

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Taylor v. Peters*,
2024 BCSC 417

Date: 20240313
Docket: M182166
Registry: Victoria

Between:

Patricia Jane Taylor

Plaintiff

And

Michael Edward Peters

Defendant

Before: The Honourable Madam Justice Murray

Reasons for Judgment re: s. 83 Deductions after Award

Counsel for the Plaintiff (Appearing via MS
Teams):

J.A.S. Legh

Counsel for the Defendant (Appearing via
MS Teams):

N.E. Welle

Place and Date of Hearing:

Victoria, B.C.
January 9, 2024

Place and Date of Judgment:

Victoria, B.C.
March 13, 2024

INTRODUCTION

[1] On September 12, 2017, the plaintiff, Ms. Taylor, was struck by a motor vehicle driven by the defendant, Mr. Peters (“the MVA”). Liability was admitted. On December 15, 2021, in reasons for judgment indexed at 2021 BCSC 2444, I awarded Ms. Taylor the following:

Non-pecuniary damages	\$125,000.00
Cost of future care	272,029.50
Special damages	<u>10,556.42</u>
Total:	\$407,585.92

[2] In this application the defendant, Mr. Peters applies to have \$137,080 deducted from the award pursuant to s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the “Act”) and *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 (the “Regulation”).

[3] The award for the cost of future care consisted of:

Physiotherapy	\$165,116
Massage therapy	\$52,746.36
Medication and assistive costs	\$4,355.68
Loss of homemaking capacity	\$40,000
TOTAL	\$272,029.50

[4] The Insurance Company of British Columbia (ICBC or “the insurance company”) appealed the cost of future care award. The appeal was heard on October 12, 2023. The Court of Appeal dismissed the appeal that same day finding the awards to be reasonable.

[5] Part 7 of the Regulation defines “Accident Benefits” which are awarded to anyone involved in a motor vehicle accident irrespective of fault, such as medical expenses, rehabilitation expenses, wage benefits, and home making benefits. These are commonly referred to as the “no fault” portion of BC auto insurance or simply Part 7 benefits.

[6] Under Section 83 of the *Act* a defendant can apply to deduct the amount that a plaintiff is entitled to receive under the “no fault” Part 7 benefits from a cost of future care award. The purpose of s. 83 is to prevent double recovery. I will expand on this shortly.

[7] At the time of the accident, the limit on Part 7 benefits was \$150,000. To date, ICBC has paid to Ms. Taylor \$9,033.00 under Part 7 of the Regulation, just \$1,154 of which has been paid in the 2 ½ years since the end of trial. \$586 of that amount was paid while the present application was being heard. I note that the \$586 payment was made for treatment Ms. Taylor received in March and April 2022. It took ICBC 18 months to reimburse Ms. Taylor.

[8] In an affidavit prepared for this application, sworn January 3, 2024, Steve Haaf, an ICBC claims review advisor advises that ICBC now “accepts the awards made by the Court” for cost of future care as being “reasonable and necessary” and that they arise from Ms. Taylor being struck by Mr. Peter’s vehicle. Accordingly, Mr. Haaf attests that under Part 7 of the Regulation ICBC will “irrevocably, unequivocally, and unconditionally agree to pay the plaintiff, for the items awarded by the court in the Cost of Future Care section in the Reasons for Judgment pursuant to section 88 of the Regulation, as incurred and submitted to ICBC by the plaintiff for reimbursement, up to the amounts allowed pursuant to section 88(12) and Schedule 3.1 of the Regulation as applicable, until the amount of \$141,533.00 is exhausted”.

[9] He further on behalf of ICBC explicitly waives:

- 1) The power to require an insured to undergo treatment under section 90 of the Regulation, the need for continued certification under section 98 of the Regulation, and the power to require an insured to submit to a medical examination under section 99 of the Regulation;
- 2) The requirement pursuant to section 88(1.01) of the Regulation for ongoing certification from ICBC's medical advisor or the plaintiff's doctor for physiotherapy and massage therapy; and

- 3) The need for the opinion of its medical advisor as required in s. 88(2) of the Regulation for fitness pass and body pillow and has accepted that these items are likely to promote the rehabilitation of the plaintiff.

[Emphasis added.]

[10] Mr. Haaf is not the first representative from ICBC to make these commitments on behalf of the insurance company. In an affidavit sworn May 4, 2022, another claims review adviser, Dave Forster, gave the same guarantees. As will be seen from the following, ICBC did not abide by the Forster promises.

