Sidhu v. Alton

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

C.L. Forth J.

Heard: January 28, 2021; written submissions of the Plaintiff,

December 23, 2020; written submissions

of the Defendants, January

7, 2020; written reply of the Plaintiff: January 14, 2021.

Judgment: February 19, 2021.

Dockets: M186714, M188543, M213743

Registry: New Westminster

[2021] B.C.J. No. 304 | 2021 BCSC 265

Between Parampal Kaur Sidhu, Plaintiff, and Thomas Peter Alton and Wendy Alton, Defendants And between Parampal Kaur Sidhu, Plaintiff, and Helen Ho, Defendant And between Parampal Kaur Sidhu, Plaintiff, and Arshpreet Kaur Gandham, Rajwinder Kaur Gandham, Balwinder Kaur Somal and Amritpal Singh Somal, Defendants

(149 paras.)

Counsel

Counsel for the Plaintiff [in all actions]: B. Yu.

Counsel for the Defendants, Thomas Peter Alton and Wendy Alton [Action #: M186714]: J.L. Ingram.

Counsel for the Defendant, Helen Ho, [Action #: M188543]: J.L. Ingram.

Counsel for the Defendants, Arshpreet Kaur Gandham, Rajwinder Kaur Gandham, Balwinder Kaur Somal and Amritpal Singh Somal [Action #: M213743]: J.L. Ingram.

Reasons for Judgment

On Post Trial Issues

C.L. FORTH J.

Introduction

1 In this personal injury action, I gave reasons dated November 24, 2020, indexed as 2020 BCSC 1802 (the "Reasons"). I awarded the following damages to the plaintiff:

a. Non-pecuniary damages: $145,000

b. Past wage loss: $56,500

c. Future loss of earning capacity: $156,000

d. Cost of future care: $17,195

e. Past loss of housekeeping capacity: $40,000

f. Future loss of housekeeping capacity: $75,000

g. Special damages: $23,910.47

TOTAL **$513,605.47**

2 I granted leave to the parties to provide submissions on the issues of income tax gross-up, management fees, costs, and the application of s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 [*Act*] and the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 [*Regulation*].

3 The parties provided written submissions on the following issues:

a. Is the plaintiff entitled to pre-judgment interest on past loss of housekeeping capacity?

b. Is the plaintiff entitled to tax gross-up and management fees? If so, what level of management fee is appropriate?

c. Is the plaintiff entitled to "double costs"?

d. Is the plaintiff entitled to increased costs?

4 The parties appeared before me on January 28, 2021, to address the issues relating to s. 83 of the *Act*. I will address the issue of the s. 83 deductions prior to considering the plaintiff's claim for "double costs" and "uplifted costs". That way, the judgment amount the plaintiff will receive is determined first.

Is the Plaintiff Entitled to Pre-Judgment Interest on the Past Loss of Housekeeping Capacity?

5 The plaintiff relies on the decisions in *Xu v. Balaski*, 2020 BCSC 940 at paras. 166-167, *Kitnikone v. Watts*, 2001 BCSC 450 at paras. 4-5, and *Sorensen v. Muker*, 2002 BCSC 204 at paras. 50 and 59, to support the proposition that an award for past loss of housekeeping capacity should bear interest from the date of the accident to the date of judgment. The defendants do not take any position on this issue.

6 I accept that an award of pre-judgment interest should be made on the past loss of housekeeping capacity. The plaintiff calculated the interest owed at $1,841.67 which was not disputed by the defendants. That amount is awarded.

Is the Plaintiff Entitled to Tax Gross-Up and Management Fee?

7 There is no claim being sought by the plaintiff for an award of a tax gross-up. The parties dispute the need for a management fee and at what level.

Applicable Legal Principles

8 In order to receive an award for management services, the plaintiff must prove:

> a. that the management assistance is in fact necessary;
>
> b. that investment advice is in fact necessary in the circumstances; and
>
> c. the costs of such services.
>
> *Mandzuk v. Insurance Corporation of British Columbia*, [1988] 2 S.C.R. 650 at 651.

9 An award for fund or investment management fees is not automatic: *Pestano v. Wong*, 2019 BCCA 141 at para. 10. It can be made if the plaintiff either is unable to manage her affairs or lacks the acumen to invest funds awarded for future care so as to produce the requisite rate of return: *Mandzuk* at 651.

10 The Law Reform Commission of British Columbia published its *Report on Standardized Assumptions for Calculating Income Tax Gross-up and Management Fees in Assessing Damages* (Vancouver: Ministry of Attorney General, 1994) (the "LRC Report"), which recommended a four-level classification system, at 45:

> Level 1 - The plaintiff requires only a single session of investment advice and the preparation of an investment plan at the beginning of the period the award is to cover.
>
> Level 2 - The plaintiff will require an initial investment plan and a review of the investment plan approximately every five years throughout the duration of the award.
>
> Level 3 - The plaintiff will need management services in relation to custody of the fund and accounting for investments on a continuous basis.
>
> Level 4 - The plaintiff will require full investment management services on a continuous basis, including custody of the fund, accounting, and discretionary responsibility for making and carrying out investment decisions. Such a plaintiff is likely to be mentally incapacitated or otherwise incapable of managing personal financial affairs.

11 Although this classification system has never been legislated, it has been repeatedly cited with approval by the BC courts, including very recently by the Court of Appeal in *Pestano*.

Plaintiff's Position

12 The plaintiff's position is that she is entitled to a management fee to assist her in ensuring the award she received at trial lasts into the future because she lacks knowledge and experience on how to manage large sums of money. She does not want to invest in high-risk stocks because it may deplete her future income stream, which she needs for her care.

13 The plaintiff submits that she suffers from chronic pain and psychological injury. She continues to be under the treatment of a psychiatrist. On bad days she is not able to manage the instrumental activities of daily living, like doing household chores. She says her pain and inability to manage daily activities supports that she is not able to manage a fund.

14 The plaintiff relies on a report from Darren Benning dated December 15, 2020 (the "Benning Report"). Mr. Benning opines that if the loss of future housekeeping capacity is included in the funds to be managed, for a Level 3/4 management, the fees would be $26,258. The plaintiff seeks an award of that amount.

Defendants' Position

15 The defendants argue that the purpose of management fees is to ensure that the sums awarded for future needs are not exhausted prematurely due to a plaintiff's inability to manage their financial affairs: *Lewis v. Todd and McClure*, [1980] 2 S.C.R. 694. The defendants deny that such an award is required for this plaintiff.

16 In the alternative, they argue that the plaintiff should only require Level 2 management services, which allows for an initial plan, and periodic updates as required to manage applicable awards over time.

17 The defendants rely on a report by Mark Gosling dated January 6, 2021 (the "Gosling Report"). Mr. Gosling calculated the current value of the costs of Level 2 fees at approximately $6,000.

Relevant Background

18 The plaintiff completed Grade 12 in India. She moved to Canada in 1993 and has not taken any additional courses or training. Her most recent job was working as a part-time stocker at Walmart. The plaintiff does not speak fluent English. She testified at trial through a Punjabi interpreter.

