

CANADA / JUDGMENT

# McGlone v. Kelly

2003 BCSC 240

## COURT

Supreme Court of British Columbia

## DECIDED

13 February 2003

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2003BCSC0240

Citation: McGlone et al v. Dr. Kelly et al Management Fees

Date: 20030213  
2003 BCSC 240Docket: 99/4707  
Registry: Victoria  
IN THE SUPREME COURT OF BRITISH COLUMBIABETWEEN: TAYLOR MCGLONE (ALSO KNOWN AS TAYLOR FLEMING), AN INFANT, BY HER  
GUARDIAN AD LITEM, TRACY MCGLONE, TRACY MCGLONE  
AND MARC FLEMING  
PLAINTIFFSAND: DR. PHILIP KELLY, DR. MANVILLE, DR. J. BALFOUR, DR. J. MATTHEW, NURSE D.  
GRONEBERG, NURSE D. MARGETTS, NURSE JOHN OR JANE DOE, THE GREATER  
VICTORIA HOSPITAL SOCIETY AND NURSE J. MCMILLAN AND NURSE C.  
STAFFORD  
DEFENDANTS

## REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE SHABBITS

(IN CHAMBERS)

Counsel for the plaintiffs:

I.C. Faulkner

Counsel for the defendant, Dr. Philip Kelly:

M. L. McBride

Counsel for the Public Guardian

And Trustee of British Columbia:

M. Sasges

Date and Place of Hearing:

Feb. 07, 2003

### Nanaimo, BC

- [1] The plaintiffs recovered judgment against the defendant, Dr. Philip Kelly. The reasons for judgment are reported at 2002 BCSC 774. Neither the arguments at trial nor the reasons for judgment addressed issues relating to the management of funds recovered by the plaintiffs.
- [2] Taylor Fleming was born on October 16, 1997. She is profoundly disabled. The judgment relates to Taylor's claim for compensation for injuries she suffered at birth.
- [3] The plaintiffs apply to have Tracy McGlone, Mark Fleming and the Bank of Nova Scotia Trust Company ("Scotia Trust") appointed as trustees of Taylor's estate. Scotia Trust consents to the appointment.
- [4] Ms. McGlone and Mr. Fleming are Taylor's parents. Ms. McGlone is employed full-time. She is pursuing a long-standing goal of obtaining accreditation as a Certified Management Accountant. Mr. Fleming is a self-employed journeyman carpenter. Ms. McGlone and Mr. Fleming have cared for Taylor since her birth. Taylor's needs are constant. Her care has demanded considerable sacrifice on the part of her parents.
- [5] Taylor's parents intend to provide her with in-home care. Most of the judgment recovered on Taylor's behalf relates to the funding of such care.
- [6] I am satisfied that Ms. McGlone and Mr. Fleming are capable of caring for Taylor. In my opinion, Ms. McGlone and Mr. Fleming are the most appropriate persons to make decisions with respect to Taylor's health care and personal care.
- [7] As the judgment is for a large sum of money, the plaintiffs propose to involve Scotia Trust as a co-trustee. The Public Guardian and Trustee of British Columbia neither supports nor opposes the application. Counsel for the Public Guardian and Trustee appeared on this application to offer guidance to the Court. The Public Guardian and Trustee has involved itself in negotiating the terms of the proposed appointment. Those terms are set out in "Draft No. 8", marked as Exhibit B to the Submissions of the Plaintiffs on this application, filed February 7, 2002.

- [8] I have had regard to the evidence received at the trial, and to the affidavit evidence filed in support of this application, as well as to *Jack v. Martin* (30 April 2001), *Victoria* 97-2372 (B.C.S.C.), and to *Renaerts v. Korn*, [1998] B.C.J. No. 3223 (S.C.), in which an order of the kind sought on this application was made.
- [9] I am satisfied that it is appropriate that a similar order be made in these proceedings.
- [10] I order that Tracy McGlone, Mark Fleming and Scotia Trust be appointed as trustees of Taylor's estate. I further order that the terms of the appointment shall be as set out in Draft No. 8, supra, subject only to these two changes:
- a. The trustees shall be authorized to expend \$125,000 of Taylor's trust in making a "Residential Investment" under clause 9(b).
  - b. The prior approval and authorization of the Public Guardian and Trustee shall be required for extra-ordinary encroachments in excess of \$25,000 in any calendar year. With the approval of the Public Guardian and Trustee, encroachments in excess of \$25,000 in a calendar year shall not require an application to the court. Extra-ordinary encroachments shall mean encroachments upon capital other than for payment of the items set out in paragraphs 276 to 309 of the reasons for judgment reported at 2002 BCSC 774.
- [11] The plaintiffs and the defendant, Dr. Philip Kelly, seek a direction as to whether the \$293,000 "lost earnings" component of the damages set out in paragraph 276 of the reasons for judgment should attract an award for the cost of fund management.
- [12] The amount of this award was agreed to by the parties. Although it was not the subject of comment in the reasons for judgment, the parties agree that the award relates to damages for lost earnings during the "lost years." The parties agreed that Taylor's life expectancy was 14 years from the date of the trial. The lost years award relates to Taylor's future loss of income. However, as the future loss of income is for a period of time after Taylor's demise, or when Taylor is otherwise provided for under the award, the award relates only to that portion of her earnings which she would have saved.
- [13] I was referred to this excerpt from the reasoning of Madam Justice McLachlin (as she then was) in *Toneguzzo-Norvell v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at 127 which discussesdiscusses this type of award:

