

CANADA / JUDGMENT

A.J.L. v. J.C.

2023 BCSC 664

COURT

Supreme Court of British Columbia

DECIDED

26 April 2023

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2023 BCSC 664 A.J.L. v. J.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.J.L. v. J.C.,

2023 BCSC 664

Date: 20230426

Docket: E92794

Registry: Nanaimo

Between:

A.J.L.

Claimant

And

J.C.

Respondent

Corrected Judgment: The text of this judgment was corrected at paras. 34,177, 202 and 236 on May 2, 2023.

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Claimant:

B. Vining

Counsel for the Respondent:

S. McPhee, K.C.

B. Gemmell

Place and Dates of Trial:

Nanaimo, B.C.

September 12-16, 20-23, 26 and 29

October 3-7, December 8, 2022 and

January 3-6, 9-10 and 12-13, 2023

Place and Date of Judgment:

Nanaimo, B.C.

April 26, 2023

- [1] The claimant, A.J.L. alleges that she and the respondent, J.C., were in a spousal relationship from February 2012 until April 2020, thereby engaging the provisions of the Family Law Act, S.B.C. 2011, c. 25 [FLA], and entitling her to both spousal support and a division of family property.
- [2] Alternatively, if the relationship is not determined to be spousal, the claimant alleges the respondent was unjustly enriched at her expense entitling her to a monetary remedy similar in value to one-half of the accretion to what would have been family property were she a spouse. In short, the proposed 'property' remedy is no different whether via the legislative scheme or in equity.
- [3] Additionally, the claimant seeks damages as a result of an alleged assault upon her by the respondent on April 27, 2020. She asserts he struck her across the face and hands with a fish 'bonker' resulting in facial bruising and scarring of the hands. She asserts she was unable to work for approximately a year following the assault.
- [4] The respondent denies the parties were spouses or that he was unjustly enriched by virtue of work performed by the claimant on his behalf. He argues he provided the claimant with both money and monies worth that far exceeded the value of any unpaid work she provided. Lastly, he denies that he assaulted the claimant.
- [5] The trial of this matter occupied 27 days; much of which was devoted to laboriously reviewing electronic data downloaded from the claimant's phone so as to detail the parties' interactions on an almost daily basis.

- [6] At the close of the claimant's case, the respondent sought dismissal of the action asserting there was no evidence on which the trier of fact could find for the claimant in respect of any of the three claims. In reasons indexed at A.J.L. v. J.C. (19 December 2022), Nanaimo E92794 (B.C.S.C.), noting the different evidentiary burden in such applications, I dismissed the application finding there was some evidence in support of a spousal relationship.
- [7] A defence was called and the respondent and others testified as to the nature of his relationship with the claimant.

Background

Chronology of the Relationship

- [8] The parties never married. The claimant is currently 57. The respondent is currently 67.
- [9] Each of the parties had been married and/or in a spousal like relationship prior to their chance encounter in February 2012 in an art shop at or near Nanaimo, British Columbia. Both have adult children from their prior relationship(s).
- [10] The respondent was and remains the owner/operator of a high-end custom home building company and, through a holding company, owns the building from which the business operates. He has successfully operated the business for many years.
- [11] The claimant had various occupations prior to meeting the respondent but, at the time of their initial encounter, was unemployed having recently moved from Alberta. She was staying with her daughter in Victoria. The claimant was seeking both employment and accommodation on Vancouver Island.
- [12] During the eight-year period of the parties' relationship, the claimant worked as a reservations clerk at a resort and as a labourer for the respondent's construction enterprise. Currently, she works as a flag person.
- [13] The chance meeting led to an instant spark between them. The respondent was residing in his home on Dorcas Point on Nanoose Bay ("Dorcas Point"). He was separated from and engaged in divorce proceedings with his second wife, with whom he was sharing custody of their three children.
- [14] Both parties testified they felt an instant connection. They had intimate relations the day they met and, for the most part, the claimant moved into the respondent's Dorcas Point residence and resided there until approximately July 2012; a period of some five months during which time she sold her condominium in Alberta, moved her personal possessions to Vancouver Island and began looking for a property on Vancouver Island.

- [15] During those first five months the flame between them burned brightly. Their relationship was uninterrupted by separations or disputes. The respondent invited the claimant to accompany him on a European cruise vacation to meet his sister and brother-in-law who resided in England.
- [16] Until the holiday, their relationship was blissful and harmonious. Each of the parties referred to it fondly in subsequent, less harmonious times.
- [17] While on the cruise, some upset occurred. The origins of the dispute are unimportant although each blames the other. By the time they returned to Vancouver Island, upset had extended beyond the mere exchange of words, and the claimant moved out of the Dorcas Point residence and moved in with her realtor for approximately 4-5 days.
- [18] Sometime later in July, she bought a condominium on McVickers Street in Parksville ("McVickers") and moved her furnishings from the respondent's business premises to the condo. There they remained until the condo's sale after the commencement of these proceedings. Throughout the eight years the parties were in a relationship, the condo remained fully furnished and the claimant maintained the bulk, if not the entirety, of her wardrobe there.
- [19] The claimant referred to McVickers as the "city" and Dorcas Point as the "country" throughout her evidence and, initially, gave the impression the parties shared their time between the two residences living together save for periods where they fought and retreated to their own separate residence.
- [20] The parties never owned anything together. Not real estate; not bank accounts nor investments nor chattels. They discussed the sale of McVickers and the purchase of a lot on which to build a residence. McVickers was listed for sale but never sold. Dorcas Point was never listed for sale. The parties looked at several potential building lots but no offer was ever made.
- [21] The parties are at odds as to how much time each spent at the other's residence. After the proceedings were commenced, the respondent produced a calendar depicting, in his view, the number of overnight visits by the claimant to Dorcas Point. They mostly consisted of weekends and trips the parties took. When his son, J. was there, he said the respondent did not attend. He prepared the document from memory and, through counsel, invited the claimant to reciprocate.
- [22] Upon receipt of the calendar, the claimant downloaded whatever electronic data she could from her phone(s) to demonstrate though pictures, then later in the relationship, text messaging and email, the extent of their interaction over the eight-year period. That information occupied approximately 30 volumes of exhibits in the claimant's attempt to reconstruct the day to day whereabouts of each of them during those eight years.

- [23] Meaning no disrespect to either of the parties, it is clear even with the aid of the documents and messaging between them, there was some subjective interpretation of how the messages were to be construed in terms of their divergent positions on whether they ever 'lived together in a marriage-like relationship'. A photograph of the claimant with a dog at or near the respondent's Dorcas Point property hardly informs the issue of whether they were spouses.
- [24] Neither party, in my view, had an independent recollection of the mundane day to day events going back over the years and the downloads, or some of them, provided a useful roadmap of recorded texts and pictures that demonstrated the claimant spent more overnights at Dorcas Point than was recalled by the respondent.
- [25] The recorded information makes equally clear that the respondent was an infrequent visitor to McVickers. He did not have or want a key to the respondent's residence some 20 minutes or so away from his home. Nor, he says did she have a key to Dorcas Point. She testified otherwise.
- [26] At the conclusion of the evidence, the respondent, through counsel presented a revised calendar indicating what the respondent acknowledged to be the occasions on which the claimant stayed over at Dorcas Point or they were otherwise together while on a trip or at McVickers. The evidence demonstrated the parties travelled together to Whistler, Tofino and Vancouver and stayed overnight at hotels or rentals.
- [27] The claimant offered up in final submissions a calendar advancing the claimant's position on nights spent together and where.
- [28] Neither document is evidence but rather an assertion by counsel of their view of the totality of the evidence as to the frequency of the parties' contact and the location where contact occurred.
- [29] The respondent suggests the evidence clearly demonstrates the parties spent more time alone in their own homes than together at one or the other of their separate residences; particularly as time passed and their disputes became more frequent and periods where they did not have physical contact with one another grew.
- [30] The claimant argues otherwise.
- [31] It is a point of disagreement as to whether the claimant had a key to Dorcas Point but, given the doors were seldom locked, the matter of whether she had a key or not is somewhat moot. She concedes, and the text messages make clear, she came to the property only upon an invitation from the respondent or after seeking his permission. Neither attended the residence of the other uninvited. On occasion, during one of the frequent disruptions in their relationship, the respondent instructed either his gardener or dog walker that the claimant was unwelcome on the premises.

- [32] Despite her evidence that he had provided her with a key, she did not suggest she returned it upon the final break up. Only at the conclusion of her evidence was a set of keys said to access Dorcas Point provided to respondent's counsel.
- [33] When asked by police following the alleged assault whether she had a key to Dorcas Point, she replied: "He doesn't lock his place up".
- [34] Following presentation of the keys, Mr. McPhee attended Dorcas Point and attempted to use the keys provided to gain access through the exterior doors and videoed the attempts. Mr. Vining was invited to attend but chose not to.
- [35] The proffered keys did not open any of the doors at Dorcas Point. The claimant argued the locks had been changed after April of 2020.
- [36] Throughout the whole of the eight years of their romantic involvement, whether continuous as urged by the claimant, or sporadic as urged by the respondent, each received mail at their separate residence and filed income tax returns giving as their residence their respective home address. Neither referred to the other as a common law partner in any of the filed returns. Nor was there evidence they presented in public as 'man and wife'.
- [37] They had no joint accounts nor did either provide for the other in any testamentary or insurance document.
- [38] Throughout their eight-year relationship, save for periods when they had fought and 'separated', the claimant was, no doubt, a frequent attendee at Dorcas Point. She would sometimes come out from Parksville to walk one of the various dogs either owned by one of them or the claimant's daughter's dog. Sometimes she would come for dinner. The respondent cooked; the claimant cleaned.
- [39] On some of those occasions she stayed overnight; on some she had dinner with the respondent and then returned to McVickers. I note the claimant often referred to McVickers as "home" or "the city" but generally referred to the respondent's residence as either 'the country' or Dorcas Point. In some exchanges by text when he asked her where she was, she replied "my place", referring to McVickers.
- [40] The parties were sexually intimate throughout their relationship including the morning of April 27, 2020, the day they ended their romantic involvement.
- [41] For reasons unimportant to the result, the claimant did not stay at Dorcas Point with any frequency when the respondent's son, "J". was present. J. has some disabilities which impaired his function. He was occasionally employed by the respondent's company and, when so employed, stayed at Dorcas Point. J.'s mother lived in Victoria. The respondent had joint custody of J. and his brother, B.

