

CANADA / JUDGMENT

British Columbia (Workers' Compensation Board) v. Sidhu

2022 BCSC 1457

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1457 British Columbia (Workers' Compensation Board) v. Sidhu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

British Columbia (Workers' Compensation Board) v. Sidhu,

2022 BCSC 1457

Date: 20220822

Docket: S200799

Registry: New Westminster

Between:

Workers' Compensation Board

Plaintiff

And

Gagandeep Singh Sidhu and Alamjeet Singh Sidhu

Defendants

Before: The Honourable Justice Kent

Reasons for Judgment

Counsel for Plaintiff, appearing via videoconference:

J. Goosen

Counsel for Defendants, appearing via videoconference:

S.T. Cope

Place and Date of Hearing:

New Westminster, B.C.

February 16, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 22, 2022

Table of Contents

Introduction.. 3

Basic background facts. 3

The lawsuit and the present application for judgement. 5

Issues in dispute and positions of the parties. 8

Analysis. 14

Interpretation of the legislation. 14

Interpretation of the Repayment Agreement 16

Conclusion.. 22

Introduction

- [1] The Plaintiff Worker's Compensation Board (the "Board") applies pursuant to Supreme Court Civil Rule 9- 6 (summary judgment) or alternatively Supreme Court Civil Rule 9-7 (summary trial) for judgment against the Defendants in the principal amount of \$51,853.11, together with interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79, and costs.
- [2] For the reasons that follow, judgment is granted as sought.

Basic background facts

- [3] The parties have provided the Court with an "Agreed Statement of Facts and Document Agreement". The Agreed Statement of Facts reads as follows:
1. The plaintiff Workers' Compensation Board (the "Board") is a tribunal independent of both workers and employers of the Province.
 2. The Board is created by and charged with the administration of the Workers' Compensation Act, RSBC 2019, c 1 (the "Act").

3. The Act replaced the former Workers' Compensation Act, RSBC 1996, c 492 (the "Former Act") on April 6, 2020.

The Underlying Claim for Compensation

4. On November 24, 2004, Mr. Gursewak Singh Sidhu was in a car accident during the course of his employment (the "Accident").
5. On December 2, 2004, Mr. Sidhu (the "Deceased") died from the injuries he sustained in the Accident
6. The defendants Gagandeep Singh Sidhu ("G. Sidhu") and Alamjeet Singh Sidhu ("A. Sidhu" and together, the "Sidhu Sons") are the sons of the Deceased.
7. At the time of the Accident, G. Sidhu was 14 years old and A. Sidhu was 11 years old.
8. On or about December 21, 2004, Mrs. Simratpal Kaur Sidhu ("Mrs. Sidhu"), the widow of the Deceased, applied to the Board for compensation for herself and the Sidhu Sons as dependants of the Deceased.
9. This claim was accepted by the Board on or about December 23, 2004.
10. Mrs. Sidhu was granted the following benefits:
 - (a) A one-time emergency lump sum of \$2,151.23;
 - (b) Funeral and incidental expenses of \$6,885.00; and
 - (c) A pension of \$1,505.83 per month, including cost of living increases as per s. 334 Act [Former Act, s. 25].
11. Of the monthly pension amount, part is an amount granted to Mrs. Sidhu for life, and part is an amount granted for the benefit of the Sidhu Sons until they are 19, or to age 25 if they are regularly attending school.
12. G. Sidhu received a University of the Fraser Valley diploma in criminal justice in 2012 and A. Sidhu received a Kwantlen Polytechnic University millwright/industrial mechanic certificate in September, 2013.
13. G. Sidhu received payments until January 22, 2013 and A. Sidhu received payments until January 22, 2015. Mrs. Sidhu still receives a monthly pension payment from the Board.
14. In accordance with the apportionment provisions under s. 177 of the Act [Former Act, s. 17(14)] the Board has paid a total amount of \$86,822.93 in pension amounts to the benefit of the Sidhu Sons (the "Compensation Paid").
15. The Compensation Paid does not include the Board's administration fee.