19 The plaintiff did not suffer any type of brain injury. As a result of the Accident, the plaintiff continues to suffer from chronic pain that impacts her ability to function on a day-to-day basis. At the date of trial she was continuing to use powerful opioid medication and antidepressants.

20 The plaintiff consulted her long time bank, TD Bank, who advised her that the fixed GIC rate for five years is 1.25%.

Analysis

21 The issue is whether this plaintiff has met the threshold of requiring any management fee award, and if so, at which level. This threshold requires that the plaintiff provide evidence of the necessity for the service, and that the management services are required to provide a rate of return equal to the discount rate. In this case, the plaintiff seeks a management fee of $26,258 in order to achieve the necessary rate of return to cover her future expenses.

22 I accept the plaintiff did not suffer any type of brain injury in the Accident, and the Accident had no effect on her intelligence or pre-Accident cognitive abilities. The plaintiff has struggled since the Accident with a host of symptoms, including chronic pain, all of which impact her functioning.

23 I am not convinced that she is incapable of making financial decisions about her future. She is capable of arranging to meet and discuss financial issues with professionals. She understands the advice given. If there is a language barrier, she can access investment information from individuals who speak Punjabi in her local community. However, given her lack of financial knowledge, I find that she should have the assistance of a financial advisor in setting up a program for her and occasionally reviewing that program.

24 The plaintiff relies on *MacLeod v. Whittemore,* 2018 BCSC 1717, an unpublished judgment, in submitting that a Level 3 management fee is appropriate. In that case a management fee of $170,000 was awarded, on the basis the plaintiff needed Level 3 financial assistance. The plaintiff was awarded $1,155,479 at trial. She had trouble sitting for prolonged periods of time, concentrating, and had low scores in math in vocational testing. In *MacLeod*, at para. 18, the Court relies on the trial decisions in *Pestano v. Wong,* 2017 BCSC 1666, and *Pearson v. Whiteside,* 2018 BCSC 1246. Management fees in those trial decisions were substantial, and both were subsequently overturned by the Court of Appeal: *Pestano* and *Pearson v. Savage,* 2020 BCCA 133, the latter being an appeal of two decisions: *Pearson v. Savage,* 2017 BCSC 1435, and *Pearson v. Whiteside*, 2018 BCSC 1246. The trial decisions in *Pestano* and *Pearson* formed the basis for the management fee awarded in *MacLeod*. Given that both trial decisions have now been overturned, it would appear that the award for management fees granted in *MacLeod* should likewise not be followed.

25 I further note that I have found the majority of the cost of future care award is deductible as a result of s. 83 of the *Act*. The plaintiff does not have to manage the majority of this award since it will be reimbursed on an as-incurred and as-submitted basis.

26 I am satisfied there is no evidence that this plaintiff is incapable of seeking out and acting on investment advice such that Level 3 or Level 4 investment management services are required. I note the approach by the Court of Appeal in *Pearson*. In that case, the appropriate management fee for a young plaintiff suffering from chronic pain with serious and disabling psychological challenges, on a management fund of approximately $1.6 million, was a Level 2 fee with a "higher touch" level of services, considering her persistent, post-accident difficulties with managing anxieties: para. 119. The management fee awarded was $25,000.

27 I find that the financial advice required by the plaintiff can be achieved with an award of $6,000. This award is supported by the Gosling Report, which sets out the Level 2 cost at about $6,000 and the Benning Report, which sets out a cost of $5,600 for the same level. The plaintiff is entitled to a management fee of $6,000.

What are the Appropriate Deductions to be made from the Cost of Future Care for Medical and Rehabilitation Benefits Payable by ICBC?

Background

28 At trial, the plaintiff put forward a claim for costs of future care of $56,840. The plaintiff did not tender a report from a future care expert. She relied on her own evidence and on some of the expert reports. The plaintiff was awarded the sum of $17,195. This award covered seven sessions of massage or chiropractic treatment, at a cost of $80 per treatment over 15 years, and medication costs.

Defendants' Position

29 The defendants submit that the sum of $17,195, the entirety of the future costs awarded, should be deducted from the future care award for medical and rehabilitation expenses payable by ICBC under s. 88 of the *Regulation*. These benefits are referred to as "Part 7 benefits" as they are administered by ICBC under Part 7 of the *Regulation.*

30 The defendants submit that s. 83(5) of the *Act* requires that after the assessment of the plaintiff's tort damages, the amount of Part 7 benefits paid or payable to the plaintiff must be disclosed to the Court and taken into account. The plaintiff is only entitled to judgment for the balance after the Part 7 benefits have been deducted.

31 ICBC does not dispute that these future care treatments are necessary and that the associated expenses are reasonable. They are therefore payable under s. 88(1) of the *Regulation*. It also does not dispute that these future care treatments are likely to promote the plaintiff's rehabilitation.

32 ICBC has also agreed to waive the need for continued certification under subsection 88(1.01)

of the *Regulation.* As a result, the plaintiff will not need to obtain a certificate that the treatment is necessary from ICBC's medical advisor or her medical practitioner.

33 ICBC has agreed to pay, under Part 7, the plaintiff's claims for massage or chiropractic treatments and medications for her Accident-related injuries, as set out in the Reasons. ICBC has agreed to pay for the treatments in accordance with the cost payable under the *Regulation* on an as-incurred basis.

34 The defendants submit that the plaintiff should receive nothing for cost of future care under the Reasons.

Plaintiff's Position

35 The plaintiff's position is that no deduction should be made, or in the alternative only a 10% reduction should be made, for the following reasons:

1. ICBC does not pay the going rate for chiropractic and massage treatments such that the plaintiff is required to fund some of the actual costs herself;
2. Present value discount rates were applied to both awards, so if the costs of future care are paid out over time, this results in a loss for the plaintiff because the plaintiff is being penalized for a present value discount factor that does not exist;
3. With inflation, the cost of future care award is significantly eroded since the cost of the treatments will rise in the future, whereas the allotted amount for cost of future care remains the same;
4. ICBC has paid medical service plan ("MSP") fees out of the Part 7 benefits, therefore diluting the pool of funds available to the plaintiff for accessing treatments, resulting in less for Part 7 benefits; and
5. There is a high likelihood that ICBC will not pay the future care costs.

36 The plaintiff argues, in addition to the above reasons, that a substantial contingency should be applied for the following reasons:

a. ICBC refused to pay for chiropractic sessions prior to the judgment, which necessitated a "direction to pay" where the law firm agreed to pay upon the receipt of the judgment;
b. The plaintiff lost money due to the interest on Dr. Louwerse's account since she paid interest and that interest is not recoverable as part of the plaintiff's claim; and
c. ICBC ignored the requests for temporary total disability benefits and treatment post-judgment.

37 The plaintiff further argues that based on the cross-examination evidence of Linda Calbick, the ICBC manager who swore two affidavits and appeared for cross-examination, no reliance should be placed on her affidavit evidence since she made a promise to pay and she "broke the promise." There should be no weight given to her assurance that payments would be made. If there is no assurance of payment then the issue should be resolved in the plaintiff's favour.

