COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Meisters v. Tompkins,*
2023 BCCA 335

Date: 20230817
Docket: CA48497

Between:

Maria Hendrina Meisters
and Canstar Restorations GP Inc.

Appellants
(Defendants)

And

Maria Helena Tompkins

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Hunter
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated July 29, 2022 (*Tompkins v. Meisters*, 2022 BCSC 1289, Vancouver Docket M188663).

Counsel for the Appellant:	S. Hoyer R.W. Parsons
Counsel for the Respondent:	T.R. O'Mahony
Place and Date of Hearing:	Vancouver, British Columbia May 1, 2023
Place and Date of Judgment:	Vancouver, British Columbia August 17, 2023

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Hunter

Summary:

The respondent was injured in a motor vehicle accident. The appellants admitted liability, and the trial judge made awards for loss of earning capacity and costs of future care, amongst other heads of damage. The appellants applied under s. 83 of the Insurance (Vehicle) Act to reduce the awards by the amount of benefits provided by the Insurance Corporation of British Columbia. The judge reduced the deductions sought from the award for future loss of earning capacity by 50% and the award for future cost of care by 20% on the basis of several contingencies. On appeal, the appellants challenge the amount of the reduction to the deductions arguing that they were untethered to the probability of specific contingencies materializing.

Held: appeal allowed in part. The reduction to the deduction from the award for future loss of earning capacity is varied to 20%. The judge's 50% reduction was inordinately large given the applicable contingencies and the judge erred in applying that deduction to benefits already paid to the respondent after the trial. The 20% reduction to the cost of future care deduction is upheld subject to a deduction for benefits paid after the trial. While the judge could, arguably, have been more specific as to what grounded the reduction percentage she reached, her ultimate finding was reasonable and thus does not warrant appellate intervention.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

I. OVERVIEW

[1] This appeal concerns deductions made under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 ("the *Act*") from a damages award made in a negligence claim arising from a motor vehicle accident. The issues relate to the contingency reductions applied by the trial judge to the deduction of benefits from the award for future loss of earning capacity ("Future Earning Capacity Award") and the award for future cost of care ("Future Care Award").

[2] The respondent also applies to adduce fresh evidence on this appeal, being a letter from Service Canada dated December 4, 2019 in which she was advised that Service Canada denied her claim for Canada Pension Plan ("CPP") Benefits.

[3] The respondent suffered injuries to her head, neck, right shoulder, upper back, lower back, right arm and right hip as a result of an accident on June 29, 2017. Her most significant injury was to her right shoulder. She also suffered from

headaches, depression, fatigue, and nausea as a result of her accident-related injuries. Liability for the accident was not in issue.

[4] In reasons for judgment indexed as 2021 BCSC 2080 (the "Trial Decision"), the judge awarded the respondent the following damages:

Non-pecuniary damages (including loss of housekeeping capacity)	$190,000.00
Past loss of earning capacity	$120,000.00
Future loss of earning capacity	$255,000.00
Cost of future care	To be calculated
Special damages	$4,970.00

[5] The judge provided leave to the parties to re-appear before her if they were unable to agree on any outstanding issues, including any deductions pursuant to benefits the respondent received from the province's no-fault insurance scheme.

[6] Section s. 83(2) of the *Act* provides that an injured person's damage award against a tortfeasor will be reduced by certain no-fault insurance benefits that the injured person "receives" (is paid) or "is entitled to receive" from (is payable by) the Insurance Corporation of British Columbia ("ICBC").

[7] Since the respondent was an "insured" for the purposes of Part VII of the *Insurance (Vehicle) Regulation* under the *Act* (the "Regulation"), the appellants subsequently applied for deductions totaling $299,273.44 under s. 83 of the *Act*, comprising:

- $55,000.00 in deductions from the award for past loss of earning capacity to take into account temporary total disability ("TTD") benefits paid to the respondent to the date of trial; and

- $170,726.40 in deductions from the Future Earning Capacity Award, to take into account TTD benefits (i) of $16,800.00 paid since the date of trial; and (ii) $153,926.40 still payable to age of 65; and

- $73,046.04 in deductions from the Future Care Award, to take into account medical and rehabilitation benefits (i) $2,774.30 paid since the conclusion of trial; and (ii) $70,271.14 payable under s. 88 of the Regulation.

[8] The parties were unable to agree on some aspects of the quantum of s. 83 Part VII deductions, and accordingly, reappeared before the judge for a resolution of these issues.

[9] The parties agreed on the $55,000 in deductions sought in respect of the award for past loss of earning capacity. The judge, accordingly, was not required to decide this issue and those deductions do not form part of this appeal.

