

CANADA / JUDGMENT

Park v. VW Credit Canada Inc.

2017 BCSC 1733

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 1733 Park v. VW Credit Canada Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Park v. VW Credit Canada Inc.,

2017 BCSC 1733

Date: 20170928

Docket: M132985

Registry: Vancouver

Between:

Wan Su Park and Jun Ja Kim

Plaintiffs

And:

VW Credit Canada Inc.,

Credit VW Canada, Inc., and Jae-Ho Ouh

Defendants

And:

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

January 9-13, 16-18, April 24-25

and September 11, 2017

Place and Date of Judgment:

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1.0 Introduction

- [1] No claims are more tragic than those brought under the Family Compensation Act, RSBC 1996, c 126, and this one is no exception. In the early morning of January 26, 2013, the life of the plaintiffs' beloved daughter, Song-Yi Park, ended at the age of 26. She died in a horrific single car accident, when she was a passenger in a car driven by her live-in boyfriend, the defendant Jae-Ho Ouh.
- [2] At the beginning of the trial, over which Madam Justice Harris presided, Mr. Ouh formally admitted that his negligence was the sole cause of the accident that killed Song-Yi, obviating the further participation of the Insurance Corporation of British Columbia as a defendant representing an alleged unidentified driver.
- [3] Unfortunately, Harris J. was unable to complete this matter, and on August 3, 2017, the Chief Justice assigned it to me for the purpose of delivering judgment. I have listened to recordings of the evidence, and I have reviewed transcripts of the testimony and all of the exhibits and submissions. I also invited the parties to make any further submissions they thought appropriate. Counsel for the plaintiffs and counsel for the defendant VW Credit Canada Inc. did so on September 11, 2017.
- [4] There is nothing this court can do to make up for the loss of a young life. The issues that fall to be decided are what damages are available to the plaintiffs under the Family Compensation Act, and whether those damages should be reduced because of contributory negligence on the part of Song-Yi. The contributory negligence alleged is that she rode with Mr. Ouh when she knew or ought to have known that it was unsafe to do so due to his consumption of alcohol. His blood alcohol concentration was very high, nearly three times the legal limit.
- [5] The law does not permit an award of damages for the terrible pain the plaintiffs have suffered, or for the loss of their daughter's companionship. Rather, the plaintiffs' claim is limited to what pecuniary loss they can establish as flowing from their daughter's untimely death; see, for instance, *Lian v Money* (1994), 93 BCLR (2d) 16 (SC) at paras 17 and 26, and *Bianco Estate v Fromow* (1998), 56 BCLR (3d) 12 (CA) at paras 8-12.
- [6] In this case, the plaintiffs frame their claim specifically as what they expected to be paid by their daughter after their retirement, at which point they would have gifted their wholesale food supply business to her for her continuing operation in return for her ongoing support.
- [7] Complicating the analysis are two very different perspectives on what the future held for Song-Yi.

2.0 A COMMENT ON THE EVIDENCE

- [8] The most significant issue in this case is what Song-Yi's future would have been. When her life was taken, she was in Canada on a study visa, studying English in Vancouver and living with Mr. Ouh. Her parents knew nothing about Mr. Ouh. They were expecting her to return to Korea and work with them in the family business. Mr. Ouh was expecting her to stay in Canada.
- [9] Song-Yi cannot tell us about her plans, her hopes or her doubts. Her mother and father testified about what she told them. Her brother talked about what she told him. Mr. Ouh testified about his conversations with her, and text messages between them were admitted as an exhibit. A counsellor at her school, Mr. Ha, talked about their discussions during three meetings. The basis upon which this evidence was tendered was not articulated, and no objections were taken to its admission.
- [10] In my view, all of this evidence was clearly hearsay evidence. Its relevance was not limited to the fact that Song-Yi said or wrote certain things at certain times. Rather, it was adduced for the purpose of determining the truth about what Song-Yi would likely have done. The basis of the admissibility of this evidence was not argued, but it seems to me that it was admissible both under the hearsay exception of a statement of intention by the declarant going to the declarant's state of mind at the time that the statement was made (see, for instance, *R. v. Smith*, [1992] 2 SCR 915, *R. v. Lowe*, 2009 BCCA 338 at paras 73-74, and *R. v. Khelawon*, 2006 SCC 57 at para 60), and in accordance with the principled approach established by the Supreme Court of Canada in *Khelawon*, based on the two requirements of necessity and reliability.
- [11] Turning to the principled approach, there can be no doubt as to the requirement of necessity, as the relevance and lack of reproducibility of the evidence are not in question. As to reliability, I am satisfied that its admission is consonant with the integrity of the trial process. The question is one of threshold reliability (whether the circumstances suggest that the declarant was being untruthful or mistaken), not ultimate reliability (that is, the extent to which the hearsay statement can be relied upon to determine the merits): see *Khelawon* at para 51.
- [12] The problem the evidence in question raises, as I see it, is not whether I can accept that Song-Yi was speaking what she perceived as truth, but rather whether, ultimately, she herself knew what she wanted to do in the context of what is, after all, a future contingent event, not a past occurrence. Viewed this way, I am satisfied that the test for threshold admissibility has been met. Nothing in the witnesses' testimony or in the personal circumstances of Song-Yi convinces me that she was mistaken or disingenuous when expressing her future plans with those close to her. Her differing accounts of those plans suggest to me not that she was being untruthful, but rather that her feelings were in conflict.
- [13] It follows that the evidence of all of the witnesses who testified about what Song-Yi had to say is admissible. This is, of course, a different question from whether I find any particular witness to be credible.