Legislation

38 The key legislative provisions are s. 83 of the *Act* and s. 88 of the *Regulation.* Section 83 of the *Act*, as it read at the relevant time, provides:

> 83 (1) In this section and in section 84, "benefits" means benefits
>
> (a) within the definition of section 1.1, or
>
> (b) that are similar to those within the definition of section 1.1, provided under vehicle insurance wherever issued and in effect,
>
> but does not include a payment made pursuant to third party liability insurance coverage.
>
> (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 the insurer from demanding from the person referred to in subsection (2), as a condition precedent to payment, a release to the extent of the payment.
>
> (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.
>
> (6) If, for the purpose of this section or section 84, it is necessary to estimate the value of future payments that the corporation or the insurer is authorized or required to make under the plan or an optional insurance contract, the value must be estimated according to the value on the date of the estimate of a deferred benefit, calculated for the period for which the future payments are authorized or required to be made.

39 The *Regulation* was recently amended. Under the transitional provisions, the previous version of the *Regulation* applies to treatment received before April 1, 2019, while the new version applies to treatment received afterwards.

40 The applicable parts of s. 88 of the *Regulation* reads:

> (1) If an insured is injured in an accident for which benefits are provided under this Part, the corporation must, subject to this section, pay as benefits all reasonable expenses incurred by the insured as a result of the injury for necessary
>
> (a) health care services listed in Column A of Table 1 or Table 2, as applicable, of Schedule 3.1 and provided by the applicable health care practitioner,
>
> (b) occupational therapy provided by an occupational therapist, and
>
> (c) dental, hospital, ambulance and professional nursing services, speech therapy, medication, prostheses and orthoses.
>
> (1.01) For the purposes of subsection (1) (a), a treatment
>
> (a) that is in addition to the number of treatments listed in Column D of Table 1 of Schedule 3.1 corresponding to that health care service, or
>
> (b) that is provided more than 12 weeks after the date of the accident
>
> is not a necessary health care service unless the corporation's medical advisor or the insured's physician certifies to the corporation in writing that, in the opinion of the medical advisor or physician, the treatment is necessary for the insured.
>
> (1.2) Subject to subsection (1.3), the benefits paid under subsection (1) must not,
>
> (a) for each health care service referred to in subsection (1) (a), exceed the fee limit set out in Column B or C, as applicable, of Table 1 of Schedule 3.1 corresponding to that health care service,
>
> (b) for occupational therapy, exceed the fee limit of $112 per hour, and
>
> (c) for each health care service referred to in subsection (1) (a) that is provided by a physician, exceed the fee limit set out in Column B of Table 2 of Schedule 3.1.
>
> (1.3) For the fiscal year beginning on April 1, 2020 and for each fiscal year after that, each fee limit referred to in subsection (1.2) must be determined annually by multiplying
>
> (a) the fee limit amount for the preceding fiscal year, and
>
> (b) the sum of
>
> i. 1, and

ii. the annual percentage change in the British Columbia consumer price index, as determined under subsection (1.5) and rounded up to the nearest 1/10 of a percentage point.

...

(3) Before incurring an expense or obligation under subsection (2) for which the insured intends to request payment by the corporation, the insured shall obtain written approval from the corporation and the corporation may, before giving its approval, require the insured to submit such information as it considers necessary to assist it in making a decision.

...

(5) The amount by which the liability of the corporation under this section is limited is the amount set out in section 3 of Schedule 3.

(6) The corporation is not liable for any expenses paid or payable to or recoverable by the insured under a medical, surgical, dental or hospital plan or law, or paid or payable by another insurer, except expenses referred to in subsection (1) (a) and (b).

(7) The maximum amount payable by the corporation under this section for health care services, except for the health care services listed in Column A of Table 1 or Table 2 of Schedule 3.1, is the amount set out in a payment schedule for that service established by the Medical Services Commission under section 26 of the Medicare Protection Act, as that schedule is amended from time to time, for that service.

41 Schedule 3.1 of the *Regulation* provides fee limits for an assessment visit and report, fee limits for standard treatments, and the number of pre-authorized treatments for: acupuncture, chiropractic, counselling, kinesiology, massage therapy, physiotherapy, and psychology.

42 The fee limits in Schedule 3.1 of the *Regulations* are increased to a figure related to the Consumer Price Index, as provided for in s. 88(1.3) to (1.6). The applicable fee limits for 2020-2021 are $54 for chiropractic treatment and $82 for massage therapy.

43 Section 88(5) and Schedule 3, s. 3(2)(a), provide that the amount of coverage available per accident is $150,000.

Legal Principles

44 The purpose of s. 88 is set out in *Fisher v. Wabischewich* (1978), 5 B.C.L.R. 335 (C.A.) at 336, where the Court described the former section:

> ... The clear purpose of the legislation is to discontinue lump sum awards for future care and to supply future benefits as and when required provided application is made within the time prescribed by the Regulations. ... Accordingly (broadly speaking) it provides that

where a plaintiff, who is entitled to the benefits provided under the Act, has brought an action for damages suffered as the result of a motor-car accident, his damages shall be assessed and that following the assessment the Judge shall deduct from his award the amount that the plaintiff will receive by way of benefits for future care.

The purpose of the deduction is two-fold:

(1) It is to determine the sum that the plaintiff shall receive at the time of the judgment. It is not to fix the amount of the future benefits. The amount of benefits that the plaintiff will receive in the future is determined by the provisions of the Act. These may well be in excess of the amount estimated by the trial Judge in his award. However, by deducting the amount that the trial Judge has estimated, the amount that is immediately payable to the plaintiff is determined; and

(2) It is to prevent the plaintiff from being compensated twice. He cannot receive a lump sum in respect of future benefits and also receive the benefits.

See also, *Norris v. Burgess*, 2016 BCSC 1452 at para. 17.

45 The court is obliged to estimate the value of the future payments, being Part 7 benefits, which the plaintiff "is or would have been entitled to", and deduct the present value of the award: *Sovani v. Jin et al.*, 2005 BCSC 1285 at para. 19. The defendants bear the onus of proving the plaintiff is entitled to the benefits that the defendants seek to deduct: *Sangha v. Inverter Technologies Ltd.*, 2019 BCSC 1174 at para. 8.

46 In carrying out this exercise, there is no obligation on the defendants to establish a "match" between the specific heads of damage in a tort award and the specific heads of damage under the contract or benefits scheme under which the benefits are payable before a deduction from the tort award is appropriately made: *Gurniak v. Nordquist*, 2003 SCC 59 at para. 47.

47 Courts must be cautious in their approach to making the estimation since it results in a lessening of the award in the tort action: *Uhrovic v. Masjhuri*, 2007 BCSC 1096 at para. 9. Any uncertainty as to whether a Part 7 benefit will be paid must be resolved in favour of the plaintiff: *Uhrovic* at para. 10.

Analysis

48 The central question I must determine is whether the plaintiff is a person who "is or would have been entitled" to Part 7 benefits. There is no question that she is.

49 I further note that the benefits at issue in this case involve benefits that are mandatory and not discretionary pursuant to s. 88(1) of the *Regulation*.