- [42] While I have only the respondent's originally submitted calendar setting out the dates of J.'s attendance at Dorcas Point, the evidence demonstrates that there were lengthy and continuous periods when J. lived with the respondent and worked for him.
- [43] The claimant maintained a few possessions at Dorcas Point; gardening pots mainly. When she stayed overnight, as she often did, she brought an overnight bag with clothes and toiletries. The respondent's housekeeper testified, and I accept, that when she cleaned the house, generally monthly or on demand, there was little evidence of the claimant living there. There were no women's clothing in the closets or other items to indicate her residency there.
- [44] The claimant was unaware of the respondent's creation of a family trust during their relationship. She was not named a beneficiary.
- [45] It's clear from the claimant's finances that maintaining McVickers was a financial challenge for her. The respondent often advanced her funds either personally or on company cheques to assist her with her day to day living expenses.
- [46] On two occasions the respondent endorsed sizeable cheques payable to the business over to the claimant. The claimant freely and frequently made clear her financial need and the respondent, even when the parties were bickering, generally assisted her financially. When she had a surgical procedure and was unable to work, he paid the mortgage on McVickers.
- [47] Despite the financial stress it caused, the claimant steadfastly maintained McVickers. Even when the realtor engaged to sell McVickers suggested the absence of offers was in part due to the 'cluttered' look because all her possessions were there, her personal items remained at McVickers.
- [48] The claimant offered two reasons for the parties maintaining two separate residences: (1) the claimant feared her possessions would be damaged because of a rodent infestation at Dorcas Point, so she kept them at McVickers; (2) the parties' relationship was "complicated". While never expressly stated, I take that to mean the frequent conflicts that seemed to impact their relationship increased over time. As well, the respondent suffered from sleep apnea. If he didn't use a CPAP machine, he snored loudly interfering with the claimant's rest.
- [49] The relationship between the two was increasingly tumultuous with the passage of time. Throughout their eight-year romantic association there were numerous separations following heated arguments. Each blamed the other for the bad behaviour that led to the separations.

- [50] On occasion, the arguments turned physical. The claimant acknowledged she assaulted the respondent on three separate occasions, the most recent assault was in April 2020 following the respondent's acknowledgement of infidelity. The respondent acknowledged on one occasion, following the claimant throwing some memorabilia into a burning fireplace, shoving her out the door of Dorcas Point. He denies the alleged assault which is the subject of the litigation.
- [51] The claimant also testified as to an occasion in April 2020 of non-consensual sex, which I will describe later on in these reasons.
- [52] The respondent characterized the separations and reconciliations as a series of separate timelines; none reaching, let alone exceeding, two continuous years.
- [53] The first period of estrangement in July 2012 was brief; perhaps 4-5 days before they reconciled and resumed their intimate relationship. Increasingly, as time past, the separations became more frequent and lasted longer.
- [54] For reasons, I shall come to, I disagree each 'spat' was the end of the relationship and each reconciliation was the commencement of a new relationship for the purpose of 'counting time'.
- [55] At the same time, for reasons that I shall come to, it is difficult to understand the complaint's evidence that the parties were living together continuously for any period save the first five months of their relationship. Once the claimant acquired McVickers, she maintained it as her residence even when the economics of maintaining it required her to seek financial assistance from the respondent.
- [56] The claimant characterized the two properties as the "city residence" and the country" as if each was a habitual common residence of the two of them. That implied assertion is not borne out by the evidence of their treatment of their respective residences and the time spent together at one or the other of them.
- [57] The claimant conceded that the respondent never had unfettered access to her condo; specifically, a key. She told Constable Banks he didn't even want one. She also agreed he was subject to 'rules' at her residence; he had to use the guest shower and he could not eat in the living room. There are examples in the text messages of the respondent asking her to leave the door unlocked if she was unavailable to open it upon his arrival. He occasionally dropped off coffee at her door and texted her that it was there for her rather than bring it in to her.
- [58] The text messages that provides the most illumination as to where each of the parties was at any given time, do not begin until September of 2015. The claimant was able to access photos from the commencement of the relationship in 2012 but not texts.

- [59] Through almost 14 days of evidence, the claimant referred to photos, greeting cards, texts (some amorous, some vitriolic), email, bills and other stored documents to chronicle the time the parties were together and the status of their relationship as evidenced by the tone and frequency of text exchanges.
- [60] The text exchanges, at times, reflect a happy, romantic relationship that looked forward to a lifetime together. Occasionally, in a text written by the respondent he would offer up statement such as "I will take care of you"; "I would have married you" and, numerous other indications of the depth of his love for her. The claimant responded in like fashion.
- [61] In many instances, the timing of a text exchange provides satisfactory evidence of the parties' locations. The respondent conceded, after he was provided with the downloads, that the claimant was with him more than was reflected on his original calendar.
- [62] The text history also demonstrates the increasing dysfunction in the parties' relationship. Despite the many blissful moments over the course of the parties' eight-year relationship, there were, increasingly, many unhappy times.
- [63] Fights erupted resulting in separations of varying length; some as long four months. The parties would engage in lengthy wars of words as to whose fault the upset was and express regret over the loss of their relationship.
- [64] Increasingly, over the eight-year span of their relationship, the fights and separations became more prominent. Often, they were provoked by minor incidents magnified by the aggrieved party into something much weightier. In many of the text exchanges, one or both would say "I'm done", "have a good life", or words to that effect. The respondent says these exchanges terminated the relationship and when they reconciled, as they did each time until April 2020, that was the beginning of a new relationship.
- [65] The claimant agreed each used 'break-up' language in their exchanges. Despite that, until April of 2020, they always reconciled and their intimate relationship resumed.
- [66] Chronicling each and every break-up and determining, assuming I could, where the fault lay for same is unhelpful in determining the issues in this lawsuit.
- [67] One of the early frictions in the parties' relationship was the pace of the respondent's divorce from his second wife, A. Steps were proceeding slowly for reasons which are not clear. The respondent and his wife separated in 2010. Proceedings and legal involvement followed almost immediately and according to the respondent, all financial and custodial matters as between the two of them were settled reasonably quickly by way of an agreement.
- [68] Nonetheless, the respondent remained married to A. until approximately April 2016 when his divorce was finalized by court order. He left a copy of the divorce order in the claimant's vehicle as a surprise for her but didn't propose or offer her an engagement ring.

- [69] The respondent testified that he early on raised the subject of a prenuptial agreement with the claimant but that proposition was never put to the claimant when she testified in chief.
- [70] In her discussions post separation with police, the claimant acknowledged the respondent's cautious approach and told Constable Banks that stemmed from his divorces.
- [71] The respondent's marital status was a thorn in the side of the claimant. It came up on occasion and, according to the respondent, he offered the claimant access to his lawyer to discuss the matter and try to understand what delays were occurring. The claimant, I conclude, was resentful of the respondent's inability to marry her; a topic discussed often retrospectively in texts exchanged following a period of discontent.
- [72] At Christmas in 2015, the claimant had expectations of receiving an engagement ring, or told the respondent that her father had asked if she received one, and, when she did not, a squabble erupted and the parties had little or no face to face interaction from January 1 until January 17, 2016. On January 2, the respondent emailed the claimant:

Also, we agreed that I would get the Divorce Paper first then the ring. I never said I would not marry you.

- [73] Later, during another of their rifts in March 2017, the respondent texted:

If we don't start living together soon then I believe we both can't start living life also not feeling loved and enjoy everything life as (sic) to offer.

- [74] When asked about that in cross examination, a seeming invitation to commence living together and the implied suggestion that they had not been cohabiting up to March 2017, she replied, to the effect, she was not going "live, live together until we are married."
- [75] Early on in the relationship, they attended counselling together and each opened up about issues from their past; mostly failed relationships. The respondent testified he had issues with his upbringing; citing his mother's abusiveness, and that explained his willingness to return to what he described or perceived as an abusive relationship with the claimant.
- [76] The respondent accepted little, if any, responsibility for the parties' numerous separations. Instead he blamed the separations on the claimant behaviour which he testified manifested itself largely when she had consumed too much alcohol.
- [77] When events occurred that demonstrated, in the respondent's view, the claimant's poor behaviour, he threatened to and sometime actually shared those incidents with her family.
- [78] The claimant similarly painted the respondent as the person most responsible for the fractious relationship that spanned the eight plus years of their involvement with one another.
- [79] She referred to medications the respondent was taking and the warnings about use of them with alcohol. On two occasions she took video on her phone of the respondent ranting profanely about (1) the amount of alcohol she was consuming compared to him and

demanding she leave his house; and (2) what had become of missing cutlery. The video depicted dishware he had angrily thrown about the table. Neither paint a particularly attractive picture of their interactions while consuming alcohol. His behaviour was visibly inappropriate. The claimant instead of leaving as requested in the first instance, chose to stay and video record his actions.

- [80] By the fall of 2017 their relationship had deteriorated to the point the claimant consulted legal counsel as to her rights. The parties separated in late October 2017 after another fight. On December 6, 2017, the claimant's lawyer wrote the respondent asking for immediate commencement of spousal support and to commence discussions about property division.
- [81] The respondent replied through his then counsel on December 19 denying a spousal relationship noting "they dated for five years" but never lived together. The response suggested the claimant was indebted to the respondent and/or his business for a combined total in excess of \$38,000.
- [82] In early February 2018, the parties reconciled and there were no further exchanges between counsel. It does not appear the parties ever discussed their divergent positions on the nature of their relationship following the exchange of correspondence from their respective counsel.
- [83] However, the relationship continued to spiral downward. By May 2018, even by the claimant's account, she was spending far more time at McVickers than at Dorcas Point. While the parties remained in communication, the frequency of actual contact was reduced.
- [84] Further periods of physical separation occurred. From mid-May 2019 to early August, the claimant did not spend the night at Dorcas Point.
- [85] In late October 2019, the parties fought and separated from all face to face contact until March 2020. During this period, the original Notice of Family Claim was filed but not served.
- [86] During the longer separations of 2017/18 and 2019/20, the respondent re-kindled a relationship with G.D., the woman he now lives with. He did not tell the claimant he was seeing another woman or that he was intimate with her.
- [87] In November 2019, the claimant received anonymous letters cautioning her that the respondent was "two-timing" her. When she first confronted him with the accusation, he denied it.
- [88] Later, in early April 2020, he acknowledged the affair but told the claimant he had ended it with G.D. and that he loved the claimant.

- [89] On April 4, 2020 the claimant was at Dorcas Point. He was asleep upstairs and she had been texting her son who interpreted his mother's texts as expressing suicidal ideation. He, the claimant's son, requested a police wellness check and apparently provided the McVickers address to police; not Dorcas Point. Police attended and when they didn't locate her got the Dorcas Point address.
- [90] Upon attending Dorcas Point, they located the claimant. In the process, now late at night, the respondent was awakened. He testified the claimant was intoxicated and aggressive. The claimant denied specifics but the result was police eventually handcuffed her and took her to the detachment overnight. She was released in the morning. The booking report gives her address as McVickers.
- [91] The claimant presumed the respondent had initiated police contact and was angry with him.
- [92] The same day she was released from custody she received a second anonymous letter advising the respondent was cheating on her so she returned from McVickers to Dorcas Point to once again confront the respondent. He acknowledged the affair but said it was over and that he loved her.
- [93] She said they had sex that day but described the incident as non-consensual because she was bound to a chair and handcuffed. Later, after the sexual encounter, they argued over his admission that he had sex with G.D. The claimant acknowledges she was angry and assaulted him by slapping him and kicking him. When she returned home, sending text messages which threatened or suggested he had sexually assault her, stating "RAPE". She said her threat followed his threat to share details of her arrest after a wellness check in April 2020 with her family.

