

CANADA / JUDGMENT

Panghali v. Panghali

2014 BCSC 647

COURT

Supreme Court of British Columbia

DECIDED

15 April 2014

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2014 BCSC 647 Panghali v. Panghali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Panghali v. Panghali,

2014 BCSC 647

Date: 20140415

Docket: S073127

Registry: Vancouver

Between:

Tarminderpal Singh Basra and Jasmine Kaur Bhambra,

Administrators of the Estate of

Manjit Kaur Panghali, Deceased

Plaintiffs

And

Mukhtiar Singh Panghali aka Mukhtiar Paanghali aka "MP"

Defendant

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiffs:

P.A. Mazzone

Counsel for the Defendant:

G. Pyper

Counsel for Kulwinder Singh Panghali:

B.D. Easton

Place and Date of Hearing:

Vancouver, B.C.

November 21, 2013

Written submissions of the Plaintiffs received December 17, 2013

Written submissions of the Defendant received

December 9, 2013

Place and Date of Judgment:

Vancouver, B.C.

April 15, 2014

- [1] The plaintiffs in this matter claim for damages arising from the defendant's murder of his wife, Manjit Kaur Panghali. On behalf of the deceased's ten-year-old daughter, Maya Kaur Panghali, they have applied for an assessment of damages under the Family Compensation Act, R.S.B.C 1996, c. 126 [FCA]. The defendant's liability under the FCA was determined on March 19, 2013, when Madam Justice Dardi found that the defendant was liable to the plaintiffs for the wrongful death of Manjit Kaur Panghali. She ordered that the defendant pay damages to be assessed.
- [2] This application is for summary trial of the assessment of damages, pursuant to Rule 9-7 of the Supreme Court Civil Rules.
- [3] The defendant in his response opposed the application on the basis that it was not suitable for summary determination. He characterized it as an attempt to litigate in slices and as a collateral attack on an existing action between the same parties. The defendant submitted that this proceeding should be joined or consolidated with a number of other claims against the defendant.
- [4] Counsel advised there is ongoing litigation involving the defendant, the deceased's estate, and a number of other interested parties. Broadly speaking, those claims all relate to the parties' entitlement to some portion of the liquidated value of the matrimonial home and an investment property owned by the defendant at the time of the deceased's death. The deceased's estate has made a claim against that property in constructive trust, a matter due

for trial in November 2014, while two of the defendant's brothers have advanced claims for monies advanced and services rendered to the defendant relating to the preservation, maintenance, upkeep and improvement of both properties. Mr. Easton appeared on behalf of Kulwinder Singh Panghali, one of the brothers; his attendance was limited to a submission that the actions should be consolidated for trial.

- [5] In addition, the defendant's parents have asserted a financial interest in those properties, on the basis they contributed to their acquisition. It was not clear that they are currently involved in the ongoing litigation but Mr. Sukvinder Panghali, their son and another of the defendant's brothers, appeared and briefly addressed the court on their behalf. He took the position that this matter should be consolidated with the other matters.
- [6] Given the purpose of this summary application, the defendant's position, as well as that of the others who appeared, was misconceived. This Court was not asked to determine entitlement to assets or to answer any questions relating to the enforcement of, or priorities between, various claims. This application was restricted to an assessment of damages under the Family Compensation Act. Any judgment issued on that basis will do no more than establish the value of the plaintiffs' entitlement to damages arising from the wrongful death of Manjit Kaur Panghali. It will not affect the unresolved issues in other litigation concerning the defendant's assets and other obligations. Indeed, it is likely the plaintiffs will have to wait to enforce this judgment until the issues raised in those other matters are resolved. However, that is not a reason to further complicate the trial of the other matters, or this matter, by ordering consolidation with this matter.
- [7] As a result, I refused to consolidate the actions.
- [8] Defendant's counsel then indicated that given that the application for consolidation had been dismissed, the matter should be adjourned as he was not prepared to argue the application on its merits. It appeared that he had assumed that there was no question that the matters would be consolidated.
- [9] I also dismissed the application to adjourn. The summary trial application was served on defence counsel well before the hearing date. The defendant filed a response. The fact that the defendant chose not to respond meaningfully to the application was a tactical step he chose to take. It did not provide the basis for an adjournment and the defendant must live with the consequences of his litigation strategy.
- [10] Finally, the defendant submitted that without the information arising from the other court claims, the court would not have the facts necessary to assess damages. I rejected that submission. I am satisfied on the material filed that the facts necessary to assess damages under the FCA can be found and that it would not be unjust to do so. As a result, I find that the matter is suitable for summary disposition.

- [11] Following the hearing in chambers, the defendant sought and obtained leave to file written submissions on a number of points of law. Initially, based on the defendant's oral submissions, it appeared that the defendant intended to argue that the plaintiffs were not entitled to any damages in this proceeding based on the principle of "double jeopardy." In other words, the defendant suggested that no damages could flow under the FCA because the defendant had already been punished in the criminal proceeding.
- [12] However, the defendant's written submissions varied from counsel's position in oral submissions. The written submission addressed the issue of special costs and also submitted that the deceased's estate will receive a double recovery from the defendant should the survivorship benefits from the former family residence not be taken into consideration in assessing damages. In their written submissions, the plaintiffs have accordingly responded only to the two issues raised by the defendant in his written submission. I will address both issues in these reasons.
- [13] Counsel for the defendant also filed an application seeking an order that the fees of the defendant owing to his previous and present counsel be paid from trust funds currently held by prior counsel. That application was premature and was adjourned.