50 In this case, ICBC relies upon the sworn evidence of Ms. Calbick, Manager, Claims Services,

at ICBC to remove the uncertainty of payment. She states:

> 11. I have reviewed the breakdown of the items awarded under Cost of Future Care as set out in paragraphs 294 to 301 of the Reasons for Judgment. I am authorized on behalf of ICBC to advise that ICBC accepts the Court's findings that the following treatments and medication awarded in the Cost of Future Care section in the Reasons for Judgment are reasonable and necessary and arise as a result of the First Accident, the Second Accident, and the Third Accident:
>
> a. Chiropractic treatment and massage therapy: $7195
>
> b. Medication: $10,000
>
> 12. I have reviewed the amount awarded by the Court for chiropractic treatments and massage therapy as set out in the Cost of Future Care section contained in the Reasons for Judgment. I am authorized on behalf of ICBC to advise that ICBC accepts the amounts the Court has awarded for these items as reasonable and necessary. As such, I am authorized on behalf of ICBC to waive the need for continued certification under section 88(1.01) of the Regulation with respect to these Cost of Future Care items.
>
> 13. I am authorized on behalf of ICBC to advise that ICBC will irrevocably, unequivocally, and unconditionally agree to pay, under Part 7, up to $7195 for any combination of chiropractic treatment and massage therapy as awarded in the Cost of Future Care section of the Reasons for Judgment as incurred and submitted to ICBC by the plaintiff for reimbursement.
>
> 14. I am authorized on behalf of ICBC to advise that ICBC will irrevocably, unequivocally, and unconditionally agree to pay, under Part 7, up to $10,000 for medications awarded in the Cost of Future Care section of the Reasons for Judgment as incurred and submitted to ICBC by the plaintiff for reimbursement. ICBC further accepts the medications awarded are reasonable and necessary and waives the requirement pursuant to section 98 and 99 of the Regulations for ongoing certification from ICBC's medical advisor or the Plaintiff's doctor.

51 In order to determine whether a deduction should be made I am required, in order to discharge my function under s. 83(5) of the *Act*, to independently analyze the evidence and determine the Part 7 benefits the plaintiff has received or is likely to receive: *Sangha* at para. 16. I will specifically consider each of the issues raised by the plaintiff to dispute any reduction in the future care cost award.

Non-Payment of Going Rates

52 The evidence before me is that the current rate that the plaintiff is paying for chiropractic treatment is $58 per session. ICBC will only reimburse her for $54 per session at the current approved schedule. As a result, the plaintiff will be out of pocket $4 for each session.

53 With respect to massage therapy, the current rate paid by ICBC is $82 per session. The plaintiff's counsel referenced the recommended fee guide from the Registered Massage Therapists Association which shows the cost of a 60 minute massage being from $95 to $120. The plaintiff submits that there will be a shortfall if she attends for massage therapy since she is only reimbursed at $82.

54 I note the same fee guide sets out the rates for a 30 minute massage at $45 to $60. A 45 minute massage costs $65 to $90.

55 Based on my review of the special damages invoices tendered at trial, the majority of the plaintiff's massage therapy sessions with All Care Physiotherapy were for 30 minutes. In 2019, she had some massages with Chattel House Spas & Wellness Centre for 45 minutes. The account statements show that when she started having the 45 minute massages, the amount of $10.50 was not covered by ICBC.

56 The evidence does support that the plaintiff will be out of pocket for the uninsured costs of the treatments in the future, whether accessing chiropractic or massage treatments. This factor supports that some contingency should be applied.

Present Value Discount/Cost of Inflation Factors

57 The plaintiff argues that if the stream of future care costs are paid out in the future, she has been penalized for a present value discount factor that did not exist. There is some limited merit in this submission since the vast majority of the costs relating to future treatments are now being incurred by ICBC and not by the plaintiff. The only future costs she will incur is the difference between the approved ICBC rates, which are adjusted yearly in accordance with the Consumer Price Index, and the actual rates she has to pay for the treatments she receives.

58 In respect to the inflation argument, the plaintiff argues that in forty years the costs of medication could increase substantially. If the same rate of inflation occurs between 1980 to 2020, the $10,000 worth of medication today will cost $29,740.26 forty years from now.

59 A similar argument was discussed in *Hutchings v. Dow*, 2007 BCSC 1085 at paras. 32-41. There was evidence showing the plaintiff would exhaust their Part 7 benefits. That is not the case here. The plaintiff has a substantial buffer in her remaining entitlement to Part 7 benefits, regardless of any future increase in medication costs.

60 In *Hutchings*, expert evidence supported the plaintiff's argument that the full amount awarded in future care costs at trial should not be deducted under what was then s. 25(5) of the *Act*. The expert calculated the lump sum present value of the plaintiff's remaining entitlement to Part 7 benefits over the applicable period, incorporating estimates for when certain expenditures would

be made, then suggested subtracting that lump sum present value from the cost of future care award at trial:

> [33] It was [the expert economist's] estimate that based on the onset of need for attendant care at 56, in 2037, the Part 7 contributions to attendant care costs would be terminated with the exhaustion of the remaining maximum of $143,991 early in 2039. He adopted an approach that incorporated the potential timing of all future expenditures in order to allow conversion of the remaining benefits ($143,991.43) to an equivalent lump sum present value which would represent "the size of the reserve which would be required by ICBC to invest (as of the date of trial) to fund the Part 7 obligations." The lump sum estimated by Mr. Struthers would then be subtracted from the award of costs as an appropriate reduction under s. 25(5).

61 The type of argument advanced in *Hutchings* has some merit where a plaintiff is at risk of exhausting their Part 7 benefits, but it involves complex calculations that should be supported by expert evidence.

Allegation that ICBC Failed to Pay for Chiropractic Treatments Pre-Trial

62 The evidence before me establishes that the plaintiff was seeing Dr. Louwerse, a chiropractor, and he was directly billing ICBC for the treatments he provided to the plaintiff commencing on April 24, 2019. Dr. Louwerse was charging $55 per session. Under this direct billing system, Dr. Louwerse would be paid $53 by ICBC and $2 by the plaintiff. As of January 2021, Dr. Louwerse's rate has increased to $58 per session.

63 ICBC has a system where health care providers, like Dr. Louwerse, are required to submit forms through a portal. One such form is a Health Care Provider Invoicing and Reporting form. The health care provider is required to indicate on this form whether a treatment extension request is being made. On October 3, 2019, Dr. Louwerse submitted a Health Care Provider Invoicing and Reporting form. He did not seek a treatment extension request. That box was not ticked.

64 The plaintiff submits that it was incumbent on the ICBC adjuster to read the Chiropractic Reassessment Report dated September 27, 2019, that accompanied the October 3 form, and determine that this chiropractor was setting out a treatment plan for "1-2x per week for 6 months, reevaluating every 3 months". The plaintiff submits that the onus was on the adjuster to call Dr. Louwerse or the plaintiff to inquire further.