The Alleged Assault

- [94] Despite those events, by April 8, they were reconciled. From April 8 to 27, 2020, the claimant stayed overnight at Dorcas Point including the weekend of the April 25.
- [95] Both agree they had sexual relations the morning of April 27; the day of the alleged assault. April 27 marked the end of their relationship although the respondent continued to contact the claimant up to and perhaps after these proceedings were served in August 2020.
- [96] All came to a head on April 27, 2020 when the claimant alleges she was assaulted by the respondent at Dorcas Point. Following that event, the parties never resumed their intimate relationship.
- [97] The claimant testified that several weeks before the events of April 27, 2020, the respondent brandished a "fish bonker" that was in his garage. According to her, he said he has something for her and then tapped the fish bonker on his hand while eying her menacingly.
- [98] The respondent says he showed her the fish bonker as a joke stating that if she was ever going to "beat him again; use this".

- [99] She described the fish bonker as a number 7 pool ball attached to a 12 to 14-inch stick with metal rasps or cleats on it. The fish bonker, or what the respondent later identified as the fish bonker, was produced to the claimant during her cross examination. While it was a red number seven pool ball attached to a stick of the approximate length estimated by the claimant, there were no metal rasps or cleats. The claimant denied this was what she had been shown by the respondent in April 2020.
- [100] On April 27, the respondent, by pre-arrangement travelled to Victoria to celebrate his grandson's birthday, he returned to Dorcas Point in the early evening and according to the claimant's theory of the assault, he stealthily approached her from the side or back and struck her across the right side of her face with the fish bonker.
- [101] The claimant acknowledges she never saw the respondent before or as she was struck.
- [102] Much of the aftermath of the encounter between the respondent and the claimant and, later, the neighbours; R.W. and S.F., is captured on video taken by the parties. I agree the videoing, initially commenced by the respondent, is a curious reaction to his discovery of the claimant lying bleeding on the garage floor. Nonetheless, the respondent denies any involvement in the events resulting in the injury to the claimant.
- [103] Both spoke extensively to police after the incident. The respondent cooperated with the investigation into what was seen as a possible domestic assault and took a polygraph test when offered by RCMP.
- [104] No charges were laid.
- [105] In August 2020, these proceedings, amended from their original form, were served on the respondent. The date of separation was changed from the original pleadings from October 2019 to April 2020. The assault allegation was added.

The Nature of the Relationship Generally

- [106] Throughout the relationship, the claimant testified and the respondent acknowledged that from time to time the claimant would do chores for him of various sorts. Those included shopping, gardening, occasionally looking after his dog (at his request as opposed to having the claimant's and respondent's dogs walk or play together in the area surrounding the respondent's home).
- [107] The respondent testified, and the claimant acknowledged, that he provided her with money from time to time, the use of his credit card for her personal use, paid for repairs to her vehicle, vet bills and other of her expenses. He paid her mortgage following a surgery when she was unable to work.
- [108] Only the claimant testified as to the nature of her and the respondent's relationship. The other witness called by the claimant was a police officer who testified as to events surrounding the allegation of assault.

- [109] The entirety of the police investigatory file was put into evidence. By that I mean only that the police files containing the statements interested parties made to the police and records of hospital admission and ambulance transport were admitted as business records.
- [110] Those records, for reasons I shall come to, are illuminating in terms of the parties' self-perception of the nature of the relationship and its history.
- [111] Regardless of whether or not the parties were spouses, the claimant noted, without documenting the extent to which or the hourly rate one might expect for payment such services, an array of chores that she did that no doubt benefited the respondent. They ranged from working in his gardens, picking up items both work and non-work related, doing laundry at her own residence because of the poor water quality at Dorcas Point, dog minding and personal shopping.
- [112] Following separation, the claimant did not work for approximately one year. She trained as a flag person and, for the purpose of assessing her quantum of support, she accepts an imputed income of \$40,000 annually.
- [113] The respondent continues to operate his business, and it is submitted that for support purposes, his income is over \$350,000 annually.
- [114] Since the commencement of these proceedings, the claimant has sold McVickers. Most of the sale proceeds are in trust but are subject to a consent order allowing her to withdraw \$3,500 monthly.
- [115] For a period following the commencement of the action, the claimant, by consent, received support in the amount of \$2,500 monthly on a without prejudice basis and subject to repayment if her claim at trial was dismissed.
- [116] When the original trial date was adjourned, the Chambers Judge declined to extend the support payment.
- [117] There is no disagreement as to the value of family property after exclusions. The assets were all subject to joint valuations.
- [118] In the event a spousal relationship is determined, the respondent seeks an unequal division of the family property.

Collateral Witnesses

- [119] As can be seen from the case law described later, the observations of others, outside of the parties' relationship, can also inform the determination of the status of parties as spouses or something lesser. Similarly, the parties' own subjective perceptions are helpful, although obviously not determinative, of the nature of their relationship.

- [120] I have noted the unfiltered subjective thoughts of the claimant when discussing her interaction with Constable Banks. Her subjective assessment is little different than the respondent's testimony whose evidence as to the nature of the relationship was buttressed by a number of lay witnesses who had some experience with the parties as a "couple".
- [121] The respondents' neighbours, S.F and R.W., participated, to some extent, in the aftermath of the alleged assault. S.F. testified to another event in August 2018 when the claimant appeared at the neighbours' residence agitated and seemingly intoxicated.
- [122] Social involvement between the next-door neighbours and the claimant and respondent was occasional and generally for cocktails in the afternoon. They were not close as friends although S.F. sailed with both the respondent alone and the respondent and the claimant on occasion.
- [123] Another witness, K.M., met the respondent in 2012 after being involved with him professionally throughout the building of a home for her and her husband. In August 2018, she became the respondent's dog walker and walked his dog almost daily thereafter. On occasion, once socially with her husband, and during interactions throughout her functions as a dog walker or occasional friend of the respondent, she interacted with the claimant.
- [124] K.M. occasionally walked the respondent's dog together with the claimant and her dog (or her daughter's).
- [125] She testified that on occasions, the respondent told her that the claimant was not to be at his residence and that, on one occasion, she found the claimant there and reported her presence to the respondent.
- [126] She described the relationship between the respondent and the claimant, from her perspective, limited particularly before 2018, as on-again/off-again.
- [127] It was K.M. who, when walking with the respondent's dog, Darwin, in January 2020 saw him find and retrieve "a stick" to play with. She sent a picture of it to the respondent because of its uniqueness; a stick or piece of wood wrapped around a red number seven pool ball. The photo depicts the implement produced and exhibited during the trial; not the implement described by the claimant.
- [128] K.M. returned with it to Dorcas Point where she testified that J. told her it was a fish bonker.
- [129] Another witness, C.M. testified that she was employed by the respondent's construction company doing on-site cleanup work and then begin working for the respondent personally as a housekeeper at Dorcas Point after the respondent and his first wife separated. She met the respondent's second wife, A., as Dorcas Point was being built.

- [130] While the respondent was cohabiting with A., C.M. did an occasional deep clean of the house but did not attend regularly. She began regularly cleaning Dorcas Point once the respondent and A. separated. She would generally attend on a monthly basis and was generally there for a full day or more depending what needed to be done. She did not have a key to Dorcas Point as the doors were always unlocked, a point agreed to by the claimant.
- [131] She met the claimant at two separate Christmas parties held by the respondent's company.
- [132] She testified that when cleaning, the only belongings of the claimant she saw at Dorcas Point was, in the earlier days, some extra furniture in a back room that was waiting to be moved to the claimant's condo.
- [133] Other than that, she saw a bathrobe in the upstairs bathroom but nothing of the claimants in the closets or drawers when she cleaned them.
- [134] As to the "rodent infestation", she testified from 2012 to 2020 she saw one mouse in a trap and never saw any damage caused to the contents of Dorcas Point done by rodents.
- [135] The respondent's oldest son D.C., gave evidence of his relationship with his father and the relationship he had with the claimant. He spoke with his father regularly and visited when he could. For most of the time under consideration in these proceedings, he lived in the Lower Mainland and was not frequently present at Dorcas Point.
- [136] He stated his belief that the claimant resided at McVickers and that she did not keep any of her possessions at Dorcas Point. He said when she was in attendance and he was present she would bring an overnight bag containing, he believed, the possessions she would need for the period she would be there.
- [137] G.D., a friend of the respondent for 35 years, testified that she had a business relationship with the respondent as she was a realtor. They became friends and in 2011 had a casual romantic relationship for three or four months.
- [138] That relationship cooled but she would still see the respondent occasionally and would sail with him on some Wednesday nights. Over the period between 2012 and 2017, she said they had the occasional "hookup". That intensified in 2017 and they got back together for "a few months".
- [139] She acknowledges that the respondent got back together with the claimant in the early spring of 2018 but that she and the respondent then got together later in 2018, for the last few months of 2019, and early few months of 2020. She accompanied him to Whistler in February 2020, whereupon he told her that he was getting back together with the claimant.
- [140] D.W. was the respondent's gardener from 2012 to present. She met the claimant early in 2012. She took all of her instructions from the respondent and verified any instructions given by the claimant with the respondent.

- [141] She shopped occasionally for plants with the claimant. On one such instance she recalls speaking to the claimant about the parties' relationship and whether she, the claimant, was going to move in with the respondent. The claimant, according to D.W., responded she did not want to do that.
- [142] S.S. was the office manager for the respondent's company starting in early 2017. Within days of commencing work, she met the claimant who was introduced to S.S. as the respondent's girlfriend.
- [143] Because the claimant was working for the respondent's company, there were daily interactions with the claimant and S.S. and, when they were "broken up" she would for various reasons have text exchanges with the claimant.
- [144] Since 2017, S.S. attended Christmas parties of the respondent's company and does not recall seeing the claimant at any of them.
- [145] She did not socialize with the claimant and respondent save for one dinner with her husband and the parties at the Qualicum airport.
- [146] She never spoke specifically to the claimant about a relationship with the respondent but had text exchanges about their breakups and about the claimant being fired.
- [147] In 2019, during a period of separation of the parties, K.M. reported the claimant was at Dorcas Point. The respondent had told both K.M. and S.S. that the claimant was not to be in attendance. Later, after a text exchange, he apparently gave permission.
- [148] From S.S.'s observations of seeing the parties, she formed the view the parties were boyfriend/girlfriend in an unstable relationship.
- [149] S.S. knew that the respondent was seeing G.D romantically from time to time when the respondent and claimant had broken up.
- [150] Importantly, in my view, S.S. testified that when she began work she noticed that the claimant's address on her pay stubs had not been changed to McVickers from Dorcas Point. She verified the correct address, McVickers, with the claimant and made the change to the pay slips.
- [151] When asked to do the claimant's tax return for the years 2016 and 2017, she testified, as was her invariable practice when completing tax returns, she verified with the claimant her address and marital status, together with other necessary information.
- [152] Both on examination-in-chief and cross-examination, S.S. was resolute the claimant identified herself as being single living at McVickers. I accept her evidence as being in harmony with the totality of the evidence of the parties living arrangements as I have found them.