[10] The respondent made a preliminary objection to the medical and rehabilitation deductions sought by the appellants from the Future Care Award. She did so on the basis that the amounts the appellants had calculated for physiotherapy and massage therapy deductions had been improperly adjusted for inflation. The appellants then revised their deductions' claim to seek the following:

- $170,726.40 of deductions in relation to the Future Earning Capacity Award; and

- $71,816.29 of deductions in relation to the Future Care Award.

[11] On 29 July 2022, in reasons for judgment indexed at 2022 BCSC 1289 (the "Deductions Reasons"), the judge ordered the following Part VII deductions:

- By consent, $55,000.00 from the award for past loss of earning capacity to reflect TTD benefits paid to the date of trial;

- $85,364.20 from the Future Earning Capacity Award to reflect TTD benefits paid since the date of trial and those still payable to age 65; and

- $57,453.03 from the Future Care Award to reflect medical and rehabilitation benefits paid since the date of trial and those still payable in the future.

[12] The appellants now challenge the contingency reductions to both the Future Earning Capacity Award and the Future Care Award and the application of contingency reductions to benefits received after the trial.

[13] For the reasons that follow, I would allow the appeal to the extent of varying the judge's order regarding the deductions to be applied to the Loss of Future Earning Capacity Award and dismiss the appeal as it concerns deductions to the Future Care Award with the exception of benefits received after the trial.

[14] I would also dismiss the application to adduce fresh evidence.

II. THE LEGAL FRAMEWORK

[15] The legal framework was recently summarized by Justice Saunders in *Blackburn v. Lattimore,* 2023 BCCA 224:

> [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.
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> …
>
> (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.

[10] Part 7 of the Regulation mandates the no-fault benefits referred to in s. 83 of the *Act*, including disability benefits for employed persons:

> 80 (1) Where, within 20 days after an accident for which benefits are provided under this Part, an injury sustained in the accident totally disables an insured who is an employed person from engaging in employment or an occupation for which the insured is reasonably suited by education, training or experience, the corporation shall, subject to section 85, pay to the insured for the duration of the total disability or 104 weeks, whichever is shorter, the lesser of the amounts determined under paragraphs (a) and (b):
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> ...
>
> (2) Where disability benefits are payable to an insured for a period of less than one week, the amount payable for each day shall be determined by dividing the amount payable weekly by the number of days the insured regularly works in a week….

…

[12] Section 86 of the Regulation allows payment of disability benefits under both ss. 80 and 84 beyond 104 weeks:

> 86 (1) Where an injury for which disability benefits are being paid to an insured under section 80 or 84 continues, at the end of the 104 week period, to disable the insured as described in the applicable section, the corporation shall, subject to subsections (1.1) and (2) and sections 87 to 90, continue to pay the applicable amount of disability benefits to an insured described in section 80 or 84
>
> (a) for the duration of the disability, or
>
> (b) until the insured reaches 65 years of age, whichever is the shorter period.

> [13] Last, s. 87 of the Regulation allows for termination of disability benefits in these terms:
>
> > 87 Any benefits payable under section 80, 84 or 86 may be reviewed every 12 months and terminated by the corporation on the advice of the corporation's medical adviser.
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> [Emphasis added.]

[16] I will canvass additional principles below as they relate to the specific errors which are alleged on appeal.

III. STANDARD OF REVIEW

[17] The interpretation of s. 83 of the *Act* is a question of law that is reviewable on a correctness standard. Where the appellant challenges the factual findings of the trial judge, or where the trial judge is alleged to have erred in applying the correct legal principles to the evidence, the applicable standard is the deferential one of palpable and overriding error: *Warick v. Diwell*, 2018 BCCA 53 at para. 21, citing *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at paras. 53–56 and *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8–9 and 36–37.

[18] Deductions from damage awards on the basis of future payable benefits involve applying the s. 83 framework to particular factual circumstances. Accordingly, the standard of review is deferential.

[19] In *Warick*, Justice Fisher dismissed an appeal from an award for future care costs despite acknowledging that she "may have come to different conclusions on some aspects of the award for future costs", because absent errors of law and palpable and overriding errors of fact, "there is no basis on which this Court should interfere with the award." *Warick* at para. 23.

[20] This Court has emphasized that in assessing future damages, the relevant question is whether the figure falls within the range of reasonable compensation, rather than the providence of each individual step taken to reach the final figure: *Uhrovic v. Masjhuri*, 2008 BCCA 462 at para. 30. The final award is to be assessed

for its overall reasonableness: *Uhrovic* at para. 33. The burden is on the appellant to demonstrate error.

Issue 1: Did the judge err in the contingency reduction she applied to the Future Earning Capacity Award deduction?

