-amendment *Act* is quite different in scope. No longer is there a single insurer in most cases, with ICBC acting as both third-party insurer for defendants and first-party insurer for Part 7 benefits, but there are now many private insurers potentially involved. All manner of benefits are captured, and private insurers can no longer seek reimbursement through subrogation. These are very significant changes and there is no particular reason to expect that principles established under the former *Act* would be unaffected by the statutory amendments, as the plaintiff suggests.

[18] In any event, I do not accept that the words of subsection 5.1 ("the court may not consider the likelihood that the benefits will be paid or provided") are intended to prohibit only a consideration that "an insurer will *unfairly* adjust the plaintiff's entitlement to benefits" sometime in the future. This interpretation would mean that subsection 5.1 is merely confirming existing law. Had this been the case, surely the legislative draftsperson would have written the subsection in a manner that addressed that issue much more directly.

[19] The excerpt from *Blackburn* speaks of situations where the payment of future benefits is uncertain and, in such cases, applying a contingency deduction to reflect that uncertainty. In my view, it is clear that subsection 5.1 is addressing those situations – the Court is not to go through the exercise of assessing the likelihood (or "uncertainty") that benefits will (or will not) be paid or provided in future.

[20] Accordingly, I am satisfied that for vehicle accidents occurring after May 17, 2018, the Court is no longer permitted to make deductions for uncertainties when estimating the value of future benefit payments.

[21] At the hearing of this matter it was not clear whether the plaintiff intended to advance other arguments concerning s. 83 deductions once this issue was decided. If not, then the deductions at issue are settled in the amount of $316,436, as set out herein. If there are further issues to be resolved, counsel should make arrangements for a further hearing.

[22] Costs of this application to the defendant.

"Blok J."