Background

- [14] The plaintiffs in this matter are the administrators of the deceased's estate. Jasmine Kaur Bhambra is the deceased's sister while Tarminderpal Singh Basra is her brother. They bring this action on behalf of the deceased's estate and the deceased's child, Maya.
- [15] Maya was born May 11, 2003 and was three years of age at the time of her mother's death. She is now 10. Since December 3, 2007 she has been in the permanent custody of, and resident with, Ms. Bhambra and her family in a single-family residence in the Fraser Valley in British Columbia. Ms. Bhambra was granted sole custody of the child by a Provincial Court Order dated December 13, 2007.
- [16] Ms. Bhambra is married and has three children of her own, all under the age of seven. She does not work outside the home and describes herself as a homemaker.
- [17] The deceased, Manjit Kaur Panghali, was born on July 4, 1975. She died on October 23, 2006, at 31 years of age. She was a teacher. At the time of her death she was job sharing in an elementary school in Surrey, British Columbia. The defendant was also a teacher. The deceased and the defendant were living together as husband and wife at the time of the murder. It appears on the evidence that theirs was a traditional family. At the time of the deceased's death they were expecting their second child.

- [18] In addition to working full-time as a high school teacher the defendant was the sole shareholder of a company called Southridge Homes Inc. Through that company he was involved in the construction and sale of single-family dwellings in Surrey. In October 2006 the company owned one property (the "Southridge property"), which was earmarked for sale once construction was complete.
- [19] The defendant was arrested for the murder in early 2007 and has remained in custody since then. On February 4, 2011 he was convicted of second-degree murder of the deceased and was subsequently sentenced to imprisonment for life with no eligibility for parole for a period of 15 years. The British Columbia Court of Appeal dismissed his conviction appeal on October 16, 2012.
- [20] As is often the case the deceased's future plans were uncertain and the evidence of those plans even more so as a result of her death. Ms. Bhambra deposes that the deceased told her that she planned to take maternity leave upon the birth of her second child and then at some later point return to the workforce as a teacher. Unfortunately, that is the extent of the information available respecting the deceased's long-term plans with respect to childcare and her career.
- [21] The plaintiffs produced copies of computer printouts of the deceased's tax returns for the year 2000 to 2005 and a copy of her 2006 income tax return. As discussed below, the plaintiffs' economist relied on these figures and the information given by Ms. Bhambra as to the deceased's career intentions in calculating the value of the lost dependency.
- [22] Evidence of the defendant's career intentions (and thus of his role in the family's economic circumstances absent the death) is likewise limited. As noted what is known is that at the time of the murder the defendant was working full-time as a teacher and was also involved in the construction and sale of single-family dwellings in Surrey.
- [23] Ms. Bhambra says that at the time of her sister's death the defendant was completing the construction of the Southridge property with the intention of selling it for a profit. She does not know whether or not the defendant intended to build any more houses, but an affidavit from the defendant's brother states that that was the last home to be built as the defendant had decided to work only as a teacher given his expanding family. I am satisfied that, absent the death, he would have continued to work full-time as a teacher.
- [24] Despite at least two requests for production by the defendant of his income tax returns he failed to do so. His income as noted on the deceased's 2006 tax return was \$65,930.27.
- [25] The parties' assets at the time of the death consisted of the matrimonial home and the Southridge investment property. The parties were joint tenants in the family home in Surrey and the Southridge property was registered in the name of the defendant's company. Both homes were sold in 2007; the net equity in the matrimonial home was \$264,760.92 while the Southridge property generated net proceeds of \$266,287.24. Those funds are currently held in trust, pending the outcome of the estate's constructive trust claim.

[26] As is apparent from this review, the available evidence about the hypothetical future of this family absent the death is relatively limited. Where there is limited evidence because of the actions of the defendant I approach the plaintiff's burden of proof on the basis described by Spencer J. in *Clements et al v. Central Valley Taxi Ltd. et al*, (26 November 1992), New Westminster A910185 (B.C.S.C.), as quoted and relied upon by Mr. Justice Parrett in *Uri Estate v. Pahal*, [1994] B.C.J. No. 1720 (S.C.) at para. 30:

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The burden of proof is on the plaintiff to show what the dependants' losses are. While it is to a degree speculative to say what would have happened but for the accident, the burden of proof should not be so tightly drawn against the plaintiff that the law forgets that the difficulty of proof was caused by the defendants' negligence. The defendants are entitled to be protected from mere speculation, but in considering what might have happened in the now impossible future, they cannot hide behind the difficulties of proof caused by their own fault.

Law

[27] At common law there is no action for wrongful death. However, the FCA creates a statutory basis for the recovery of damages by the deceased's surviving spouse, parents, or children. Section 2 states as follows:

2 If the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not resulted, have entitled the party injured to maintain an action and recover damages for it, any person, partnership or corporation which would have been liable if death had not resulted is liable in an action for damages, despite the death of the person injured, and although the death has been caused under circumstances that amount in law to an indictable offence.

[28] Claims are brought in the name of the deceased's personal representative. While the surviving spouse would normally be a claimant under the FCA, in this case the deceased's husband has no claim because he was criminally responsible for his wife's death. As a result, this action is advanced solely for the benefit of the deceased's child.

[29] The purpose of the FCA to place claimants in the economic position they would have been in but for the death (*Keizer v. Hanna and Buch*, [1978] 2 S.C.R. 342 at 351). Recoverable losses are restricted to pecuniary losses, including "the actual financial benefit of which the [the claimant] has been deprived and financial benefit which might reasonably be expected to accrue in the future if death had not occurred": *Cox v. Takahashi* (1977), 5 B.C.L.R. 162 at 164; see also *Brown v. Finch* (1997), 42 B.C.L.R. (3d) 116 (C.A.).