1. The Judge's Reasons

[21] In the Deductions Reasons, the judge reduced the s. 83 deduction sought by the appellants from the Future Earning Capacity Award by 50%.

[22] She noted at para. 8 of the Deductions Reasons that her initial Future Earning Capacity Award of $225,000 in the Trial Decision was crafted to reflect the 10% chance that Ms. Tompkins would return to paid employment. This appears to be a typographical error: in the Trial Decision at paras. 73–74 and 100, the judge refers to $255,000 as the total amount that reflects the 10% chance that Ms. Tompkins would return to paid employment.

[23] In support of their application to deduct payable TTD benefits from the Future Earning Capacity Award, the appellants relied on an affidavit from Mr. Dave Wright, a Claims Manager with ICBC. The judge quoted from Mr. Wright's affidavit, including the statement that he is "authorized on behalf of ICBC to confirm that ICBC will irrevocably, unequivocally, and unconditionally continue to pay up to $300.00 per week in TTD benefits to the Plaintiff until the Plaintiff's 65th birthday in accordance with sections 80 and 86 of the Regulation." Mr. Wright calculated the TTD benefits payable from the date of trial until Ms. Tompkins' 65th birthday to be $170,726.40. Accordingly, the appellants sought a deduction of that amount.

[24] The respondent disputed the propriety of this deduction. She did so on the basis that Mr. Wright's affidavit did not demonstrate that ICBC would, as a matter of certainty, pay the full $300 per week until the respondent turns 65. ICBC had simply committed to paying "up to" $300 per week, a commitment that could ultimately amount to any number between $0–300 per week. Accordingly, she argued that deducting the full amount of $170,726. 40 from the Future Earning Capacity Award would be unfair. Indeed, the respondent argued that deducting *any* amount from the

Future Earning Capacity Award would be unfair, precisely because ICBC had not committed to making any particular weekly payment to the respondent.

[25] In the alternative, the respondent sought a 75% reduction to account for the combination of: (i) the 10% chance that the respondent would return to work, as initially reflected in the Trial Decision; (ii) a return to part-time employment that would reduce the benefit payable; and (iii) the uncertainty engendered by the words "up to" in Mr. Wright's affidavit.

[26] The judge agreed with the respondent that Mr. Wright's commitment on behalf of the ICBC was insufficiently certain and that the deduction from the Future Earning Capacity Award should be reduced, but selected 50% as the quantum of reduction on the following basis:

> [27] I note that, in his affidavit, Mr. Wright confirms that ICBC accepts the court's findings with respect to Ms. Tompkins' loss of future earning capacity. He does not say that ICBC accepts that Ms. Tompkins will continue to be totally disabled until age 65. It is possible that ICBC will, at some point in the future, determine that Ms. Tompkins is no longer totally disabled, and disentitled to further TTD payments. Considering the language in Mr. Wright's affidavit and the possibility that Ms. Tompkins could return to work, and the uncertainty about what benefits Ms. Tompkins would receive in that event, I find it appropriate to reduce the deduction sought by the defendants by 50%. Applying that contingency to the deduction sought by the defendants of $170, 726.40, I deduct $85,363.20 from that amount, for a total deduction from the future loss of earning capacity award of $85,363. 20. I note that $16,800.00 has already been paid from this amount since the conclusion of the trial.

2. The Parties' Positions on Appeal

[27] The appellants acknowledge that they bear the burden of establishing the respondent's entitlement to Part VII benefits.

[28] They also acknowledge that uncertainty as to the respondent's entitlement to the payment of benefits is thus a relevant consideration in fixing the amount of any s. 83 deduction: *Del Bianco v. Yang*, 2021 BCCA 315 at paras. 61–69. However, the appellants say that ICBC can *remove* the uncertainty of payment of the benefits to which the respondent is entitled by waiving the regulatory requirements that operate as conditions or terms of disbursing the insurance benefits.

[29] Once the appellant establishes the respondent's entitlement to future benefits, the judge must then "estimate" the amount of the entitlement*: Del Bianco* at para. 52.

[30] Insofar as proof of entitlement is concerned, the appellants argue that the judge ought to have considered the very evidence that was before the court in the tort action and upon which the assessment of the respondent's damages was based. This approach to deductibility of benefits under s. 85(2) of the *Act* is consistent with the purpose of the legislative scheme: *Schmitt v. Thomson*, (1996), 18 B.C.L.R. (3d) 153 (C.A.), at paras. 18–21.

[31] The appellants say the judge erred in failing to consider the evidence that resulted in a finding of 10% residual employability. The eventual 50% reduction the trial judge applied to the deduction had no meaningful connection to the respondent's 10% chance of returning to work. The deduction was thus unsubstantiated and inordinately large.