The logic of the making of a deduction for personal living expenses on the lost years in the case of a child is also supported by the argument that since Jessica's care is fully provided for under another head of the award, the award for lost earning capacity will serve but one purpose: to enrich her heirs. It will do little to improve her life. As Cooper-Stephenson and Saunders persuasively argue in *Personal Injury Damages in Canada* (1981), at p. 244, the amount by which heirs can ordinarily expect to be enriched by a victim's putative earning is small indeed:

... the award of damages to a very young child for prospective loss of earnings during the lost years should reflect only that portion of the entire lifetime earnings which the court estimates would have been saved by the child for his estate, at the end of his pre-accident life expectancy. It may result in a very small award.

[14] I was also referred by counsel to the following helpful discussions on the issue of whether a "lost years" award should attract an award for fund management. In *Lewthwaite v. Godin* (1984) 53 B.C.L.R. 360 (S.C.), Mr. Justice Bouck said this at paras. 21-23:

In my view, an award to compensate an injured plaintiff for the anticipated expenses he will incur by way of an investment management fee should be confined to a consideration of the amount given with respect to his future loss. If there is no future loss, either by way of cost of future care or loss of future income, there can be no management fee. The reason for this is relatively simple. Future loss claims are based upon the plaintiff's recovering compensation from a diminishing fund. It is anticipated he will invest the money and get back a certain rate of return. From time to time he may sell off securities to pay for the cost of his care or to produce the income he needs. It is presumed he will be wise enough to make the correct investments so that the fund will earn the sums contemplated in the judgment. At the end of the relevant period the fund will be exhausted. If a mistake is made during the investment process, the amount the plaintiff is supposed to recover may be diminished.

On the other hand, damages for pain, injury, suffering and loss of enjoyment of life and past loss of income are not predicated on any sort of actuarial basis. As for pain and suffering, the award mostly involves discomfort suffered from the date of the injury to the date of trial although there is frequently an ingredient of pain, suffering and loss of amenities from the date of trial into the future. Damages for past loss of income represent an amount due the plaintiff to the time of the trial. Neither have [sic] anything to do with a prospective loss, or a diminishing fund based upon actuarial evidence. Therefore, the law does not anticipate the plaintiff should have the use of this money over any future period. He may spend it at once or invest it in perpetuity. The option is entirely up to him and the award is made on that understanding.

For these reasons, a management fee is only an item of damages applicable to a plaintiff's future financial loss.

In *Lee v. Richmond Hospital Society* (2002), 3 B.C.L.R. (4th.) 91 (S.C.), Mr. Justice Wong made these comments at paras. 31-32:

The defendant is responsible for the awards for future care costs and future loss on income earning capacity, and because they are funds which must be invested to produce a stream of income, the defendant therefore must be responsible for the fees that will be incurred to produce the income expected.

However, the other damages are not based on any present value analysis, and the defendant should not have to assume any management fee nor committee fee associated with any investment of these funds, which are not required to be invested to produce any income stream.

Finally, in *Townsend v. Kroppmanns* (2002), 2 B.C.L.R. (4th.) 10 (C.A.), Chief Justice Finch, speaking for the court, stated at para. 40:

The award of a sum for management fees is another refinement on the assessment of damages since 1978. The law recognizes that specific awards including costs of future care, future loss of income earning capacity, cost of housekeeping care, and other present lump sum amounts awarded in respect of future losses, must be invested in order to provide sufficient funds for the future income stream in respect of which the award is made. Accordingly, a sum of money is provided to cover professional financial manager's fees and similar expenses.

