CA46728
Supreme Court File No.: 144097
Supreme Court Registry: Victoria
Heard before: Madam Justice Winteringham and Jury

COURT OF APPEAL

BETWEEN:

PATRICIA DAWN ELLIOTT

RESPONDENT (PLAINTIFF)

AND

RYAN McCLIGGOT and SLEGG CONSTRUCTION MATERIALS LTD.

APPELLANTS (DEFENDANTS)

APPEAL RECORD

SOLICITORS FOR THE APPELLANTS:

HARRIS & BRUN LAW CORPORATION
500 – 555 West Georgia Street
Vancouver, B.C. V6B 1Z6
Telephone: 604-683-2466
Facsimile: 604-683-4541
Email: jbrun@harrisbrun.com
Email: rbrun@harrisbrun.com

JENNIFER J.L. BRUN
ROBERT C. BRUN, Q.C.
Counsel for the Appellants

SOLICITORS FOR THE RESPONDENT:

VANCOUVER ISLAND LAW
1 – 1007 Johnson Street
Victoria, B.C. V8V 3N6
Telephone: 250-900-1159
Facsimile: 250-900-0368

KARL J. HAUER
Counsel for the Respondent

I N D E X

A P P E A L R E C O R D (i)

Court File No. VIC-S-M-144097

Victoria Registry

In the Supreme Court of British Columbia

Between

Patricia Dawn Elliott

Plaintiff

and

Ryan McCliggot and Slegg Construction Materials Ltd

Defendants

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff(s) for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

(a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
(b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

(a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
(b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff(s),

(a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
(b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
(c) if you were served with the notice of civil claim anywhere elsewhere, within 49 days after that service, or
(d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFF

Part 1: STATEMENT OF FACTS

1. The Plaintiff Patricia Dawn Elliott is an office assistant and has an address for service of c/o Karl Hauer, Barrister and Solicitor, 301 -1321 Blanshard St, Victoria, BC V8W 0B6.
2. The Defendant Ryan McCliggot (the “Defendant McGliggot”) is a worker in the construction business and resides at 29 – 70 Cooper Road, Victoria, BC V9A 4K2.
3. The Defendant Slegg Construction Materials Ltd (the “Defendant Slegg”) is a company incorporated under the laws of British Columbia and has its registered office at 9830 Fourth Street, Sidney, BC V8L 2Z3.

4. The Defendant McCliggot was at all material times the driver of a 2004 Ford flatbed truck bearing BC license plate number BA 9160 (the "Vehicle").

5. The Defendant Slegg was at all material times the owner of the Vehicle.

6. On or about November 08, 2012, at or about 09:30 a.m., the Plaintiff was driving her vehicle, a blue 2003 Dodge Grand Caravan Sport, northbound on Cedar Hill Rd in or about Victoria, BC.

7. The Plaintiff was travelling behind and following the Vehicle.

8. As the Plaintiff travelled past the intersection of Hopesmore Drive, the Vehicle came to an abrupt stop in the roadway. The Plaintiff, too, stopped, in order not to hit the Vehicle, and the Plaintiff came to a halt a safe distance away.

9. The Defendant McCliggot then put the Vehicle into reverse and began to travel towards the Plaintiff's vehicle.

10. The Plaintiff used and steadily sounded her horn in order to warn the Defendant McCliggot. Unfortunately, the Plaintiff's warnings were to no avail and the Vehicle collided with the Plaintiff.

11. The collision between the Plaintiff's vehicle and the Vehicle was caused solely by the negligence of the Defendant McCliggot, particulars of which, to the extent they are known to the Plaintiff, include:

    a. Driving without due care and attention and without reasonable consideration for other persons using the highway, contrary to s. 144 of the *Motor Vehicle Act*,

    b. Failing to keep a proper or any lookout,

    c. Failing to take reasonable and proper steps to avoid a collision in the circumstances,

    d. Attempting an improper and unsafe maneuver on the highway, and

    e. Causing the vehicle to move backwards when that could not be done safely, contrary to s.193 of the *Motor Vehicle Act*.