[11] On June 22, 2022, about six weeks after Ms. Taylor received the Forster guarantees, she submitted receipts for neuro physiotherapy for reimbursement. ICBC adjuster Ed Nieweler responded via email that ICBC required a “current referral for therapy” and on receipt, he would confirm with Ms. Taylor what ICBC is “able to do in regards to [physiotherapy] reimbursement”.

[12] On July 6, July 29 and August 22, 2022, Ms. Taylor submitted receipts for reimbursement. She sent the requested doctor’s referral on July 29, 2022. By the time of her September 22, 2022 affidavit, Ms. Taylor had received no response from ICBC. I pause to note that Ms. Taylor, who is now 65 years of age, is retired and has a fixed income, and had to pay those invoices up front. Delay in receiving reimbursement creates significant problems for her financially.

[13] On December 22, 2022, when Ms. Taylor sought reimbursement for house cleaning she was advised by ICBC claims services manager Steven Spencer that “housekeeping was a part of the judgment at \$40,000 and that full amount was paid January 10, 2022”. Mr. Legh, counsel for Ms. Taylor wrote to ICBC advising that they were unaware that anything had been paid for housekeeping and asking for clarification. He received no response. He followed up four more times on February 28, March 23, April 26 and May 30, 2023. Mr. Legh finally received a response from Mr. Stevens advising that “housekeeping would not qualify as a Part 7 benefit because there was no application/request made for housekeeping under Part 7 until

at or just before trial” which “was well past the 20 days after accident that section 84 under Part 7 states”. He then added, “if you feel that this should qualify as Part 7, please let me know, and provide your logic and I will take that for discussion.” No reimbursement has been made for housekeeping.

[14] On January 20, 2023, Ms. Taylor sought reimbursement for physiotherapy. On January 24, 2023, she sought reimbursement for massage therapy. On January 24, 2023, claims specialist Nieweler wrote to Ms. Taylor’s counsel acknowledging receipt of Ms. Taylor’s emails stating that he does not “seem to have any recent referrals on file at this time”. He asked Mr. Legh to provide referrals for each modality, adding that “the doctor should also specify an MVA need/ requirement as appropriate.” Mr. Nieweller advised that he would not consider the receipts until he had these doctor’s referrals. On January 25, 2023, Mr. Legh sent Mr. Nieweller a copy of the trial judgment and posed a number of questions including how long he had worked on the file, whether he was aware of the court decision, why he asked for referrals and why Ms. Taylor had not yet received any reimbursement. The next day, Mr. Niieweller wrote to Mr. Legh advising that the cheque was in the mail. He never responded to the questions.

[15] In addition to the above, Ms. Taylor has submitted other receipts but has not been reimbursed. Of the claims that have been paid, they are partial reimbursements. And she has only received partial payment of the judgment. According to Mr. Legh, payment of the judgment has come in “odd” amounts. ICBC has provided no explanation as to what the payments are for despite many requests from counsel to do so.

[16] As a result of the issues with ICBC, Ms. Taylor has been unable to attend therapy. She is on a tight budget and cannot afford to pay for therapies then wait and see if and when ICBC will reimburse her. Neither can she keep incurring legal expenses to try to persuade ICBC to pay her what she is entitled to under Part 7.

THE LEGAL FRAMEWORK

[17] As stated above, the object of s. 83 of the *Act* is to prevent an insured from collecting on both the tort award and from ICBC under Part 7 for a benefit, thereby receiving double the award. Under s. 83 a defendant may apply to deduct from an award amounts that an insured is entitled to receive as “no fault” benefits under Part 7 of the Regulation.

[18] The relevant part of s. 83 reads as follows:

(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 a person who is liable to pay or provide benefits from demanding from the person referred to in subsection (2), as a condition precedent to receiving the benefits, a release to the extent of the value 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 provided, 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.]

[19] Section 83 deductions have been the subject of much litigation including several recent decisions of our Court of Appeal. In *Watson v. Fatin*, 2023 BCCA 82, Saunders, J.A., writing for the Court, identified a concern converse to over compensation: the risk of short-changing the plaintiff where it is uncertain that a benefit will be paid by ICBC (*Watson* at para. 11).

[20] In a subsequent decision, *Blackburn v. Lattimore*, 2023 BCCA 224, Saunders, J.A. explained the purpose of s. 83:

[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.

[Emphasis added.]

ANALYSIS

[21] It is clear from the above that ICBC did not honour the undertaking given by Mr. Forster in his affidavit sworn May 4, 2022. The insurance company still required doctor's letters, referrals and justifications. And it failed to reimburse Ms. Taylor for her claims. Until the day of the application, in the almost 30 months since the end of the trial, ICBC had reimbursed Ms. Taylor less than \$600 in Part 7 benefits. As mentioned above, ICBC made an additional payment of \$586 while the application was being heard.

