

CANADA / JUDGMENT

Murdoch v. Kim

2025 BCCA 211

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 211 Murdoch v. Kim COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Murdoch v. Kim, 2025 BCCA 211 Date: 20250624 Docket: CA49412 Between: Brandon Geoffrey Murdoch, Toyota Credit Canada Inc., and Insurance Corporation of British Columbia Respondents on Cross Appeal (Defendants and Third Party) And Jiyeon Kim and Myeongsup Shim Appellants on Cross Appeal (Plaintiffs) Before: The Honourable Madam Justice Fenlon The Honourable Justice Riley The Honourable Justice MacNaughton On appeal from: An order of the Supreme Court of British Columbia, dated September 19, 2023 (Kim v. Murdoch, 2023 BCSC 1647, Vancouver Docket M196122). Counsel for the Appellants on Cross Appeal: T.J.H. Maledy J.D. Maledy Counsel for the Respondents on Cross Appeal: M-H Wright J.E. Fergusson Place and Date of Hearing: Vancouver, British Columbia May 27, 2025 Place and Date of Judgment: Vancouver, British Columbia June 24, 2025 Written Reasons by: The Honourable Madam Justice Fenlon Concluded in by: The Honourable Justice Riley The Honourable Justice MacNaughton Summary: The appellants' 17-year-old son died after being struck by the respondent's vehicle. The appellants brought an action under the Family Compensation Act, R.S.B.C. 1996, c. 126, seeking compensation for: (1) the loss of their son's unpaid work at their family restaurant; (2) loss of future support their son would have provided them pursuant to hyodo, a Korean cultural form of filial piety; and (3) loss of other services their son provided, such as English translation. The judge ordered compensation for the loss of the son's financial assistance and services but held that the appellants could not seek compensation for the loss of their son's unpaid labour because that loss was to a company operated by the appellants. The appellants say the judge erred in finding that a company loss was incompatible with a compensable personal loss, and by omitting to compensate them for lost hyodo payments for a four-year post-university period. Held: Appeal allowed in part. Order varied to award the appellants \$50,000 for loss of their son's unpaid labour during university. The judge erred in finding that the appellants could not prove a direct personal economic loss resulting from the loss of their son's unpaid contributions to the family company. There is no principled basis to restrict proof of economic loss to proof of diminution in share value. The appellants established they paid employees to replace their son's unpaid labour, which reduced the income available to them from the company. The judge did not err by failing to compensate the appellants for the loss of hyodo in the four years post-university. That period was included in his general assessment of damages. Reasons for Judgment of the Honourable Madam Justice Fenlon:

- [1] The appellants' 17-year-old son was struck by the respondent's car and, tragically, died just three months before his high school graduation. This appeal concerns the adequacy of damages awarded to the appellants under the Family Compensation Act, R.S.B.C. 1996, c. 126 [Act].

Background

- [2] Compensation under the Act is restricted to economic loss suffered by a surviving spouse, parent or child. It does not address the emotional suffering and pain of losing a family member--here, an only child: *Skelding v. Skelding*, [1994] 118 D.L.R. (4th) 537 (BCCA) at para. 18.
- [3] In most cases, parents will not have a claim for economic loss resulting from the death of a child, because the expense of raising and educating a child will usually exceed any economic benefit the parents might have expected to receive from their child. The present case is an exception to this general rule. As the trial judge observed, the appellants' claim falls into a rare category of cases in which courts have awarded more than nominal damages for the death of a child based on the deceased child's "adherence to filial piety, entrenched in particular cultural norms": at para. 30.
- [4] The judge found that the appellants came to Canada primarily to allow their son Jaeheon (who went by Eric in Canada) to study outside of the highly-competitive and all-consuming Korean education system. Eric was ten when he and his mother moved to Nanaimo in 2012. His father joined them in 2016, at which point the parents purchased a sushi restaurant. They acquired a second restaurant in 2021, operating both restaurants through a corporation.
- [5] The judge found that Eric almost certainly would have practised filial piety, known in Korean as "hyodo", saying:
- [40] Eric's consistently demonstrated dedication to assisting his parents, coupled with the particular cultural norms of hyodo, specifically established through expert evidence, place the present case in those rare circumstances where the loss of a child constitutes a sufficiently certain economic loss of substance. Further, the consistent practice on both sides of Eric's family, and amongst the family's friends, in Korea and in Canada, is that hyodo would be realised, to some extent, through regular and meaningful monetary payments. Following the jurisprudential admonitions above, to look to the particular circumstances of the deceased's family, Eric would have almost certainly practiced economic hyodo in some form.