12. As a result of the collision caused by the negligence of the Defendant McCliggot, the Plaintiff has sustained physical injuries. Particulars of the Plaintiffs injuries are as follows:

    a. Pain and injury to neck,

    b. Pain and injury to shoulder,

    c. Pain and injury to upper and mid back,

    d. Numbness and tingling in right arm,

    e. Pain and injury to the hips

    f. Headaches,

    g. Sleeplessness, and

    h. Such further and other injuries as counsel may advise

13. As a result of the collision caused by the negligence of the Defendant McCliggot, the Plaintiff has sustained and continues to sustain loss of earnings. In particular, as a result of the accident, the Plaintiff remained off work as a daycare provider from the date of the accident until, on or about 08 Mar 2013, she found work which she was physically able to do, namely clerical work.

14. As a result of the collision caused by the negligence of the Defendant McCliggot, the Plaintiff has sustained loss of earning capacity, and she is no longer able to work as a daycare provider but rather is restricted to lower-paying clerical work.

15. As a result of the collision caused by the negligence of the Defendant McCliggot, the Plaintiff has incurred, continues to incur, and will incur in the future, care expenses including but not limited to physiotherapy and massage therapy.

Part 2: RELIEF SOUGHT

1. The Plaintiff claims:

    a. General damages,
    b. Special damages,
    c. Damages for past loss of income
    d. Damages for future loss of income or capacity to earn income
    e. Damages for future cost of care
    f. Damages for loss of housekeeping capacity, past and future
    g. Interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c.79,
    h. Costs, and
    i. Such further and other relief as this Honourable Court may find just.

Part 3: LEGAL BASIS

1. The negligence of the Defendant McCliggot caused injury and loss to the Plaintiff

2. At the time of the collision, the Defendant McCliggot was employed by the Defendant Slegg as, *inter alia*, a driver and was operating the Vehicle within the scope of his employment and with the permission, express or implied, of the Defendant Slegg.

3. The Defendant Slegg is vicariously liable for the conduct of the Defendant McCliggot due to the employment relationship between them and/or s.86 of the *Motor Vehicle Act*.

Plaintiff's address for service: c/o Karl Hauer, Barrister and Solicitor, 301 – 1321 Blanshard St, Victoria, BC V8W 0B6

Fax number address for service (if any): 250 900 0368

E-mail address for service (if any):

Place of trial: Victoria, BC

The address of the registry is: 850 Burdett Ave, Victoria, BC

Date: 03 Nov 2014

Karl Hauer

Signature of
[ ] plaintiff [x] lawyer for plaintiff(s)
Karl Hauer

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record

.

APPENDIX

[*The following information is provided for data collection purposes only and is of no legal effect.*]

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

[*Check one box below for the case type that best describes this case.*]

A personal injury arising out of:
[X]a motor vehicle accident
[ ] medical malpractice
[ ] another cause

A dispute concerning:
[ ] contaminated sites
[ ] construction defects
[ ] real property (real estate)
[ ] personal property
[ ] the provision of goods or services or other general commercial matters
[ ] investments losses
[ ] the lending of money
[ ] an employment relationship
[ ] a will or other issues concerning the probate of an estate

[ ] a matter not listed here

Part 3: THIS CLAIM INVOLVES

[*Check all boxes below that apply to this case*]

[ ] a class action
[ ] maritime law
[ ] aboriginal law
[ ] constitutional law
[ ] conflict of laws
[X] none of the above
[ ] do not know

Part 4:

[*If an enactment is being relied on, specify. Do not list more than 3 enactments.*]

No. 14 4097
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PATRICIA DAWN ELLIOTT

PLAINTIFF

AND:

RYAN MCCLIGGOT and SLEGG CONSTRUCTION MATERIALS LTD.

DEFENDANTS

RESPONSE TO CIVIL CLAIM

Filed by: Ryan McCliggott and Slegg Construction Materials Ltd. (the "Defendants")

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendants' Response to Facts

1. The Defendants admit the particulars of the parties' addresses in paragraphs 1, 2, and 3 of Part 1 of the Notice of Civil Claim.

2. The Defendants admit the allegations of fact set out in paragraphs 4, 5, 6 and 7 of Part 1 of the Notice of Civil Claim.

3. The Defendants admit that on or about November 8, 2012 a collision occurred at or near the location referred to in paragraphs 6 and 8 of Part 1 of the Notice of Civil Claim, but the Defendants do not admit that this collision was caused or contributed to by the actions of the Defendants.