[22] Counsel for ICBC admits that ICBC has failed to handle Ms. Taylor's claim appropriately but submits that starting now they will do so and that this Court (and Ms. Taylor) can rely on the undertakings of Mr. Haaf.

[23] Ms. Taylor responds that given the history she is unable to trust that ICBC will stand by their solemn commitment or to deal with her fairly or promptly. To date, ICBC has refused her payment until her lawyer stepped in on her behalf, at a significant cost to her. As noted, she is now 65. Her long-term disability benefits from her employment has ended and she is on a fixed income. She is unable to bank roll her treatments hoping that ICBC will eventually honour their commitment. Neither can she keep incurring legal expenses to try to persuade ICBC to pay her what she is entitled to under Part 7. Consequently, the necessary therapies are a luxury she cannot afford and she has had to stop attending them. Her health and quality of life have diminished as a result.

[24] It is concerning that Ms. Taylor is unable to continue with therapy. Based on the evidence from medical experts at trial I found that the therapies are required to ameliorate the debilitating injuries suffered when Ms. Taylor was hit by the defendant's car and assist her to cope with the pain.

[25] In addition to the therapies, in my reasons for judgment I found that Ms. Taylor needed assistance with housekeeping as follows:

[80] The evidence was consistent that keeping house is much more taxing on Ms. Taylor since the MVA. John Taylor testified that Ms. Taylor's quality of life has decreased because everyday tasks take her longer and require more effort. It follows that some housekeeping help will ameliorate the impact of the injuries by helping Ms. Taylor preserve her energy for things that she enjoys.

[81] Ms. Taylor seeks housekeeping help of 1.5 to two hours per-week (six to 10 hours per month) to assist with heavy work that she cannot do herself or that consumes much of her precious energy. She testified that she has considered hiring help, but has not done so because of the cost. If she had help then she could use her new-found time and energy to re-engage with the church.

[82] I find an award of \$40,000.00 to be modest and appropriate.

[26] To date, Ms. Taylor has not received any reimbursement from ICBC for housekeeping. She has cancelled her housekeeping service due to the problems she has had dealing with ICBC and the cost of having to hire her lawyer to try to obtain her reimbursement.

[27] Section 83 was not intended to permit ICBC representatives to ignore or revise decisions of the court by refusing to fulfil court ordered awards or to frustrate them. Nor was the Part 7 regime intended to make engaging in much needed therapy financially impossible for insureds because ICBC is not reimbursing them in a timely fashion.

[28] ICBC relies on a comment of the Court in *Norris v. Burgess*, 2016 BCSC 1452 that "ICBC is an agent of the government. The Court will not presume that the future conduct of ICBC will be other than honourable." *Norris* involved a much different set of circumstances than before me.

[29] Based on the consistent conduct of ICBC toward Ms. Taylor since her accident, I am unable to presume that ICBC will conduct itself honourably moving forward. I am strengthened in this conclusion by the fact that Mr. Haaf only provided his undertaking on January 3, 2024, in an affidavit prepared for this application. If ICBC was truly prepared to accept the court's ruling and pay to Ms. Taylor the benefits to which she was entitled, why did it not do so immediately after the Court of Appeal's decision instead of waiting almost three months? And why did ICBC provide payment to Ms. Taylor on the day of the court application when the claim was submitted 18 months prior? This behaviour is consistent with how ICBC has handled this claim. It waits until a lawyer or the court is involved before it fulfills its obligations.

[30] Ms. Taylor is not seeking double recovery. She merely wants what she was awarded by the Court so she can engage in therapy and move forward with her life. To that end she is willing to forego the Part 7 benefits that remain available to her.

CONCLUSION

[31] For the reasons above, I am unable to conclude that ICBC will pay Ms. Taylor her benefits. ICBC has failed to meet its burden.

[32] Due to ICBC's egregious conduct, I order that only the amount that has been paid to Ms. Taylor in Part 7 benefits to date be deducted from the award. Based on the information in Mr. Haaf's affidavit I believe that amount to be \$9,033, but I leave the calculation to counsel.

[33] I order that Ms. Taylor waives her entitlement to the remainder of the Part 7 benefits being \$150,000 less the amount she has received to date from ICBC in Part 7 benefits.

[34] Ms. Taylor is entitled to the costs of this application.

[35] If Ms. Taylor is seeking higher than normal costs or if counsel are unable to agree on the amount of Part 7 benefits paid to Ms. Taylor, they can schedule a brief hearing before me through Supreme Court scheduling.

“The Honourable Madam Justice Murray”