65 I disagree. It is my view that the plaintiff, or her counsel, when they were advised by Dr. Louwerse that further treatments had not been approved and that the payments were going to be made on a direction to pay basis, should have contacted the adjuster to inquire why the treatments were no longer being funded. If they had inquired, they could have determined that the error laid on the shoulders of Dr. Louwerse, or his staff, for not properly completing the documentation

needed to request a treatment extension. Ms. Calbick confirmed that ICBC did not receive an email or phone call seeking ongoing treatment. Plaintiff's counsel confirmed that he made no such request when he learned from Dr. Louwerse that further funding was not available.

66 As Ms. Calbick explained in her cross-examination, ICBC does not know if a client has decided to quit the service or go to a different service provider. It is incumbent on the healthcare provider to advise whether a treatment extension is being requested. Ms. Calbick noted this process had been done in the past and should have been followed.

67 I find ICBC is not at fault for the failure to fund chiropractic treatments from October 2019 to the date of trial.

68 I note that this situation is markedly different than the situation that Justice Groves commented on in *Del Bianco v. Yang*, 2020 BCSC 410. Justice Groves found that:

> [7] [The plaintiff] 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.
>
> ...
>
> [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. ...

69 Unlike in *Del Bianco*, the evidence before me supports a reasonable explanation for ICBC's conduct. The explanation provided by Ms. Calbick and the documents produced support that ICBC never refused to fund chiropractic treatments. Non-payment was due to the health care provider's error in failing to request an extension of treatment.

70 I further note that in *Del Bianco*, the plaintiff referenced news articles and the comments made by the Attorney General. The judge noted that this evidence was "particularly germane" to his decision. I understand the *Del Bianco* decision is under appeal. The plaintiff in this case made no such references to news articles, and rightly so. I accept Justice MacDonald's approach in *Aarts-Chinyanta v. Harmony Premium Motors Ltd*., 2020 BCSC 953 at para. 14, that newspaper articles attached to affidavits are not admissible.

71 I am not persuaded that ICBC refused to fund pre-trial chiropractic treatments as the plaintiff asserts.

Payment of MSP and Medical Fees as Part of Part 7 benefits

72 ICBC has deducted from the plaintiff's Part 7 benefits fees paid to various medical

practitioners. From April 16, 2016, to December 20, 2020, the MSP and medical services fees paid from the plaintiff's Part 7 benefits amounted to approximately $6,000.

73 The plaintiff is entitled to $150,000 of Part 7 benefits for each accident. According to the evidence, she has a combined total of $401,965.25 remaining.

74 The majority of the plaintiff's visits to see medical practitioners have already occurred. The plaintiff only seeks ongoing treatment from her family doctor and a psychiatrist. I do not see any likelihood that the MSP and medical fee deductions in the future would in any way impact this plaintiff's ability to access Part 7 benefits.

Payment of Interest

75 The plaintiff claims she lost money due to the interest she had to pay to Dr. Louwerse. She submits this interest was not recoverable as part of her special damages claim. She submits this "will eat significantly into whatever money I have left from my award". She attaches to her affidavit an invoice dated July 31, 2020 from North Delta Chiropractic, where Dr. Louwerse practices, which shows the amount of interest billed at $375.38.

76 I note the plaintiff claimed this interest amount as part of her special damages claim. She sought recovery for Dr. Louwerse's invoice. The first line on that invoice was an interest charge of $375.38.

77 The plaintiff tendered a list of special damages as Exhibit 1, Tab 10, which included this invoice.

78 The defendants only disputed two aspects of the plaintiff's special damages claim, the amount paid for the private MRIs and for family counselling. As such, it appears the plaintiff has been fully reimbursed for interest charged by Dr. Louwerse.

79 As I have already found, the need for the direction to pay Dr. Louwerse's accounts was not caused by ICBC's actions.

ICBC's Post-Judgment Conduct

80 The plaintiff argues that the failure of ICBC to respond to the plaintiff's request for Total Temporary Disability ("TTD") benefits and approval for chiropractic and massage therapy treatments on December 2, 2020, until the day before this matter was set to continue in court on January 28, 2021, supports that ICBC cannot be relied on to make any future payments.

81 Ms. Calbick testified that she was not aware of the December 2, 2020 emails. She believes that the adjuster assigned to this file was "confused" on what should take place and the adjuster

did not seek guidance from her. She confirmed that a cheque for the TTDs has been forwarded to the plaintiff. The adjuster was waiting to hear back from the chiropractor and massage therapist.

82 Ms. Calbick testified that the adjuster now has a "strong understanding of what needs to be done moving forward."

83 I note that Ms. Calbick's assurance in her affidavit was that ICBC would pay for massage therapy or chiropractic upon receipt of the invoices. It appears the approach taken by the plaintiff was to ask for approval in advance for future chiropractic or massage therapy treatments.

84 I am not persuaded that any of these arguments support that ICBC will dishonour its commitment to this plaintiff. I heard Ms. Calbick's explanation and I accept it. I expect, based on the assurances given by Ms. Calbick on behalf of ICBC, that no further "confusions" will arise.

85 I adopt my comments in *Wark v. Kang*, 2020 BCSC 196 at para. 38, that I see no future risk that ICBC will dishonour its commitment.

86 To be fair to this plaintiff, a contingency should be provided in the amount of 20% to account for the discrepancy in the prescribed fees and actual costs and the potential in the future for that discrepancy to widen. As such, the future care costs deduction requested by the defendants is reduced by 20%, being $3,439. The amount of $13,756 should be deducted from the plaintiff's cost of future care award.

87 I do not find that a further reduction is warranted to reflect the possibility that ICBC will not pay the Part 7 benefits to which the plaintiff is entitled.

88 Before considering the costs issue, I need to determine what amount the plaintiff will receive. The defendants take the position that the amount of $56,785.25 paid to the plaintiff in TTD benefits needs to be deducted as required by the *Regulation*. The plaintiff agrees with this position and with the amount received.

89 I find the net judgment that the plaintiff will receive includes an additional $1,841.67 for pre-judgement interest on the past loss of housekeeping capacity and $6,000 for the management fee. The plaintiff's calculation of interest on the special damages award was $693.58. There is no evidence that the defendants disputed this amount. The plaintiff concedes that there is no interest payable on the past wage loss since the TTDs paid were roughly equivalent to the judgment amount.

90 With these additions the judgment amount stands at $522,140.71. From this amount needs to be deducted the s. 83 deduction of $13,756 and the TTDs paid of $56,785.25. Thus the net amount the plaintiff will receive is $451,599.46.

Is the Plaintiff Entitled to Double Costs?

Background

91 The parties attended a mediation on June 21, 2019. At that mediation, the plaintiff says she presented a comprehensive settlement proposal outlining her position in the litigation.

92 The trial was set to commence on August 17, 2020.

93 On July 20, 2020, the plaintiff made a formal offer to settle (the "Plaintiff Offer"). The offer was for $450,000 with the following statement:

> The Settlement Payment is "new money", offered after taking into account Part 7 benefits paid or payable, any advances paid, court order interest, and excludes Settlement Costs.

94 The Plaintiff Offer was made without prejudice except as to costs. The plaintiff reserved the right to bring this offer to the attention of the Court for consideration in relation to costs after the judgment, pursuant to Rule 9-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*].