[32] Further, the appellants contend that the judge erred in applying the 50% contingency to the $16,800 in TTD benefits which the respondent had in fact already received following the trial. This amount is certain.

[33] The respondent submits that the judge's deduction was entirely appropriate, and was in fact generous to the appellants, given the amount of uncertainty associated with ICBC's future payments. In doing so, she argues:

> The most that ICBC indicated it would do in relation to TTD benefits is pay no more than $300 per week. There is no set minimum, there is no total amount that ICBC promises to pay, there is simply uncertainty. Similarly, the ICBC representative may have stated an acceptance of the trial judge's findings but that does not mean much if ICBC does not promise to pay TTD benefits in accordance with those findings. The corporation can accept the findings but not pay out in accordance with them.

[34] The respondent points to the trial judge's finding in this respect, who noted that "[Mr. Wright] does not say that ICBC accepts that Ms. Tompkins will continue to be totally disabled until age 65."

[35] The respondent also submits that ICBC could have removed any uncertainty by promising to pay a total amount subject to a residual earning capacity. Instead, the appellants sought to deduct the entire amount of the TTD benefits, while leaving it open that ICBC may not have to pay out that sum.

[36] In response to the appellants' secondary argument that the judge incorrectly applied a global deduction of 50% to TTD benefits already paid, the respondent argues that the judge did indeed consider the amount which had been paid, but simply deemed it appropriate to apply a global 50% reduction in any event.

3. Discussion

[37] The starting position is what this Court stated in *Schmitt* at paras 18–21. *Schmitt* involved a motor vehicle accident that resulted in serious injuries to the respondent. There, as here, the appellant sought a deduction to the costs awarded to the respondent on the basis of possible future payments by ICBC. This Court overruled prior authority, *Jang v. Jang*, 1991 154 B.C.L.R. (2d) 121 (C.A.), which stood for the proposition that there could be no deductions on account of future discretionary Part VII benefits without a commitment from ICBC to pay those benefits. With respect to the evidence the judge should rely on in making such a deduction based on future benefits, the Court explained:

> 18 There can be no doubt that the mandate of the legislature in s. 24(5) of the *Act* coupled with the regulations under the *Act* require the trial judge in a case such as this to embark on what could be but not necessarily must be, a difficult task when it comes to estimating the amount of benefits to which the plaintiff "is or would be entitled" to in the future. However, be that as it may, in my opinion the words of s. 24(5) are without ambiguity and the mandate is clear that "The court shall estimate it and take the estimate into account" before judgment is entered. The difficulty in the task before the court cannot, in my opinion, obscure the mandate in s. 24(5). I agree with the submissions of the appellant that there is nothing in the *Act* or regulations that could be said to permit the court to require an undertaking before permitting the appellant to invoke s. 24(5) of the *Act*.
>
> 19 Insofar as proof is concerned I think it is necessarily implicit in s. 24(5) that the evidence upon which the estimate of future benefits is made is that very evidence which was before the trial judge in the tort action and upon which he or she made their assessment of those damages. The uncertainties as to the payment of future benefits which are created by the regulations cannot, in my opinion, act as a bar to the court estimating these future

> benefits as best it can as required by s. 24(5). It may well be in any given case that the s. 24(5) estimate, when measured against the findings of fact in the tort action, will be nominal by reason of the uncertainty of payment, or more correctly speaking entitlement to payment, of future benefits created by the regulations. Trial judges may be cautious in their approach to the s. 24(5) estimate inasmuch as the deduction results in a lessening of the award in the tort action considered proper on the evidence by the trial judge. However, if that is the result of uncertainty created by the regulations I do not think the Corporation in all fairness can be heard to complain. In the case before us there is no such problem because the amount of the estimate is agreed upon.
>
> 20 It is quite possible that in any given case when the trial judge embarks on the s. 24 exercise the parties will wish to adduce evidence on the issue of the estimate alone. I see nothing to prevent the trial judge from hearing further evidence on this issue when it comes before the court.
>
> 21 I think that to rely on the evidence in the tort action on the assessment of damages as to the future when it comes to s. 24(5) deductibility is consistent with the purpose of s. 24 as has been seen by this court in the cases I have referred to above. With the greatest of respect to those who hold a contrary view I think the conclusion I have reached must necessarily follow if the courts are to give effect to the mandate in s. 24 of the *Act* which I think they are obliged to do regardless of the difficulties which may be encountered in that exercise.
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> [Emphasis added.]

[38] The Court in *Schmitt* took pains to make clear that a court must, on a principled basis, and relying on the evidence, estimate the payment of future benefits even in the face of uncertainty.