4. The Defendants deny the allegations of fact set out in paragraphs 9 through 15 of Part 1 of the Notice of Civil Claim.

Division 2 – Defendants' Version of Facts

Division 3 -- Additional Facts

1. The Plaintiff has failed to mitigate her loss or damage.

2. Any injury alleged was not materially caused or contributed by the collision as alleged, but was attributable to previous or subsequent injury or medical conditions affecting the Plaintiff, which injuries or medical conditions were not aggravated by the collision as alleged.

3. If the Plaintiff suffered injury, loss or damage, then this was wholly as a result of the Plaintiff's contributory negligence for failing to wear properly or at all a seat belt or to adjust properly or at all the seatbelt in a vehicle he was traveling.

Part 2: RESPONSE TO RELIEF SOUGHT

1. The Defendants oppose the granting of the relief sought in the Notice of Civil Claim.

Part 3: LEGAL BASIS

1. In answer to the whole of the Notice of Civil Claim, if a motor vehicle collision occurred as alleged or at all, and if the Plaintiff suffered any injury, loss, damage or expense as alleged, or at all, all of which is not admitted but is denied, the Defendants say that at all material times the Plaintiff was a worker and the Defendant driver was a worker within the scope of s.10 of the *Workers Compensation Act*, R.S.B.C. 1996, c.492, and amendments thereto, and the cause of the action of the Plaintiff, if any, arises out of and in the course of employment and is barred by the provisions of the aforesaid *Act.*

2. The Defendants say that if the Plaintiff suffered injury, loss or damage, either as alleged or at all, all of which is not admitted but specifically denied, then the sole, effective and proximate cause of such injury, loss or damage was the negligence of the Plaintiff in failing to wear a seatbelt properly or at all and the Defendants plead and at the trial of this action will rely upon the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333 as a complete defence to the Plaintiff's claim for damages or to that extent which the Plaintiff may be found contributorily negligent.

3. The Plaintiff could, by the exercise of due diligence, have reduced the amount of any alleged injury, loss, damage or expense, and the Defendants say that the Plaintiff failed to mitigate his damages.

4. The Plaintiff was insured at all material times under the provisions of the Insurance (Vehicle) Act, R.S.B.C. 1996, c.231, and amendments and Regulations thereto and the Plaintiff received, or was entitled to receive, benefits as provided under the said Insurance (Vehicle) Act and the Defendants further say that payment of, or an entitlement to, benefits as aforesaid constitutes a release by the Plaintiff to the Defendants to the extent of such payment or entitlement and the Defendants plead the provisions of the said Insurance (Vehicle) Act and Regulations and, without restricting the generality of the foregoing, the Defendants specifically plead the provisions of s.83 of the said Insurance (Vehicle) Act.

5. The Defendants say that they are designated Defendants pursuant to the provisions of s.95 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c.231 and the Plaintiff's entitlement to recovery of loss of income is limited by the provisions of s.98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c.231, and the Regulations thereto, and the Defendants specifically plead and rely upon sections 95 and 98 of the Insurance (Vehicle) Act R.S.B.C., 1996, c. 231 and the Regulations thereto.

Defendants' address for service:

Fax number address for service (if any): 250-475-6528

E-mail address for service (if any): 104-645 Fort Street, Victoria, B.C. V8W 1G2

Date: January 19, 2015

Michael F. O'Meara
Solicitor for the Defendants

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

SUPREME COURT
OF
BRITISH COLUMBIA
SEAL
27-Aug-20
Victoria
REGISTRY

Court File No. VIC-S-M 144097
Victoria Registry

In the Supreme Court of British Columbia

Patricia Dawn Elliott

Plaintiff

and

Ryan McCliggot and Slegg Construction Materials Ltd

Defendants

ORDER AFTER TRIAL

BEFORE THE HONOURABLE MADAM JUSTICE WINTERINGHAM 04 February 2020

THIS ACTION coming on for trial at Victoria, British Columbia on January 27, 28, 29, 31 and February 3 and 4, 2020, and on hearing Karl Hauer, counsel for the plaintiff Patricia Dawn Elliott and Michael F. O'Meara, counsel for the defendants Ryan McCliggot and Slegg Construction Materials Ltd

THIS COURT ORDERS that:

1. The defendants pay to the plaintiff $461,568.22.

2. The defendants pay to the plaintiff ordinary costs of this action at Scale B until January 24, 2020 and double costs at Scale B thereafter to the end of the trial.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

.....
Signature of [ ] party [x] lawyer for Patricia Dawn Elliott
Karl Hauer

.....
Signature of [ ] party [x] lawyer for Ryan McCliggot and Slegg Construction Materials Ltd, Michael F. O'Meara

Digitally signed by
Winteringham, J

By the Court.

