

CITATION: Hoang v. Vicentini, 2012 ONSC 6644
COURT FILE NO.: 06-CV-315832PD3
DATE: 20130125

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Christopher Hoang and Danielle Hoang, both minors by their Litigation Guardian, San Trieu, and San Trieu, personally, Plaintiffs

AND

Adriano Vicentini, Ford Credit Canada Leasing Company and Can Hoang, Defendants

BEFORE: Madam Justice Darla A. Wilson

COUNSEL: *L. Craig Brown and R. Ben*, Counsel for the Plaintiffs

Joshua Henderson, Counsel for the Defendant Vicentini

Bruce Mitchell, Counsel for the Defendant Ford Credit

Todd J. McCarthy, Counsel for the Defendant Hoang

HEARD: 10 July 2012

ENDORSEMENT

[1] The moving party, the Defendant Hoang [“Hoang”], brings a motion pursuant to rule 59.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for an order amending or varying the Judgment dated March 9, 2012 entered in accordance with the Jury’s verdict. Counsel relies on section 267.8 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

[2] Hoang seeks various amendments: an order reducing the *Family Law Act*, R.S.O. 1990, c. F.3, awards for the Plaintiffs Danielle Hoang and San Trieu, by a deductible of \$15,000 each; an order reducing the damages for Christopher Hoang for future health care expenses and other pecuniary losses due to the payments available pursuant to the *Statutory Accident Benefits Schedule — Accidents On or After November 1, 1996*, O. Reg. 403/96 [“SABS”], or, in the alternative, an order assigning to the Defendant Hoang all payments to which the Plaintiff Christopher Hoang is entitled after the trial for health care, medical, rehabilitation and other expenses.

Background

[3] This action is a claim for damages sustained by the infant Plaintiff [“Christopher”] as a result of a motor vehicle accident that occurred August 6, 2004 when Christopher was six years

of age and was crossing the street with other children. His father had let him off at the intersection while he went to park the car. As the infant was crossing the street, his hat blew off and he ran to retrieve it. At the same time, the vehicle being driven by the Defendant Vicentini was travelling along Queen's Quay and struck the infant, resulting in personal injuries for which damages were claimed in this action.

[4] The trial commenced with a jury and lasted approximately seven weeks. The jury returned its verdict March 9, 2012, finding the Defendant Hoang liable. The verdict assessed the general damages claim of Christopher at \$150,000 and awarded the Plaintiff Danielle Hoang \$10,000 for her claim pursuant to the *Family Law Act* and the mother, San Trieu, the sum of \$35,000 for her claim. The jury assessed the claim of Christopher for future medical treatment, rehabilitation, attendant care, housekeeping and home maintenance at \$684,228.22.

[5] A motion was brought for judgment in accordance with the jury verdict. This was opposed by Mr. McCarthy. I endorsed judgment in accordance with the verdict of the jury. I understand an appeal has been served and filed by the Plaintiffs, as well as cross-appeals.

[6] Mr. McCarthy requested the opportunity to make submissions on the need for an amended judgment. Counsel therefore submitted their briefs and I heard argument, reserving my decision in order to deliver written reasons.

Positions of the Parties

Defendant Hoang

[7] Mr. McCarthy argues that pursuant to rule 59.06, the Court has a broad discretion to amend the Judgment to deal with matters not adjudicated upon. He submits that the awards to the *Family Law Act* claimants must be reduced by the statutory deductibles of \$15,000, pursuant to section 267.5(7) of the *Insurance Act*. This is not opposed by the solicitor for the Plaintiffs.

[8] Counsel for Hoang also submits that the award for Christopher's general damages must be paid into court pursuant to rule 7.09(1) of the *Rules of Civil Procedure*, although this relief is not sought in the notice of motion. He argues that the award for pecuniary losses into the future must be ordered by way of structured judgment.

[9] Finally, Mr. McCarthy asks for an order reducing the damages to which Christopher is entitled for expenses that will be incurred for health care and other pecuniary losses due to the payments that were and are available from SABS for these expenses. Reliance is placed on the affidavit of Harry Movios sworn May 14, 2002 and the affidavit of Ralph Fenik sworn June 25, 2012 as well as section 267.8(4) and (6) of the *Insurance Act*.

[10] In the alternative, an order is requested assigning to the Defendant Hoang all payments to which Christopher is entitled after the trial for SABS for health care and other losses. With respect to this ground of relief, the Defendant Hoang relies on sections 267.8(9) and (12) of the *Insurance Act*.