[30] In *Keizer*, Mr. Justice Dickson at 352 said that the award in fatal compensation claims should provide "a monthly sum at least equal to that which might reasonably have been expected during the continued life of the deceased." The assessment of damages should not be punitive or influenced by sentimentality: "It is largely an exercise of business

judgment" (ibid).

- [31] In this case the court must be careful to limit the losses to those that flow from the deceased's death, rather than any losses that flow from the defendant's criminal acts and subsequent incarceration. As set out at s. 3(2), damages under the FCA must flow from "the injury resulting from the death." Any loss arising from the fact that the child's father is no longer present in her life and no longer earning an income flows from his own actions, not from the death itself. Similarly, in *Butterfield (Guardian of) v. Butterfield Estate* (1996), 96 O.A.C. 262, both parents died in a car accident but the surviving children sued the father's estate as he was liable for the accident. The court emphasized that the children had no claim for the loss of any support from their father as he was the author of his own death; damages were restricted to those flowing directly from the mother's death. See also *Collins v. Savovich* (1996), 20 B.C.L.R. (3d) 126 (S.C.), where the child's mother died in a car accident caused by his stepfather's negligence. The child went to live with other relatives, thereby cutting off the flow of income from his stepfather as well as his mother. The court noted that the child could not be compensated for the loss of the stepfather's income in the circumstances. Any recovery for the loss occasioned by the father's incarceration must be addressed in a child support claim.
- [32] The calculation of future losses requires that the court attempt to address the unknowable. In *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 9, Madam Justice Huddart noted that the standard of proof for evaluating future or hypothetical events is:
- [9] simple probability, not the balance of probabilities Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.
- [33] As a result, in assessing the child's losses in the future, the court must apply contingencies, both positive and negative, to reflect the uncertainty inherent in making such predictions.
- [34] I will address the law that is specifically applicable to the various compensable claims as those are considered.

Assessment of Damages

- [35] The usual heads of damage in a Family Compensation Act claim are:
- a) Loss of financial support (or loss of dependency);
 - b) Loss of household services and child care;
 - c) Loss of guidance, care and companionship;
 - d) Loss of inheritance;
 - e) Management fees;

f) Tax Gross-up.

- [36] In quantifying the losses the plaintiffs rely on a report from Mr. Robert Carson, an economist with Associated Economic Associates. I accept him as an expert in economics qualified to provide opinion evidence on the loss to the child of past and future financial support, household services, loss of inheritance, and income tax gross-up calculations.
- [37] The defendant submitted that Mr. Carson's report was flawed because it assumed that the plaintiff's death had not occurred and that the defendant had continued to work as a teacher when in reality he is incarcerated. I reject this argument. The purpose of the FCA is to compensate the child for the loss arising from the death of her mother. Such a calculation necessarily requires that one assume that the death had not occurred, just as losses in personal injury matters are calculated by assuming that the injuries had not occurred.
- [38] The defendant did not otherwise oppose the calculations nor did he file a report in reply.
- [39] In considering the expert evidence I bear in mind the comments of Dickson J. in *Lewis v. Todd*, [1980] 2 S.C.R. 694 at 708, regarding the use of expert opinion evidence: "The evidence of actuaries and economists is of value in arriving at a fair and just result. But the trial judge, who is required to make the decision, must be accorded a large measure of freedom in dealing with the evidence presented by the experts." Where the economist's figures result in an award which seems inordinately low in the circumstances, the judge must adjust it upwards, and vice versa.

Loss of Financial Support (Dependency)

- [40] Generally speaking, the award for loss of financial support is calculated by determining what income the deceased would have earned but for the death, then reducing that amount to account for the deceased's personal consumption. The award is meant to reflect the portion of the deceased's earnings that would have gone towards the financial support of the surviving child. The amount awarded is net of income tax as, had the deceased survived, her contributions to the family and to the child would have drawn on after-tax income. Contingencies should then be considered and an allowance for "grossing up" the award made (see *Cogar Estate v. Central Mountain Air Services Ltd.* (1992), 72 B.C.L.R. (2d) 292 (C.A.)).
- [41] In *Ratansi v. Abery* (1994), 97 B.C.L.R. (2d) 74, 49 A.C.W.S. (3d) 1242 (S.C.), Madam Justice Koenigsberg provided a convenient summary of the principles that apply in making these assessments when the claimant is a child:

In order to determine how much of families' income is devoted to maintaining the child or children, two categories of expenses must be constructed; those amounts devoted exclusively to the children and those amounts which constituted the lifestyle of the children as part of the family and thus although shared with other members of the family are necessary to maintain that lifestyle.

- [42] The goal, as set out in *Plant v. Chadwick* (1986), 5 B.C.L.R. (2d) 305 (C.A.), is to give the claimant "an award of such an amount as will assure her the comforts and station in life she would have enjoyed" but for the death.
- [43] The award for loss of support for a child is limited in time to the period in which the child would have been dependent on the parent for financial support.
- [44] In his report Mr. Carson made the following assumptions:
- a) The child would have been and will be a dependant to age 22, on the basis that she will attend university and complete a degree.
 - b) A second child would have been born to the family on April 1, 2007.
 - c) After a one-year period of maternity leave Ms. Panghali would have returned to work on a permanent part-time basis (40% of full-time); or, in the alternative, that she would have returned to full-time work.
 - d) Ms. Panghali's work anniversary date, for movement up the teaching pay scale, was September 1, and pay increments would have occurred every second year. Mr. Carson relied on information regarding the pay scale for teachers in School District Number 36, where the deceased worked, in making these calculations.
 - e) The defendant would have continued to work full-time as a high school teacher in School District Number 36. Again, Mr. Carson based his calculations on information regarding the pay scale in the Surrey School District.
 - f) There was no information concerning the defendant's income from his business activities. The plaintiffs were content to proceed without that information and any calculations that referred to Mr. Panghali's income included income from teaching only.
 - g) But for the murder, Ms. Panghali and the defendant would have performed household services typical of an average Canadian male and female in similar economic circumstances.
- [45] I accept the assumptions relied upon by Mr. Carson and find that the available evidence supports them. I have concluded that the deceased would likely have returned to part-time employment following a period of maternity leave, but am not satisfied that it has been established as a certainty that she would in fact have returned to full-time work, at least while her children were living at home. There is a real possibility that she would have done so eventually, however, and I have taken that into account as a contingency in assessing the loss of financial support.
- [46] Because the mother is deceased and the defendant father incarcerated (and because the defendant has chosen not to file evidence in this matter) there was minimal evidence tendered regarding the pattern of family expenditures. There is no evidence that either parent expended substantial sums outside of meeting the needs of the family, however.