[14] With this in mind, I now turn to consider the evidence.

3.0 BACKGROUND

3.1 Korea

- [15] Song-Yi grew up in Seoul, in the Republic of Korea. Her father, Wan Su Park, was born there on November 29, 1960. Her mother, Jun Ja Kim, was born on August 18, 1961. Mr. Park finished middle school, while Ms. Kim finished elementary school.
- [16] Mr. Park and Ms. Kim married in 1984, and Song-Yi was born on August 14, 1986. Her brother Dong Suk Park was born on November 6, 1987.
- [17] For 30 years, Mr. Park and Ms. Kim have worked together to develop a wholesale food supply business. For the last 15 years, they have operated as Donghae Food Bank Inc. ("DFB"), selling food supplies to retail outlets including restaurants, schools, cafeterias and military camps. It has been a successful business. Mr. Park and Ms. Kim are the shareholders of the company.
- [18] In 2005-2006, after finishing high school, Song-Yi attended Daejin University in Korea, where she studied in the College of Arts, majoring in product and environment design. The second semester of each year was spent in China, studying Chinese language and culture.
- [19] Song-Yi did not finish her program there, but sought to attend a more prestigious institution. After first studying to obtain the necessary entrance qualifications, she attended Hansung University in Seoul from March 2009 through February 2011. There, she obtained the degree of Bachelor of Fine Arts, majoring in interior design.
- [20] After graduating, Song-Yi worked for a few months as an intern with Hyundai Capital, but said that she did not enjoy the work, and quit. Later in 2011, she began working for her parents at DFB, where she remained for about a year. While at DFB, she was involved in accounting, including taxes, and in organizing the company's programs, or systems, concerning matters such as distribution, sales, payroll and expenses. These programs were already in place, but according to her parents, Song-Yi took them over and improved them.
- [21] During Song-Yi's time at DFB, her father reported, they would leave for work together every morning at 4:30 a.m., arriving at about 5:00 a.m. They would return home together between 6:00 and 7:00 p.m. These were long days.
- [22] Throughout this time, her parents testified, Song-Yi was healthy with a bubbly personality.
- [23] In 2012, Song-Yi decided, with her parents' consent, to go to Vancouver and enrol in an English language program. Her parents' understanding was that when she finished the program, in about six months (according to Ms. Kim) or a year (according to Mr. Park), she would return to Korea and resume working at DFB in order to learn the business. By this time, she would have studied both Chinese in China and English in Canada, and would be in a position to help manage and grow the business.

- [24] The concept, her parents reported, was that Song-Yi would live with them while she worked in the business, learning from her father. In 2020, her father would turn 60 and her parents would retire, gifting the business to her. Her father would continue to be available over the next five or ten years to advise her, and in return, she would support her parents from the profits of the company for the remainder of their lives.
- [25] According to the plaintiffs, they had discussed this with their daughter, and she was in full agreement. Mr. Park, indeed, testified that the understanding they had reached was that after Song-Yi took control of the business, she would pay her parents ₩7,000,000/month (using the exchange rate at the time of trial of 909.0909 Korean won to one Canadian dollar, this equals \$7,700/month, or \$92,400/year). Mr. Park was subsequently obliged to retreat from that assertion insofar as the precise figure was concerned, but remained clear that the concept was one to which they had agreed.
- [26] With respect to Song-Yi's time in Vancouver, Ms. Kim testified that she understood her daughter would be living in some kind of dormitory arranged by the agency that had also arranged for the English language course and appropriate visas.