[11] Section 267.8(9) of the *Insurance Act* states that a Plaintiff who recovers damages for expenses for health care or other pecuniary loss shall hold certain amounts **in trust**: all payments received after the trial for SABS for health care; and all payments received after the trial for SABS for pecuniary losses. Section 267.8(12) of the *Insurance Act* states that if a Plaintiff recovers damages in an action, they may be required to **assign** to the Defendant or the Defendant insurer all rights in respect of all payments to which the Plaintiff who recovered damages is entitled for SABS for health care or other pecuniary losses.

[12] It is submitted that Christopher has been designated catastrophic, thus it is clear that under the SABS, more than the amount awarded by the jury in the tort action will be paid to Christopher over the next 10 to 15 years for future medical and rehabilitation expenses, treatment, attendant care and housekeeping and home maintenance services. It is submitted that the infant must hold any monies received for SABS in trust for the Defendant's insurer. It is noted that Hoang's insurer is entitled to an assignment for whatever is paid to the infant for care costs to the extent that Christopher receives or is entitled to receive anything from the SABS insurer. It is submitted that if it is clear that the SABS available to the infant will exceed the amount awarded by the jury for future care costs, then the Defendant Hoang ought to be entitled to deduct the full amount of the care costs awarded at trial.

[13] The Defendants Vicentini and Ford support the motion of the Defendant Hoang.

The Plaintiffs

[14] Mr. Brown concedes that the awards pursuant to the *Family Law Act* must have the statutory deductibles applied.

[15] On the issue of the payment into court of the funds for the damages, Mr. Brown submits that presently, there is no insurer to pay the judgment awarded against Hoang so there are no funds to be paid into court. Mr. Brown argues that this issue must be deferred until the coverage issue has been determined and it will be known if there is an insurance policy to respond to the judgment. It is clear that the Defendant Hoang does not have the means to pay the judgment.

[16] With respect to the argument concerning the deduction of future benefits, counsel argued that the court must be satisfied that it is beyond dispute that Christopher will qualify for future benefits in every respect. With the history of payment of benefits and the disputes encountered as set out in the MacDonald affidavit, it is obvious that there is no guarantee that benefits will continue to be paid into the future. The history of payment of accident benefits to Christopher, it is submitted, is not that of acquiescence, but rather of dispute and denial.

[17] At trial, it was the position of the Defendant that Christopher would not require attendant care after he completed high school. In the affidavit of Harry Movios relied on by the moving party, it sets out what is available to Christopher in benefits as a result of his catastrophic designation, but he does not say that the insurer will undertake to continue to pay the benefits without dispute into the future. Thus, there is no certainty that Christopher will continue to receive a stream of future accident benefits. Further, there is no specific number for future benefits that could be used as a deduction.

[18] The provisions in the legislation are to ensure there isn't double recovery. Mr. Brown noted that in this case, coverage has not been determined and the evidence before the Court is that Hoang's insurer has refused to indemnify him for the judgment. The provisions that a Plaintiff must hold monies received in trust from a tort judgment for accident benefit expenses assumes that the injured person has the funds to purchase the services and thus, ought to be obliged to reimburse the accident benefit insurer. In this case, it is unclear if the judgment will ever be paid and in the absence of the receipt of monies pursuant to a judgment, there can be no double recovery.

Analysis

Deductibles on the Family Law Act claims

[19] It is not disputed that the claim of San Trieu pursuant to the *Family Law Act*, net of the statutory deductible, is \$20,000 and that of Danielle is nil. The judgment shall be amended to read accordingly.

Payment into Court

[20] Rule 7.09(1) of the *Rules of Civil Procedure* states that "[a]ny money payable to a person under disability under an order or a settlement shall be paid into court, unless a judge orders otherwise."

[21] While it is the general practice for monies to be paid into court on behalf of a minor such as Christopher, under this rule, the Court has discretion not to order the payment in if it is not in the best interests of the infant in all of the circumstances.

[22] Section 6 of O. Reg. 461/96 to the *Insurance Act* deals with structured judgments and reads as follows:

6.(1) The court shall order that an award for damages for pecuniary loss be paid periodically under section 267.10 of the Act if two or more of the following circumstances exist:

1. The award, including prejudgment interest but excluding costs, is for \$100,000 or more.
2. On the date of the order, the plaintiff is less than 18 years of age.
3. The court is satisfied that the plaintiff has no other means to fund his or her future care.
4. The court is satisfied that the plaintiff is not likely to manage the award in a prudent manner.

