

 **Bennett V. Certas Home and Auto Insurance Co.**

Alberta Judgments

Alberta Court of Queen's Bench

Edmonton, Alberta

J.E. Topolniski J.

Heard: April 30, 2019.

Judgment: April 30, 2019.

Action No. 1803-317537

E-File No. EVQ19BENNETTJ

**[2019] A.J. No. 604**

Between Janine Bennett, Plaintiff, and Certas Home and Auto Insurance Company, Defendant

(25 paras.)

**Case Summary**

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**Insurance law — Payment of insurance proceeds — Advance payments — Application by the plaintiff Bennett for an advance under the Insurance Act allowed in part — Bennett was in a motor vehicle accident — There were conflicting medical opinions — Bennett was having financial difficulties but was still working — The Court concluded that \$75,000 was not an appropriate amount in the circumstances, but Bennett was granted an advance of \$25,000, with \$5000 paid up front.**

**Statutes, Regulations and Rules Cited:**

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Fair Practices Regulation,

Insurance Act, s. 581

**Counsel**

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J.A. Nagy, For J. Bennett.

R.K. Saroya (Student-at-Law), For J. Bennett.

S.E. Hart, For Certas Home and Auto Insurance Company.

L. Narula (Student-at-Law), For Certas Home and Auto Insurance Company.

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## Decision

### J.E. TOPOLNISKI J.

1 All right. Thank you very much. This is an application for what is, in common parlance, called an advance under the *Insurance Act*. So we have legislation and regulation, the *Fair Practices Regulation*, which permits the Court to give an advance on giving judgment in an action between an insured person and a claim -- or an insured and a claimant, if there are a couple of conditions met, and on conditions. It is all set out in the legislation and I do not read it to everybody, but clearly there has to be a link shown that as a result of the injuries of the claimant, the claimant cannot pay for the necessities of life, and the necessities of life, I think we need not spend much time debating what that means. Typically it is thought of as food, clothing and shelter. In cases where people need medications, I would not hesitate to include things like medications in those things, in that category. Pedicures and manicures, not so much. That's not a necessity, that's a luxury. And there are other types of expenses that are luxuries, not necessities. So that is part 1, claimant is unable to pay for necessities, or the Court says that the payment is otherwise appropriate. So those are really when you can look at granting these advances in litigation of this nature.

2 Ms. Bennet was in a motor vehicle accident - and this is all laid out in the briefs, I am not going to repeat all the facts - but short version, since August of 2013, there have been issues concerning the accident that occurred. Liability is not in dispute. By the insurance party represented here today. The question is really, is this an appropriate case to grant this type of relief in.

3 Ms. Bennett has been through numerous doctors, experts, testing and investigations and she's been seen by an occupational therapist, Ms. Wilson. There are differing views concerning Ms. Wilson's (sic) condition and her prospects, and the cause of her condition. I have been directed to statements in certain experts' reports to say this expert has overstepped his bounds, Dr. Reid in that case. This expert made a presumption that is unfounded, in that case Dr. Groves. Both parties say the experts are saying things that they should not be saying because the evidence or facts don't substantiate their position. And frankly, both of them have arguable positions on that. I am not saying today who is right and who is wrong, it is simply a matter of there are arguable positions advocated by both parties.

4 On the causation issue, the link has to be shown. I have put Ms. Hart's feet to the fire to say what is Ms. Bennet's worst case scenario because that is also the insurer's worst case scenario on an application of this nature. I have been pointed to cases with pre-existing conditions which is the issue in this case, are there pre-existing conditions that would somehow undermine that \$93,000 general damage claim and the subsequent future cost of care claims that Mr. Nagy points to on behalf of Ms. Bennett.

**5** And in the result -- this is not a trial. Everybody has to understand that. This is not a trial. And while it is clear that the proof on an application of this nature does not have to be trial worthy, if we call it that, it has to be something more than a suspicion. It has to be something more akin to a reasonable likelihood. It may not have to be proven on a balance of probabilities, which is the trial proof, but it's got to be something more. And in this case, I am not satisfied that the something more is there, given the conflicting medical opinions, to warrant the type of award sought by Ms. Bennett today.