[39] This leads me to *Del Bianco*, where this Court reduced a damage award for the massage therapy component of a future care award because the plaintiff was entitled to benefits covering that treatment from ICBC. In doing so, it overturned the trial judge's refusal to make the deduction on the basis that it would be impossible to predict the rate at which ICBC would pay out insurance benefits because the future rates for massage therapy under Part VII were unknown. This Court reiterated that the judge was required to estimate that amount despite the difficulty: *Del Bianco* at para. 52.

[40] In *Watson v. Fatin,* 2023 BCCA 82, this Court explained that assessing the certainty of benefits is a matter of a multi-factorial assessment, which, "[o]n some

occasions," "may be handled by applying a percentage contingency discount to the value of the benefit to account for uncertainty": at para. 19.

[41] Moreover, as the appellants observe, ICBC can negate the uncertainty generated by a future payment by waiving its discretionary powers to decline to make payments in certain instances: *Del Bianco* at para. 38, citing *Schmitt* at para. 24. Where ICBC undertakes or promises to pay discretionary benefits going forward, and the court is "satisfied the undertaking or promise is sufficient in that there is no significant uncertainty the benefits will be paid", "the court should deduct the benefits from the damages award because the uncertainty has been removed." *Fryer v. Village of Nakusp*, 2023 BCSC 477 at para. 83, citing *Aarts-Chinyanta v. Harmon Premium Motors Ltd.*, 2020 BCSC 953 at para. 79.

[42] In deciding *whether* to reduce the deduction based on no-fault coverage, the relevant question is "whether there is a risk that [the plaintiff] will not receive the benefits she is entitled to": *Watson* at para. 28. In deciding the *quantum* of reduction, a particular percentage contingency reduction requires "some connection to the evidence plausibly supporting the view that there is the required realistic risk that the insured will not be full compensated for future care in the event the award is reduced by the present value of the identified Part 7 care items": *Watson* at para. 29.

[43] In *Lynn v. Pearson*, 1985 B.C.L.R. (3d) 401 (B.C.C.A.), aff'g 1973 C.C.L.I. (3d) 175 (B.C.S.C.), this Court upheld the trial judge's nominal deduction of $1,500 from the Future Care Award of $120,000. This Court declined to interfere with the trial judge's finding that the chance ICBC would exercise its discretion to pay the insured plaintiff was "low but not non-existent" and thus warranted a nominal reduction to account for this contingency: at para. 16. Put differently, the trial judge tied the nominal reduction to a specific estimate about the likelihood of a future ICBC payment.

[44] A similar conclusion was reached in *Uhrovic*. There, this Court upheld the trial judge's nominal deduction of $1,000 from a future care award of $140,000, because,

just as in *Lynn*, the plaintiff insured was highly unlikely to receive Part VII benefits from ICBC, though this remained at least a possibility.

[45] It is therefore clear that (1) the court must make an estimate as to the future payable benefits; and (2) any reduction to that amount based on contingencies associated with payment must be tethered, as precisely as possible, to particular evidence.

[46] Contrary to the position they took before the judge, the appellants now concede there should be a 10% contingency reduction based on her finding that the respondent had a 10% residual earning capacity. But they argue that the 50% contingency reduction that the judge actually applied is not tethered to the evidence.

[47] The judge recognized that the "possibility Ms. Tompkins will return to work is not high, given the 10% contingency I applied to the award for loss of future earning capacity...": at para. 19. However, she eventually settled on a 50% contingency reduction to the deduction from the Future Earning Capacity Award.

[48] Her analysis on this point is brief, and is contained in its entirety at para. 27 of the Deductions Reasons: see para. 26 above. The difficulty with this paragraph is that the judge did not attempt to delineate what particular contingencies informed her 50% reduction. In my view, she erred in not doing so, bearing in mind (i) the caution in *Schmitt* that trial judges are to make evidence-based estimates regardless of the difficulties that come with such assessments; and (ii) the principle from *Watson* that the courts are to assess whether there is a "realistic risk" of non-payment and quantify that risk based on the evidence. Here, other than Ms. Tompkins 10% chance of a return to work—which is merely one relevant contingency—the additional 40% contingency reduction is unexplained.

[49] Accordingly, while the reduction here should not be nominal, given that 10% remains a meaningful possibility, the 50% reduction was inordinately large.

[50] The question becomes what additional contingencies are properly applied in this case.

[51] The starting point is ICBC's position, which was described in Mr. Wright's affidavit as follows:

- ICBC would waive any requirement for the respondent to undergo treatment, the need for continued certification, and the power to require the respondent to submit to a medical examination under sections 80, 90 and 99 of the Regulation; and

- ICBC would irrevocably, unequivocally and unconditionally continue to pay up to $300 per week in TTD benefits to the respondent until her 65th birthday in accordance with sections 80 and 86 of the Regulation.