(2) Subsection (1) does not apply if the court is satisfied that,

(a) sufficient funds to pay the award periodically are not available under a motor vehicle liability policy; or

(b) an order to pay the award periodically would have the effect of preventing the plaintiff or another person from obtaining full recovery of a claim arising out of the incident.

[23] Given the evidence concerning the inability of the Defendant Hoang to pay the judgment, I am of the view that the motion to order payment into court and a structure is premature. It may be the case that once the insurance coverage issue has been determined and if there is an insurance policy to respond and pay the judgment, it would be in the best interests of Christopher to have a structure in place with periodic payments. I do not have evidence before me on this point and it seems to me it is moot unless there are funds to pay the judgment. While Mr. McCarthy submits that the coverage issue is not before me and that is correct, I cannot ignore the realities of the situation, and the position taken by the insurer. Subsection 6(2) specifically requires the Court to consider whether there is a motor vehicle policy to respond to an award, when determining whether an order ought to be made for periodic payments.

[24] On the evidence before me at this juncture, it is unclear whether there will be an insurance policy to respond to the judgment. Bearing in mind the affidavit evidence of the Defendant Hoang concerning his inability to pay the amount of the judgment, it cannot be said at this time that there are funds available to pay the judgment so the issue of whether the funds ought to be paid into court is not one that the Court needs to rule on at present. The motion for payment into court and imposition of a structure is premature and must be deferred until the coverage issue is determined.

Order reducing damages for future expenses

[25] The question giving rise to the motion before me is question 7 which reads as follows:

Regardless of your answer to questions 1-6, at what amount do you assess the damages sustained by the Plaintiffs as a result of the motor vehicle accident of August 6, 2004 under the following heads of damages:

(a) for Christopher Hoang's pain, suffering and loss of enjoyment of life? Answer: \$150,000

(f) for Christopher Hoang's future medical treatment, rehabilitation, attendant care and housekeeping and home maintenance services? Answer: \$684,228.22.

[26] The applicable provisions of the *Insurance Act* read as follows:

267.8(4) Collateral benefits; health care expenses—In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a

plaintiff is entitled for expenses that have been incurred or will be incurred for health care shall be reduced by the following amounts:

1. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of the expenses for health care.

...

267.8(6) Collateral benefits; other pecuniary loss—In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for pecuniary loss, other than the damages for income loss or loss of earning capacity and the damages for expenses that have been incurred or will be incurred for health care, shall be reduced by all payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of pecuniary loss, other than income loss, loss of earning capacity and expenses for health care.

...

267.8(9) Future collateral benefits—A plaintiff who recovers damages for ... expenses that ... will be incurred for health care, or other pecuniary loss in an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile shall hold the following amounts in trust:

...

4. All payments in respect of the incident that the plaintiff receives after the trial of the action for statutory accident benefits in respect of expenses for health care.

...

6. All payments in respect of the incident that the plaintiff receives after the trial of the action for statutory accident benefits in respect of pecuniary loss, other than income loss, loss of earning capacity and expenses for health care.

267.8(10) Payments from trust—A plaintiff who holds money in trust under subsection (9) shall pay the money to the persons from whom damages were recovered in the action, in the proportions that those persons paid the damages.

...

267.8(12) Assignment of future collateral benefits—The court that heard and determined the action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of the automobile, on motion, may order that, subject to any conditions the court considers just,

(a) the plaintiff who recovered damages in the action assign to the defendants or the defendants’ insurers all rights in respect of all payments to which the plaintiff who recovered damages is entitled in respect of the incident after the trial of the action,

...

(iv) for statutory accident benefits in respect of expenses for health care,

...

(vi) for statutory accident benefits in respect of pecuniary loss, other than income loss, loss of earning capacity and expenses for health care; ...

[27] In my opinion, the order sought by counsel for the Defendant Hoang cannot be made at the present time for several reasons. The case law is clear that a deduction from a Plaintiff’s damage award to prevent against double recovery will only be made if it is absolutely clear that the Plaintiff’s entitlement to the future accident benefits is certain and the Plaintiff received compensation for the same benefits in the tort judgment. The jury award was for future expenses only.