- [153] She testified that many of the payments made by the respondent on company cheques were credited to his shareholders loan account and that the respondent told her of an arrangement between himself and the claimant that the loan or mortgage payments made by him on account of McVickers were to be repaid to him when the claimant sold McVickers.
- [154] Finally, she testified that she was aware of cash payments made from clients to the respondent averaging some \$12,000 to \$15,000 a year. She noticed her disapproval of this practice.
- [155] Finally, in preparing the claimant's record of employment when she ceased working for the respondent's company, she chose the reason to leave as insufficient work so as to allow the claimant to receive employment insurance.

Issues

[156] The issues to be determined are:

- a) Were the parties spouses as defined in the FLA and, if so, what, if any, is the claimant's entitlement to spousal support and how should family property be divided?
- b) If property is divided, should the division be unequal?
- c) If no spousal relationship is proven, does the claimant have a remedy in equity for services she provided the respondent from 2012 to 2020?
- d) Did the respondent assault the claimant as alleged on April 27, 2020 and, if so what damages are proven?

Position of the Parties

- [157] The claimant argues the weight of the evidence militates in favour of finding the parties were spouses. Based on that determination, the claimant argues she has established an entitlement to spousal support on both a compensatory and needs basis.
- [158] Alternatively, she seeks an order for a monetary award for unpaid services done to benefit the respondent. When asked in what amount, the claimant through counsel suggested the dollar figure would be the same or similar as her entitlement to property division were it determined she was the respondent's spouse.
- [159] As for the assault, the claimant acknowledges, her case is based on circumstantial evidence. She never saw her assailant but testified she was "hit". She argues logic and circumstances leading to the event found her allegation that it was the respondent who struck her.

- [160] She seeks \$15,000 in respect of non-pecuniary loss for her bruised face and lacerated hand, together with one year's loss of earning capacity based upon her present income of \$40,000 annually. No medical evidence of her injuries or their impact, physically or psychologically, was presented.
- [161] The respondent points to the fractured nature of the relationship and their separate dwellings as evidence they were "boyfriend/girlfriend" involved in an on and off again relationship throughout the eight years. They were not, according to him, spouses within the meaning of the FLA or at common law.
- [162] While acknowledging the claimant did tasks at his behest from time to time, he argues she was compensated for that which she did.
- [163] He denies assaulting the claimant on April 27, 2020 or at all.

Credibility

- [164] Credibility is in issue in these proceedings, mainly as to the frequency of their contact during their relationship and the events of April 27, 2020.
- [165] As to the former, each prepared, as aide-mémoires, calendars purporting to represent the effect of the totality of the evidence; both the documents and the oral testimony.
- [166] The parties' major divergence on time together seems confined mostly to the early years of the relationship where there are no text exchanges providing greater clarity to the location of each and the status of the relationship.
- [167] The claimant, through the calendar her counsel tendered, argues that from 2012 until the summer of 2014, she spent virtually every night together with the respondent at Dorcas Point.
- [168] She was not working during that period and testified the respondent wanted her 'at home'. She acknowledged that changed when she began working. From 2015 onward, her calendar reflecting overnights at Dorcas Point show significantly less contact.
- [169] The retrievable text messages only commenced in September of 2015. Data downloaded in the earlier years consists mainly of photographs. The claimant, in submissions, suggested she could re-create her whereabouts, and more specifically where she slept each night, from those photos and, with the exception of when the photos depict travels where the parties were not together, she asserts that she was at Dorcas Point with the respondent.
- [170] The respondent disagrees noting it was common ground that the claimant did not spend much time with him at Dorcas Point when his children, particularly J. was there. He acknowledges she attended often to the property and adjacent area to walk her, his or her daughter's dog.

- [171] Without the benefit of the text messages, or pictures taken by the claimant in the early morning giving rise to an inference she had spent the night, it is not in my view, credible the claimant can confidently assert she was there 'all the time'.
- [172] In her statement to Constable Banks following the events of April 27, 2020, the claimant, in response to focused questions about their living arrangement, gave responses which undermine my confidence in her assertions respecting the living arrangement generally and, in particular, the early years of their relationship.
- [173] She answered Constable Banks' question concerning keys not by saying she had one, as she did before me, but rather by saying: "He doesn't lock his place up." If the claimant had a key as she states in her evidence; a simple yes would have sufficed. Instead, she explained how she gained access.
- [174] Further in her statement to Constable Banks, after he said "sounds like you lived with him a couple of months or a short period of time at the beginning" to which the claimant said "Yeah. And then I got my own place".
- [175] Earlier in the conversation, after being asked "Have you ever lived there?", the claimant replied "I lived there a short period of time at the very beginning." While her answer goes on to note the eight-year relationship, she acknowledges their separate residences.
- [176] Later, she told Constable Banks:
- He's kept everything very, I mean he has been divorced now twice now so, I mean, no, he is very precautionist or whatever I just thought that when we were, when we were started that we were going to be further that what we were, are, and it's just gotten worse.
- [177] When asked about the truth of that statement to Constable Banks by Mr. McPhee, she agreed it was true but said she was referring to the time period preceding the letter sent by her lawyer to the respondent in 2017.
- [178] She later agreed to she told Constable Banks that her lawyer told her:
- of all the, a number of things that would resemble a relationship being together, well I didn't have a hope in hell because he has been very good at not letting me move in.
- [179] As a fact, I find the relationship, post October 2017, was fractured to the extent the parties spent more time physically apart than they did together and their relationships were strained by physical assaults, infidelity and vitriolic exchanges by text denouncing the other's behaviour.
- [180] None of what the claimant told Constable Banks in her interview on April 27, 2020, stands harmoniously with her evidence as to the early years of their relationship; those prior to the retrieval of the text messages.

- [181] The claimant's evidence about the alleged sexual assault and her aversion to the bondage she described is in contrast to a text she was referred to in cross examination from earlier in time where she invited the respondent to bring the 'rope pack' to a planned trip away. The respondent testified, and I accept, that their sexual encounters were consensual and that the claimant's allegation of "RAPE" were reactive to the respondent's ill-advised suggestion he would tell her family of her arrest and overnight incarceration.
- [182] Another area of concern is the claimant's description in her testimony of the fish bonker. She described it as having shards of metal or cleats that aligned with the hand injuries she suffered.
- [183] Nowhere in the description given to Constable Banks of the fish bonker did she mention the metal cleats despite having seen the fish bonker sometime within a month prior to her alleged assault.
- [184] When asked specifically about the lacerations to her hands by Constable Banks, she did not mention the metal cleats. She testified in support of her theory of the assault, that it was the respondent who caused her injuries striking her first across the face with the pool ball and then 'finishing her off' when she lay on the grounds by striking her hands. She attributed the injuries to her hands to the cleats or rasps on the 'fish bonker'.
- [185] She testified that the respondent had keys to McVickers. Such is inconsistent with her statement to Constable Banks.
- [186] When asked by Constable Banks about previous violent incidents by the respondent she relayed the incident where she was grabbed by the arm and shoved out of the house but failed to describe the circumstance leading to that event; her setting fire to the respondent's personal memorabilia. Perhaps, not untruthful but certainly disingenuous.
- [187] The respondent's evidence was by no means perfect or reliable in all instances. His failure to acknowledge responsibility for some of the events that took place are belied by the string of text messages that followed. His depiction in the two videos taken inside of his home are supportive of the claimant's contention he was abusive to her and easily lost his temper.
- [188] His original calendar as to her attendances at Dorcas Point was unreliable and, in some measure, sent the claimant down the rabbit hole of displaying through photographs and texts the days she was in attendance at Dorcas Point.
- [189] That said, the respondent has nothing to prove. He called others who testified as to their perceptions and observations of the parties' relationship which stand in harmony with his description.
- [190] While I place little reliance on the evidence of the R.W., the next-door neighbour as to the circumstances of April 27, his partner, S.F. seemed fair minded in her description of events involving her and the claimant both before and at the incident.

- [191] S.F.'s description of the claimant's intoxicated state is consistent with the views of the respondent and the results of the blood test.
- [192] The respondent's housekeeper testified that the claimant, more than once, denied living at Dorcas Point and that she found no evidence of a female person in residence there when she cleaned.
- [193] The claimant testified she brought an overnight bag to protect her belongings from the rodent infestation, but that does not accord with the evidence generally. There were mousetraps set out and one photo of a victim of the traps' efficiency. Neither the claimant or anyone else testified as to any damage caused by rodents.
- [194] The business' bookkeeper testified, and I accept, that in the two years that she prepared the claimant's tax returns for her, she asked the claimant where she lived and her marital status. The claimant gave McVickers as her address and reported she was single.
- [195] Common to the evidence of the collateral witnesses was their description of the parties as boyfriend/girlfriend in on again/off again romantic relationship. No one described them as 'a couple'.
- [196] The claimant called no evidence as to the perceptions of others, specifically her son or daughter, who had interaction with the parties from 2012 to 2020. Her son, Grant, and his partner stayed at Dorcas Point in the guest wing for a protracted period before finding their own accommodation.
- [197] Therein lies the tension in the evidence. Once the record was complete with text messages, the parties agree, for the most part, who was where and when. The respondent's summary suggests only slightly less by way of overnights than does the claimant's.
- [198] In preferring the evidence of the respondent on this point, recognizing his evidence was far from perfect in his recall, I look to the claimant's conversation with Constable Banks where she noted she lived with the respondent "at the very beginning"; not for the first two or three years which would be the case if her evidence on her residency was preferred.
- [199] Further, the claimant, was cavalier in her assertions of the parties living together and being common law without details supporting what were conclusory statements; statements, in fact contrary to what she told others (gardener/dog-walker/housekeeper).
- [200] Her original description of the 'city and the country' conveyed the impression the parties moved freely from one to the other, but is a far cry from what the records demonstrate.
- [201] Each gave different views of the nature and scope of the relationship coloured, no doubt, by self-perception. However, the claimant's now perception of the relationship is at odds with the description she gave others; notably Constable Banks and D.W., the gardener.