Digitally signed by
Chappell, Rebecca

.....
Registrar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Elliot v. McCliggot,*
2020 BCSC 1128

Date: 20200731
Docket: M144097
Registry: Victoria

Between:

Patricia Dawn Elliott

Plaintiff

And

Ryan McCliggot and Slegg Construction Materials Ltd.

Defendants

Before: The Honourable Justice Winteringham

Reasons for Judgment (Costs)

(Via teleconference)

Counsel for the Plaintiff:	K.J. Hauer
Counsel for the Defendants:	M.F. O'Meara
Written Submissions received:	Victoria, B.C. June 25, 2020
Place and Date of Judgment:	Victoria, B.C. July 31, 2020

[1] The plaintiff, Patricia Dawn Elliott, seeks an order that she be entitled to double costs on the basis that she delivered a timely offer to settle that was well exceeded by the verdict of a jury. The defendants take the position that the offer to settle was ambiguous and that the ambiguity arose in two respects:

a) First, the plaintiff referred to an “early bird discount” in the offer; and

b) Second, it was unclear whether the offer took into account monies that had already been paid to the plaintiff.

[2] Briefly, this was a personal injury action relating to a motor vehicle accident that occurred in Victoria, BC, on November 8, 2012. Liability was admitted. The parties each selected a trial by jury, where their only task was to assess damages. The trial proceeded from January 27, 2020 – February 4, 2020. The jury rendered its verdict in the evening of February 4, 2020.

[3] At trial, the plaintiff sought an award in the range of approximately $100,000 plus non-pecuniary damages and agreed upon special damages of $3,885.54. The jury awarded $463,385.54, distributed across the relevant heads of damages as follows:

a) Special damages: $3,885.54;

b) Past loss of income earning capacity: $46,500;

c) Loss of future income earning capacity: $45,000;

d) Cost of future care: $15,000;

e) Loss of housekeeping capacity: $3,000; and

f) Non-pecuniary damages: $350,000.

[4] The plaintiff now seeks an order for double costs as a consequence of an offer to settle made on January 13, 2020[1] for $99,999 plus costs and disbursements.

[5] The parties agreed to deal with costs by way of written submissions given the restricted operations of the court during the COVID-19 pandemic.

[6] I will note that offers to settle are governed by Rule 9-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

[7] Rule 9-1(5) sets out the options available to the court where an offer to settle has been made, including in subparagraph (b):

> . . . 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.

[8] Rule 9-1(6) identifies a number of factors that the court may consider when making a costs award in the face of an offer to settle, including:

> . . .
>
> a) Whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
>
> 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.

[9] The Court of Appeal summarized the purposes of costs awards in *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282. Those purposes include:

> a) Deterring frivolous actions or defences;
>
> b) Encouraging conduct that reduces the duration and expense of litigation and discouraging conduct that has the opposite effect;
>
> c) Encouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases; and

[1] The offer to settle was dated Saturday, January 11, 2020.

d) To have a winnowing function in the litigation process by requiring litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation and by discouraging the continuance of doubtful cases or defences.

[10] While the *Supreme Court Civil Rules* and the cases interpreting them are instructive, the issue of costs is in the discretion of the trial judge.

[11] I turn to a consideration of the factors set out in Rule 9-1(6).

[12] First, was the plaintiff's offer one that ought reasonably to have been accepted?

[13] The plaintiff submits that this was a straightforward monetary offer in a lump sum, and in an amount that a reasonable jury, properly instructed, easily could have awarded.

[14] The defendants submit the offer was ambiguous, relying on *Ostiguy v. Hui*, 2010 BCSC 641 for the principle that it is necessary that "the offer be clear, unambiguous and unconditional." Again, the defendants submit the offer was ambiguous because of the language and because it was not clear whether the offer took into account approximately $1,000 previously paid.