- [47] Because of the limited evidence available of the family's actual expenditures Mr. Carson relied on Statistics Canada's 2008 Survey of Household Spending to produce estimates of the child's benefit from family expenditures, both with respect to her exclusive use goods (such as food and clothing), and shared use goods (such as shelter). In making the calculations Mr. Carson took into account that a second child would have been born in 2007 and that as a result the amount devoted exclusively to Maya, and the amount available for shared use consumption, would have diminished at that point. For example, he found that shared use expenditures decreased from 33.5% of total household expenditure in a three person household in 2006 to 29.8% of total household expenditure with the addition of a second child in 2007. Similarly, he estimated a child's exclusive use consumption in a three-person household at 19.3% of total household expenditure, versus 14.5% for each child in a four-person household.
- [48] Mr. Carson then estimated the dependency loss by calculating the family disposable income absent the accident and multiplying it by the child's consumption share (both exclusive and shared use) absent the accident. He provided alternate calculations to account for the possibility that the deceased would have returned to full-time employment.
- [49] The results from that formula were as follows:
- a) Maya's past exclusive and shared use consumption (to July 1, 2013) ranged from \$206,100 to \$208,600, depending on Ms. Panghali's pattern of employment following maternity leave;
 - b) Maya's future exclusive and shared use consumption, to age 22, ranged from \$324,800 (if Ms. Panghali worked part-time throughout) to \$453,200 (if Ms. Panghali returned to work full-time sometime in 2013).
- [50] Mr. Carson then calculated the portion of those amounts attributable to Ms. Panghali's death. In calculations based on permanent part-time employment, he found that Ms. Panghali's disposable income accounted for 26.5% of the family expenditure on Maya's past use consumption (approximately \$54,700) and 31.25% of her future use consumption (\$101,500). In calculations based on full-time employment from 2013, Ms. Panghali's disposable income accounted for 27.4% of the total family expenditure on Maya's past use consumption (\$57,200) and 50.7% of total expenditures on her future use consumption (\$229,900).
- [51] In terms of contingencies, Mr. Carson took statistical estimates of the mortality risks for the child and the deceased into account in making the calculations.
- [52] Given the deceased was employed half-time and was expecting another child I conclude, as I have indicated, that she would have, after maternity leave, returned to work part-time rather than full-time. The deceased had elected to work part-time after Maya's birth. It is probable she would have continued to do so for a period following the birth of the second child. As a result I assess the child's past dependency loss at \$54,700.

- [53] The situation is somewhat different for the future dependency loss, which looks quite far into the future. I am satisfied that there is a real possibility that Ms. Panghali would have returned to full-time work at some point during the period of Maya's dependency. This contingency must be recognized in the award.
- [54] The plaintiffs seek the sum of \$165,000 for the future dependency loss claim, a sum partway between the figures based on part-time work and those based on full-time work from 2013 onwards. In my view that figure is an appropriate assessment of the loss as it takes into account the possibility of the deceased returning to a full-time position teaching. I assess the future dependency loss at \$165,000, for a total of \$219,700 under this head of damages.

Loss of Household Services and Childcare

- [55] Ms. Bhambra estimated that the deceased normally spent an average of 3.6 hours per day on household work and childcare tasks. However, the estimates provided by Ms. Bhambra with respect to childcare tasks appear to include double counting of time that was spent doing primary child care tasks when those tasks overlapped with time spent doing household tasks.
- [56] As a result of the limited evidence, Mr. Carson turned to the Statistics Canada 2010 General Social Survey, which sets out the average hours per day spent by females on household work and child care. These figures were reasonably consistent with the estimates given by Ms. Bhambra.
- [57] Mr. Carson noted that most tasks that comprise household work produce shared goods (i.e. they benefit all household members), although in some cases work done as well by one family member may benefit one or more than one but not all other family members. It was therefore likely that some proportion of household work done by the deceased would not have been of benefit to Maya. Mr. Carson advised that he was unaware of any statistical data that shows how much household work done by one family member is done for the benefit of other family members.
- [58] As a result, since not all domestic, shopping and service acquisition work done by one household member benefits others, a reduction to the estimates of total time spent doing household work is appropriate where the objective is to estimate the value of a survivor's loss of the value of such work as a result of the death or absence of a parent.
- [59] Mr. Carson noted that there is no way to objectively measure the effects of positive or negative contingencies as they affect the value of the work done by one household member to the benefit of another. He provided his opinion that as much household work benefits all household members, and some household work benefits only the individual doing the task, a deduction of approximately 20-30% for a child is appropriate. With regards to the childcare amounts, Mr. Carson suggested that a 20% deduction might be appropriate to recognize that some childcare would have accrued to the exclusive benefit of the second child.