- [202] While the claimant denied she had an aversion to being at Dorcas Point if the respondent's children were there, many of the entries in the calendar she submitted note days where she was not present "J. at country". The claimant acknowledged she made a point of not being present if J. was there.
- [203] C.M., the housekeeper, testified she saw J. there frequently from 2012 to 2020 noting he had shared custody with A. She was not specific on the dates.
- [204] While J.'s presence at Dorcas Point might well have accelerated in later years, the respondent's calendar notes J. was staying with him and working for him through early 2014. The claimant makes no mention of this despite asserting, through the submitted calendar, she was staying over.
- [205] The claimant referred to the parties as spouses on a number of occasions despite objections by the respondent's counsel and admonitions from the bench to refrain from conclusions best left for the end of the trial.
- [206] It is clear that the claimant's memory was "refreshed" by reference to the extensive documentation put into evidence and not from any real memory of events. This was amply demonstrated when the claimant would, without looking further ahead in the text exchanges, reach conclusions as to what events had transpired or when the parties reunited when there were clear indications later in the documents that she had tendered in evidence that such was not the case.
- [207] On matters of some import, specifically the weapon alleged to have been used by the respondent, she testified the weapon was a number seven pool ball attached to a stick 12-14 inches in length. She said there were metal shards on it that aligned with the injuries to her hand(s).
- [208] When she described the fish bonker to police, she made no mention of the shards and was unable to explain why that detail was missing from her report. The fish bonker produced in Court matched the claimant's description absent any scaling device or metal shards as she described in her evidence but not to police

The Law

- [209] The claimant's major assertion is that she is a spouse within the meaning of the FLA and thus entitled to relief by way of spousal support and property division recognizing that the respondent is entitled to an exclusion of property for the value of that which he held at the time the parties met.
- [210] Section 3 of the FLA provides:
- 3 (1) A person is a spouse for the purposes of this Act if the person
- (a) is married to another person, or

- (b) has lived with another person in a marriage-like relationship, and
 - (i) has done so for a continuous period of at least 2 years, or
 - (ii) except in Parts 5 [Property Division] and 6 [Pension Division], has a child with the other person.
- (2) A spouse includes a former spouse.
- (3) A relationship between spouses begins on the earlier of the following:
- (a) the date on which they began to live together in a marriage-like relationship;
 - (b) the date of their marriage.
- (4) For the purposes of this Act,
- (a) spouses may be separated despite continuing to live in the same residence, and
 - (b) the court may consider, as evidence of separation,
 - (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
 - (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.
- [211] I agree with the respondent that there are three essential elements to the test:
- a) Firstly, the temporal aspect, that is the parties must live with one another in a marriage-like relationship for "for a continuous period of at least two years";
 - b) Secondly, they must have lived together, a test which includes both subjective and objective elements; and
 - c) Finally, their cohabitation must be in a "marriage-like relationship". That test relies on the analysis of a number of factors set out in the case law. Admittedly some are present here and some are not. The claimant bears the legal burden of establishing on the balance of probability all three elements of the test. The respondent says she has established none.
- [212] In *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 at 381-382, 1980 CanLII 1537 (Ont. Dist. Ct.), a set of indicia was developed to enumerate factors militating in favour of a determination of whether parties were in a 'marriage-like' relationship.
- [213] One of the factors is the intention of the parties. Additional criteria include whether the parties lived under the same roof and, if so the sleeping arrangements. Did the parties have sexual relations and if they did not, why not? Were they faithful to one another? What were their feelings for one another? Did they take meals together? Further, *Molodowich* asks whether the parties provided services to one another, whether they participated in social events together, outside views of the nature of their relationship, was there financial interaction between the parties creating a dependency of one upon the other, and the

respective attitudes of the parties towards the children of the others.

- [214] None of the factors are determinative and some have been refined and commented upon in subsequent decisions. The Court must take a holistic approach in determining whether or not they were 'spouses': *Austin v. Goerz*, 2007 BCCA 586 at paras. 58, 62.
- [215] In the recent decision of *Schwab Estate v. Warriner*, 2023 BCSC 220, Justice Winteringham considered the elements of a 'marriage-like relationship' through the lens of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA]. The definition of spouse in s. 2 of WESA is similar to that of s. 3 of the FLA, and Justice Winteringham considered cases which were decided under s. 3 of the FLA in the following passage:
- [40] WESA prescribes the manner in which an estate is to be distributed when a person dies without a will. Section 21 provides that if a person dies without a will leaving a spouse and descendants then the estate is to be distributed to those persons subject to the preferential interest of the spouse.
- [41] Under s. 2 of WESA, two persons will be spouses if, at the time of death of one of the persons, they were married or had lived in a marriage-like relationship for at least two years.
- [42] In *Jones v. Davidson*, 2022 BCCA 31 at para. 21, the Court of Appeal highlights the fact that there is no specific definition of a marriage-like relationship, nor should the analysis be constrained by a checklist approach, since such relationships are no longer defined by financial dependence, sexual relationships, or the mingling of property and finances: see also *Coad v. Lariviere*, 2022 BCCA 222, at para. 127. In *Austin v. Goerz*, 2007 BCCA 586 at para. 58, the court cited *Yakiwchuk v. Oaks*, 2003 SKQB 124 at para. 10:
- [10] Spousal relationships are many and varied. Individuals in spousal relationships, whether they are married or not, structure their relationships differently. In some relationships there is a complete blending of finances and property- in others, spouses keep their property and finances totally separate and in still others one spouse may totally control those aspects of the relationship with the other spouse having little or no knowledge or input. For some couples, sexual relations are very important - for others, that aspect may take a back seat to companionship. Some spouses do not share the same bed. There may be a variety of reasons for this such as health or personal choice. Some people are affectionate and demonstrative. They show their feelings for their "spouse" by holding hands, touching and kissing in public. Other individuals are not demonstrative and do not engage in public displays of affection. Some "spouses" do everything together - others do nothing together. Some "spouses" vacation together and some spend their holidays apart. Some "spouses" have children - others do not. It is this variation in the way human beings structure their relationships that make the determination of when a "spousal relationship" exists difficult to determine. With married couples, the relationship is easy to establish. The marriage ceremony is a public declaration of their commitment and intent. Relationships outside marriage are much more difficult to ascertain. Rarely is there any type of "public" declaration of intent. Often people begin cohabiting with little forethought or planning. Their motivation is often nothing more

than wanting to "be together". Some individuals have chosen to enter relationships outside marriage because they did not want the legal obligations imposed by that status. Some individuals have simply given no thought as to how their relationship would operate. Often the date when the cohabitation actually began is blurred because people "ease into" situations, spending more and more time together. Agreements between people verifying when their relationship began and how it will operate often do not exist.

- [43] Furthermore, the court in *Weber v. LeClerc*, 2015 BCCA 492 at paras. 23-24, explained the importance of considering the parties' intentions against the objective evidence:
- [23] The parties' intentions--particularly the expectation that the relationship will be of lengthy, indeterminate duration--may be of importance in determining whether a relationship is "marriage-like". While the court will consider the evidence expressly describing the parties' intentions during the relationship, it will also test that evidence by considering whether the objective evidence is consonant with those intentions.
- [24] The question of whether a relationship is "marriage-like" will also typically depend on more than just their intentions. Objective evidence of the parties' lifestyle and interactions will also provide direct guidance on the question of whether the relationship was "marriage-like".
- [44] Ultimately, the determination of a "marriage-like relationship" is contextual and involves the consideration of subjective intentions and objective evidence on a wide assortment of characteristics or indicia: *Jones* at para. 24.
- [216] This passage provides guidance here.
- [217] At the conclusion of the claimant's case, the respondent made a no evidence application in respect of the entirety of the claim as set out in the amended notice of family claim.
- [218] In dismissing the respondent's no evidence motion at the conclusion of the claimant's case, I was constrained by the legal test for such motions to consider the claimant's evidence in its best light: at the stage of the trial where a no evidence motion is considered, the trier of fact does not decide whether the evidence is believable but only whether there is sufficient evidence which, if left uncontradicted, a reasonable trier of fact could; not would, find for the claimant. *Tran v. Kim Le Holdings Ltd.*, 2010 BCCA 156 at para. 2.
- [219] Here, I am obliged to weigh the evidence, both internally and as against the evidence of others called in the trial. In addition, the burden rests on the claimant to prove her case on the balance of probabilities; not merely showing there is some evidence on which the trier of fact could find in her favour.
- [220] On balance, for the reasons that follow, I find the claimant has failed to discharge that burden and she has not established an entitlement to a legal remedy under the FLA as she is not a spouse within the meaning of Section 3.

Were the Parties Spouses

- [221] At this stage of the proceeding, I am to determine whether the claimant has discharged the legal burden of proving her case. I find that she has not. I have commented at some length upon the claimant's reliability as a historian.
- [222] It is her evidence, both oral and documentary, upon which the case rests.
- [223] While the claimant has presented evidence of some of the Molodowich indicators including a mutual intention for a long-term relationship, sexual intimacy, some financial interdependence, taking meals and socializing together, there is an absence of many indicators which would suggest the relationship was marriage-like in nature.
- [224] The parties never presented as a married couple to others. The description by the respondent's collateral witnesses meshed consistently with his view that the parties were on again/off again in a boyfriend/girlfriend relationship. None of these witnesses, either objectively or subjectively, thought of the pair as 'married' or in a common law relationship.
- [225] Neither of the parties identified their relationship to others as that of anything beyond 'boyfriend/girlfriend'.
- [226] Importantly, in my view, the claimant denied, in her remarks to Constable Banks, (1) living together other in the early days of the relationship; (2) the respondent's attitude of not allowing her to move in because of his "precautionist" nature; and (3) her own evidence in cross examination that she would not "live, live with respondent until they were married". Those remarks, taken together, militate against the finding of a two-year period of living together.
- [227] The claimant, from July 2012 onward, owned and maintained a separate residence. There was no 'city' and 'country' dual-home lifestyle. There was Dorcas Point, the home of the respondent where she required permission or an invitation to attend and her home, as self-described, McVickers.
- [228] She increasingly spent time alone at the latter as the relationship unraveled.
- [229] While I do not accept that each brief 'spat' constituted the end of the parties' relationship and their later reconciliation reset the meter, I am unable to conclude from the evidence of the claimant, when compared against that of the respondent and other witnesses, that they lived together, at all after July 2012.
- [230] They admittedly spent a great deal of time together. More so from 2012 to 2015 than afterwards when separations became more frequent and longer. By 2017, it is fair to say the length of the separation, coupled with the respondent's commencing intimate relations with another, re-set the clock.