[28] In *Chrappa v. Ohm* (1998), 38 O.R. (3d) 651 (C.A.), the Court considered whether the present value of future disability benefits ought to be deducted from the damages award. Although this case was decided under different legislation, the analysis is helpful. The Court considered what is meant by the word “entitled” and stated, at p. 657,

Thus, in my view, the jurisprudence supports the view that where the concept of entitlement to future long-term insurance benefits is used as a basis for reducing the plaintiff[’]s damage recovery it must be strictly interpreted to require that it be beyond dispute that the plaintiff qualifies for these future payments in every respect.

The court was concerned that if the payment of future benefits was uncertain, it would be unfair to deduct them from a Plaintiff’s damages award as the Plaintiff would recover less than he or

she was entitled to. Clearly, persuasive evidence must be before the Court to demonstrate that it is patently clear the Plaintiff qualifies for the future benefits. It is not sufficient that there be a “likelihood” or “probability” that the future benefits will be received.

[29] The provisions in the legislation assume that the judgment will be paid and, therefore, that the Plaintiff will have the funds to purchase services that are necessary in the future. If the Plaintiff were then to receive SABS payments to cover the costs of the items, there would be double recovery, which is what the wording of the sections of the *Insurance Act* is intended to prevent.

[30] In the case at hand, the insurer of Hoang has taken an off coverage position and there is another action in which the issue of coverage will be determined. That issue was never before me in the tort action. The affidavit of Can Hoang filed on the motion deposes that the insurer has not agreed to indemnify him on the judgment and that he does not have sufficient funds to pay the judgment personally.

[31] On the facts presently before me, there is no certainty that the judgment will be paid so that it can be said Christopher will fully recover his damages. If the judgment is not paid, Christopher will need the funds from the SABS to purchase the various items he will need in the future. There will be no double recovery.

[32] Another difficulty with the argument advanced by the Defendant Hoang is that it is not clear from the jury answer what amount is to be deducted as the value of the accident benefits. They found that the sum of \$684,228.22 was to be awarded to Christopher for future expenses, but this was comprised of five different categories: medical treatment; rehabilitation; attendant care; housekeeping; and home maintenance. It is not clear what amount is to be allocated to the individual categories. The case law is clear that in order for a deduction to be made, the amount must be deducted from the same type of expense.

[33] Thus, Christopher was awarded future health care expenses. The provisions of the *Insurance Act* entitle the insurer to deduct what amounts will be paid for the same type of expenses, if the payment is beyond dispute. If so, there must be a specific amount that is to be deducted, which is not the evidence in the case at hand. The sections in the Act which deal with deductions for future benefits seem to me to envisage the situation where an injured Plaintiff has settled his entitlement to SABS on a full and final basis, so that the amounts of the settlement under the specific categories of benefit can be readily ascertained. That is not the case before me.

[34] Rather, the award of the jury for future expenses was in the nature of a lump sum award without any allocation towards what category of expense the monies related to. The jurisprudence is clear that SABS must be deducted from the “type of loss akin to that for which the no-fault benefits were intended to compensate. In other words, and employing the comparison of Morden J. in *Cox, supra*, if at all possible, apples should be deducted from apples, and oranges from oranges”: *Bannon v. McNeely* (1998), 38 O.R. (3d) 659 (C.A.), at p. 679, citing *Cox v. Carter* (1976), 13 O.R. (2d) 717 (H. Ct. J.).

[35] Further, as stated in *Moore v. Cote*, [2008] O.J. No. 3541 (S.C.), at para. 9, if the value of the accident benefits entitlement is uncertain, it is not beyond dispute as required for a deduction.

[36] The onus of proof to establish the entitlement to future payments of benefits rests with the Defendant. To put it another way, the Defendant bears the burden of establishing entitlement under s. 267.8 since they are the ones who want to benefit from the operation of s. 267.8. Further, per *Bannon*, at p. 673, “[t]he standard of proof for establishing entitlement to no-fault benefits under s. 267(1) is very strict.”

The court dealt with the onus on a defendant seeking a deduction of future benefits in *Cowles v. Balac* [2005] O.J. No. 229(S.C.J.) and noted, “The standard of proof a defendant is required to meet to establish entitlement to a no fault benefits is very strict. It must be shown to be beyond dispute that the plaintiff qualifies for those payments in every respect. A plaintiff to recover for loss of future income need only establish a substantial possibility of the future loss. A defendant seeking a deduction of future accident benefits bears a much heavier onus.”

