Can An ICBC Tort Claim Be Worth Less For Not Going To The Doctor Regularly?

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Perhaps with the exception of the "failure to mitigate defence" the frequency of medical appointments attended by a plaintiff is not necessarily tied to the value of an ICBC tort claim. The value of a claim is largely tied to the severity of injuries and the impact of the injuries on a persons life. As a matter of common sense one would expect a Plaintiff with very severe injuries to receive more extensive medical intervention than a Plaintiff with relatively minor injuries. In this sense there may be an indirect connection between the value of a claim and the number of medical treatments. However, the number of doctor's visits does not in and of itself add value to an ICBC tort claim and reasons for judgement were released today exploring this area of the law.

In today's case (Brock v. King) the Plaintiff was involved in a 2006 T-Bone collision in Burnaby, BC. The Court found that the Plaintiff suffered various injuries and in awarding $50,000 for her pain and suffering summarized the injuries as follows:

I find that the plaintiff continues to suffer from back pain, neck pain and headaches. These injuries continue to interfere with her work and her daily activities. It appears that some further improvement may occur but that some level of ongoing chronic pain is probable.

The Defence Lawyer argued that the Plaintiff's injuries were not all that serious and in support of this conclusion drew the court's attention to the fact that "*there were large gaps in treatment and medical visits*".

Mr. Justice Punnett rejected this submission and in doing so summarized some of the principles courts consider in tort claims when reviewing the frequency and nature of post accident medical treatment. The key discussion was set out at paragraphs 58-65 which I set out below:

[58] The defendants place significant emphasis on the fact that the plaintiff had relatively little in the way of treatment, that there were no referrals to any specialists, that there was limited therapy, that there were large gaps in treatment and medical visits, little in the way of prescription medication and that there were no diagnostic examinations arranged by the family physicians.

[59] The defendants rely on Mak v. Eichel, 2008 BCSC 1102, and Vasilyev v. Fetigan, 2007 BCSC 1759, in support of their position on the issue of gaps in the plaintiff's reporting to her physician and the inference to be drawn. In Mak v. Eichel there appeared to be a gap in treatment with no evidence that the discomfort continued during that period and inVasilyev v. Fetigan there were credibility issues. As a result both cases are distinguishable.

[60] The plaintiff relies on Travis v. Kwon, 2009 BCSC 63, and Myers v. Leng, 2006 BCSC 1582. In both cases there were gaps in the plaintiffs' attendance on their physicians. InTravis v. Kwon, Mr. Justice Johnston states at paras. 74 and 77:

[74] ...Where a plaintiff gives credible evidence at trial, and is not significantly contradicted by entries in medical records or otherwise, the absence of a full documentary history of medical attendances it not that important.

*[77] In this case the plaintiff is generally credible, and I do not fault her for a commendable desire to avoid making a nuisance of herself by going to a doctor primarily in order to build a documentary records and thus avoid the risk of an adverse inference from failing to do so, or out of a misguided belief that by papering her medical files, she can prove her claim. A sensible plaintiff, having some knowledge of the medical system and its capabilities from her training, would be better advised to go to the doctor only when necessary, and thus avoid accusations that she is exaggerating, or suffering from what some authorities have referred to as "chronic benign pain syndrome": **Moon v. Zachary**, [1984] B.C.J. No. 241, 1984 CarswellBC 2000, at para. 100.*

[61] In Myers v. Leng Madam Justice Gropper stated at para. 50:

[50] I am not troubled by the gap in the plaintiff seeking treatment. His decision not to continue to see a doctor about his neck and back complaints was clearly based on a reasonable conclusion that the doctors could only provide temporary relief from the pain by prescribing medication and physiotherapy. The plaintiff did not consider either to be helpful. It is a sensible and practical approach to medical treatment. If continuous medical treatment can cure you, or make you feel better, then it is worthwhile to attend on a regular basis. If it cannot, there really is no point in taking the doctor's time. The purpose of a seeing a doctor is not to create a chronicle of complaints for the purpose of proving that you have ongoing pain from an injury arising from a motor-vehicle accident. Rather than detract from the accuracy of the plaintiff's complaint, I consider the plaintiff's course of conduct, in not seeing the doctor on a continuous basis, to enhance his evidence.

[62] Mrs. Brock testified that she is not sure if the physiotherapy helped that much and sometimes it increased her pain. Likewise she indicated that she did not like taking prescriptions and preferred to avoid medications other than Tylenol or Advil. She was told to exercise daily doing stretching and other exercises which she did.

[63] I accept that she was aware that her doctor really could not do much more for her than he had already done. Given that, it made sense not to keep raising her injuries with him on a regular basis or, indeed, each time she visited with him.

[64] The defendants also argued that the fact that Dr. Nakamara did not order further tests or investigations relating to the neck and back injuries while doing so for an earlier knee injury and a sprained thumb indicates that the neck and back injuries could not have been viewed by him as serious.

[65] The defendants did not call Dr. Nakamara for the purposes of cross examination on his report. They are asking that the court infer the medical reasons for the lack of a more extensive investigation of the plaintiff's injuries. That is a medical decision and not one for the court to make. It is likely more probable that he did not order more extensive investigations because in his opinion they were not required. He notes in his report that there was no structural damage. I decline to accept the defendants' submission on this point.