3.2 Vancouver

- [27] Song-Yi attended Pan Pacific College, a private school in downtown Vancouver. She enrolled in its Intensive ESL Program with a start date of August 20, 2012, and an initial completion date of February 1, 2013. This was subsequently changed to March 22, 2013, apparently to accommodate her desire to take a five-week vacation from school from November 5 through December 7, 2012. On her vacation request form, she gave the reason as "I want to take a rest".
- [28] On her application form, Song-Yi indicated that she did not wish to apply for homestay service. Instead, she lived with Mr. Ouh, whom she had known and dated since middle school in Korea. He was a couple of months older. She and Mr. Ouh lived together in a house on 49th Avenue in Vancouver, close to Langara College where Mr. Ouh was enrolled. He had preceded her to Canada, and was by this time a permanent resident (he is now a citizen). His parents lived nearby.
- [29] Mr. Ouh testified that he and Song-Yi planned to marry and raise a family. According to Mr. Ouh, Song-Yi very much enjoyed life in Canada and did not want to return to Korea. She planned instead to extend her stay, transfer to Langara College, and be with him. Ultimately, he said, she did not want to work, but wanted to be a stay-at-home mother whom he would support. In the immediate aftermath of the accident, he described her to the attending police officer, Cst. Patricia Peck, as both his "girlfriend" and his "fiancée".
- [30] According to Mr. Ouh, Song-Yi was not in good physical shape during their time together in Vancouver. She lacked energy, and slept ten or more hours a day.

[31] Mr. Park and Ms. Kim knew nothing about Mr. Ouh and had no idea that their daughter was living with him in Vancouver. Texts that Mr. Ouh and Song-Yi exchanged on the last day of her life are consistent with an affectionate, romantic relationship. For instance, Song-Yi addressed Mr. Ouh as "Honey" and "Hubby", and signed off a text in the afternoon with "I love you <3 [heart]". But neither those texts nor evidence from her school counsellor of complaints of problems in the relationship tell me what the future of that relationship would have been.

[32] In Vancouver, Song-Yi was known to her friends as "Lucy". Mr. Ouh went by "Jay".

4.0 DISCUSSION

4.1 Outline of the positions

[33] The plaintiffs' claim is for a loss of dependency in the period from November 2020 on. At that point, when Mr. Park reached the age of 60, they say that they would have retired and gifted the company to Song-Yi, who would have paid them an annuity thereafter. They claim no loss arising before that time.

[34] The plaintiffs also claim expenses. They advance no claim for loss of care, guidance and affection.

[35] The plaintiffs base their claim for loss of dependency on the financial history of DFB. They do not assert that Song-Yi would have grown the company so that its profits would be substantially increased. Rather, they submit, the future performance of the company based upon its history would have been sufficient so that after Song-Yi took it over, she would have been able to pay both an income to herself and an annuity to her parents. In the plaintiffs' submission, the amount they could reasonably have expected to receive from Song-Yi, assessed on this basis, is in the range of ₩58,720,380 per annum, or, at the current exchange rate, \$64,592, yielding a present value in the range of \$1,012,000.00.

[36] That Song-Yi would have taken that path, her parents submit, follows from their evidence of the agreement they had reached with her, supported by the evidence of Song-Yi's brother, and her school counsellor. Mr. Wiseman was clear that he is not advancing a claim based on cultural factors, such as filial piety. Rather, his claim is based upon the proposition that Song-Yi would have taken over the company as a gift from her parents, and thereafter would have supported them in consideration for that gift.

[37] The defendant VW Credit Canada (to whom I will refer as "the defendant", referring to Mr. Ouh by name), maintains that this argument is based upon a flawed analysis, and that, given the remaining value of the company to the parents, no demonstrable pecuniary loss has been demonstrated. In any event, the defendant argues, it is by no means certain or even probable that Song-Yi would have returned to Korea to take over the family business.