The Repayment Agreement

16. On December 7, 2011, A. Sidhu filed a notice of civil claim against the other parties involved in the Accident (the "Sidhu Action") which was amended on January 28, 2013 to incorporate a Family Compensation Act claim for the benefit of his brother, G. Sidhu.
17. The Sidhu Sons were represented by Stanley T. Cope in the Sidhu Action.
18. On or about April 19, 2013, the Board entered into an agreement (the "Repayment Agreement") with the Sidhu Sons.
19. On or about April 7, 2016, the Sidhu Sons reached a settlement agreement with the defendants in the Sidhu Action for a total of \$143,500 which was paid to Mr. Cope in trust (the "Settlement Amount").
20. From the Settlement Amount, Mr. Cope deducted his legal fees and disbursements of \$63,211.86, leaving \$80,288.15 in net settlement proceeds (the "Net Settlement Amount").
21. The Net Settlement Amount was divided as follows:
 - (a) \$28,435.03 to the Board;
 - (b) \$25,926.56 to G. Sidhu; and
 - (c) \$25,926.55 to A. Sidhu.
22. A total of \$51,853.11 (the "Contested Funds") remains held in trust by Mr. Cope.
- [4] The Board has already been paid the \$28,435.03 referred to above. The Contested Funds comprise the two \$25,926.50 payments proposed to be paid to the two Sidhu Sons. The Board claims that it is entitled to receive these monies in priority to the Sidhu sons. The latter, of course, deny that claim and they seek payment in their favour.

The lawsuit and the present application for judgement

- [5] The Board issued its Notice of Civil Claim in this action in March 2018. The legal basis for their claim is a combination of s. 10 of the Former Act and the contractual obligations imposed upon the Defendants by the Repayment Agreement.
- [6] The Sidhu Sons filed their Response to Civil Claim in May 2018. They admit most of the facts alleged in the Notice of Civil Claim but allege that:
 - the Repayment Agreement only applies to "funds recoverable for personal injuries [to the defendant's father] not his death; and
 - the amount payable to the Board under the Agreement "should have been restricted to the sum of \$195.51" and that the Board "has [actually] received more funds than the Repayment Agreement required the Defendants to pay".

- [7] Notwithstanding the allegation that the Board has been "overpaid", the Defendants have not issued any counterclaim for the return of any such "overpayment".
- [8] The Board's application for summary judgment/trial was filed in June 2021. Even though it is an application for final judgment, it was supported only by an Affidavit sworn by a Legal Assistant in the Board's law department which contained no narrative of facts but which simply attached some 25 documents as "evidence" for the application.
- [9] The Defendants filed their Application Response in June 2021. That Response expanded somewhat upon the legal basis for resisting the Board's claim, arguing
- the Former Act "limits dependency compensation to a percentage of the deceased's earning capacity and nothing else";
 - while s. 10 of the Former Act makes the Board dominus litis over any separate tort litigation against non-WCB-covered third parties, that status was "surrendered" by the Repayment Agreement, which "allowed [the Defendant] to pursue an action that the Plaintiff had preferred not to pursue by itself";
 - the Defendant's repayment obligations were limited to the amount of "financial dependency" recovery proportionate to the allocation of fault determined in the tort litigation; and
 - in any event, the term "injuries" in the Repayment Agreement "obviously excludes" death "in keeping with the distinction between injury and death within the Act" [and hence the Repayment Agreement applies only to funds recovered as a result of injuries, not death].
- [10] The Defendants' Application Response was supported by an Affidavit sworn by one of the Defendants, Gagandeep Sidhu. It attaches the Defendants' mediation brief for the April 7, 2016 mediation, and a February 19, 2015 letter from WCB's counsel setting out the benefits paid to date [a little over \$190,000, approximately \$87,000 of which related to the two sons]. The Affidavit states that "intimidating trial cost consequences [of losing the action]" led Mr. Sidhu and his brother to "conclude [the action] in a manner that provided some recognition with respect to those intangible losses arising from the premature death of our father".
- [11] The application came on before me in chambers on February 16, 2022. Neither party had prepared written argument. As the hearing proceeded, it became apparent that the Board may have underestimated the extent to which the Defendants were relying on perceived frailties in the Repayment Agreement as the basis for resisting the Board's claimed priority to the settlement proceeds. The Board sought and was granted an adjournment to prepare additional written submissions and the Court directed,
- the WCB written submissions were to be filed and served no later than March 11, 2022;
 - thereafter counsel for the Defendants would have 15 days to file any written response; and
 - counsel would then advise whether any additional oral hearing is required to complete the matter.