- [231] While the authorities presented by the claimant, notably Connor Estate, 2017 BCSC 978 allow for circumstances where a marriage like relationship was found where parties did not reside together, the circumstances in such cases provide a contextual rationale underlying the conclusion. They are fact specific. Such a contextual rationale is not present in this case, where, beyond the parties not living together for a period of 2 years, they also were not in a marriage-like relationship.
- [232] In Connor, another decision under WESA, the parties were each married to another person. They carried on an intimate relationship for over 20 years. The evidence of others was that they were devoted to one another.
- [233] The decedent was a 'hoarder' making cohabitation a practical impossibility.
- [234] Justice Kent found that although not and all Molodowich factors existed, sufficient did, coupled with the underlying rationale for separate residences, to find that the parties satisfied the definition for spouses.
- [235] Here, the claimant relies on rodent infestation, a fact I reject as being unproven, and the 'complicated' relationship as between her and the respondent. The complication, in my view, was the fact neither could or did make the necessary commitment to make the relationship fit within the confines of s. 3 of the FLA.
- [236] Other cases referred to by the claimant, Coupar v. Roh, 2014 BCSC 1392, Campbell v. Campbell, 2011 BCSC 1491 [Campbell SC], rev'd on other grounds 2013 BCCA 109, and Thompson v. Floyd, 2001 BCCA 78, are cases where the parties resided together for a time and in a manner to establish the spousal relationship. The issue common to those authorities was when did the parties separate after a spousal relationship had been established; not whether a spousal relationship was ever proven.
- [237] In each, the indicia of what constitutes separation was the focus of the inquiry. Here, I am unable to conclude that a spousal relationship was ever created so determining whether the lengthy separation in 2017/2017, for example, ended the relationship is unnecessary.
- [238] In Thompson, the Court of Appeal, in upholding the trial decision as to the spousal nature of the parties' relationship despite separation made clear (1) that the parties achieved the status of spouses by virtue of living together in excess of two years prior to the 'wife's' departure from their jointly owned home for health reasons; (2) the separation was occasioned by health reasons; and (3) neither of them announced that their relationship was over during the period of physical separation.
- [239] That is factually different from the situation here. The parties here never cohabited for two years and, at least by 2017, their communications regarding the termination of the relationship must be given some meaning given the length of the separation(s) that followed.

- [240] A similar result accrued in *Coupar*, where a spousal relationship was established before the parties took up separate portions of the house yet continued to socialize with one another and present, in many respects, as a couple by attending social events together.
- [241] The Court in *Campbell SC* similarly considered the effect of living apart from one another following cohabitation for a period in excess of two years. The question was not: did the parties live together in a marriage like relationship for two continuous years? In fact, the parties were married. The question was rather, given the terms of their marriage agreement, when did the relationship end?
- [242] Justice Groves concluded it did not end immediately upon the parties taking up separate residences (as they were still working on reconciling their differences) but rather when defendant's counsel contacted the plaintiff and communicated the defendant's desire to terminate the relationship.
- [243] Here, in 2017, lawyers were engaged and letters exchanged. Each proceeded on the basis the parties' relationship, in whatever form it was later determined, was over.
- [244] The claimant clearly wanted the imprimatur of an engagement ring and marriage before she would live with the respondent. While he spoke of marrying her, in retrospect when they were fighting with one another, he never proposed or invited her to physically move in with him on more than a night by night basis.
- [245] Crucial, in my view, to a determination of whether the parties were spouses is the nature of their living arrangements. Did they live continuously together for two years? I find they did not.
- [246] In *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264 at 267-268, 1986 CanLII 164 (C.A.), Justice Lambert stated the following test for determining whether a couple cohabited as man and wife thus invoking the spousal support obligations of the predecessor to the FLA, the Family Relations Act, R.S.B.C. 1996, c. 128 as follows:

In deciding whether a couple lived together as husband and wife, I would be guided by the scheme and intention of the Act itself. The purpose of the legislative scheme is to impose on an unmarried couple the same obligations under s. 57 as are voluntarily undertaken by a married couple. So I would ask whether the unmarried couple's relationship was like the relationship of the married couple in that the unmarried couple have shown that they have voluntarily embraced the permanent support obligations of s. 57. If each partner had been asked, at any time during the relevant period of more than two years, whether, if their partner were to be suddenly disabled for life, would they consider themselves committed to life-long financial and moral support of that partner, and the answer of both of them would have been "Yes", then they are living together as husband and wife. If the answer would have been "No", then they may be living together, but not as husband and wife.

Of course, in the particular circumstances of any case, the answer to that question may prove elusive. If that is so, then other, more objective indicators may show the way. Did the couple refer to themselves, when talking to their friends, as husband and wife, or as spouses, or in some equivalent way that recognized a long-term commitment? Did they share the legal rights to their living accommodation? Did they share their property? Did they share their finances and their bank accounts? Did they share their vacations? In short, did they share their lives? And, perhaps most important of all, did one of them surrender financial independence and become economically dependent on the other, in accordance with a mutual arrangement.

All those questions, and no doubt others, may properly be considered as tending to show whether a couple who have lived together for more than two years have done so with the permanent mutual support commitment that, in the relevant sense of the Family Relations legislation, constitutes living together as husband and wife.

- [247] Here, I refer to the evidence of the claimant when the respondent had a surgical procedure requiring the changing of bandages. He asked the claimant for assistance and she declined, saying, in effect, "I am not your nurse".
- [248] The parties maintained separate residences from July 2012 until the final breakdown of the relationship in April 2020. Between those dates there were frequent periods when they did not see one another; some as long as four months without personal contact. Admittedly, they remained in contact through text (mainly) or email.
- [249] The claimant argues they lived together in a marriage-like-relationship for a continuous period of two years but premises that assertion of the fact the parties maintained two residences; Dorcas Point (the "country") and McVickers (the "city").
- [250] Belying that assertion is the fact that the respondent seldom attended, let alone stayed at, McVickers. He came as an invitee and could not access the condo without the claimant allowing entry.
- [251] During his visits, he was subject to the claimant's rules: where he showered; where he ate, etc. The claimant was similarly constrained. She attended Dorcas Point by invitation or with permission; not at will.
- [252] Despite her assertions of having a key to access Dorcas Point, I conclude, both on the video evidence of the failed attempts to use her proffered key to gain access to the residence and her response to Constable Banks, she did not.
- [253] I also have in mind the evidence of the gardener, whose evidence, I accept, that the claimant told her that she did not reside at Dorcas Point.

- [254] Claimant's counsel now suggests that the appearance of the faceplates to the locks do not accord with having been exposed to the elements since construction and hence I should conclude the respondent changed the locks after April 2020. With respect, without something more than speculation as to the condition of the locks, I am unable to accede to that submission.
- [255] Ergo, I conclude, as submitted by the respondent's counsel, that neither party came and went to the separate residence of the other without express permission. Even when the claimant attended with her dog(s) at Dorcas Point, she communicated her intentions to the respondent and he acknowledged her 'request' to walk the dogs at or near Dorcas Point.
- [256] The evidence of both parties, the housekeeper and dogwalker was that the doors were never locked at Dorcas Point unless the respondent was on an extended absence. There was no need for keys to be provided to the claimant.
- [257] The respondent lived alone at Dorcas Point; the claimant was frequently in attendance. She kept very little at Dorcas Point; perhaps a bathrobe. I accept the evidence of the housekeeper on this point. The respondent kept nothing of his at McVickers.
- [258] Accordingly, I find the parties never resided together for two years. Quite apart from that conclusion, while they objectively satisfied some of the Molodowich factors, there are many which militate against the finding of a marriage-like relationship.
- [259] For example, they never co-mingled their finances; made provision for the other in their respective estate planning; or discussed one another's financial circumstances save for the claimant from time to time relaying financial need.
- [260] The respondent was not faithful to the claimant during periods of 'separation' evidencing, at least in his mind, the termination of the relationship. Their joint participation in social events was limited. They took separate holidays, seldom involved their respective families in events together and socialized with others as a couple only infrequently.
- [261] There were few events where the parties' families mingled. The claimant's son and his partner lived in the respondent's guestroom for a period of time but did not testify as to their observations of the parties' relationship.
- [262] The claimant went on several of the respondent's annual family vacations, to Whistler or Tofino, but not the majority. She attended some of the respondent's work events, specifically Christmas parties, but not all of them.
- [263] The observations of all collateral witnesses called who testified as to their perception, based on observation or conversation with one or both of the parties, were that the parties were casual off again and on again boyfriend/girlfriend.
- [264] In summary, in rejecting the notion the parties were spouses from 2012 until April 2020, I have considered the following facts:

- a) The parties never co-mingled their finances during the entirety of their eight- year association. The respondent was generous with the claimant but never set up joint accounts or credit facilities she could operate independent of his oversight.
- b) The claimant, since the summer of 2012, maintained a separate residence where she received her mail, kept majority of her personal possessions and, more importantly, lived there the majority of the time. She self-identified McVickers, not Dorcas Point, as "home". Each of the parties acknowledged the requirement of permission or an invitation to occupy the home of the other. Neither, I find, had a key to the other's premises.
- c) No plausible reason, as was the case in Connor, was offered to support the notion they 'lived together but apart'. I reject the notion the claimant maintained a separate residence with all her personal effects because of a rodent infestation that would potentially damage her possessions.
- d) Neither included the other in their estate planning; the respondent created a family trust for the benefit of some of his children without mentioning the existence of it to the claimant.
- e) The respondent filed his taxes as a divorced or separated person; never as having a common law spouse.
- f) The claimant filed as a single person and reiterated to S.S. that she was a single person living at McVickers in each year S.S. assisted the claimant in the preparation of her taxes.
- g) The paucity of the claimant's personal items or furnishings at Dorcas Point as described by the respondent and corroborated by the housekeeper.
- h) The rarity of the parties' intermingling their families for joint celebrations or vacations.
- i) The claimant's acknowledgement to Constable Banks that she never resided at Dorcas Point and that the respondent had "protected himself".
- j) The claimant, when asked whether she lived at Dorcas Point by D.W., said she did not; the respondent similarly told D.W. the same.
- k) The claimant's statement that she wanted to be married, or at least 'have a ring' before she would 'live, live with' the respondent.
- l) The parties did not hold themselves out as a couple to the outside world. I accept the collateral witnesses perceived the relationship between them as something less than a long term committed relationship. Subjectively the parties each demonstrated by actions; the respondent's ongoing dalliance with G.D., the claimant by her statements to Constable Banks. That despite their aspirations for same, neither considered the other a "spouse".

[265] The totality of the above, coupled with my conclusion the claimant's attendance at Dorcas Point throughout the whole eight-year period was sporadic, never continuous, and that the respondent rarely attended McVickers to stay there, result in my finding that the claimant has failed to establish her claim the parties were spouses at any time over the whole of the eight-year period advanced.