[52] I agree with the respondent that the Wright affidavit does not offer the requisite certainty about ICBC's future TTD benefit payments that would justify a total deduction of the payable TTD benefits payable. Accordingly, it falls to this Court to determine the applicable contingency reductions.

[53] It is clear that the minimum contingency reduction would be 10%, so as to reflect the respondent's residual earning capacity as found by the judge and I read the judge's reasons on this point to include the possibility of part time employment. Accordingly, the only other identifiable uncertainty is that the respondent may be entitled to receive CPP Benefits at some point before her 65th birthday.

[54] The fresh evidence which the respondent seeks to adduce is a letter she received from the CPP, before the trial and deductions hearing, to the effect that she did not meet the criteria at that time to receive those benefits.

[55] This Court will exercise its discretion to admit fresh evidence on appeal where it is satisfied that the purposive, four-step test from *Palmer v. the Queen*, [1980] 1 S.C.R. 759 is met:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial …
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

Rana v. Ullah, 2022 BCCA 192 at para. 56, citing *Barendregt v. Greblunias*, 2022 SCC 22 at para. 3.

[56] In my view, this proposed evidence does not meet the *Palmer* criteria for two reasons.

[57] First it could have been before the Court at the deductions hearing. Second, it is not ultimately relevant or dispositive of the issue of uncertainty going forward, since it would be open to the CPP to reconsider its position in the event the respondent's medical situation changed.

[58] Accordingly, I will consider the contingency associated with the respondent receiving CPP benefits without relying on this evidence.

[59] The respondent was 52 years old as at the time of trial and 53 years old at the time of the Deductions Reasons. Because ICBC had not contested her total disability to that point in time, the respondent had received $16,800 in TTD benefits between the time of the trial and the deductions hearing. By the time of the decision on this appeal there will be approximately 10 more years in which the respondent could receive CPP benefits.

[60] In light of the respondent's age, the judge's findings as to her injuries and residual earning capacity, and the maximum time frame in which she would be entitled to receive CPP benefits, any additional contingency—while not nominal as was the case in *Lynn* and *Uhrovic*—should be modest. I would fix that at 10% for a total contingency reduction of 20%.

[61] This leaves the issue of whether the $16,800.00 already paid to the respondent following the trial should be included in the global contingency reduction of 20%.

[62] The appellants argue that because this amount was not subject to any contingency—having already been paid—it should have been applied as against the Future Earning Capacity Award before the contingency reduction is applied.

[63] The respondent argues that it was within the judge's discretion to apply a global reduction to the deduction from the Future Earning Capacity Award that included the amount already paid.

[64] I agree with the appellants that they are entitled to a credit of $16,800.00 towards the Future Earning Capacity Award in light of the TTD benefits that the respondent has received following the trial. The contingency reduction of 20% is just that—a contingency reduction, and so cannot be applied to a certain amount already paid. Accordingly, the credit must first be applied to the Future Earning Capacity Award, after which the 20% contingency reduction will be applied.

[65] The Future Earning Capacity Award was $255,000.00. The total deduction sought by the appellants was $170,726.40 (para. 10 above) which included the $16,800.00 of benefits paid after the trial and which should first be deducted in full from the Future Earning Capacity Award in light of my conclusion that it should be credited prior to the application of a contingency reduction. Applying the credit of $16,800.00 reduces the award to $238,200.00. This leaves the deduction sought by the appellants at $153,926.40. Applying the 20% contingency reduction to this amount results in a deduction of $123,141.12. Subtracting this amount from $238,200.00 results in a Future Earning Capacity Award of $115,058.88.

Issue 2: Did the Judge err in the contingency reduction she applied to the Future Care Award deduction?

1. The Judge's Decision

[66] The judge accepted that the respondent's ongoing injuries warranted a Future Care Award. Based on the experts' recommendations, she found several items of care both reasonable and justified and invited the parties to calculate their net present value using the multipliers provided by the respondent's economist.

[67] At the hearing, the appellants applied to have $71,816.29 deducted from the Future Care Award for medical and rehabilitation benefits already paid and payable in the future to the respondent. Of this amount, $2,774.30 had already been paid since the conclusion of the trial and $69,041.99 remained payable.

[68] In support of the medical and rehabilitation cost deduction, the appellants also relied on the evidence of Mr. Wright, which included the confirmation that ICBC would "irrevocably, unequivocally, and unconditionally agree" to pay both mandatory and discretionary Part VII medical and rehabilitation benefits as incurred and submitted to ICBC for reimbursement "up to" the amounts allowed pursuant to s. 88(1.2) and Schedule 3.1 of the Regulation.