[15] I disagree with the defendants' submission in this regard. I have little difficulty concluding, having reviewed the offer and its terms, that the offer set out clearly that the plaintiff was prepared to accept the amount indicated, plus costs and disbursements, and there was nothing ambiguous about the language used or the calculation of the wage loss. In my view, the defendants were in a position to evaluate her offer and the offer was clearly within the range of possible outcomes. I am satisfied, on the first factor that the plaintiff's offer was one that the defendant ought reasonably to have accepted.

[16] The second factor is the relationship between the terms of the settlement offered and the final judgment of the court. The authorities caution against relying on hindsight to assess the reasonableness of an offer particularly as jury awards are somewhat more difficult to predict than assessments by judges. See, for example, *Smagh v. Bumbrah*, 2009 BCSC 623. Nonetheless, the relationship between the offer and the final result is a relevant factor. Here, the plaintiff's offer of $99,999 plus costs and disbursements was approximately $350,000 less than what she was awarded at trial. The analysis of this factor favours the plaintiff.

[17] The third factor is the relative financial circumstances of the parties. The parties did not say much about this factor. In light of the circumstances presented here and having taken into account the plaintiff’s financial position, I have concluded that this is a relatively neutral factor.

[18] The fourth factor is whether there exists any other factor that the court considers appropriate. In my view, there are no other factors or considerations that inform the analysis in the circumstances presented here.

[19] I am satisfied that the offer to settle made by the plaintiff on January 13, 2020 in the amount of $99,999, plus costs and disbursements, was reasonable and is one that the defendants ought to have accepted. The plaintiff will thus have her ordinary costs and disbursements until January 24, 2020, the day the offer expired, and double costs thereafter through until the end of the trial.

[20] The plaintiff is entitled to ordinary costs of this application.

“Winteringham J.”

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Elliot v. McCliggot,*
2020 BCSC 1129

Date: 20200731
Docket: M144097
Registry: Victoria

Between:

Patricia Dawn Elliott

Plaintiff

And

Ryan McCliggot and Slegg Construction Materials Ltd.

Defendants

Before: The Honourable Justice Winteringham

Reasons for Judgment (s. 83 Deductions)

Counsel for the Plaintiff:	K.J. Hauer
Counsel for the Defendants:	M.F. O'Meara
Written Submissions received:	Victoria, B.C. July 25, 2020
Place and Date of Judgment:	Victoria, B.C. July 31, 2020

Table of Contents

I. OVERVIEW

[1] This is a post-trial application brought by the defendants in a personal injury action arising out of a motor vehicle accident that occurred in Victoria, BC, on November 8, 2012. Liability was admitted. The parties each selected a trial by jury. The jury's only task was to assess damages. The trial proceeded from January 27, 2020 – February 4, 2020. The jury rendered its verdict in the evening of February 4, 2020.

[2] The plaintiff sought an award in the range of approximately $100,000 plus non-pecuniary damages plus agreed upon special damages of $3,885.54. The jury awarded $463,385.54, distributed across the relevant heads of damages as follows:

a) Special damages: $3,885.54;

b) Past loss of income earning capacity: $46,500;

c) Loss of future income earning capacity: $45,000;

d) Cost of future care: $15,000;

e) Loss of housekeeping capacity: $3,000; and

f) Non-pecuniary damages: $350,000.

[3] The defendants provided notice of their intention to seek certain deductions from the amount of the damages award pursuant to s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "*Act*") and Part 7 of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 (the "*Regulation*"). Specifically, the defendants seek the following deductions:

a) $1,817.32 for past earning capacity; and

b) $11,045.00 for medication and physiotherapy from the plaintiff's award for future care costs.

[4] The plaintiff agrees that $1,817.32 must be deducted from past loss of earning capacity and I direct that deduction accordingly.

[5] The plaintiff disagrees that any amount should be deducted from the plaintiff's future care cost award.

II. POSITION OF THE PARTIES

[6] The defendants contend that s. 83(5) of the *Act* requires that after tort damages have been assessed, the amount of Part 7 benefits paid or payable to a plaintiff 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." The defendant relies on *Sovani v. Jin*, 2005 BCSC 1285, in support of its position that if the plaintiff "is or would be" entitled to Part 7 benefits then the court must make the appropriate deduction and that the Part 7 deduction is mandatory and not discretionary.