95 Counsel confirmed during the continuation of the trial on January 28, 2021, that this offer was for new money meaning the TTDs that had been paid would not be deducted. The Plaintiff Offer was open for acceptance up until the last business day before the commencement of the first day of trial. As of that date, approximately $56,700 of TTDs had been paid. As such, this was an offer in the range of $507,000 as of the last day it was open for acceptance.

96 On July 24, 2020, the defendants made a formal offer to settle for $87,810.62 (the "Defence Offer"). Both counsel confirmed during the continuation of the trial on January 28, 2021, that this was also for new money. This offer was also open for acceptance up until the last business day before the first day of trial. As such, this was an offer in the range of $144,000 as of the last day it was open for acceptance.

Legal Principles

97 Rule 9-1(4) of the *Rules* provides that the court may consider an offer to settle when exercising its discretion in relation to costs. In a proceeding in which an offer to settle has been made, Rule 9-1(5)(b) allows the court to award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle. Such an award is a punitive measure against a litigant for their failure to accept an offer to settle that, in all of the circumstances, should have been accepted: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25.

98 Under Rule 9-1(6), the following factors may be considered in making an order for costs in a

proceeding in which an offer to settle has been made:

(a) whether the offer to settle was one that ought reasonably to have been accepted;

(b) the relationship between the terms of settlement offered and the final judgment of the court;

(c) the relative financial circumstances of the parties; and

(d) any other factor the court considers appropriate.

99 Whether an offer ought reasonably to have been accepted must be determined by reference to the time the offer was open for acceptance, not by reference to the ultimate decision: *Hartshorne* at para. 27. *Hartshorne* set out the following (non-exhaustive) factors for courts to consider in deciding whether an offer ought reasonably to have been accepted:

(a) the timing of the offer;

(b) whether the offer had some relationship to the claim or was instead a nuisance offer;

(c) whether the offeree could easily have evaluated the offer; and

(d) whether the offeror provided some rationale for the offer.

100 The onus is on the party seeking to displace the usual rule as to costs, which in this case is the plaintiff: *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 75.

Plaintiff's Position

101 The plaintiff, in her written submissions, put forward her claim for double costs on the basis that she obtained a judgment greater than the Plaintiff Offer. She calculated the net amount of the judgment, after deducting TTDs of $56,785.25 at $456,820.22 without including any pre-judgment interest or management fees.

102 The plaintiff argues that the Plaintiff Offer was one that ought reasonably to have been accepted. It was delivered approximately one month before the second trial date, after the parties attended mediation, and after all expert reports had been exchanged. As liability had been admitted in all three actions, the only issue was quantum.

103 The defendants had the reports from Shannon Jameson, occupational therapist, who worked with the plaintiff from 2016 to 2018 and formed the view that the plaintiff was incapable of meeting her job demands and was impaired from regularly performing her household chores. The plaintiff was regularly attending her psychiatrist, which supported the chronic nature of her psychological injuries.

104 The plaintiff argues that the Defence Offer is not one that any counsel could have recommended in the circumstances. It was not an offer that involved a reasonable application of the law to the facts. The Defence Offer did not meet any of the *Hartshorne* factors.

105 The plaintiff further points out that the defendants did not conduct a discovery of the plaintiff after the third accident. As a result, the defendants chose to go to trial without a true knowledge and understanding of the plaintiff's case. This supports a "lackadaisical" attitude in this case.

Defendants' Position

106 The defendants submit that this case involved subjective complaints of pain and the resolution of the issues turned to a significant extent on the plaintiff's credibility. A number of issues were raised on the reliability of the plaintiff's evidence. These issues supported that there was good reason to doubt the plaintiff's credibility prior to trial. In particular, the issue relating to the various non-organic findings and pain behaviours was resolved at trial after the Court had the benefit of hearing from Dr. Waspe. The defendants did not have the benefit of such evidence in advance of trial to assist in considering credibility.

107 The defendants submit that *Noori v. Hughes*, 2019 BCSC 139, supports that it is not unreasonable for an offeree to have rejected an offer where credibility was a factor in assessing the strength of an offeror's claim, and the offeree had good reason to question credibility before trial.

108 The defendants further rely on the case of *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1497 at para. 19, aff'd at 2011 BCCA 516. They submit costs should be a penalty for unreasonable litigation conduct, not a penalty for mistakenly guessing the outcome of a proceeding. Leeway should be given to parties who have mistakenly but honestly guessed their positions.

Analysis

Whether the Plaintiff Offer Ought Reasonably to Have Been Accepted?

109 Considering the factors set out by the Court of Appeal in *Hartshorne*, I am not convinced that the Plaintiff Offer was one which ought reasonably to have been accepted by the defendants.

110 I am most persuaded by the defendants' submission that the medical reports were replete with comments about non-organic findings and pain behaviours on examination of the plaintiff. A sample of those are:

> * Dr. Charles Telfer, treating orthopedic surgeon, found the plaintiff had a fair amount of abnormal pain behaviour and he found no signs of serious pathology of her right shoulder. He recommended her return to normal activities as soon as possible. He did not think there was anything more he could do for her.
>
> * Dr. Melissa Nadeau, treating orthopedic surgeon, comments in one of her consult reports that there are "disproportionate symptoms" and that "There are tertiary gain issues, and her presentation does have non organic findings (eg leg tremor)". This doctor was of the view that the plaintiff was not a good surgical candidate and that she should stay as physically active as possible and continue doing her regular exercises.
>
> * Dr. Stephen Maloon, treating orthopedic surgeon, found that the plaintiff had multiple non-organic findings on assessment. He reassured the plaintiff there was no serious pathology in her back, that she should keep active and work around her discomfort, and that most often the symptoms settle spontaneously. He found that she was not a surgical candidate. He made no arrangements to see the plaintiff again.

111 I accept that the defendants had reason to be "suspicious" of the plaintiff's claims in light of the various statements in the medical reports. The defendants acted reasonably in taking into account the various credibility issues raised by the plaintiff's own treating physicians. In addition, the plaintiff has provided, in support of her costs application, the report of Dr. Paul F. Roberts, orthopedic surgeon. Dr. Roberts assessed the plaintiff on April 3, 2019 and prepared a report dated April 17, 2019 (the "Roberts Report") at the request of the defendants. The Roberts Report was not tendered by the defendants at the trial. However, of significance is the finding that Dr. Roberts made, which closely aligned with the findings made by the other treating physicians. He states under the heading "Summary of Physical Examination":

> The examination was overwhelmingly in keeping with a non-organic presentation with the presence of a number of Waddell signs without evidence of organic pathology of the neuromusculoskeletal system.

112 His opinion was that any soft tissue injuries had resolved, there was no physical impairment to substantiate any ongoing disability, the plaintiff was capable of performing her pre-accident activities, and she had no residual sequelae resulting from the car accidents. In my view, the Roberts Report would have bolstered the defendants' pre-trial conclusion that this plaintiff had not been seriously injured in the Accidents.