- [60] According to Mr. Carson, before any adjustments for contingencies and personal consumption, the value of past and future household services provided by Ms. Panghali totalled \$328,800 (\$112,600 to July 2013 and \$216,200 calculated to the child's age 22). For childcare the total value was \$89,800 (\$62,800 to July 2013 and \$27,000 to age 19). In making this calculation, Mr. Carson decreased the amount of time attributed to childcare as Maya grew older. Applying the contingencies discussed above -- 30% for the shared portion of household services and 20% for childcare devoted to the second child -- the loss of household services is approximately \$230,000 (\$79,000 for past loss and \$151,000 for future), while the loss of child care is \$71,000 (split into \$50,000 for past loss and \$21,000 for future). I note that Mr. Carson calculated the hourly value of household work at \$16.62 and the hourly value of childcare at \$11.68.
- [61] Because the calculations were based on statistical averages that included women who worked both part-time and full-time, the calculations already reflect the possibility that Ms. Panghali would eventually have returned to full-time employment. In any event the differences between the average hours per day spent on household work and child care for a woman employed part-time and one employed full-time is almost negligible; for women with children over five, for example, the total time spent on household work is 3.5 hours per day, regardless of employment status. As a result there is no need to adjust the award to reflect the contingencies associated with the uncertainties of Ms. Panghali's future employment.
- [62] Mr. Carson has built into his estimates for all the future losses a discount rate of 2.5%, pursuant to s. 56(2)(a) of the Law and Equity Act, R.S.B.C. 1996, c. 253. He notes in his report that there is a legal issue regarding whether the present value of future household work should be calculated at the 2.5% discount rate, or the 3.5% rate governed by s. 56(2)(b) of the Law and Equity Act. The defendant made no submissions on this point but I accept that Mr. Carson was correct to use the 2.5% rate, (*Duncan v. Brown*, 2014 BCSC 153 at para. 134).
- [63] The court's task is to assess a fair and reasonable measure of damages based on the evidence before it. A slavish adherence to mathematical calculations is not necessarily appropriate. After all, as noted by Mr. Carson, a precise calculation of the contributions to household and childcare is not possible. In addition the future cannot be predicted. That said, the calculations provided by Mr. Carson acknowledge that is the case. As a result I am satisfied that a fair and reasonable assessment of past and future household assistance is \$230,000 and for past and future childcare is \$71,000.

Loss of Guidance, Companionship and Care

- [64] The child is entitled to compensation for the loss of guidance, companionship, care and training that she would have received from her mother: *Plant*. The award under this head is pecuniary; it is "not a non-pecuniary award by way of solace as in awards for pain and suffering in personal injury cases": *Bjornson v. McDonald et al*, 2005 BCSC 765 at para. 29. The award is meant to replace a pecuniary loss that the child suffers because of the loss of care, guidance and affection.
- [65] It is difficult for the court to assess such losses, as "[m]oney cannot buy a suitable replacement for a parent" (*Plant* at 314). As a result, awards under this head are generally conventional: *McVea v. T.B. et al*, 2002 BCSC 1407, noting that not only is it "impossible to replace a parent, but it is impossible (and invidious) to make nice comparisons between one parent's love and another's" (para. 75). In *McVea* the court reviewed the case law and found that the awards under this heading when given to younger children ranged between \$25,000 and \$30,000. The upper limit of the award may increase over time with inflation and in *Foster v. Perry and VSA Highway Maintenance Ltd.*, 2005 BCSC 1214, Mr. Justice Pitfield concluded that the conventional award under this head of damages had risen to a limit of \$35,000 per child.
- [66] The child has lost the care, love and support of her mother who would have provided guidance throughout her youth into young adulthood as I am satisfied that it is probable that the child will continue on to university. The plaintiff seeks the conventional award of \$35,000 and I so order.

Loss of Inheritance

- [67] The plaintiffs claim for damages reflecting the present value of the inheritance the child might reasonably be expected to have received from Ms. Panghali but for her premature death. In making this claim, they focus on the value of two properties: the matrimonial home, and the Southridge investment property. Mr. Carson in his report calculated Maya's absent-incident expected share in the value of the properties following her parents' deaths, calculating in an increase in value for the properties tied to the rate of inflation over their natural lifespans.
- [68] The defendant takes issue with this claim. The defendant submits that the principle that the plaintiff is not entitled to double recovery for any loss arising from an injury claim is equally applicable to claims under the FCA. The defendant says that the loss of inheritance claim, if granted, would amount to double recovery, because the deceased's estate has already received a benefit because of the defendant's conduct. According to defence counsel, that benefit arises because the portion of the value of the matrimonial home which the defendant would have received as a result of survivorship principles has reverted to the deceased's estate.

- [69] In order to understand the difficulties arising under this head of loss, it is necessary to briefly discuss the current status of both the matrimonial home and the Southridge property.
- [70] The defendant and the deceased owned the matrimonial home in joint tenancy. As a result, on her death, the deceased's undivided half interest in the property passed to the defendant by right of survivorship. As the deceased died intestate, the defendant also became entitled, subject to the then Estate Administration Act, to inherit any other assets under the intestacy.
- [71] It is trite law, however, that a murderer cannot profit from his wrongful act by acquiring property from the victim. Based on this principle, the deceased's estate advanced a claim in constructive trust against the defendant, claiming that the deceased's half interest in the matrimonial home, and a half interest in the Southridge property, should both flow to the deceased's estate.
- [72] That claim is the subject of the other lawsuit between the parties that was discussed in the introduction to this matter. In that action, Dardi J. has issued a declaration that the defendant, by virtue of the fact that he unlawfully caused the deceased's death, is disentitled to any benefit he might otherwise have gotten as a result of her death, by operation of law, right of survivorship, or on intestacy.
- [73] As a result, it appears that Maya is the sole beneficiary of her mother's estate. In the normal course, the estate would receive half of the equity in the matrimonial home (approximately \$130,000) and, in addition, whatever portion of the value of the Southridge property the court finds should be held on constructive trust for the estate. Again, assuming the estate is successful in claiming a half interest, this amounts to approximately \$130,000.
- [74] However, as noted above, there are a number of other claims against both those properties. As a result, it is not clear what portion of the funds currently in the trust account will eventually enter the deceased's estate and flow, from there, to the child.