**6** Insofar as the necessities of life, I have mentioned that briefly. I appreciate that Ms. Bennett is having financial difficulties - some of it was there before the accident, some of it would have been there after the accident in any event - but she's struggling. Nevertheless, she's still working and the shortfall in her monthly income pared down is I am sure hard for her, but nevertheless, it is not I think at the level that has been suggested in the materials because that includes items which frankly I -- I think are not necessarily appropriate.

**7** I also had a good deal of argument today about what is Ms. Bennett's responsibility if she comes to the court looking for money as an advance, to move her case forward quickly, speedily, using her best efforts, and to ensure that everything is done to get the case resolved. Ms. Hart is perfectly right, the foundational rules accord with the practice, a procedure, speak to the need for us to move cases forward quickly. Mr. Nagy says well come on now, in fairness this isn't a really long time and - it's four years from the time of filing - and it takes time to get experts' reports, and I -- I appreciate that we are operating in a system where that may be the reality. I don't think it is what we should be targeting by any stretch and it may be that there will come a time that we hear directives like those in *Jordan* coming for civil cases. It may not be that far away.

**8** I am not penalizing in any way Ms. Bennett for the four years that this has taken to where she is today. What I am saying is I am deeply troubled, and -- and I -- I am deeply troubled by the fact that seven months went by while this case sat waiting to come to special chambers and nothing was done to exchange tax information. I don't buy that you can get a group discount, or that there is -- it is excusable to not file your returns so that you can get a bulk discount on -- on accountant's fees. I -- I simply do not accept that. Plaintiffs have an obligation to get information to the defence in a reasonable fashion, and sitting on tax returns for four and five years is not a reasonable fashion.

**9** All of that has to be disclosed or the case will just stall out. It will not go anywhere. There are cost of care claims, there are general damage claims, there are future loss of income claims.

**10** All of that is impacted by what can be disclosed in the tax returns. That will drive questioning. That may drive reports. And it may drive the trial decision, if in fact this case goes to a trial. And so I simply do not accept that the failure to deliver those tax returns, either prior to the booking of this special chambers hearing or after, is out of the control of the plaintiff, and not the fault of the plaintiff. I reject that argument in its entirety.

**11** So, the end result, I do think it is appropriate to grant some form of an advance today on the

evidence before me, mindful that it is the evidence before me and mindful that the tax returns are not an excusable issue. I do not find that \$75,000 is appropriate in this circumstance. I do find that \$25,000 is a more appropriate figure and that it will be paid \$5,000 in a lump up front. That is going to help clear off some urgent collectors knocking at the door bills, and ensure that the utilities are on and there's food on the table. The balance will be paid at \$1000 a month over the next 20 months.

**12** There are conditions. Obviously an undertaking for damages to repay. More importantly, that if the case is not set for a JDR or some form of alternate dispute resolution, or trial, 12 months from now, the payments are suspended. It gives everybody a year to get their ducks in a row. Any other conditions that the parties would think would be reasonable?

**13** MR. NAGY: Not off the top of head, My Lady, other than the time for the first payment, which I am going to suggest is -- normal turnover of two weeks from today's hearing.

**14** MS. HART: I do have to get a cheque out of Ontario, My Lady, if we could say three weeks, that would give me just the extra time.

**15** THE COURT: Thirty days.

**16** MS. HART: Thirty days is fine.

**17** THE COURT: Your friend will do it faster, if she can.

**18** MS. HART: Of course.

**19** THE COURT: All right. I take it, Mr. Nagy, your application, you will prepare the form of order. Are there any other applications that the parties wish me to entertain before we adjourn?

### **Submissions by Ms. Hart (Costs)**

**20** MS. HART: My Lady, my only question would be costs and whether there should be costs. Mr. Nagy did get an advance but he didn't get the amount, or whether are just a wash between the parties.

**21** THE COURT: Mr. Nagy.

### **Submissions by Mr. Nagy (Costs)**

**22** MR. NAGY: It is an application for section 581 advance. There is -- we have gotten the section 581 advance. We have been successful in getting that section 581 advance. Costs are payable to the plaintiff for being successful in the action.

### **Ruling (Costs)**

**23** THE COURT: Thanks very much. In my view, there should be no costs on this application.

The offer that was put forward was for less than what I awarded in the long run, but certainly not as great a discrepancy as what the plaintiff was seeking. I think that's the best way I can put it. So no costs, everyone bears their own.

**24 MS. HART:** Thank you, My Lady.

**25 THE COURT:** All right. Thanks very much. We are adjourned.