[37] As counsel for the Plaintiffs submits, in awarding the infant damages for future treatment, the jury was persuaded there was a substantial possibility that as a result of his injuries, Christopher would require various services. However, the test the Defendant Hoang must meet to obtain an order that there be a deduction is much more stringent: it must be demonstrated beyond dispute that the future payments will be made; otherwise there is no deduction from the award. Furthermore, the test on an insured for payment of an expense is that it must be reasonable, necessary and as a result of the injuries from the accident.

[38] Although counsel for the Defendant Hoang submits that it is clear that the benefits will continue to be paid, I am not persuaded that is the case. The Movios affidavit sets out the amount of SABS that have been paid and it also confirms that there have been disputes in the benefits applied for, which were resolved through the arbitration process. In fact, the issue of the Bond Academy tuition for Christopher remained in dispute at the time of the swearing of the Movios affidavit. Further, there was another arbitration pending dealing with the issue of whether the monthly attendant care rate ought to be increased.

[39] Mr. Movios deposes in his affidavit that there is \$682,107.73 left on the medical and rehabilitation \$1 million limit and \$933,822.70 remains for attendant care benefits. Mr. Movios anticipates this will be exhausted in 15 years time, given current usage patterns.

[40] Despite Mr. McCarthy’s able argument, I am not persuaded the payment of future benefits is beyond dispute such that the very strict onus of proof has been met. While I agree that payments will be made in the future, it is impossible to determine at this stage the quantum of the payments and if there is a deduction to be made, what amount is to be deducted. The affidavit of David MacDonald filed on the motion sets out the history of the benefits submitted by the Plaintiffs and the denial or reduction of benefits from the insurer. The infant Plaintiff has been required to attend assessments. There has been at least one appeal by the insurer of an arbitration award dealing with medical/rehabilitation payments. I say this, not in a critical fashion of the

insurer, but rather to simply note that I do not agree that the future payments for benefits are beyond dispute.

[41] As noted by the Court of Appeal in *Chrappa*, at p. 658, the fact that a Plaintiff was receiving accident benefit payments at the time of trial “does not mean that there is the required entitlement to future disability payments.”

[42] While Mr. Movios, in his affidavit, indicates that the medical and rehabilitation benefits will be used up over the next 15 years if usage continues as it currently is, there is nothing in his affidavit that amounts to a guarantee that the payments will continue into the future.

[43] The Fenik affidavit is premised on the benefits being used in the future as they are at the present time. It does not and cannot calculate the numbers if the insurer refuses to pay for certain benefits.

[44] With respect to the alternative argument advanced by the Defendant Hoang, that Christopher be required to hold in trust future accident benefits payments he receives or assign to Hoang all rights to future accident benefits, the relevant provisions of the *Insurance Act* make it clear that a Plaintiff must have recovered payment for damages for health care and other pecuniary losses as a precondition to the application of sections 267.8(9) and (12). In other words, the Plaintiff must have recovered damages, which in practical terms means must have been paid the damages awarded at trial.

[45] Where, as on the evidence before me, the Plaintiff has not been paid, it would be premature to make an order of assignment of future benefits or that amounts be held in trust for the reasons I have set out previously in these reasons dealing with the issue of deduction of future benefits. Otherwise, requiring the infant plaintiff to hold in trust monies received for future accident benefits when the jury award had not been paid would result in the situation where there were no monies available to pay for such items as treatment, rehabilitation and housekeeping. This would be an unjust result in all of the circumstances.

I am mindful of the fact that the ability of the Court to order a trust or assignment is discretionary and is intended to enable the Court to avoid the situation where there is double recovery by a Plaintiff. In the same vein, the Court must ensure that where there has been an award made to a Plaintiff for various types of damages, the Plaintiff ought to be fully compensated and not deprived of funding because of the imposition of a trust or assignment.

Conclusion

[46] An order shall issue amending the judgment to read that the award to San Trieu for her claim is \$20,000 plus pre-judgment interest.

[47] The motion for an order amending or varying the judgment dated March 9, 2012 to order payment into court pursuant to Rule 7.09(1) is premature. It is dismissed without prejudice to the ability of the Defendant Hoang to bring the motion on for hearing after the determination of the issue of insurance coverage.

[48] The motion for an order amending or varying the judgment dated March 9, 2012 to reduce the damages for future health care expenses and other losses is dismissed without costs.

[49] I am indebted to counsel for their excellent advocacy and their patience in waiting for these written reasons.

D.A. Wilson J.

Date: January 25, 2013