[69] The respondent did not dispute that there should be some deduction from the Future Care Award on account of future benefits and benefits already paid since the trial. She also agreed with the $71,816.29 calculation. However, her position was that the judge should apply a "global reduction" of 20% to that amount to reflect three types of uncertainty relating to entitlement to those benefits:

(a) First, the Part VII coverage limits of $150,000 less benefits paid and the Medical and Rehabilitation Deductions sought by the appellants would leave the respondent with approximately $40,000 remaining in coverage for her lifetime. The respondent pointed to the fact that her rheumatologist, Dr. Shuckett, had recommended referral to a pain clinic to consider various types of treatment. The respondent said this would

be funded through her Part VII policy and thus there was "a good chance" that she may exhaust her policy before the cost of care judgment award ordered therapies have been funded";

(b) Second, there were a number of items of care that the judge had awarded that extended decades into the future and which had an "ameliorative" not "rehabilitative" purpose as defined in the Regulation; and

(c) Third, the amount that ICBC pays for medical and rehabilitation benefits may be "curtailed" in the future for a particular treatment.

[70] The judge's reasons on this issue are succinct. She ordered a 20% reduction to the $71,816.29 deduction from the Future Care Award on the following basis::

> [28] The parties agree that the present net value of the cost of future care award is $136,968.32. The defendants apply to have $71,816.29 deducted from this amount to reflect Part 7 benefits paid and payable to Ms. Tompkins. Of this amount, $2,774.30 has already been paid since the conclusion of the trial.
>
> [29] Ms. Tompkins agrees with the $71,816.29 figure, but submits that it should be reduced by 20%. In support of this position, she submits that she may exceed the maximum benefits payable to her under her Part 7 policy. She says that after the deductions sought by the defendants, there would only be about $40,000.00 left in her Part 7 policy. In this regard she refers, for example, to the fact Dr. Shuckett recommended she attend a pain clinic, which should be funded under Part 7, and that was not ordered as part of the tort award. She also submits that the amount that ICBC pays for particular treatments could change over the next two decades, and that some of the items ordered may be considered ameliorative rather than restorative, and thus not compensable under Part 7.
>
> [30] In this regard, Ms. Tompkins relies on *Aarts-Chinyanta,* in which the deduction for future cost of care was reduced by 25% at para. 117 to take into account various contingencies. She also relies on *Richmond v. Osztovits*, 2020 BCSC 1160, in which the deduction for cost of future care was reduced by 20% at para. 24.
>
> [31] I agree with Ms. Tompkins that a 20% reduction of the deduction for the cost of future care is appropriate. Applying that reduction to the amount sought of $71,816.29, I conclude that the deduction from the cost of future care award should be $57,453,03.

2. On Appeal

[71] The appellants challenge the 20% contingency deduction and submit that the judge made several errors. First, she effectively treated Dr. Shuckett's recommendation to attend a pain clinic to *consider* trigger point injections and facet or medial branch blocks as mandatory and certain to materialize into treatment. This was a mere recommendation and thus this item of care was not medically "necessary" so as to give rise to mandatory benefit coverage under s. 88(1) of the Regulation. There was no evidence that ICBC would approve such treatment. Consequently, the appellants contend that there was no reason to accept that the available pool of benefits would be reduced.

[72] Moreover, the appellants argue that the respondent failed to adduce any evidence of the costs of the referral to the pain clinic, or indeed the eventual costs of treatment should it have been or become necessary. Accordingly, the appellants suggest that it is purely speculative to assume that the costs of this referral and treatment would reduce the respondent's pool of Part VII medical and rehabilitation coverage.

[73] Second, the appellants argue that the judge did not provide any analysis in her apparent acceptance of the respondent's position that some of the items were for ameliorative, rather than rehabilitation purposes (and accordingly were outside the ambit of Part VII).

[74] Finally, as was the case with the $16,800 TTD benefits which the respondent had received by the time of the deductions hearing, the appellants say that the judge erred in applying the global 20% contingency to the $2,774.30 in medical and rehabilitation benefits that the respondent had already received. This amount should first be applied as a credit to the Future Care Award.

[75] The respondent's position is that the judge's global 20% reduction was entirely defensible, particularly given that inflation would negatively affect the available pool of Part VII benefits as the years passed.

[76] The respondent also points to the Wright affidavit, observing that there were a number of payments made for items outside of what was specifically identified in the Future Care Award, including occupational therapists. These costs were factored into the judge's reduction, and may be funded as part of Part VII benefits. The respondent submits that she is entitled to Part VII benefits separate and apart from the Future Care Award itself, which justifies the global reduction of 20%.