- [12] The Court received WCB's written materials filed on March 11, 2022. Counsel for the Defendants evidently filed his written submissions on April 6, 2022 but, through oversight, the registry failed to forward the submissions to me until the first week of June 2022 and it was not until June 20, 2022 that counsel confirmed no further oral hearing was required. Hence the delay in the preparation in these preparation of these reasons for judgment.
- [13] The Agreed Statement of Facts and Document Agreement referred to above, signed by both counsel, was attached as a schedule to the Board's written submissions. Counsel had evidently noted the Court's reservations regarding the Legal Assistant's Affidavit as the evidentiary basis for an application for judgment. The Agreed Statement of Facts is set out earlier in these reasons. The Document Agreement permits the attached exhibits to the Legal Assistant's Affidavit to be admitted in evidence. Hence, the Agreed Statement of Facts and Document Agreement should be regarded as part of the formal Record for the purposes of this application.

Issues in dispute and positions of the parties

- [14] One technical, perhaps not substantive, issue to be decided in this case is whether the priority claim between the parties is governed by Former Act or the 2019 Act. The Former Act was revised in 2019 pursuant to the Statute Revision Act, R.S.B.C. 1996, c. 440. The revisions were purely editorial in nature, but they resulted in a re-numbering of the legislation's parts, divisions and section numbers.
- [15] Section 8 of the Statute Revision Act provides as follows:

Legal effect of revision

- 8 (1) A revision does not operate as new law but has effect and must be interpreted as a consolidation of the law contained in the Acts and provisions replaced by the revision.
- (2) If a revised provision has the same effect as a provision replaced by the revision, the revised provision
- (a) operates retrospectively as well as prospectively, and
 - (b) is deemed to have been enacted and to have come into force on the day on which the provision replaced by the revision came into force.
- (3) If a revised provision does not have the same effect as a provision replaced by the revision,
- (a) the provision replaced by the revision governs all transactions, matters and things before the revision comes into force, and
 - (b) the revised provision governs all transactions, matters and things after the revision comes into force.

- [16] I recognize that s. 8(2) set out above very likely applies to this case and that the rather convoluted s. 10 of the Former Act is now replaced by ss. 127-133 of the 2019 Act, a revision that helpfully includes both headings and subsections that improve both syntax and comprehension.
- [17] Still, the entire background to this dispute, including the claim for "survivor benefits" following the fatal accident, the tort litigation arising out of that accident, the Repayment Agreement between the parties, and the pleadings in this lawsuit were all governed by the Former Act. The Former Act thus forms part of the "surrounding circumstances known to the parties at the time of formation of the contract" which may assist in interpreting the terms of the Repayment Agreement. I therefore decline the Board's invitation to use only the 2019 Act in these reasons for judgment and instead will be referring to the language of the Former Act.
- [18] Ultimately, the issues in dispute in this case involve the interplay between the WCB benefits regime and related tort litigation arising out of the same accident, here the November 24, 2004 car accident leading to the death of Mr. Gursewak Sidhu on December 2, 2004.
- [19] The relevant parts of s. 10 of the Former Act in force at the time of the accident include:

Limitation of actions, election and subrogation

10 (1) The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. This provision applies only when the action or conduct of the employer, the employer's servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part.

- (2) Where the cause of the injury, disablement or death of a worker is such that an action lies against some person, other than an employer or worker within the scope of this Part, the worker or dependant may claim compensation or may bring an action. If the worker or dependant elects to claim compensation, he or she must do so within 3 months of the occurrence of the injury or any longer period that the Board allows.

[]

- (4) An application filed by a parent, guardian or the Official Guardian for compensation for the infant child of a deceased worker is a valid election on behalf of that child.