- [15] Damages for future losses are designed and intended to provide a fund of money which a plaintiff can invest in order to produce a future sum to pay for ongoing care costs, to replace future income, or to fund a future loss or a future purchase.
- [16] I am of the opinion that the "lost years" award should attract a management fee award for the following reasons.
- [17] The \$293,000 award relates to the present value of the sum of money which would be available to benefit Taylor's estate at the end of her agreed life expectancy. The present value of that future sum has been discounted in accordance with the Law and Equity Act, R.S.B.C. 1996, c. 253. Since the award has been discounted to reflect the present value of a future sum of money, the award must continue to be invested in order to produce the future sum for Taylor's estate at the end of her life expectancy.
- [18] Another reason to award a management fee is that in addition to the fact that the present value of this award is not currently available to the heirs of Taylor's estate, it may be necessary for this money to be expended on Taylor's care and needs during her lifetime. Taylor may well have a use for the money or needs not reflected in the judgment, and she may well live longer than her agreed life expectancy. The award is based on Taylor's loss of future income. Taylor may have need of that income. The award must continue to be invested, and kept available for Taylor's use or needs during her lifetime.
- [19] At the hearing of this application, the parties agreed that if the lost years award is included in the management fund, then the portion of the judgment which attracts management fees is \$1,335,546. The parties also agreed that if it was found that the portion of the judgment which attracts a management fee award is \$1,335,546, that the appropriate award for a management fee would be \$106,300, subject only to the defendant's submission that the award should be discounted because of the evidence that the investments will produce a rate of return greater than the discount required by the Law and Equity Act. The defendant, Dr. Kelly, submitted that the evidence filed on this application suggested that a 50% discount of the management fee of \$106,300 was appropriate.
- [20] I am aware that there is the illusion of inconsistency in allowing such a discount. The present value of the fund was determined by discounting future sums on the assumption that the fund would earn investment returns of 3.5% per annum. This discount is required

by the Law and Equity Act. If the management fee award is reduced on the basis that the actual return on the investments will exceed 3.5%, it would seem that the value of the fund which was fixed after applying the discount required by law by the Law and Equity Act is being indirectly eroded.

- [21] In my opinion, this concern is answered by the observation that the cost of money management can vary widely. The trustees of a fund may well decide that a particular money manager, with special expertise and training, and with sophisticated resources, should be retained in the hope that the return on investment will exceed 3.5%. However, the plaintiffs' decision to retain such a money manager cannot be at the expense of the defendant. The defendant's obligation is to fund management reasonably required to achieve a recovery of the discount fixed by the Law and Equity Act.
- [22] On the evidence before me, I am satisfied that the plaintiffs intend to retain a money manager at extra cost in anticipation that the investment returns on the fund will exceed 3.5%. It is true that such a return may not be achieved. In the economist's report dated November 14, 2002, and filed in this proceeding, it was pointed out that bond yields over the past 50 years have, on average, been below 3.5%; that there is extreme variability of yields on various forms of investments; and that indexed annuities are presently generating real returns of only about 2.5% per annum.
- [23] However, the money manager that the plaintiffs propose to retain does not intend simply to invest the fund in bonds or to purchase an annuity. In my opinion, since part of the money manager's fees are being incurred to attempt to recover investment returns greater than 3.5% per annum, that part of the manager's fees must be borne by the fund and not the defendant.
- [24] I note that the Court of Appeal did not allow a reduction of management fees in *Townsend v. Kroppmanns* (2002), 2 B.C.L.R. (4th) 10. However, at paragraph 69, Chief Justice Finch said this:

In this case, unlike *O'Brien*, *supra*, and *MacDonald*, *supra*, the court was presented with uncontradicted evidence that the real rates of return on the plaintiff's investment are unlikely to exceed the real discount rate (net of inflation). This case is therefore grounded on different assumptions than were the previous cases, and the 50% reduction imposed by the trial judge is inappropriate.

- [25] I am satisfied on the evidence before me that the real rate of return on the managed funds is likely to exceed the real discount rate (net of inflation) of 3.5% per annum, or, to put the matter in a different way, that a portion of the management costs are being incurred not to achieve a rate of return of 3.5% per annum, but to achieve a rate of return in excess of that amount. For these reasons, it is my view that a reduction must be made.
- [26] I am of the opinion that the appropriate discount is 50%. I order that the plaintiff Taylor McGlone shall recover a management fee of \$53,150.

[27] In fixing the discount at 50%, I have had regard to the guidance afforded by the British Columbia Court of Appeal in *Macdonald v. Neufeld* (1993), 85 B.C.L.R. (2d) 129.

[28] The Public Trustee is entitled to costs. The parties may speak to costs by way of a telephone application.

"S.J. Shabbits, J."

The Honourable Mr. Justice S.J. Shabbits

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