

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Del Bianco v. Yang*,
2020 BCSC 410

Date: 20200318
Docket: M137014
Registry: Vancouver

Between:

Anthony Del Bianco

Plaintiff

And

Bing Jian Yang

Defendant

- and -

Docket: M158812
Registry: Vancouver

Between:

Anthony Del Bianco

Plaintiff

And

**Florante Haban
Thyron Merc Haban**

Defendants

Before: The Honourable Mr. Justice Groves

Reasons for Judgment

Counsel for the Plaintiff:

R.K. Dewar

Counsel for the Defendants:

I.A. Currie

Place and Date of Application: Vancouver, B.C.
December 4, 2019

Place and Date of Judgment: Vancouver, B.C.
March 18, 2020

[1] By way of application dated November 21, 2019, the defendants seek an order that the judgment granted by this court on March 22, 2019 be entered, less \$56,648.00, pursuant to s. 83(5) of the *Insurance (Vehicle) Act* [Act].

[2] This monetary amount represents three aspects of a cost of future care award which were ordered to the plaintiff, Anthony Del Bianco, as a result of a trial for which reasons were granted on March 22, 2019. The three aspects of the benefits the court determined the plaintiff be entitled to are massage therapy to his 65th birthday at a cost of \$51,183, massage therapy from his 65th birthday to his 75th birthday in the amount of \$3,715, and kinesiology sessions for one year totalling \$1,750. Those three sums total \$56,648.

[3] The basis of the defendants' claim is found in s. 83 of the Act. It is the defendants' suggestion that s. 83 mandates the court to estimate the amount of benefits that a plaintiff is entitled to receive under the Act, and that amount is to be deducted from his damage award. The plaintiff points out to the court that in Schedule 3.1 of the *Insurance (Vehicle) Act Regulations*, both massage therapy and kinesiology are listed. By so listing, that mandates the defendants' insurance corporation, the Insurance Corporation of British Columbia ("ICBC"), to pay benefits for both massage and kinesiology.

[4] In support of their application, the defendants rely primarily on the decision of Mr. Justice Riley of this court in *Sangha v. Inverter Technologies Ltd.*, 2019 BCSC 1174. Paragraph 15 of that decision is germane to the decision I have to make today. Paragraph 15 provides:

[15] This is not a case involving a jury verdict in which the parties are left in some uncertainty about the basis for the decision, making it difficult to predict what position ICBC might take on the plaintiff's entitlement to Part 7 benefits. In such cases, there is often considerable uncertainty as discussed in *Boota* at para. 85-86. Where such uncertainty exists, it is open to a trial

judge to infer from the fact that ICBC has refused to pay various benefits in advance of trial or argued against them at trial that it will continue to take that position after trial. However, in the case at bar the situation is much different. Here, the ICBC claims specialist with conduct of Ms. Sangha's file has reviewed the reasons for judgment and has stated, in a sworn document, that ICBC accepts the Court's conclusions regarding the plaintiff's treatment needs in connection with her collision-related injuries. In this context, the sworn evidence of an authorized ICBC representative attesting to ICBC's commitment to pay out certain benefits may carry considerable weight: *Norris v. Burgess*, 2016 BCSC 1452 at para. 35; *Stanikzai v. Bola*, 2012 BCSC 1904 at para. 20-21.

[5] In support of the application of the defendants is the affidavit of Andrew Rudkowski, a claims specialist at ICBC. In that affidavit, Andrew Rudkowski states that he has been assigned to manage the claims made by the plaintiff in regards to the two motor vehicle accidents, which were the subject matter of my decision on March 22, 2019. He further states that he is authorized to speak on behalf of ICBC in relation to these claims. He indicates in the affidavit that he is prepared to accept the findings of the court, specifically the findings related to the court's determination that the plaintiff was entitled to 26 massage therapy sessions per year until age 65, ten massage therapy sessions per year to age 75, and 26 kinesiology sessions. He states in paragraphs 6-8:

6. ICBC will reimburse Mr. Del Bianco for the necessary health care services he has incurred since March 22, 2019 and he incurs in the future, and I specifically waived on behalf of ICBC the requirements for continued certification under section 88(1.2) of the Insurance (Vehicle) Regulations.
7. I also specifically waive on behalf of ICBC, any further medical certification or examination as a condition of reimbursement for the necessary health care services...
8. I am authorized on behalf of ICBC to irrevocably, unequivocally, and unconditionally agree to pay for the health care services, as costs for these services are incurred by Mr. Del Bianco and submitted to ICBC by way of a claim for benefits under Part 7.

[6] The plaintiff has sworn an affidavit in response and is opposed to the application of the defendants. He confirms that at the time of swearing the affidavit he is 35 years of age. This is of considerable note in that it confirms that there is a 40-year requirement to pay for these services, as the services were awarded to him

regularly to age 75. He further confirms, as I found at trial, that he was a self-employed tile setter and stone mason, requiring him to do a physically demanding job. He required massage therapy treatments from the date of injury until trial, and after trial, in order for him to do his work.

[7] He confirms that post-accident and pre-trial, despite numerous requests for funding or reimbursement, ICBC initially did not respond to requests, then delayed approval and eventually did not fund any reimbursements for his treatment. Additionally, since the trial, which concluded with reasons on March 22, 2019, no payments have been made. In fact, counsel for the plaintiff advised the court, and it was not disputed, that it was only days before this court application, December 4, 2019, that the tort award ordered on March 22, 2019 was in fact partially paid.

[8] The plaintiff confirms in his affidavit, consistent with his evidence at trial, that as a result of the lack of response and eventual refusal to pay for his treatment, he was unable to pay for massage therapy treatments and his treating providers graciously deferred payment of his massage therapy treatment costs until such time as trial. As he has only recently received a substantial amount of his tort award, it is likely the case that these treaters carried the cost of the plaintiff's treatments from perhaps as early as 2011 to late 2019.