Law on Loss of Inheritance

- [75] An inheritance -- or the expectation of one -- can play two roles in a wrongful death claim: first, as a head of damages, known as "loss of inheritance," and second, as a deduction from the overall award made to account for any benefits received by the claimant in the deceased's estate.
- [76] The plaintiffs may say, as they do here, that they have lost a potential inheritance by the deceased's premature death, on the basis that the untimely death of the victim has stopped her from accumulating assets that would eventually have entered her estate. The compensation is meant to replace the amount by which the deceased's estate would have increased if she had lived.

- [77] As the court pointed out in *Kwok v. B.C. Ferry Corp.* (1987), 20 B.C.L.R. (2d) 318 at 361 (S.C.), a "claim of this nature is beset with uncertainty and any award must necessarily be largely arbitrary." It is very difficult to predict what assets a person might have accumulated over their natural lifespan, how they might have dealt with them during that period, or predict how they might have dispersed them at death. The deceased may have put aside savings at one point in life only to spend them later, or invested in real estate (the matrimonial home or otherwise) only to consume the value of those assets during retirement. Catastrophes might have arisen that required the deceased to draw on savings; or perhaps the deceased would have spent the majority of her income, rather than saving, and not accumulated much in the way of assets at all. At the end of a natural lifespan she might have devised her assets entirely on her spouse, if he outlived her. The contingencies and uncertainties associated with the award are very high.
- [78] The other side of the inheritance claim is a deduction to account for any financial benefits flowing through the estate to the claimant. The amount deducted is not the actual amount received, but instead, the value of the acceleration of the inheritance -- the value of the fact that the estate has come to the plaintiff much earlier than it would have done absent the wrongful death.
- [79] In many cases, these two factors cancel each other out, so that no award or deduction is made with regards to the value of an inheritance; see for example *Keizer, and Boechler v. Edwards et al*, 2004 BCSC 301.
- [80] If the deceased's estate had no (or minimal) assets, there is no need to make a deduction for acceleration of inheritance. In such a case, courts generally award a nominal sum -- the conventional award for children ranges from \$5,000 to \$10,000 -- to recognize the difficulty of calculating losses under this head of damages. See for example *McVea, Morrison v. Moore*, 2009 BCSC 1656, and *Coe Estate v. Tennant* (1988), 31 B.C.L.R. (2d) 236 (S.C.).
- [81] Courts in British Columbia have given higher awards under this head of damages, but only where there is evidence establishing a pattern of income and savings that would support the potential for a significant estate remaining at the end of the deceased's natural lifespan: see for example *Stegmann v. Pasemko*, 2010 BCCA 151 (\$30,000 per child) and *Duncan* (\$25,000 for the child).

Discussion

- [82] The facts in this case are unusual, but I do not think they can be said to be so unusual as to support, as the plaintiffs claim, an award of \$125,650 under this head of damages. That amount is almost five times as much as the amount in *Stegmann*, where the deceased mother was an entrepreneur whose efforts at the time of death had built a high-value asset base and who, absent death, would likely have continue to make large contributions to the wealth of her future estate. While I accept that Ms. Panghali was devoted to her family, and that she appears to have been financially prudent, I do not think that the evidence supports

the contention that she would have been able to accrue an unusually large estate.

- [83] The plaintiff submits that the increased value of the estate would have come from the growing equity in the family home (and the investment property, although the evidence is that the property was meant to be sold at completion) as the parents contributed to the mortgage over the years. I note that some of that value is already covered in the award for loss of dependency, as Mr. Carson's calculations included Ms. Panghali's contribution to shelter costs and therefore to the mortgage. Further, there is no guarantee that any of the equity in the home would have remained at the end of Ms. Panghali's natural lifespan and passed in her estate to the child. As discussed above, the deceased and the defendant might have used the equity in their home up in their retirement, or otherwise consumed the value in their own lifetimes; and if Ms. Panghali had predeceased Mr. Panghali, both properties would have passed to him. Any inheritance based on these assets would have been subject to significant contingencies.
- [84] In other circumstances I might have found this a proper case to make a modest nominal award, likely the conventional \$5,000. However, it seems clear that some portion of the liquidated value of both the matrimonial home and the Southridge property will fall into the mother's estate and pass, by virtue of the fact that the father is disentitled to take on the intestacy, entirely to the plaintiff. Following Dardi J.'s declaration in the other lawsuit, the estate has established an interest in, at very least, a half interest in the equity of the matrimonial home. As a result, the child will receive an accelerated inheritance. That acceleration will eliminate the contingencies and uncertainties associated with the future inheritance.
- [85] The plaintiffs say that there has been no acceleration because, as a result of the multiple claims against the subject properties, the estate may never receive any of the funds held in trust. I cannot accede to that argument. If the defendant's parents can successfully establish that they are entitled to a portion of that value due to their contributions to the assets, then the basis for the loss of inheritance claim is diminished, as the equity available at the available at the end of the deceased's natural lifespan would have been correspondingly diminished. Whatever equity does enter the estate, it will correspond with the amount the deceased would have relied upon to establish her estate in her natural lifespan.
- [86] In the circumstances, I find it fair to say that any potential loss of future inheritance to the child will be offset by the acceleration of her inheritance. I decline to make an award under this head of damages, but also decline to make any deduction from the loss of dependency award.