- [41] The plaintiffs, along with family friend Suniyoung ("Sunnie") Choi and pastor Soo Yeon Lee, confirmed that Eric had demonstrated early and consistent adherence to hyodo generally, and contribution to his parents' economic well-being specifically. As their only child, he expressed, through words and actions, particular concern for his parents' immediate and long-term well-being.
- [43] Beyond his sacrifice and assistance to his parents, he generally exhibited a strong sense of generosity, loyalty, and duty. He assisted his pastor at the Nanaimo Korean Presbyterian Church, played bass guitar in the band, and volunteered as a youth leader, as well as on church missions to Mexico and Port Alberni. He was immersed in traditional Korean values and culture, studying Korean at the church language school, and recognising with his family traditional Korean holidays at home. He stood out in consistently providing traditional forms of deference to more senior church members, bowing, using traditional honorifics, and offering assistance. He was described as a particularly loyal and supportive friend. [Emphasis added.]
- [6] The judge concluded it was likely Eric would have joined his parents in the restaurant business after completing his studies at Vancouver Island University in Nanaimo, where the family lived. The judge found Eric would have paid economic hyodo of 20 percent of his income over his parents' lifetime, including 20 percent of the profits from the restaurant as he gradually took over the business. Accounting for various contingencies, and deducting the expenses the parents would have incurred supporting Eric, the judge assessed damages at \$327,634.88: Loss of future financial assistance \$249,714.60 Less: child expenses not incurred
- \$140,000.00 Loss of housekeeping services \$100,000.00 Loss of translation services \$30,000.00 Loss of driving services \$20,000.00 Loss of guidance \$36,000.00 In-trust claim: Brian Lee \$7,980.00 In-trust claim: Sunnie Choi \$5,915.00 Special damages \$18,025.28 TOTAL \$327,634.88 On Appeal
- [7] The appellants contend the judge under-compensated them because he overlooked two periods of loss:
- 1) Eric's labour contributions to the restaurant during the four years he would have been in university (2019-2023); and
 - 2) Hyodo payments over the four-year period between Eric's expected graduation from university and his assumption of management of the restaurant (2023-2027).
- [8] I will address each period in turn.
1. Compensation for loss of Eric's labour during university

- [9] The appellants sought damages for the loss of Eric's unpaid labour in the family restaurant during the period he would have been attending the local university. They submit that since he planned to live at home, he would have continued to provide the same level of help during those four years as he had throughout high school.
- [10] In assessing this claim the judge said only:
- [59] Third, the plaintiffs claim \$61,527 for loss of Eric's labour contributions to the restaurant business. As this category represents a loss to the corporation, and not to the parents directly, it must fail. [Emphasis added.]
- [11] In my respectful view, the judge fell into error in rejecting the claim on this basis. It is true that a corporation is a distinct legal entity, and that loss to a company cannot be equated with loss to a parent who owns the company merely because the child worked for low or no wages: *Takacs v. Gallo*, [1998] 157 D.L.R. (4th) 623 (BCCA) at para. 9 [Takacs], citing *Mensink v. Dueck* (1981), 29 B.C.L.R. 46 (C.A.). However, a parent in such circumstances may nonetheless be able to prove a direct economic loss through diminution in share value or other pecuniary loss such as reduced dividends or wages drawn from the company.
- [12] In *Takacs*, the claimant's son died in a motor vehicle accident. The son worked for his father's wholly owned company at below-market pay. The father sold the company immediately after his son's death. The trial judge awarded compensation for the loss of the potential benefit of an anticipated increase in the company's shares due to the son's uncompensated contributions.
- [13] This Court in *Takacs* set aside that award, finding the father had failed to establish direct personal financial loss given the way the claim had been advanced. The trial judge assessed the loss based on the additional cost of hiring and paying a replacement for the son. That approach was found to be flawed because there was no evidence the company had the means or inclination to replace the son: at para. 13.
- [14] This Court recognized, however, that the loss of a child's below-market labour could form the basis of a compensation claim under the Act: 15 I consider that a valuation of [the son's] potential uncompensated contribution would require an assessment of the capacity of [the company] to pay a higher income to [the son] at the date of his death and the potential for the growth of that capacity had he lived. The difference between what [the company] could pay and what [the son] would have been willing to accept because he was Steven Takacs' son and had expectations of taking over the business at full market value would form a realistic basis for the assessment of Steven Takacs' pecuniary loss. What [the son] could have earned elsewhere was not relevant to his contribution to the value of [the company's] shares, or to the income it could distribute to its shareholders. [Emphasis added.]