Unjust Enrichment

[266] In her amended pleadings, the claimant claims an express, implied or constructive trust arising from the relationship.

[267] No evidence or submission was tendered in support of either an express trust or an implied trust but there was evidence of services provided by the claimant which were to the benefit of the respondent.

[268] The response to the amended claim simply denied the existence of the equitable relief claimed without reference to the benefits provided by the respondent to the claimant over the tenure of their relationship.

[269] The leading authority on the question of division of assets between unmarried partners based on equitable, as opposed to statutory principles, is *Kerr v. Baranow*, 2011 SCC 10.

[270] In *Kerr*, the Supreme Court of Canada developed the concept of a "joint family venture" as the test for deciding whether one party retained a disproportionate share of assets accumulated during the course of the relationship. Justice Cromwell noted at para. 28 that the principles of unjust enrichment combined with the "possible remedy of a constructive trust" provide a comprehensive and principled basis to address the wide variety of circumstances that may lead to claims arising from domestic partnerships, such as what is alleged here.

[271] The analysis begins with an inquiry as to whether there has been an enrichment of one party at the expense of the other: *Kerr* at para. 32.

[272] Succinctly put, it must be determined there has been an enrichment or benefit to the respondent with a corresponding deprivation of the claimant in the absence of a juristic reason for that enrichment.

[273] If such enrichment is found, the Court should first consider whether a monetary award is an appropriate remedy, since in most cases it will be sufficient to remedy the unjust enrichment. That monetary award is not restricted to the quantum meruit valuation approach (i.e. the value received or "fee for service" approach); in appropriate cases it may be assessed on a value survived basis (i.e. referring to the overall increase in value of the couple's assets): *Kerr* at paras. 47-49.

- [274] It is clear from the totality of the evidence that the claimant, over the course of time she and the respondent were together, and by that I exclude periods obviously when they were separated, did numerous tasks for the respondent including, laundry, shopping, gardening, and errands. She was also a salaried employee of his construction company for a period of several years.
- [275] In my view, work performed by the claimant for the company while employed by the company cannot be the basis for an enrichment to the respondent. The juristic rationale is the contract of employment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25.
- [276] The claimant's evidence as to tasks performed for the respondent outside the scope of her employment was wide-ranging but lacked specifics as to the frequency or the hours/days spent on the tasks so as to assess the combined worth of her contribution.
- [277] Nonetheless, the claimant asserts that her claim in equity, given I have rejected her claim of a spousal relationship, should be compensated in a similar manner as if she were a spouse. Mr. Vining suggested there was no difference in the quantum regardless of which claim succeeds adopting, presumably, the "value survived" model of compensation.
- [278] That submission is difficult to understand in view of the fact that the claimant cannot point to any enhancement of any particular asset owned by the respondent save for inflationary gains.
- [279] The claimant acknowledged that the respondent would sometimes issue company cheques to the claimant before she was an employee and, while an employee, he would often increase her pay beyond the hours she actually worked for the company. He also provided her with several cheques payable to the company in excess of \$15,000.
- [280] The respondent testified the additional funds that this was sometimes paid to reflect chores done for his benefit outside of actual duties on behalf of the company and sometimes, when she was not working at all, simply to fulfil a financial need of the claimant's. It was not uncommon for the claimant to draw to the respondent's attention her financial need.
- [281] When she was off work following surgery, he serviced her mortgage payment on McVickers.
- [282] Additionally, the respondent provided the claimant with significant benefits by way of paying expenses directly on her behalf. Mainly these or in respect of the operation of a motor vehicle; repairs, new tires, use of the gas card, dental expenses and expenses associated with her dog.
- [283] The respondent suggested that over the course of the relationship, independent of the salary provided to the claimant through his company, provided advances totaling an additional \$38,000.

- [284] The respondent did not counterclaim for the value of benefits bestowed by him upon the claimant nor did he seek a remedy in debt. Arguably, a claim in debt would have been premature given the respondent's evidence that repayment was to come from the sale proceeds of McVickers. By the time the pleadings closed, McVickers remained unsold.
- [285] In *Kerr, Cromwell, J.A.* discussed the proper approach to the consideration of mutual benefits as follows:
- [109] As I noted earlier, my view is that mutual benefit conferral can be taken into account at the juristic reason stage of the analysis, but only to the extent that it provides relevant evidence of the existence of a juristic reason for the enrichment. Otherwise, the mutual exchange of benefits should be taken into account at the defence and/or remedy stage. It is important to note that this can, and should, take place whether or not the defendant has made a formal counterclaim or pleaded set-off.
- [114] As previously set out, juristic reason is the third of three parts to the unjust enrichment analysis. As McLachlin J. put it in *Peter*, at p. 990, "It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are 'unjust.'" The juristic reason analysis is intended to reveal whether there is a reason for the defendant to retain the enrichment, not to determine its value or whether the enrichment should be set off against reciprocal benefits: *Wilson*, at para. 30. Garland established that claimants must show that there is no juristic reason falling within any of the established categories, such as whether the benefit was a gift or pursuant to a legal obligation. If that is established, it is open to the defendant to show that a different juristic reason for the enrichment should be recognized, having regard to the parties' reasonable expectations and public policy considerations.
- [115] The fact that the parties have conferred benefits on each other may provide relevant evidence of their reasonable expectations, a subject that may become germane when the defendant attempts to show that those expectations support the existence of a juristic reason outside the settled categories. However, given that the purpose of the juristic reason step in the analysis is to determine whether the enrichment was just, not its extent, mutual benefit conferral should only be considered at the juristic reason stage for that limited purpose.
- [286] In *De Angelis v. Siermy*, 2022 BCCA 401, Justice Fenlon writing for the Court, confirmed that the Court may consider mutual benefit at the juristic reason stage:
- [50] It is open to a defendant to establish a juristic reason to deny recovery grounded in the parties' reasonable expectations. In the circumstances of this case, the judge was satisfied that the respondents had established that it would not be unjust to allow Annie and Joe and their company to retain the benefit of the services provided by Barbara--based on the reasonable expectations of the parties about the way the burdens and benefits of the family businesses were to be allocated: *Kerr* at para. 114.

- [51] The appellant argues it was an error for the judge to consider mutual benefits at the juristic reason stage of the unjust enrichment inquiry because in both family and non-family cases of mutual benefit conferral, any alleged offsetting of benefits is to be considered at the defence/remedy stage of the analysis where the defendant bears the onus of proof: Kerr at paras. 109-115. However, the appellant has stated this principle too categorically. As Justice Cromwell explained in Kerr at para. 109, mutual benefit conferral "can be taken into account at the juristic reason stage of the analysis, but only to the extent that it provides relevant evidence of the existence of a juristic reason for the enrichment".
- [287] On whatever view one takes of the services that the claimant provided, those outside the scope of her employment, were, on the evidence, fully compensated for by payments made by the respondent either directly or indirectly for her benefit and provide a juristic reason to deny the claimant recovery for the benefits she conferred upon the respondent: see also Brennan v. Gardy Estate, 2011 BCSC 1337 at paras. 31-34. Accordingly, the claimant has not established a claim in unjust enrichment.
- [288] Even were it not within the mutual expectation of the parties that they would voluntarily provide benefits to the other of them, the respondent is still entitled to rely on the value of the reciprocal benefits at the defence/remedy stage of the analysis. This is particularly so where there is no finding of a joint family venture, as is the case here.
- [289] In Brennan, Justice Fenlon, as she then was, concluded that the benefits received by the plaintiff from the defendant equalled or exceeded those he provided the defendant. Here, I conclude the benefits received by the claimant far outweighed the monetary value of the benefits she conferred upon the respondent.
- [290] Finally, I adopt the remarks of Justice Ball in Rasmussen v. Larsen, 2015 BCSC 651:
- [88] Had I found the claimant entitled to a remedy for unjust enrichment, that remedy would have been damages on a fee-for-services basis to compensate her for unpaid household services. (I note that the claimant did not present any evidence of the appropriate quantum or how the quantum could be determined). At this point, the benefits conferred by the respondent in the form of household services would have become relevant to off-set the amount awarded to the claimant. On the materials presented to the court, there was no basis to award the claimant damages on a fee-for-services approach for these unpaid services as the evidence does not establish that her household contributions exceeded those of the respondent. Moreover, Ms. Rasmussen's notional rent for the West Vancouver apartment for the same years had she continued living there would have exceeded \$184,000 (without any rent increase) calculated over the entire period of the parties' cohabitation (1992 to 2011). Even after deducting the amount the claimant paid the respondent for her "keep", it is clear that the claimant received a very substantial benefit while living in the condominium.

- [291] The respondent, through counsel, made clear that he was abandoning any allegation of debt despite reference on some of the cheques made out in favour of the claimant as being a "loan".
- [292] The claimant further argues that his client has been deprived by virtue of eight years of "being out of the labour force" and will "start again from scratch" if not entitled to compensation for the things done by her during her relationship with the respondent.
- [293] With respect, that submission does not conform to the evidence. The respondent assisted the claimant with finding a job early on in the relationship (although he conceded that he was prepared to provide the majority of support to her) and then, later, provided her with employment through his company and not only paid her market wages for the hours she worked but additionally paid in excess of that when her circumstances demanded, and by that I mean her financial need.
- [294] Further, he paid for training that enhanced the claimant's value as an employee.
- [295] Accordingly, at whatever stage, the juristic reason or the remedy stage, there is no basis on which to find that it would be unjust to allow the respondent to retain the benefits provided by the claimant without further compensation to her.
- [296] The claim in trust is dismissed.

The Alleged Assault

- [297] Assault is the intentional creation of the apprehension of imminent harmful or offensive contact, even if the contact never actually occurs: *Khan v. School District No. 39*, 2021 BCSC 49 at para. 17. The tort of battery involves the infliction of unlawful force on another person, and the plaintiff must prove that the defendant intended to, and did in fact, make physical contact and that contact was harmful or offensive: *Khan* at para. 18.
- [298] The claimant alleges on April 27, 2020, sometime in the early evening, around 6:30 p.m., the respondent, after travelling to Victoria to celebrate in a drive-by celebration of his grandson's birthday, returned to Dorcas Point and assaulted her with a fish bonker. The alleged assault took place on the driveway or in the garage.
- [299] The claimant concedes she did not see the respondent, or anyone else, strike her. She infers, from the totality of events, that the respondent, presumably from behind or off to the side struck her with the fish bonker, causing her to fall to the ground and briefly lose consciousness.
- [300] She testified that she realized the next day that the cleats or shards she described on the fish bonker the respondent previously displayed to her aligned with 'scars' on her hands.
- [301] Despite his protestations that he arrived to find her lying on the ground bleeding, she insists that it was he who struck her.