[38] But we are dealing here with the future contingent event: Song-Yi taking over the ownership and management of DFB in 2020, and thereafter paying an annuity to her parents. The plaintiffs do not have to prove that this would have happened on a balance of probabilities. But they can have no claim based upon this scenario unless I am able to find, on the evidence, that there is a real and substantial possibility that it would have happened, as opposed to being mere conjecture or wishful thinking: see, for instance, *Smith v Knudsen*, 2004 BCCA 613 at para 24; *Perren v Lalari*, 2010 BCCA 140 at para 32; and *Gillespie v Yellow Cab Co Ltd*, 2015 BCCA 450 at para 34. I turn now to consider that question.

4.2 A real and substantial possibility?

- [39] It seems clear on the evidence that Song-Yi was conflicted about her future. In discussions with her parents, she expressed an interest in learning the family business under her father's tutelage, and ultimately taking it over. Indeed, they say, she had agreed to do so. She expressed a similar interest to her brother. In addition, she mentioned to her counsellor in Vancouver, at a time when she seemed to be having difficulty with her relationship with Mr. Ouh, that she would go back to Korea to help her parents at home.
- [40] What she said, however, must be considered in the context of what she did. Song-Yi could have stayed in Korea and worked with her father in the business, as she had done for about a year. But she did not. Instead, she went to Vancouver to study English and to live with Mr. Ouh, of whom her parents knew nothing. I am satisfied that this was not a random coincidence. Song-Yi had known Mr. Ouh for years. She did not simply date him when she got to Vancouver, but lived with him. I accept Mr. Ouh's evidence as indicating that Song-Yi was at least contemplating staying with him in Canada instead of returning to Korea.
- [41] That Song-Yi would be conflicted is understandable. She was young and inexperienced. Her background was not in business. She had obtained a Bachelor of Fine Arts degree, majoring in interior design, indicating a strong interest in something quite different from running a wholesale food business. On the other hand, I give little weight to Mr. Ouh's report that Song-Yi expressed a preference to being a stay-at-home mother supported by him. The conversations reported by her school counsellor indicate that she had by no means abandoned the prospect of returning to Korea.
- [42] But getting Song-Yi back to Korea to work with her parents is only part of the equation. With her arts background, would Song-Yi still have found the business to her liking after two or three more years? Would she have demonstrated a capacity for running it and taking on the responsibility of ownership? By the time her father turned 60 in 2020, Song-Yi would be 34. Might she by then have or be planning a family of her own, and would she choose to take on the ownership and running of the business, or might she prefer to devote more time to raising a family than such responsibilities would allow? That might depend in part upon the circumstances of her husband, should she marry. Her mother, I observe, chose to keep working with her husband in the family business during the time that she raised her two children.

- [43] Notwithstanding the many doubts raised by these and other questions, I conclude on the basis of the evidence of the plaintiffs, Song-Yi's brother and the counsellor that the scenario upon which the plaintiffs rely was a real and substantial possibility. The defendant did not seriously contend otherwise. Rather, the defendant took the position that while the contingency was indeed possible on the evidence, it was very unlikely.
- [44] It then falls upon me to assess the likelihood of the possibility. That likelihood, expressed as a percentage, must then be applied to any loss I find established by the evidence on the assumption that the contingency would in fact take place.
- [45] I turn first to assess what future loss is established by the evidence before considering to what extent any such loss must be reduced in accordance with the percentage likelihood of the contingency taking place.