- [15] In this case, the respondents accept that a parent may be able to claim for loss of free labour provided by a child to a family company, but argue that they must do so by proving a diminution in share value--something the appellants did not do. At most, the respondents say, the appellants have claimed a reduction in the amount of money they could take out of the company by way of salaries or dividends because they had to hire and pay others to do the work formerly done by their son.
- [16] I see no principled basis to restrict proof of economic loss to diminution in share value. If a claimant in a closely-held family company can establish higher expenses following the death of a family member, thereby reducing the profit available for distribution, logically that could result in direct economic loss in the form of lower salaries or reduced dividends. However, the loss of a child's unpaid labour will not necessarily equate to a dollar-for-dollar loss to the bottom line of the company. The burden will be on the claimant to prove the loss in the circumstances of the particular case.
- [17] In this case, the evidence was admittedly thin. The judge found that Eric worked 20 hours per week in the restaurant without pay. His father testified that the company replaced Eric's labour by extending the hours of paid employees. The appellants' accounting expert prepared a report showing that the parents drew money from the company as either salaries or dividends based on tax planning, and that their earnings depended generally on the funds available after the company expenses were paid.
- [18] In my view, the appellants have established that, in these straightforward circumstances, paying an employee for 20 hours per week would add to the expenses and decrease the funds available to the appellants for their own support.
- [19] The respondents contend that a dollar-for-dollar loss should not be assumed. They say there is some evidence that Eric was not always working when he was at the restaurant, noting that he was seen at times to be doing homework. They also suggest that other employees could have managed to do Eric's work along with their own. I see no basis in the record to support these arguments.
- [20] First, the judge made a finding that Eric worked 20 hours per week at the restaurant. That finding is not inconsistent with Eric spending additional time there doing homework. Further, the nature of the work done by Eric could not easily be taken on by other employees. The judge described Eric's contributions in some detail, saying:
- [42] Eric worked at their sushi restaurant without pay. His duties were integral to its incorporation and day-to-day operations: his assistance included legal communications, computer work, establishing online delivery and point-of-sale systems, dealing with health inspections, connecting with suppliers, communicating with non-Korean speaking staff about scheduling, registering the business on Google, translating customer reviews, and creating menu items. This work dedicated to the family business occupied 3 or 4 hours after school and on weekends, for a total of around 20 hours a week.

- [21] The appellants' expert calculated the loss to the company of Eric's unpaid labour, discounted to reflect tax savings. On appeal, the appellants acknowledge that, taking into account the judge's findings, this calculation should be adjusted to \$50,000 for the four-year period.
- [22] Given this record, we are in a position to assess the loss and it is not necessary to remit the matter to the trial court.
- [23] The respondents argue that, in assessing loss for this period, the full \$50,000 should not be awarded to the appellants because it is likely Eric would have worked fewer hours at the restaurant during his university years. However, as the appellants point out, it is also possible that he could have worked more hours given the longer four-month summer break available to university students.
- [24] Eric worked 20 hours per week throughout high school despite the demands of school work, and social and recreational commitments. In my view, those contributions can safely be extrapolated over the next four years, especially given Eric's plans to continue to live with his parents during university.
- [25] In summary on this ground of appeal, I would vary the judge's order by awarding an additional \$50,000 to the appellants to reflect their decreased income from the company as a result of the loss of Eric's unpaid labour during what would have been his university years.
2. Twenty percent hyodo on earnings between graduation in 2023 and taking over the business in 2027
- [26] The appellants say the judge failed to assess compensation due to them for the loss of the 20 percent hyodo in the four-year period between Eric's expected graduation from university and his assumption of management and ownership of the restaurant as his parents moved towards retirement. The error is said to be demonstrated in the following passages from the judge's reasons:
- [64] Given the authority of Park, and the present evidentiary gaps, and the fundamental difficulty with the plaintiffs' primary damages model, the Court will base its analysis on table 9 of the Turnbull report, which sets out alternative scenarios of Eric providing 25 percent, 33.3 percent and 50 percent of his restaurant income to his parents until his mother reaches age 87: a range of \$416,191 to \$832,383 in present value. Those figures exceed those in table 10, which are based upon the earnings generated by the average bachelor degree: \$337,626 to \$675,252.
- [65] While Eric would likely be generous in his payments, even the lowest scenario of 25 percent of his income exceeds the hyodo amounts provided by most of the witnesses. Further, the Court must apply the contingencies set out above. Eric's income or own child support obligations or otherwise might limit his ability to provide as much money as he wished. As a member of a younger generation immersed in western culture, his sense of hyodo obligation, particularly in economic form, might be diluted. Both possibilities might lead to the predominant provision of hyodo in non-pecuniary form, such as gifts or companionship.