[7] The plaintiff takes the position that it is not possible for the defendants to meet their burden in establishing a Part 7 deduction for future care because the court has no way of knowing the basis for the jury's future cost of care award and whether any amount of the award correlates with Part 7. That is because, the plaintiff submits, the jury does not particularize the basis of its award. As such, it is not possible for the defendants to establish the necessary correlation between the plaintiff's claim as determined by the jury and the Part 7 benefits she may receive in the future.

III. LEGAL FRAMEWORK

[8] The *Act* and the *Regulation* create a no-fault scheme which provides, subject to certain exceptions and restrictions set out in the *Regulation*, the Insurance Corporation of British Columbia (ICBC) must pay benefits as defined in Part 7 of the *Regulation* to an insured (as defined in Part 7 of the *Regulation*) in respect of injury arising out of a motor vehicle accident in Canada, regardless of who was at fault for the accident: *Regulation*, s. 79(1).

[9] Relevant to the issue raised here, Part 7 benefits include medical and rehabilitative benefits, which can be either mandatory or permissive. In *Siverston v. Griffin*, 2020 BCSC 528, Justice Jackson described the operation of the scheme in this way at paras. 9-15:

> As part of the scheme created by the Act and the Regulation, Part 7 Benefits paid or payable to a plaintiff are to be deducted from a plaintiff's tort damages after those damages have been assessed at trial: s. 83(5). If the amount of Part 7 Benefits has not been ascertained, for example where it involves a future cost of care, the court must estimate the amount and take that estimate into account by deducting it from a plaintiff's damage award: Act, s. 83(5). The plaintiff is only entitled to enter judgment for the balance after the Part 7 Benefits amount or estimate has been deducted. The purpose of this aspect of the legislative scheme is to prevent double recovery by a plaintiff: *Norris v. Burgess*, 2016 BCSC 1452 at para. 17, citing *Gurniak v. Nordquist*, 2003 SCC 59.
>
> A defendant who seeks a deduction under s. 83 of the Act has the onus of establishing a deduction should be made: *Lynn v. Pearson* (1998), 55 B.C.L.R. (3d) 401 (C.A.) at para. 18; *Sovani v. Jin*, 2005 BCSC 1285 at para. 32.
>
> Section 83(5.1) of the Regulation, which became effective May 17, 2018, dictates that in estimating the amount of benefits, the court may not consider the likelihood that the benefits will be paid or provided.
>
> When determining what, if any, deductions should be made under s. 83, strict compliance with the statutory scheme is required: *Lynn* at para. 18; *Wiebe v. Wiebe*, 2018 BCSC 1062 at para. 29.
>
> In *Jurczak v. Mauro*, 2013 BCSC 1370, Justice Silverman set out a two-step approach to follow when considering whether a s. 83 deduction is appropriate:
>
> > [16] … First, the Court must determine if there are some Part 7 benefits which the plaintiff has received or is entitled to receive. Second, the Court then must estimate the amount of the deduction.
>
> It is important to note that at the first stage, the court's task is to determine whether the plaintiff who "has a claim" received or is entitled to receive Part 7 Benefits for services or treatments "respecting the loss on which the claim is based": Act, s. 83(2), (4) and (5); *Uhrovic v. Masjhuri*, 2007 BCSC 1096 at para. 11, cited with approval in *Li v. Newson*, 2012 BCSC 675 at para. 14; *Gurniak* at para. 31. In other words, the defendant must establish the plaintiff has a claim for which she is entitled to a corresponding benefit under Part 7.
>
> However, s. 83 does not contemplate a second level of matching between a specific head of damage in a tort award and a specific head of Part 7 Benefits. If the defendant establishes an entitlement, the court must proceed to determine or estimate the amount of the plaintiff's Part 7 Benefits. The

> amount of the entitlement is to be deducted from the overall tort award: *Gurniak* at para. 47.

[10] I have set out Jackson J.'s reasons in *Siverston* in some detail because she provides a helpful analytical framework for determining s. 83 deductions.

IV. ANALYSIS

[11] The defendants have the burden of proving a correlation between the plaintiff's claim, as determined by the court, and Part 7 benefits such as medication and physiotherapy at issue here.