- (5) If after trial, or after settlement out of court with the written approval of the Board, less is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under this Part, the worker or dependant is entitled to compensation under this Part to the extent of the amount of the difference.
- (6) If the worker or dependant applies to the Board claiming compensation under this Part, neither the making of the application nor the payment of compensation under it restricts or impairs any right of action against the party liable, but as to every such claim the Board is subrogated to the rights of the worker or dependant and may maintain an action in the name of the worker or dependant or in the name of the Board; and if more is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under this Part, the amount of the excess, less costs and administration charges, must be paid to the worker or dependant. The Board has exclusive jurisdiction to determine whether to maintain an action or compromise the right of action, and its decision is final and conclusive.
- (7) If, in an action brought by a worker or dependant of a worker or by the Board, it is found that the injury, disablement or death, as the case may be, was due partly to a breach of duty of care of one or more employers or workers under this Part, no damages, contributions or indemnity are recoverable for the portion of the loss or damage caused by the negligence of that employer or worker; but the portion of the loss or damage caused by that negligence must be determined although the employer or worker is not a party to the action.

[]

- [11] Costs may, notwithstanding that a salaried employee of the Board acts as its solicitor or counsel, be awarded to and collected by the Board in an action taken by the Board under this section.
- [20] The father was a "worker" whose injuries and subsequent death arose out of and in the course of his employment as a taxi driver. The other persons allegedly responsible for the accident that ultimately caused the father's death were neither "employers" nor "workers" within the scope of the Act and hence were not protected by the litigation immunity bestowed by s. 10(1) of the Former Act.
- [21] Hence subsections 10(2) and (6) of the Former Act were triggered; the father's dependants, his wife and two young sons, were put to an election whether to claim compensation under the Act or to pursue a tort lawsuit under the Family Compensation Act, R.S.B.C. 1996, c. 126 [Family Compensation Act] against the other persons allegedly responsible for the accident.
- [22] In this case Mrs. Sidhu elected to claim compensation from the Board both on her own behalf and also on behalf of her two sons. Under s. 10(4) of the Former Act, that application was "a valid election on behalf of" the two sons.

[23] The effect of this election to claim WCB benefits is described in *Yaremy v. Insurance Corporation of British Columbia*, 2010 BCCA 418 at paras. 77-85 and may be summarized as follows:

- the election does not extinguish any cause of action by the injured worker (or his dependants in the case of a fatal accident) against a tortfeasor who is not immunized by the Act, however it is "an encumbrance on the ability of an injured worker [or dependant] to commence [such] an action";
- once benefits are elected, an action cannot be independently commenced by the injured person or dependant; and
- in such cases, the Board has exclusive jurisdiction to commence and conduct any available tort action in the name of the injured worker or dependant and to settle that action if it so wishes, and its decisions in that regard are "final and conclusive".

[24] When the Family Compensation Act lawsuit was issued in 2011, it was unknown to and unauthorized by the Board. In fact, the Board had decided that the prospects of success for any such lawsuit were very slim and had decided not to pursue that option. However, once the tort lawsuit was brought to its attention, the Board ultimately granted the Sidhu sons permission to continue the action in accordance with the terms and conditions of the Repayment Agreement executed on April 19, 2013.

[25] The fundamental issue in dispute in this case is how the Repayment Agreement combines with s. 10(6) of the Former Act to govern the distribution of the monies recovered through settlement of the tort litigation.

[26] Section 10(6) provides in part:

if more is recovered and collected [in the tort action] than the amount of the compensation to which the worker or dependant would be entitled under this Part [of the act], the amount of the excess, less costs and administration charges, must be paid to the worker or dependant.