113 The plaintiff was assessed by Dr. Zeeshan Waseem, physiatrist, on April 25, 2020 and he provided a report dated May 6, 2020. The plaintiff served this report on the defendants. In that report Dr. Waseem notes his examination of the plaintiff was "confounded by pain behaviours." Dr. Waseem does not specifically opine on the concept of central sensitization. He has the term defined as part of an index/glossary of technical terms. He does comment under prognosis that the plaintiff "has developed maladaptive pain behaviours that are difficult to extinguish and can entrench a sense of disability".

114 I agree with the defence submission that it was not until Dr. Waspe testified that an explanation for these non-organic findings and pain behaviours was clarified. As the plaintiff submitted in her closing submissions at trial, Dr. Waspe was the "missing link" and entirely explained her pain behaviours and non-organic findings.

115 The plaintiff suggests that the defendants could have found out Dr. Waspe's opinion by conducting a pre-trial Swirski interview of her. The plaintiff is correct, the defendants could have sought to interview any of the treating physicians, but given the long list of treating medical professionals seen by the plaintiff, they were not obliged to do so. These professionals include her family doctor, Dr. Cheema; a physiatrist, Dr. Kim Waspe; a psychiatrist, Dr. Rajreet Sidhu; an anesthesiologist, Dr. Mahesh Palanisamy; and orthopedic surgeons, Dr. Charles Telfor, Dr. Abeer Syal, Dr. Melissa Nadeau, and Dr. Stephen Maloon. She only saw Dr. Waspe on one occasion, being June 3, 2019, and this doctor prepared one consult report, consisting of four pages. The report contains a reference, on page three, to the following under the heading of Evaluation:

> Parampal presents with a primarily soft tissue pain central sensitization phenomenon with a great deal of guarding and kinesophobia that is really holding her back.

116 Dr. Waspe provided no explanation for this diagnosis in her report. She only went into a detailed explanation of "central sensitization phenomenon" and how it impacted the plaintiff when she testified. Dr. Waspe's diagnosis only became obviously significant at trial. I am not prepared to find that the defendants ought to have explored Dr. Waspe's report further in light of the extensive medical information they received prior to trial.

117 As noted in *Hartshorne*, whether an offer to settle is one that ought reasonably to have been accepted is not to be assessed with the benefit of hindsight or by reference to the award ultimately made, but under the circumstances that existed when the offer was open for acceptance. The same approach applies to what the defendants ought to have known about the significance of Dr. Waspe's diagnosis in July 2020 when the Plaintiff Offer was made. Hindsight is 20/20 and these defendants, on the medical evidence they had, acted reasonably in not accepting the Plaintiff Offer.

118 This factor weighs in favour of the defendants in not awarding double costs.

Results at Trial

119 As a result of the further submissions post-trial and the application of s. 83 of the *Act*, I have found that the net amount the plaintiff is entitled to is $451,599.46. Since the Plaintiff Offer did not include deducting the TTDs already paid, the net judgment is less than the Plaintiff Offer.

120 The relationship between the Plaintiff Offer and the final amount that the plaintiff receives

weighs in favour of the defendants. However, in my view the plaintiff was forced to go to trial in light of the Defence Offer. I accept the plaintiff's submissions that no counsel could have recommended the Defence Offer to their client.

Relative Financial Circumstances of the Parties

121 The plaintiff suggests that the defendants knew she was not a person of means. They were aware of her pre-accident earnings in the $12,000 to $13,000 range. She asserts that the defendants, relying on the superior financial resources of their insurer, could simply sit back and "play chicken" with the plaintiff. They stood to gain an advantage by waiting and playing hardball since there was a real risk that this plaintiff, with her psychological condition, would give up and take whatever was on the table.

122 The defendants argue that the plaintiff's choice to retain counsel by a contingency fee arrangement to fund her counsel of choice, as well as disbursements and medical management, is a relevant consideration with respect to the financial circumstances of the parties. They rely on *Meghji v. Lee*, 2012 BCSC 379 at paras. 40 to 42. The defendants submit that the Court can take judicial notice of the fact that the plaintiff was not directly funding the litigation at the outset and was ably represented by counsel.

123 I am not prepared to give this factor any weight for either party. I note that in the vast majority of motor vehicle accidents in this Province an insurer will be involved, and many plaintiffs are under financial pressure and hardship. The existence of an insurer can be taken into account, but I am not convinced there is a reason to do so on these facts.

Any other Factor that Court Considers Appropriate

124 The plaintiff submits that the defendants' failure to even attempt to schedule a discovery after the third accident is an important factor. I do not accept this submission. It is a party's choice whether, and when, to conduct a discovery.

125 The plaintiff argues her case necessitated calling 13 witnesses. She did so during the current COVID-19 pandemic, putting all witnesses who testified at risk. This risk could have been avoided if the defendants had taken the Plaintiff Offer.

126 I am not convinced that the defendants bear the responsibility for the number of witnesses the plaintiff called. I further do not find the defendants were the ones who put any witness at risk. Appropriate COVID-19 protocols were followed by all counsel at trial. Master Keighley canvassed protocols for witness testimony at the pre-trial management conference on July 10, 2020, and ordered:

> 10 The parties to identify those witnesses whose evidence might be given by affidavit and who are available for cross examination by the opposing party or by videoconferencing;
>
> 11 Drs. Robert and Daneshan will provide their evidence by videoconferencing.

127 The parties were free to request that any witness appear by way of videoconferencing at the trial.

128 I further accept that the defendants did not engage in any unreasonable litigation conduct that would merit an award of double costs. The defendants had medical evidence supporting the non-organic symptoms and evidence from the plaintiff's own treating orthopedic surgeons. Their approach was reasonable. I reject the submission that the defendants adopted a "play chicken" approach. The defendants' approach was supported by some of the plaintiff's own medical evidence and further backed by the Roberts Report. Their assessment ultimately turned out to be in error but not, in my view, due to any unreasonable litigation conduct on their part.

129 I find the plaintiff has not met her onus of demonstrating that an award of double costs should be granted.

Should an Award of Increased Costs be Made?

Legal Principles

130 Appendix B, section 2(5) of the *Rules* provides that at the discretion of the Court, costs may be increased if the otherwise applicable rate of costs would be "grossly inadequate or unjust":

> If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3(1).

131 The Court in *380876 British Columbia Ltd. v. Ron Perrick Law Corp*., 2009 BCSC 1209 at para. 37, set out the following factors that may constitute unusual circumstances and justify increased costs:

> * Misconduct by the unsuccessful party in the litigation;
>
> * The serious nature of the allegations;
>
> * The complexity or difficulty of the issues in the litigation; and
>
> * The importance of the litigation to the parties or to the development of the law.