- [302] Throughout what followed, that is from the time the respondent says he arrived back at his home and from the point in time that the claimant decided to pull out her cell phone and start recording the respondent, both recorded the events on their cell phones up to and including the arrival of neighbours.
- [303] I agree with the claimant that the respondent's behaviour seems odd given, according to his evidence, he arrived home in the driveway to find the claimant on the ground, bleeding, and visibly injured to her face and hands. He testified that the first thing that she requested of him was to go to the fridge and bring out a bottle of wine, presumably to show she had not opened a fresh bottle. He says he did so and placed it in proximity to her.
- [304] The video goes on to depict the respondent cowering behind his neighbour when the claimant arises and becomes aggressive.
- [305] The claimant says his response, coupled with what she perceived as the implied threat of him tapping the fish bonker on his hand, is sufficient to establish the respondent as her assailant. His response, while curious, does not, in my view, lead to the conclusion he struck her.
- [306] In argument, the claimant, through counsel, reminded me of the videos of the respondent on previous occasions where he clearly was "on a rant" behaving in an unpleasant, although not violent, fashion.
- [307] The claimant also notes that approximately 10 to 15 days before the alleged assault, the respondent, when they were sitting at or near the garage, pulled out the 'fish bonker', which she described as a pool ball, attached to a stick with a scraper on it, looked at her malevolently or menacingly without saying a word. She said she was intimidated by this and took it as a threat.
- [308] His explanation of that event was quite different: he testified that after having been assaulted by the claimant earlier in the month, he jokingly displayed the fish bonker to her and said, in effect, 'next time use this'. He described the origins of how the fish bonker came into his possession. It was a red numbered seven pool ball attached to a stick of wood. It had no shards or metal cleat on it.
- [309] I have already commented on my findings on credibility. I reject the claimant's evidence that she accurately described the fish bonker when shown it earlier in April. I accept the fish bonker, complete with red numbered a seven pool ball, absent rasps or cleats, was what was shown to her earlier in April.
- [310] Each party relied on phone records and/or their recorded texts preceding the event to 'extrapolate' the respondent's position from time to time before his arrival out front of the Dorcas Point garage. Without some explanation concerning the workings of cell towers referable to the position of the phone using a particular tower, I decline to make findings, based on text messages, as to where the respondent was located at any particular time.

- [311] The claimant argues, based on the phone records, his behaviour weeks before with the fish bonker and his curious response to coming upon her injured, should lead me to conclude that the respondent arrived in advance of when he testified, parked his car away from the driveway then surreptitiously returned to the garage to get the fish bonker and assault her. Finally, she asks me to conclude he then struck both her hands after she had dropped to the ground.
- [312] She never saw him prior to the beginning of the videoed portion of the exchange. She could not tell the police or hospital personnel the mechanics of her injuries.
- [313] The respondent denies any involvement with the claimant's injuries or the manner in which they occurred. He notes, and it is undisputed, that the relationship had seemingly been restored by the weekend preceding April 27, 2020, even after his admission of infidelity, the wellness check where the claimant ultimately was removed from the respondent's residence by police, and an admitted assault by the claimant upon the respondent.
- [314] On that morning, after the claimant had slept over the night of the 26, the parties had sexual relations. They parted amicably in the morning and, by pre-arrangement, the respondent drove to Victoria to participate in his grandson's birthday. The claimant remained at Dorcas Point to garden but it was not in their mutual expectation she would be there when he returned.
- [315] They texted amicably throughout the day and, more particularly after the respondent began heading home from Victoria. At 4:34 p.m., the respondent sent the claimant a joke. She replied "LOL". At 5:05 he texted her "ETA 7:00".
- [316] At 5:07, she replied with a photograph of the garden where she had been working in and said "having happy hour now". Noting specifically "wine from last night & not opening the full bottle" and "Detox". At 6:24 p.m. she texted the respondent "I have been here. Leaving in ten", "love you" and at 6:28 the respondent replied "almost home" followed by "have a good evening".
- [317] It is a fair inference the respondent did not know the claimant would still be at Dorcas Point until her text at 6:38 p.m. when she texted him: "I am here". This was approximately five minutes before she alleges he attacked her.
- [318] The respondent replied at 6:40 p.m., saying "pour me a beer please". She replied immediately saying "okay".
- [319] Sometime thereafter the claimant says, or assumes, she was attacked. At 6:43 p.m. she texts "where you" and then adds "are". A minute later at 6:44 p.m. he says "home" and at 6:45 p.m. she sends a text "I am bloodying".
- [320] The respondent testified home did not mean at the Dorcas Point residence but the road leading to it.

- [321] When video begins, apparently at 6:57 p.m., the claimant is conscious and speaking incoherently.
- [322] From all of this, I am asked to conclude that the assault occurred between 6:40 to 6:43 p.m. The claimant says I should reject the respondent's testimony about where he was at 6:44 p.m. and conclude he arrived before that leaving him sufficient time to get the fish bonker from the garage and position himself so as to strike her, unseen, as she walked through the garage.
- [323] Between the time of his arrival and the commencement of video when, according to her counsel, the claimant is just regaining consciousness, she suggests the respondent turned off the boombox and went into the fridge to retrieve a full bottle of wine and place it beside the claimant.
- [324] The respondent's actions thereafter are admittedly not what one might expect. The video recording in his seeming fear of the claimant, although explained by him based on her previous aggressive behaviour and the accusations levied at him as she regained sensibilities are supposed to suggest, on a balance of probabilities that it was he who committed an assault.
- [325] Later, a neighbour, R.W. comes over and, finally, his common-law partner and S.F. Both testified and described the claimant as intoxicated. Both gave previous examples, albeit, few in number, of involvement with the claimant and observations leading to their mutual conclusion she was intoxicated.
- [326] At the urging of S.F., the claimant was driven home by S.F. with R.W. following. S.F. wouldn't give the claimant her car keys which also contained her house key. The claimant attended at her neighbours and the neighbour's son in law- Constable Elston was summoned. He was off duty but called both an ambulance and active duty officers.
- [327] While unnecessary to establish an assault occurred, the claimant offers no motive other than a reference to the showing of the fish bonker to her in the days or weeks preceding the assault. The respondent explains that the fish bonker was found by his dog, Darwin, sometime in January 2020 and that his dog walker K.M brought the fish bonker back with Darwin and it was placed in the garage.
- [328] The steps that followed, including the claimant's attendance at hospital, are telling in many respects.
- [329] Hospital records were admitted as business records pursuant to s. 42 of the Evidence Act, R.S.B.C. 1996, c. 124. The records are not admissible for the opinion expressed within them, but are prima facie evidence of facts recorded, which includes statements made by the claimant to the physicians: *Seaman v. Crook*, 2003 BCSC 464 at paras. 14-15. Evidence of a diagnosis is admissible only for the purpose of showing that the diagnosis was made, not for the truth of the diagnosis: *Edmondson v. Payer*, 2011 BCSC 118 at para. 38. A prior inconsistent statement by a party may be used to impeach the party's credibility in cross-

examination, or may be treated as a party-admission and accepted for the truth of their content: Edmondson at paras. 29-30, aff'd 2012 BCCA 114; Egan v. Andrychuk, 2022 BCCA 110 at paras. 53-54. However, in Edmondson, the Court warned that caution must be exercised when reviewing clinical records as they are the subjective notes recording what the declarant is saying, and are not intended to be verbatim indications of what was said: Edmondson at paras. 31-36; Firman v. Asadi, 2018 BCSC 2437 at para. 29. As explained in Egan at para. 54, many party-admissions will also be prior inconsistent statements, and s. 14 of the Canada Evidence Act provides procedural requirements to admitting any prior inconsistent statements.

- [330] With those caveats in mind, the hospital records concerning the respondent's admission the evening of April 27, 2020 were admitted into evidence along with the police records. According to the hospital records, blood was drawn from the claimant. Amongst, other diagnostic tests, her blood alcohol was tested. The result was "Ethanol 52 mmol/L".
- [331] Documentation from her hospital admission describe the claimant as a "vague historian and also intoxicated difficult to obtain a clear history of the events."
- [332] She reported that she had "been dating John for 7 years, she owns and lives in her own home and John does not have a key."
- [333] She admitted to Emergency staff drinking a bottle of wine. The remarks attributed to her correspond with what she told Constable Banks later when interviewed and, in my view, constitute admissions against interest.
- [334] I agree with the respondent that an expert is not required to make a calculation into the more familiar "blood alcohol content". The formula, as agreed by Cst Elston, is mathematical; not a matter of opinion.
- [335] The result is the claimant's blood-alcohol reading was well in excess of the legal limit to operate a motor vehicle.
- [336] While there were differing opinions by the witnesses as to the claimant's sobriety, Constable Elston, the one witness who thought she did not appear intoxicated conceded he was often surprised by the blood alcohol reading of a seemingly sober person when tested and that the best indication of sobriety was scientific testing; not observation. The respondent, R.W., and S.F. described her as intoxicated.
- [337] Their evidence, coupled with the blood test, the recorded observations of hospital staff and my observations of her appearance and demeanour once she rose from the floor of the garage lead me to conclude the claimant was intoxicated.

- [338] Whatever happened, the claimant cannot describe it. She presumes she was hit, she presumes with the fish bonker she saw weeks earlier and she presumes it was the respondent. He denies it and testified he arrived to find her sprawled on the garage floor. She mentioned to Constable Banks she did a "face plant". She told him she had "a hunch" the respondent was responsible.
- [339] When asked by the respondent's counsel whether there was anything that would convince her otherwise, she replied "No", despite never having seen the respondent strike her or, immediately following the incident describe the assault she now surmises happened.
- [340] As with the other claims raised by the claimant, she bears the onus, on a balance of probabilities, to prove the assault. In my view, she has not done so. The totality of circumstances, including the whole of the parties' interaction throughout the 27th and the evening before, the nature of the text messages between them leading up to the respondent's discovery of the claimant on the driveway, the absence of cleats or shards on the fish bonker which, in the claimant's view, explained her hand injury, and her intoxication, all militate against the speculative nature of the allegation against the respondent.
- [341] Further, despite the lack of medical evidence, there is merit in the respondent's submission that had the claimant been struck, as alleged, with a pool ball at the end of a 10-14-inch stick, one would expect something more by way of damage than facial bruising. Given the absence of any shards or cleats on the bonker, it is difficult to understand the mechanics of how the respondent could have inflicted the injuries to the claimant's right hand.
- [342] Finally, while I do not take into account the respondent's results from polygraph testing; I do consider the level of cooperation he afforded the RCMP in their investigation as being a factor I can consider in concluding the claimant has not discharged her burden.
- [343] The claim for assault is dismissed.

Summary

- [344] Each of the claims in the Amended Notice of Family Claim is dismissed.

Costs

- [345] The respondent is entitled to the costs of the proceeding at Scale B.

"Harvey J."

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