[9] Paragraphs 13 and 14 of his affidavit are particularly germane to my decision today. Paragraph 13 of his affidavit reads:

13. I am also very worried about ICBC's ability to reimburse me in the future because I have been reading articles and hearing on the news, including public statements from ICBC and the Attorney General David Eby, that ICBC is financially struggling, calling ICBC a financial "dumpster fire".

[10] He then attaches a number of articles which confirm his assessment and justify, it appears, his concern.

[11] Paragraph 14 of his affidavit reads:

14. I am very worried whether ICBC will continue to exist and be able to pay for my future massage therapy treatments in the next few years, let alone over the next 40 years until I reach age 75.

[12] Finally, also germane to my reasons, is paragraph 18 of the plaintiff's affidavit:

18. I have been advised by my lawyer, and verily believe the same to be true, that the maximum that ICBC will pay is \$80 per treatment as set out in ICBC's policy and the law...

Discussion

[13] It is concerning to the court that the representative of ICBC, Andrew Rudkowski, has not, in his affidavit, explained the failure of ICBC prior to trial to pay the massage therapy costs of the plaintiff. Liability for these motor vehicle accidents was never seriously in dispute. The injuries that required massage therapy, therapy that was necessary for Mr. Del Bianco to work, and effectively minimize the extent of his tort claim, were lower back, shoulder and soft tissue injuries.

[14] Equally concerning is the apparent exaggeration, even today, less than one year into a potentially 40-year commitment, as to the extent of ICBC's commitment to pay what was ordered after trial. In paragraph 6, Andrew Rudkowski deposes that "ICBC will reimburse Mr. Del Bianco for the necessary health care services he has incurred since March 22, 2019 and he incurs in the future". That is, as noted by defence counsel, not true. They will only reimburse under their payment schedule of \$80, when the court determined on the evidence the cost of such treatment at \$85.

[15] Counsel for the plaintiff ably argued about the difficult financial circumstances that his injury and the actions of ICBC placed on the plaintiff from the time of the accident until, essentially, the time of this application. For whatever reason, unexplained, ICBC refused to pay for his massage therapy treatments. The suggestion from counsel for the plaintiff was that ICBC took the position that because he had a hernia operation after the accident, not related to the injuries suffered in the accident, that the hernia problem was the source of his discomfort. That, to a great degree, defies logic, as the hernia was, for lack of a better term, in

the plaintiff's groin or abdomen, whereas the soft tissue injuries requiring massage were in his back.

[16] The court is faced with the representations of a claims specialist from ICBC that they will, in the future, pay these costs. The evidence about the lack of financial viability of ICBC, as attested to by the Cabinet Minister responsible for ICBC, the Attorney General, is not significantly disputed. Nor is it disputed that ICBC is not prepared to pay for massage therapy at a rate that the court has ordered.

[17] Additionally, and though this was not raised by counsel, but is a concern to the court, it is hard to know and predict, dare I say impossible to know and predict, at what rate ICBC will, in the future, be paying for massage therapy costs. This is not just a short-term future. This is 40 years. If, as now, this would require the plaintiff to pay the difference himself, to pay over and above what ICBC is prepared to pay, when the tort award was intended to fully compensate him. He may perhaps then seek reimbursement from ICBC. This creates a 40-year responsibility on this plaintiff to keep track of receipts, to make requests and deal with adjusters at ICBC. That is completely inconsistent with the general purpose of litigation and tort awards, to create some finality between the parties.

[18] In light of the history of non-payment by ICBC for no apparent reason, as experienced by the plaintiff, it is unrealistic, in my view, to require him for a period of 40 years, to have to continue to deal with an adjuster at ICBC in order to obtain what the court has already ordered he is entitled to.

[19] Additionally, as noted by the plaintiff, there is just too much uncertainty as to the ability of ICBC to make the payments at a rate ordered by the court. They are, today, not prepared to pay at the rate the court ordered. There is too much uncertainty related to their past history of being disinterested or disrespectful of the plaintiff's claims. There is too much uncertainty as to what the future holds for ICBC, as evidenced by the affidavit of the plaintiff, for the court to have absolute confidence that if money is deducted from the tort award for Part 7 scheduled benefits, that they will actually be paid.

[20] I note the case of *Li v. Newson*, 2012 BCSC 675, a decision of Mr. Justice Abrioux, as he then was. He notes in para. 14, *inter alia*, that “uncertainty as to whether a Part 7 benefit will be paid must be resolved in favour of the plaintiff”. I find on the facts before me considerable uncertainty that payments consistent with the tort award would be paid to Mr. Del Bianco for massage therapy for the 40 years as awarded.

[21] As such, I am not prepared to deduct amounts for massage therapy under s. 83 from the plaintiff’s tort award. These comments relate to the massage therapy treatments to age 65 and the massage therapy treatments from age 65 to age 75. There is, as noted above, in the circumstances of a 40-year payment period, too much uncertainty and, frankly, too much of a requirement placed on this plaintiff to potentially request reimbursement weekly for funds not paid directly by ICBC, but payable out of his pocket. That is simply too much to expect.

[22] A different circumstance, I have concluded, exists in regards to the kinesiology sessions. Those are a modest cost of \$1,750 and are designed to be sessions taking place over a period of one year, and the one year commencing relatively soon.

[23] I am satisfied that only the amount of \$1,750 should be deducted from the award under s. 83 of the *Act*.

[24] The plaintiff has been successful on this application. He is entitled to his costs on the same scale as costs determined at trial.

“J.R. Groves J.”

GROVES J.