[27] The operative wording of the Repayment Agreement reads as follows:

AGREEMENT

Whereas GAGANDEEP SINGH SIDHU and ALAMJEET SIDHU, sons of GURSEWAK SINGH SIDHU, who was fatally injured in a motor vehicle accident on December 2, 2004 (the "Accident"), elected to receive workers' compensation benefits under Claim No. 04400720 as a result of an application submitted on our behalf by our mother;

And whereas the Workers' Compensation Board (the "Board") has exclusive control pursuant to Section 10 of the Workers' Compensation Act, R.S.B.C. 1996, chapter 492, (the "Act") of any claim that I may have against another part for personal injury ("injuries") arising from the Accident;

I, GAGANDEEP SIDHU and ALAMJEET SIDHU, in consideration of the Board granting me permission to pursue a legal action, I AGREE that any Funds recovered by or on my behalf through negotiation, settlement or otherwise as a result of injuries sustained in the Accident be distributed in the following manner:

1. Firstly, to pay all reasonable legal fees and disbursements incurred in pursuing the legal action;
2. Secondly, to reimburse the Board for the amounts paid to me or on my behalf for the Injuries, including but not limited to the Board's administration fee pursuant to Claim No. 04400720.

3 Thirdly, the excess, if any, to myself.

In this Agreement, "Funds" shall include, but not be limited to, damages whether special, general or otherwise, pre-judgment interest, post-judgment interest and costs.

The excess, if any, shall be paid to me on the understanding that if in the future I become entitled to further benefits as a result of the Injuries, I will not receive the further benefits until such time as they are greater than the excess I have received and then I will only receive the future entitlements to the extent that they are greater than the excess.

The Board's expenses as of February 28, 2013 are \$351,282.33, inclusive of administration fee.

I understand that the Board's expenses may increase from the amount listed above and I will confirm with the Board the amount of the Board's expenses, prior to accepting any settlement proposal or proceeding to trial;

[28] The Board's position is quite simple:

- the "amount of compensation" paid to the Sidhu sons was \$86,822.93;
- the net recoveries under the settlement, after deduction of the related legal fees, was \$80,288.15;
- there is thus no "excess" recovery and the Board is entitled to receive the full \$80,288.15 and, in particular, the \$51,853.11 withheld by the Sidhu sons and sitting in the trust account of their counsel; and
- the Repayment Agreement cannot and must not be interpreted to permit or encourage "contracting out" or around the Worker's Compensation regime and the "historic compromise" it represents in the law of this province.

[29] The Defendants' written submissions again expanded upon the legal basis for opposing the Board's claim to all the net settlement proceeds. Under separate headings entitled "1996 Workers' Compensation Act Prevails" and "the Transactional Relationship between the Plaintiff and Dependents", the Defendants argued:

- the Board's statutory right of subrogation under the Act is not a full legal assignment of the Defendants' tort rights or causes of action against the third parties responsible for the fatal accident;
- rather, the Board's subrogation rights only "attach to", and their recovery rights are thus limited to, claims/losses on which the WCB compensation benefits were based i.e. loss of the father's income;
- notwithstanding the Board's subrogation rights, the Defendants still maintained a personal interest in, and after they "aged out" of any WCB benefit entitlement were entitled to independently sue, claims for "intangible losses" recoverable under the Family Compensation Act i.e. loss of love and affection, guidance, valuable services and inheritance, and the Board has no claim to settlement funds related to those losses; and
- in any event, properly interpreted, the Repayment Agreement only applies to recoveries related to the father's "personal injuries" and not consequent upon his death, therefore the Board has already received more than it is entitled to under the Agreement.

Analysis

Interpretation of the legislation

[30] Stripped to its component parts, s. 10(6) of the Former Act provides that:

- receipt of WCB benefits by dependants in fatal accident cases does not restrict or impair any right of those dependants to issue a tort action under the Family Compensation Act against third persons who might be liable for the accident;
- however, where such WCB benefits are paid, the Board is subrogated to the dependants' rights to initiate, maintain and settle the tort action (whether brought in the name of the dependants or in the name of the Board);
- if, by way of judgment or settlement of the tort action, the damages collected exceed the amount of the WCB benefits paid to the dependants, then that excess (minus costs and administration charges) is payable to the dependants; and
- the manner in which the tort action is prosecuted (whether in the name of the dependants or the Board) is controlled and determined by the Board.

[31] This "plain English" interpretation of s. 10(6) reflects both the grammar and ordinary meaning of the words in the section, read in the context of the Act as a whole, including the so-called "historic compromise" (the "trading-off" of litigation rights in favour of no-fault benefits for injuries incurred "on the job") referred to in case law such as *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 SCR 890 at paras. 25-26.