Management Fee

- [87] The plaintiff seeks a management fee and proposes that the Public Guardian and Trustee fulfill that role. The defendant made no submissions on this issue. Entitlement to a management fee depends on the sophistication of the claimant and the necessity for a

manager to achieve a certain rate of return and ensure that the lump sum award is not depleted prematurely. The plaintiff administrator Ms. Bhambra is a homemaker. There is no evidence of the occupation of her co-administrator, Mr. Basra. There is no evidence that either of them have the expertise required to manage the funds. In the circumstances in order to protect the integrity of the award and achieve its objectives an award for the management of the fund is appropriate (Uri Estate at paras. 58-61).

[88] Mr. Carson filed a report estimating the charges that would be made by the Public Guardian and Trustee of British Columbia for managing the funds awarded. The calculations provided showing the allowance for the charges of the Public Guardian and Trustee represent the present value of the additional funds required to cover the costs of management of the lump sum award so that the fund will yield a stream of income payments appropriate to the estimates of loss and also cover the costs of fees charged based on the exhausting fund principle. Mr. Carson described the calculations as follows:

I understand the fees charged by the PGT to consist of the following elements:

1. 5% of the cash received as capital;
2. 5% of cash received as income;
3. 0.4% of the gross value of all assets.

The estimates of costs of PGT fee expenses, described below, are based upon the following:

1. price inflation will be 2.5% per annum;
2. the real discount rate (net of inflation) is 3.5% per annum;
3. GST at 5% is added to fees in 2013.

I have calculated the PGT fees, expressed as percentages of initial capital amounts, for two assumptions with regard to the pattern of withdrawals from the awards. These are:

1. funds will be drawn down to zero by Maya's age 19, in constant annual (real) amounts;
2. funds will not be withdrawn, until Maya's age 19.

[89] The estimated charges of the Public Guardian and Trustee if the funds are drawn down in constant amounts is 8.4% and if held and withdrawn at age 19 is 12.7%.

[90] Ms. Bhambra deposes that she has received Canada Pension Plan survivor's benefits, the Canada Pension Plan death benefit and a Criminal Victim Assistance program payment for the child and has used all of those funds for the child's maintenance and support. I take from that there is a need for ongoing assistance respecting the child. In addition she deposes that the child does well at school, is thriving and that she anticipates the child will graduate from high school and then obtain a university education as both of her parents did. I am satisfied that there is therefore a need for both ongoing funds and funds when the child turns 19 to enable her to pursue her education. For the purpose of determining the

management feed the appropriate disbursal of the funds therefore is to assume 50% will be drawn down by age 19 and 50% will be left to that age. Mr. Carson calculates the fees for that scenario at 10.55%.

- [91] Applying that figure of 10.55% to the award of \$555,700 I award the sum of \$58,600 to provide financial accounting and management advice.

Interest

- [92] The plaintiff is entitled to pre-judgment interest on those parts of the award that are compensation for damages incurred to the date of trial. Specifically, the past dependency loss and the loss of past household assistance and childcare. The plaintiff is also entitled to post-judgment interest.
- [93] In addition as the award for loss of love and guidance is a pecuniary award under s. 1 of the Court Order Interest Act, R.S.B.C. 1996, c. 79 interest shall accrue on that award as well (see *Garami-Balmer v. Hrehirchuk* (1998), 63 B.C.L.R. (3d) 288 (S.C.)).
- [94] Interest is allowed at the court ordered interest rates and is to be calculated pursuant to the Court Order Interest Act. If issues arise with respect to the interest calculation the parties have liberty to apply.

Tax Gross-up

- [95] The plaintiff has requested that the issue of the tax gross-up should be dealt with following delivery of these reasons. If counsel are unable to agree they may speak to the issue.

Costs

- [96] The plaintiffs claim special costs. They say that such costs are available where the conduct giving rise to the liability is reprehensible and criminal in nature. They cite *Wiebe v. Gunderson et al*, 2003 BCSC 1931, for that principle.
- [97] The defendant responds that the "motivation" of the plaintiffs in seeking special costs is based on the defendant's criminal conduct and that somehow it is really a claim for punitive damages. Therefore, relying on *B. (P.) v. B. (W.)* (1992), 11 O.R. (3d) 161 (Gen. Div.) at para. 21, he submits he has already been sanctioned and punished and that "to award punitive damages in a civil lawsuit would amount to double jeopardy".
- [98] With respect there are difficulties with both these statements of law. To begin, in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 69, the Supreme Court of Canada clearly states that punitive damages may be awarded even where the defendant has already been punished by a criminal court for an offence arising out of substantially the same facts. It is simply another factor to consider in determining whether punitive damages are necessary in the circumstances. There is no "double jeopardy" defence and, as such, no argument that special costs are barred by analogy.