3. Discussion

[77] I agree with the appellants' submission that the judge could—and perhaps should—have been more specific in identifying the factors she was relying on in making this 20% deduction for contingencies.

[78] However, the reasons are to be read as a whole and within the context provided by the Trial Decision. In doing so, I cannot conclude that her decision regarding the contingency deduction from the Future Care Award discloses any reviewable error.

[79] The primary question is whether there is a "realistic risk" that the respondent will not receive the benefits in question and how to quantify that risk: *Watson* at para. 29.

[80] The Future Care Award is a matter of prediction that requires courts to estimate damages as best they can: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. The amount of benefits the respondent receives may be in excess of the amount *estimated* by the trial judge. However, in performing an exercise fraught with inherent uncertainty and difficult predictions, the judge's decision, in my view, was reasonable: *Ha v. Fritzke*, 1999 BCCA 667 at paras. 14–15.

[81] I agree with the respondent that there is a realistic risk that she may exhaust the coverage under her Part VII policy before all of the future care items which the appellants seek to be deducted can be paid.

[82] The appellants have not demonstrated that the pool of available Part VII benefits will likely remain fully intact, and they bear the onus of proving that likelihood. In that regard I agree with the respondent that requiring her to explain why a putative contingency is grounds *not* to apply a reduction has the effect of reversing the burden of proof.

[83] Here, the judge made a contingency reduction in relation to certain costs she considered may affect the available medical and rehabilitation under Part VII. A similar analysis, with which I agree, was performed in *Aarts-Chinyanta v. Harmony Premium Motors Ltd*., 2020 BCSC 953 at paras. 116–117.

[84] The judge referred to the respondent's submission that there were some medications and treatments referred to in the evidence at trial that were not specifically ordered as part of the Future Care Award but which may be funded through the respondent's Part VII benefits: Deductions Reasons at para. 29. Moreover, Mr. Wright's evidence demonstrated that the Part VII policy was being utilized to fund treatment outside of what was awarded in the future care component of the Trial Decision.

[85] There is also the fact that the amounts payable for treatment are indexed to inflation pursuant to s. 88 (1.3) of the Regulation, while the $150,000 maximum payable under the respondent's Part VII policy is not. This factor alone will further reduce what remains available to the respondent under her coverage. This, too, militated for a reduction to the deduction sought from the Future Care Award.

[86] With respect to the referral to a pain clinic for possible treatment, the fact the judge did not make a specific finding in that regard in the Trial Decision does not necessarily mean that it may not form the basis for a future payment under Part VII. It was reasonable to consider this possibility in formulating the 20% contingency reduction.

[87] In conclusion, the trial judge's 20% reduction to the deduction amount sought by the appellants demonstrates no reviewable error. While I acknowledge that the

judge's reasons do not identify and elaborate precisely the contingencies which contributed to the eventual reduction she applied, the end result is reasonable when the reasons are read as a whole and in tandem with the Trial Decision.

[88] Finally, there remains the issue of the $2,774.30 of medical and rehabilitation benefits that have already been paid to the respondent since trial. I reach the same conclusion as with the deduction of TTD benefits she has received since trial. They cannot be the basis for a contingency reduction to the deduction from the Future Care Award.

[89] Accordingly, I would not accede to this ground of appeal, except as to reduce the Future Care Award by the amount of benefits already paid for medical and rehabilitation costs and thereafter applying the 20% contingency reduction ordered by the judge.

[90] The parties agree that the present net value of the Future Care Award is $136,968.32. The total deduction sought by the appellants was $71,816.29, which includes the $2,774.30 of benefits paid after the trial and which should first be deducted in full from the Future Care Award before the application of a contingency reduction. Applying the credit of $2,774.30 reduces the award to $134,194.02. This leaves the deduction sought by the appellants at $69,041.99. Applying the 20% contingency reduction to $69,041.99 results in a deduction of $55,233.59. Subtracting $55,233.59 from $134,194.02 results in a Future Care Award of $78,960.43.

IV. DISPOSITION

[91] I would allow the appeal to the extent of varying the judge's orders as follows:

a) The total deduction from the Future Earning Capacity Award is varied to $139,941.12 ($16,800.00 for TTD benefits paid and $123,141.12 payable), for a final Future Earning Capacity Award of $115,058.88; and

b) The total deduction from the Future Care Award is varied to $58,007.89 ($2,774.30 for medical and rehabilitation benefits paid and $55,233.59 payable), for a final Future Care Award of $78,960.43.

[92] In my view, success on the appeal is divided and I would make no order as to costs in this Court.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Hunter"