[32] I do not agree with the Defendants' argument that the Board's statutory subrogation and recovery rights are limited to a particular head of damages in the tort lawsuit (i.e. loss of the deceased's income). The Act modifies the common law principles of subrogation in various respects, namely:

- it permits subrogation (here, in respect of any Family Compensation Act lawsuit) even though the injured worker or dependants may not have been fully compensated for all losses sustained;
- it grants the Board authority to control the tort litigation even though the injured worker or dependants may not have been fully compensated for their loss; and
- it grants the Board "first call" on all the monies recovered in the tort lawsuit up to the amount paid by the Board as compensation and limits the injured worker's or dependants' entitlement to the amount by which the recoveries exceed that compensation.

See *McRae v. Canada (Attorney General)*, 1997 CanLII 4121 (BC CA) [McRae]

[33] These priorities, including the requirement of full recovery of WCB benefits paid before injured workers or dependants receive the balance of any tort litigation proceeds, are also consistent with the "historic compromise" underlying the WCB compensation regime.

[34] I also do not agree with the Defendants' argument that, once child dependants have "aged out" from receiving any further survivor benefits from the Board, they are free to initiate or control any tort lawsuit against third parties responsible for the fatal accident. The language of s. 10(6) of the Act is very clear that this control resides exclusively with the Board. This remains the case even though, as acknowledged by the Court in *McRae*, the dependants may have a personal interest in the litigation in respect of amounts recovered in excess of the Board's subrogated claim.

[35] It follows from the above that, in my opinion, s. 10(6) of the Act supports the Board's claim for the "contested funds" that are the subject matter of this litigation. It remains to be determined, however, whether the Repayment Agreement dictates a different result, a question to which I now turn.

Interpretation of the Repayment Agreement

[36] While the parties have chosen to label it as a "Repayment Agreement", the document itself does not bear that title and contains terms and conditions related to matters beyond distribution of the monies recovered in the tort lawsuit. Among other things, the Agreement:

- grants the Defendants permission to pursue the tort lawsuit instead of the Board;
- makes the Defendants personally responsible for all legal fees and other expenses incurred in pursuit of the lawsuit, including any costs award that might be made against them should they lose the action at trial;

- addresses what impact any recoveries by the Defendants might have upon their future entitlement to benefits under the Act;
- sets out the quantum of the Board's "expenses" as of February 28, 2013 and requires confirmation of any updated amount before accepting any settlement proposal or proceeding to trial; and
- imposes a solicitors' undertaking upon the Defendants' counsel with respect to the disbursement of funds recovered in the action.

- [37] Before dealing with the specific interpretation of the distribution provisions of the Agreement, I would first observe that the document appears to be a standard form which has been partially modified to reflect the fatal accident background in this case. It appears to be a form designed to be signed by a single injured worker receiving WCB benefits (it uses "I" instead of "we", "me/my" instead of "us/our" etc.). It uses a possibly ambiguous term i.e. "personal injury", a term seized upon by the Defendants in this case to potentially nuclear effect. It does not specifically refer to the Family Compensation Act lawsuit which had become known to the Board by the time the Agreement was executed. Had the Agreement been better drafted, the present litigation might have been avoided.
- [38] Counsel for the Board informed me at the hearing that these "Repayment Agreements" are not expressly covered by either the Former Act or 2019 Act, nor by any WCB policies. I was also advised that none of these agreements have yet been the subject of any judicial consideration.
- [39] I am satisfied that the WCB has the legal capacity to enter into litigation agreements of this sort and also to modify the "usual" distribution of litigation proceeds as between the Board and the WCB benefits recipients if it so wishes. The interpretation of any such agreement is governed by the same legal principles applicable to contracts generally, as articulated in authorities such as *Sattva Capital Corp v. Creston Moly Corp*, 2014 SCC 53 [Sattva] and G.R. Hall, *Canadian Contractual Interpretation Law*, 3rd edition, Lexis-Nexis, Toronto, 2016, ("Hall").
- [40] The Agreement in this case was apparently prompted by a January 24, 2013 letter sent by counsel for the Defendants to the WCB (a copy of which has not been provided to the Court). That letter resulted in a response by WCB's in-house counsel, dated March 4, 2013. The Board was obviously under the impression that the tort litigation would be pursued both by Mr. Sidhu's widow as well as the two children. The letter stated:

The Board is prepared to allow Mrs. Sidhu and her children to proceed with the legal action provided they agree and you undertake to protect the Board's subrogated interest. The Board would require that any monies recovered through settlement, trial or otherwise be applied firstly to recover reasonable legal fees and disbursements, secondly, to cover the Board's subrogated interest; and the remainder, if any, payable to Mrs. Sidhu or her children as an advance against future claim costs. I have attached a draft Agreement to be executed by yourself and Mrs. Sidhu.

- [41] The attached Agreement is almost identical to the document ultimately signed except that it includes both the widow and the two children as signatories.
- [42] It appears further communication ensued between counsel, ultimately leading to the "modified" Agreement signed on April 19, 2013. This version of the Agreement contains no reference to Mrs. Sidhu and is signed by only the two sons.
- [43] The signed Agreement was sent by counsel for the Defendants to WCB under cover of a letter dated April 22, 2013 which stated that the two sons were "stunned" by the \$351,282.33 WCB claim referred to in the document. After requesting a breakdown of the amounts actually paid to each son, the letter concluded,

Once we understand what the payments made to [the two sons] were, we can advise our clients with respect to their prospects for recovery, given that liability is hotly contested.

- [44] On May 9, 2013, WCB responded to counsel for the Defendants confirming that:

- the WCB "reserve" (present value of predicted total dependants' entitlement) was \$265,231.37, although the total amount paid to date was \$158,606.14; and,
- the amount paid to the two Sidhu sons was \$81,646.96, although payment to one of the sons was continuing because he was still attending school.

- [45] Almost two years later on February 19, 2015, in reply to a further request for updated figures, WCB advised counsel for the Defendants that the aggregate survivor benefits apportioned to the two Sidhu sons was \$86,822.93.
- [46] Shortly before the April 7, 2016 mediation in the tort litigation, the Board updated its aggregate "interest" (\$340,389.85) and advised it would not be attending the mediation and would instead "leave it to you to negotiate the best settlement that you can in the hope of generating excess funds for the Sidhus". The latter responded by letter dated March 30, 2016, informing the Board that the mother was not a claimant within the proceedings and that the "WCB subrogation expectation should not exceed \$112,001.58". It was not explained to the Court how this latter amount was calculated.
- [47] On April 20, 2016 counsel for the Defendants sent WCB a letter enclosing their Mediation Brief, the Settlement Agreement signed at the mediation, a "Proceeds Distribution Statement", and a cheque for \$28,435.03. Appendix A to the Settlement Agreement allocated the settlement monies as follows:

Love guidance and affection \$100,000

Loss of financial dependency \$121,647.90

Loss of valuable service \$80,320

Loss of care \$2,200

Loss of inheritance \$20,000

Total \$324,167

Reduced for liability by 63% \$204,225.21

Net of liability \$119,941.79

Rounded to \$120,000

Bill of costs agreed at \$23,500

All-inclusive settlement \$143,500.

[48] Mr. Cope's letter of April 20, 2016 explained how the \$28,435.03 cheque to WCB had been calculated:

The enclosed payment represents 37% of the \$121,747 negotiated for [the Sidhu sons'] loss of financial dependency, less 33 1/3% for legal fees [$\$121,647 \times 37\% - \$16,574.34 = \$28,435.03$]

[49] Needless to say, the Board objected to the proposed distribution of settlement funds and the battle lines were then drawn for the present litigation.

[50] The questions which now arise regarding interpretation of the Repayment Agreement are:

- (1) whether the use of the terms "personal injury" or "Injuries" preclude recovery by the Board of any settlement funds paid as a result of Mr. Sidhu's death?, and
- (2) if not, whether the words "any Funds" is limited to that part of the settlement award which the tort litigants have labelled "financial dependency"?

[51] In my opinion, the answer to both questions is "no".