As an exercise of the Morrison "inquiry into the unknowable", based on the evidence, the Court forecasts that Eric would have provided 20 percent of his future income were he able: with a present value of \$332,952.80 by Mr. Turnbull's calculations. This amount will be reduced by 25 percent to reflect the chance that some combination of the negative contingencies above or otherwise would make him unable or disinclined to make those payments in those amounts. The Court accordingly calculates future support losses at \$249,714.60. This amount exceeds the recent awards in Park, Smith, and S.L.B., buoyed by the added consideration of Eric's demonstrated adherence to the cultural imperative of hyodo, not present in those cases. [Emphasis added.]

- [27] The appellants contend that, by using Table 9 from Mr. Turnbull's report, the judge mistakenly assumed the calculation covered the entire post-university period, when in reality it calculates hyodo from the year 2027 on--omitting entirely the four years in issue on this ground of appeal. I would not accede to this submission.
- [28] The judge began his assessment by identifying the three periods with respect to which the appellants sought compensation:
- 1) Loss of hyodo contributions from Eric for the period between graduation from university (2023) and the assumption of the restaurant operations when his parents turned 55 (2027);
 - 2) Loss of hyodo contributions from the time the parents turned 55 to age 87; and
 - 3) Loss of Eric's labour during university. (At paras. 58-59.)
- [29] Having summarily dismissed the third category (the error addressed in the first ground of appeal), the judge turned to the first and second categories, addressing them together:
- [60] Returning to the first and second categories of loss claimed by the plaintiffs, even accepting that Eric would likely have followed this path into the family business, and remitted some form of payment as a means of hyodo, there are fundamental challenges with the damages quantification approach urged by the plaintiffs. Ultimately, this approach fails for the same reason as did the plaintiffs' damages model in Park. [Emphasis added.]
- [30] By referring to Park v. VW Credit Canada Inc., 2017 BCSC 1733, the judge flagged the potential for overcompensating the parents in the circumstances of this case. As in Park, the appellants' damages model was based on parents handing control of a company over to their child, who would then pay them a percentage of the income generated by the business. Assessing damages on the basis of the lost payments alone would ignore the reality that, because of their son's death, the company would not be transferred, but would remain under the parents' control. As a result, they could choose to retain the company and receive the profits, or sell it and receive the sale proceeds instead: at para. 62. The judge then said:
- [64] Given the authority of Park, and the present evidentiary gaps, and the fundamental difficulty with the plaintiffs' primary damages model, the Court will base its analysis on table 9 of the Turnbull report, which sets out alternative scenarios of Eric providing 25 percent, 33.3

percent and 50 percent of his restaurant income to his parents until his mother reaches age 87: a range of \$416,191 to \$832,383 in present value. Those figures exceed those in table 10, which are based upon the earnings generated by the average bachelor degree: \$337,626 to \$675,252. [Emphasis added.]

- [31] It is evident from the opening lines of paragraph 64, above, that the judge was engaged in an assessment, not a precise calculation based on the expert's mathematical modelling for specific time periods. Indeed, the judge stated that he did not accept the appellants' damages model, in part because it failed to address the parents ongoing retention of the restaurant business--the "Park" issue. In conducting that assessment, the judge recognized he was engaged in an "inquiry into the unknowable" (at para. 65), and used the sums set out in the Turnbull report as an anchor. After selecting a hyodo of 20 percent, the judge reduced the resulting sum "by 25 percent to reflect the chance that some combination of the negative contingencies above or otherwise would make Eric unable or disinclined to make those payments in those amounts": at para. 65.
- [32] In summary on this ground of appeal, the appellants have not established that the judge overlooked the appellants loss of hyodo for the four-year post-university period.

Disposition

- [33] I would allow the appeal to the extent of awarding the appellants an additional \$50,000. As success on the appeal has been divided, each party will bear their own costs. "The Honourable Madam Justice Fenlon" I AGREE: "The Honourable Justice Riley" I AGREE: "The Honourable Justice MacNaughton"

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