[12] In her affidavit, Tracey Gold, claims specialist with ICBC, deposed that the cost of medication and physiotherapy expenses are benefits under Part 7 and that medications are paid under Part 7 at the cost in which they are incurred. Physiotherapy is paid at the rate of $79 per session. In her affidavit, Ms. Gold states that based on her review, the verdict included the cost of medication at $7,920 and the cost of physiotherapy of $3,125. She went on to depose:

> I have reviewed the number of sessions of treatments awarded as set out in the Cost of Future Care table [aid memoire provided by the plaintiff] as best I can, as the verdict did not particularize the physiotherapy treatments sought by the plaintiff. I am authorized on behalf of ICBC to waive the need for continued certification under s. 88(1.01) of the Regulation in payment of the physiotherapy sessions.

[13] The difficulty with the defendants' position is that it is impossible to determine how much of the future care cost award was apportioned to the cost of physiotherapy or medications. That is because the plaintiff invited the jury to consider other items under this head of damage including injections and a gym pass. The jury awarded $15,000 under this head of damages. In this case, as in *Siverston*, the lump sum nature of the jury's cost of future care award makes it impossible for me to ascertain whether, under Part 7, the plaintiff is entitled to a corresponding benefit and, if so, to what degree.

V. DECISION

[14] Accordingly, I grant the following:

a) The verdict for past earning capacity is reduced by $1,817.32; and

b) The defendants' application to reduce the cost of future care award is dismissed.

"Winteringham J."

CA 46728

Court of Appeal File No.
Supreme Court File No. 14 4097
Supreme Court Registry: Victoria Registry

COURT OF APPEAL

BETWEEN:

PATRICIA DAWN ELLIOTT

Respondent
(Plaintiff)

AND:

RYAN MCCLIGGOT and SLEGG CONSTRUCTION MATERIALS LTD

Appellants
(Defendants)

NOTICE OF APPEAL

Take notice that the Appellants/Defendants, Ryan McCliggott and Slegg Construction Materials Ltd. hereby appeal to the Court of Appeal of British Columbia from the Order of The Honorable Madam Justice Winteringham, such Order not yet having been entered, following the verdict of a Civil Jury in the Supreme Court of the Province of British Columbia, delivered February 4, 2020 at Victoria British Columbia.

1. The appeal is from a:

   [X] Trial Judgment

2. Please identify which of the following is involved in the appeal:

   [X] Motor Vehicle Accidents

And further take notice that the Court of Appeal will be moved at the hearing of this appeal for an Order that:

1. The verdict delivered by the Civil Jury be set aside in its entirety and a new Trial be ordered.

2. Alternatively, the Order of the Learned Trial Judge not yet entered be set aside in its entirety and a new Trial ordered.

The trial/hearing of this proceeding occupied 7days.

Dated at Victoria, British Columbia, this 3rd day of March 2020.

Lawyer for the Appellants

To the Respondent: Patricia Dawn Elliott

And to her solicitor: Karl J. Hauer

This Notice of Appeal is given by Michael F. O'Meara whose address for service is

109B – 645 Fort Street
Victoria, BC V8W 1G2
Tel: (250) 475-6529
Fax:(250) 475-6528

To the Respondent:

IF YOU INTEND TO PARTICIPATE in this appeal, YOU MUST GIVE NOTICE of your intention by filing a form entitled "Notice of Appearance" (Form 2 of the Court of Appeal Rules) in a Court of Appeal registry and serve the notice of appearance on the appellant WITHIN 10 DAYS of receiving this Notice of Appeal.

IF YOU FAIL TO FILE A NOTICE OF APPEARANCE

(a) you are deemed to take no position on the appeal, and
(b) the parties are not obliged to serve any further documents on you.

The filing registries for the British Columbia Court of Appeal are as follows:

Central Registry:
B.C. Court of Appeal
Suite 400, 800 Hornby Street
Vancouver BC V6Z 2C5

Other Registries:
B.C. Court of Appeal
The Law Courts
P.O. Box 9248 STN PROV GOVT
850 Burdett Ave Victoria BC V8W 1B4

B.C. Court of Appeal
223 – 455 Columbia Street
Kamloops BC V2C 6K4

Inquiries should be addressed to:

Tel: (604) 660 2468

Fax filings: (604) 660-1951