[52] At common law a cause of action in tort did not exist for loss resulting from another person's death. This was decided in *Baker v. Bolton* (1808) 170 ER 1033 (KB), a case where a husband sued after his wife died from injuries in a stage-coach accident and where Lord Ellenborough famously stated that "in a civil action the death of a human being could not be complained of as an injury". This common law principle was later legislated out of existence by what is now in B.C. called the Family Compensation Act, which provides for a statutory cause of action for "death by wrongful act, neglect or default".

[53] Case law has subsequently determined the types of compensation available under the Family Compensation Act. They include damages for (1) loss of financial support, (2) loss of household assistance, (3) loss of love, guidance companionship care and training for children, and (4) loss of inheritance (the amount the deceased would have bequeathed to their family had he/she lived to a normal life expectancy).

- [54] The Defendants rely on Lord Ellenborough's dictum as part of their argument that "injury" does not include "death". In my opinion, while the dictum may be famous, it was and remains entirely disputable. And, in any event, the argument fails to recognize basic principles of contractual interpretation (see Hall).
- [55] The recitals to the Agreement play an important role. They not only provide part of the factual matrix for the contract, but they also supply two of its important defined terms, namely, "Accident" and "Injuries" arising from the Accident.
- [56] Recitals were often treated as a subordinate part of a contract and were ignored if they were inconsistent with the contract's operative provisions. One exception to that rule, however, is that if the operative provisions were ambiguous, then recitals could be considered in order to resolve the ambiguity (Hall, at 361-365).
- [57] In this case the word "Accident" is defined to mean the motor vehicle accident whereby Mr. Sidhu was "fatally injured". The reference to "personal injury arising from the Accident" (defined as "Injuries") is an obvious reference to the fatal injury and any ambiguity in the term must be resolved accordingly.
- [58] Furthermore, the factual matrix and surrounding circumstances for the Repayment Agreement is based entirely upon the fatal accident and the WCB benefits that had already been paid in that regard. The fatal injury was the subject matter of the tort litigation under the Family Compensation Act. That lawsuit was the very subject matter of the Repayment Agreement.
- [59] In these circumstances, it cannot be rationally argued that the intent of the parties was to limit the Repayment Agreement to the two hundred dollars of income that Mr. Sidhu may have lost before he died. Such an interpretation is an absurdity, as counsel for the Defendants himself recognized when he paid WCB \$28,435.03 in recognition of the "financial dependency" claim under the Family Compensation Act. The law requires that "any interpretation [of contractual provisions] which is commercially absurd is to be avoided": Hall, at 56.
- [60] The Defendants' argument that the distribution provisions of the Repayment Agreement only applied to "financial dependency" recoveries agreed by the tort litigants must also fail.
- [61] The key words in the recovery distribution clause are "any Funds recovered as a result of injuries sustained in the Accident" (emphasis added). The word "Funds" is broadly defined to "include but not be limited to damages whether special, general or otherwise" (emphasis added).
- [62] There is nothing in this language which in any way imports a limitation to recoveries for "loss of financial dependency". Indeed, any such limitation is expressly refuted by the words "any" and "not being limited to". The law requires that these words be given their "ordinary and grammatical meaning consistent with the surrounding circumstances known to the parties at the time of the formation of the contract": Sattva, para. 47. Those circumstances

include, and the words also accord with, the distribution priorities mandated by s. 10(6) as discussed in paras. 32 and 33 above.

[63] I conclude that, properly interpreted, the Repayment Agreement requires all of the settlement proceeds in this case, net of lawyers' fees and disbursements, to be paid to the WCB.

Conclusion

[64] For the reasons stated above, judgment is granted to WCB against the Defendants in the principal amount of \$51,853.11 together with pre-judgment interest thereon from April 20, 2016 to the date of this judgment.

[65] The Court expects that counsel for the Defendants will abide by his signed undertaking forming part of the Repayment Agreement and that he will disburse the monies held in trust accordingly.

[66] Costs will follow the event and are awarded to the WCB to be assessed on Scale B of Appendix B of the Supreme Court Rules.

"Kent, J."

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