132 Justice E.A. Arnold-Bailey in *Kemp v. Vancouver Coastal Health Authority Ltd*., 2016

BCSC 1541 at para. 28, summarised the circumstances where these increased costs have been awarded:

> * there was a multiplicity of proceedings, a party failed to provide particulars or abide by document disclosure obligations, and there was a general non-compliance with the *Rules*: [*Bajwa v. British Columbia Veterinary Medical Assoc., 2008 BCSC 905*];
>
> * evidence at trial was unnecessarily lengthy, uninformative and irrelevant, which needlessly and significantly prolonged the trial: [*D. v. D.*, 2008 BCSC 1260];
>
> * false and misleading affidavits were provided, and unnecessary time and expense was spent on an issue that was unrelated to the central issue in the case: [*380876 British Columbia Ltd. v. Ron Perrick Law Corp*., 2009 BCSC 1209];
>
> * issues were placed before the court that needlessly complicated the matter and the party seeking costs was forced to spend a great deal of time responding to the other party's misconduct: *On Call Internet Services Ltd. v. TELUS Communications Company*, 2010 BCSC 1031;
>
> * unfounded and unsupported allegations of fraud and misappropriation were made, and there were repeated failures to comply with the *Rules* concerning document production: [*Luu v. Wang*, 2012 BCSC 626];
>
> * critical documents were disclosed just before trial and a considerable time after the claim had arisen, which necessitated an adjournment and late disclosure of further documents at the eventual trial: [*Chandler v. Rasmussen*, 2013 BCSC 1461]; and
>
> * a limitation defence was raised at the last minute, a witness for the party seeking costs received worrisome communication from an opposing party and there was hostility in the courtroom as well as at the examinations for discovery: *Antrobus v. Antrobus*, 2012 BCSC 613.

Plaintiff's Position

133 The plaintiff submits that "uplifted" costs are justified on the following basis:

> * The lowest end of the defendants' own submission at trial ($121,000) was some 33% higher than the Defence Offer;
>
> * The Defence Offer was so low that no counsel could have possibly recommended it in the circumstances;
>
> * The defendants "played chicken" with a terribly vulnerable plaintiff, who could have easily given up;
>
> * The defendants did not even do a discovery after the third motor vehicle accident, which likely indicates how much they cared to learn about the plaintiff's case; and

> * This trial ran in the middle of the COVID-19 pandemic with 15 witnesses and numerous physicians, taking time away from their practice and giving care to those who need it.

134 The plaintiff relies on *Johnson v. Heer,* 2020 BCSC 1751, to support that uplifted costs were ordered after the Court considered the offers to settle in light of the defendant's submissions at trial. Counsel pointed to para. 36, which reads:

> Moreover, I note that this trial proceeded a matter of just a few weeks after the court resumed limited operations following its closure due to the COVID-19 pandemic. The pandemic was at its relatively early stages at the time of the trial, and public health officials had urged British Columbians to limit their exposure to public places to only essential matters. In the circumstances I have described, attendance at this trial was not essential and it exposed the plaintiff, her husband, her mother, her counsel and defence counsel to an increased risk of exposure to the virus. In these unusual circumstances, I find that an award of costs on the usual scale would be unjust, and I exercise my discretion to award uplift costs to the plaintiff for trial preparation and attendance at trial for items 34 and 35 of the Tariff.

135 The plaintiff seeks "uplifted" costs for trial preparation and attendance at trial.

Defendants' Position

136 The defendants submit there is no basis to make an award of increased costs in the circumstances of this case. They argue there is no authority for the proposition that a trial during COVID-19 is a stand-alone basis for an increased award of costs in this province.

137 They distinguish *Johnson* on the basis that in *Johnson*, the defendant's low end submission at trial, around $69,000, was higher than its own formal offer to settle for $41,000. Additionally, and more unusually, the high end of the defendant's submissions in *Johnson*, being $111,943, was higher than the plaintiff's final and original formal offer to settle at $80,000. The trial judge noted at para. 34:

> It is difficult to fathom why the defendant would force the trial to proceed when it could have settled the trial for less money than it submitted the plaintiff was entitled to at trial.

Analysis

138 I am not convinced that the *Johnson* case is comparable to the situation here. In that case, the defendant submitted that the high end of the range of the plaintiff's damages was $111,943 even though the plaintiff offered to settle at $80,000. The defendant's high end submission at trial was "$31,943 higher than the plaintiff's final offer to settle". The trial judge commented at para. 33 on

the unusual nature of refusing an offer to settle, then going to trial and submitting that the plaintiff is entitled to a higher amount.

139 The trial judge concluded at para. 34 that "it would appear the only reason the defendant did not accept either of the plaintiff's offers was to simply force the plaintiff to go to trial." This conclusion was an important factor in Justice Majawa's finding that the witnesses' attendance at the trial was not essential.

140 In the trial decision in *Johnson*, indexed at 2020 BCSC 1168, the following is significant:

> * The plaintiff only called two experts, a physiatrist and functional capacity evaluator;
>
> * No treating physicians were called to testify;
>
> * The cross-examination of the plaintiff was limited and the defendant conceded that she was a credible witness; and
>
> * There was no evidence of any non-organic pain symptoms or pain behaviours in the medical records.

141 I have already canvassed the ample reasons for the defendants to be cautious of this plaintiff's claim in light of the commentary in the treating physicians' reports and in the Roberts Report. I have found there was a legitimate reason that the defendants did not accept the Plaintiff Offer.

142 In addition, the circumstances of the offers and the quantum proposed by the defendants are not akin to the "unusual circumstances" found in *Johnson*.

143 At trial, the defendants suggested that the range of the plaintiff's damages was approximately $120,000 to $150,000 with the deductions for the TTD advances and s. 83 deductions.

144 The analysis of costs in *Johnson* has no application to this case. Unlike the *Johnson* case, the range suggested by the defendants was not higher than the offer advanced by the plaintiff. To settle the case, the defendants would have had to pay the plaintiff $450,000 of new money as per the Plaintiff Offer. They could not have settled for less than what they submitted the plaintiff was entitled to at trial.

145 I have already commented on the issue of this trial taking place during the COVID-19 pandemic, and this factor alone does not justify awarding "uplifted" costs.

146 I decline to award increased costs. I am not satisfied that the plaintiff has met her burden of establishing any unusual circumstances that would justify such an award. I am not persuaded that it would be grossly inadequate or unjust if the plaintiff was denied increased costs.

Conclusion

147 On January 5, 2021, ICBC, on behalf of the defendants, paid to the plaintiff the sum of $439,625.22 against the judgment. Counsel confirmed that this did not include any post-judgment interest. The plaintiff is entitled to receive post-judgment interest.

148 The following orders are made:

1. The plaintiff is entitled to the sum of $1,841.67 for pre-judgment interest on the past loss of housekeeping award.
2. The plaintiff is entitled to the sum of $693.58 for pre-judgment interest on the special damages award.
3. There is no pre-judgement interest owed on the past wage loss award.
4. The plaintiff is entitled to the sum of $6,000 for management fees.
5. The award for future care costs is reduced to $3,439.
6. The amount of $56,785.25 for past TTD benefits shall be deducted from the judgment.
7. The plaintiff's application for double and increased costs is dismissed.

149 The plaintiff is entitled to costs at scale B. The plaintiff is entitled to her costs of the written submissions in support of the post-trial issues and the costs of the further day of attendance for the hearing on the s. 83 deductions. In my view the plaintiff raised legitimate concerns respecting ICBC's pre-and post-trial conduct that required an explanation from ICBC. While I have accepted the explanations provided by Ms. Calbick, it is my view that the plaintiff is entitled to costs.

C.L. FORTH J.

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