- [99] As to the availability of special costs for pre-litigation criminal conduct, I am not convinced that the law is as clear as the plaintiff suggests. In fairness, the plaintiff did acknowledge that there are no cases that directly address similar circumstances. As such, the question of whether special costs are available in a Family Compensation Act claim where the conduct causing death is criminal in nature (and has received a criminal sanction) is, at least in British Columbia, to some extent one of first impression.
- [100] The plaintiff is correct to say that special costs are awarded where there has been reprehensible conduct on the part of one of the parties. Reprehensible conduct includes "scandalous or outrageous conduct [and] milder forms of misconduct deserving of reproof or rebuke" (*Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 at para. 17 (B.C.C.A.)).
- [101] The purpose of special costs is to chastise or punish a litigant, and to allow the court to disassociate itself from the litigant's misconduct: *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at paras. 8, 10.
- [102] Generally speaking, special costs are only available for misconduct in the course of the litigation itself. However, in exceptional circumstances, special costs can be awarded where pre-litigation conduct warrants rebuke: *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183 at para. 90. To attract an award of special costs, the pre-litigation conduct must give rise to a compensable legal wrong: *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, 2009 BCCA 275 at para. 33.
- [103] As noted in *Elsen v. Elsen*, 2011 BCSC 1011 at para. 14, such awards will be "quite rare." The case law establishes two generally accepted exceptions where special costs may be awarded for reprehensible conduct prior to litigation (see *Golden Capital Sec. Ltd. v. Holmes et al.*, 2003 BCSC 1265 at para. 166). The first was identified in *Verleg v. Angeloni* (1993), 20 C.P.C. (3d) 132 (B.C.S.C.), where the court said that one exception involved misconduct giving rise to litigation in the nature of fraud or unconscionability (at para. 10). That is the exception relied on in *Wiebe*. It is not applicable here.
- [104] The second exception is identified in *Sun Life Assurance Co. v. Ritchie*, 2000 BCCA 231 at para. 54:
- [54] However, there may arise circumstances where special costs may be awarded because of the reprehensible conduct giving rise to the litigation, particularly where the fruits of the litigation do not provide any appropriate compensation in relation to the reprehensible conduct. [Emphasis added]
- [105] A number of cases have commented on the Sun Life exception. In *Golden Capital* the court said that the special costs were suitable where such an order would be "the only method in which the court can demonstrate its disapproval for the misconduct" (para. 167).

- [106] In most cases, reprehensible conduct giving rise to the cause of action can be addressed by an award of punitive damages, rather than special costs: *D.H. v. L.J.H.*, [1997] B.C.J. No. 2724 at para. 26 (S.C.). Where the plaintiff receives punitive damages, the fruits of the litigation clearly provide compensation for the reprehensible conduct, and special costs should not be awarded. Awarding both for the same conduct would comprise double compensation: *McPhillips v. British Columbia Ferry Corp.* (1993), 16 C.P.C. (3d) 284 at para. 18 (B.C.S.C.). In a number of decisions the court has refused to award special costs on the basis that punitive damages have already fulfilled that function: see *P.B. v. R.V.E.*, 2008 BCSC 613 at para. 27; and *Manavi v. McDonald*, [1993] B.C.J. No. 463 (S.C.) at para. 23.
- [107] There are others where the court has found that the fruits of the litigation are sufficient even absent a punitive damages award. In *Owners, Strata Plan KAS 3267 v. Smith*, 2011 BCSC 387 at para. 27, the court noted that the defendant's pre-litigation conduct was reprehensible, but pointed out that it gave rise to the (successful) claim for a damages award:
- [27] In my view, the fruits of this litigation, being judgment for money owing, will provide full compensation of the corporation's loss. This is not one of those unusual circumstances where reprehensible pre-litigation conduct gives rise to a need to add special costs to the claimant's recovery in order to redress something lacking in the main award.
- [108] In *Elsen and Adtronics Signs Ltd. et al. v. Sicon Group Inc., et al.* (re costs), 2005 BCSC 440 at para. 23, the misconduct complained of had given rise to the cause of action and the resultant award of damages and had therefore been adequately addressed.
- [109] One of the difficulties in this case is that punitive damages are not available in a claim under the FCA: see *Allan Estate v. Co-operators Life Insurance Co.*, 1999 BCCA 35 at para. 71. The FCA is not punitive in nature (see *Duncan*, para. 48). It is only meant to provide financial recompense for pecuniary losses flowing from the death itself, rather than providing a sanction for the wrongdoer's role in the death.
- [110] I agree with the plaintiffs that Mr. Panghali's conduct was reprehensible. Indeed it is difficult to envision more reprehensible conduct than that of the defendant in murdering his wife and their child's mother and burning her body in an effort to escape detection. However, in the circumstances I do not think that this is a proper basis for an award of special costs. First, the court has already demonstrated its disapproval of that misconduct in the criminal proceedings. Mr. Panghali is serving a life sentence for the murder. Second, I have some concerns about awarding special costs with the goal of punishing the conduct giving rise to the cause of action when the statutory basis for the cause does not permit an award of punitive damages. If special costs were claimed for misconduct in the course of the litigation itself the situation would be different; but in these circumstances such an award would essentially do indirectly what the court cannot do directly.

[111] Finally, following Adtronics and Strata Plan KAS, I find that the award of damages in this matter, which flows directly from the conduct complained of, provides full compensation for the pecuniary loss. As a result I decline to award special costs. The plaintiffs have otherwise been successful and will receive costs at Scale B.

Summary

[112] The plaintiff shall have judgment against the defendant as follows:

- a) Past Loss of Dependency: \$54,700
- b) Future Loss of Dependency: \$165,000
- c) Past Loss of Household Assistance and Childcare: \$129,000
- d) Future Loss of Household Assistance and Childcare: \$172,000
- e) Loss of Guidance: \$35,000
- f) Public Guardian and Trustee fees of \$58,600
- g) Tax Gross-up to be resolved by counsel; failing agreement, liberty to apply is granted.
- h) Court ordered interest as ordered.
- i) Costs to the plaintiffs at Scale B.

"Punnett J."

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