4.3 The claim for future pecuniary loss

4.3.1 Expert evidence

- [46] Both parties led expert evidence. The plaintiffs relied upon a report from Ronald J. Tidball, a chartered professional accountant, analysing the company's performance and estimating losses, and a report from Howard Teasley, an economist and a chartered professional accountant, estimating losses incurred by the plaintiffs as a result of Song-Yi's death.
- [47] The defendant responded with reports from Suzanne Schulz, a chartered professional accountant, responding to Mr. Tidball's report, and Douglas Hildebrand, an economist and management consultant, responding to Mr. Teasley's report. Both Ms. Schulz and Mr. Hildebrand carried out their own reviews of DFB's performance.
- [48] I am unable to accept the plaintiffs' expert evidence as helpful. Mr. Tidball's report begins with the fundamental error of attempting to assess a past loss (from the date of death to the date of trial) based on an apparent reduction in the earnings of the company. In fact, the plaintiffs did not advance such a claim, but even if they had, the basis upon which Mr. Tidball purported to assess it was analytically unacceptable and erroneous. The loss he purported to identify was a reduction in earnings to the company in 2013-15, not a pecuniary loss to the parents occasioned by the death of their daughter. In assessing this purported loss, Mr. Tidball failed to isolate unrelated factors and non-recurrent expenses. As Ms. Schulz pointed out, Mr. Tidball thereby failed to normalize the annual gross profit for the years in question, when the company's performance was adversely affected by expenses and write-offs unrelated to Song-Yi's passing. Once those matters were taken into account, there was no reduction at all in gross profit.
- [49] These problems were carried over into Mr. Teasley's report, which relied upon Mr. Tidball's. Fundamentally, the analysis was not appropriate to a claim for damages for wrongful death, as opposed to one for damages for personal injury. Mr. Teasley, in essence, calculated a future loss based on the cost of replacing Song-Yi by employees--an administrative assistant to 2020, when Mr. Kim turned 60, and a manager thereafter. This was akin to a loss of

services analysis, but that is not what the plaintiffs assert, and in any event failed to take into account the cost to the parents of Song-Yi's compensation. Mr. Teasley's analysis did not address an actual loss of dependency, which is the proper basis of any claim of this sort. Moreover, Mr. Teasley did not take into account in any of his calculations the value of the company, which, in the scenario on which they relied, the plaintiffs would have had to surrender in return for whatever annuity they expected from Song-Yi.

[50] I prefer the evidence of Ms. Schulz and Mr. Hildebrand, whose analyses were appropriate and in accordance with the legal basis of the claim.

4.3.2 Assessing the loss

4.3.2.1 The plaintiffs' position

[51] Largely abandoning their own experts, the plaintiffs turn to the report of Mr. Hildebrand and point to his assessment (based in part on the report of Ms. Schulz) of the average normalized pre-accident earnings of DFB at ₩138,720,380, expressed in 2015 won. Taking this as the appropriate projection for the company's income from 2020 on, the plaintiffs then submit that this should be reduced by the amount typically earned by Ms. Kim, who would have to be replaced (₩20,000,000), and the amount taken as income by Mr. Park, representing Song-Yi's income (₩60,000,000), leaving ₩58,720,380 to be paid over to the parents as consideration for the gift of the company. Using Mr. Hildebrand's evidence of the exchange rate at the start of trial of 909.0909, this translates to an annual value of \$64,592. The plaintiffs then apply Mr. Teasley's present value multiplier of 15.669 (which is stated to include all labour market contingencies) to get to the present value of \$1,012,098.

[52] There are significant problems with this proposition. One is that it requires virtually all of the company's net earnings to be paid out as income. That has never happened in the past, and would soon lead to financial ruin. We see, for instance, that in 2012, Mr. Park withdrew compensation of ₩60,000,000, but no compensation was paid to Ms. Kim. Mr. Park testified that this would have been because the company was not doing as well that year. Yet its normalized actual after-tax earnings were in excess of ₩144,000,000; even without normalization, they were well in excess of the ₩60,000,000 paid to Mr. Park. But Mr. Park retained the excess, rather than paying it out as compensation. That was sound business sense. Why would the same prudence not be expected of Song-Yi?

[53] A second major problem is that the plaintiffs' proposition values only one side of the agreement upon which the plaintiffs rely, being the consideration moving from Song-Yi to her parents in the form of support. It completely ignores the consideration moving from the parents to Song-Yi, in the form of the ownership of the company.

[54] The only evidence of the company's value came from Mr. Park. He testified that before reaching the agreement with Song-Yi that she would take over the company, his plan was to sell it. In 2012, he already reached a deal with "another larger company" to sell DFB for ₩1,000,000,000, so he was sure about that amount. By the time of trial, he testified, that

amount was "the worst amount of money like the lowest, lowest, lowest" that he would expect to receive, the company's performance having improved considerably since 2012. It follows, using Mr. Hildebrand's exchange rate, that by the time of trial, the value of the company was in excess of \$1,100,000. Mr. Park acknowledged that if he could sell the company for at least that amount, it would probably be sufficient to fund his and his wife's retirement.

[55] On behalf of the plaintiffs, Mr. Wiseman objected that we really cannot take into account the value of the company because we have no evidence about the tax consequences and the costs involved in selling it. But we also have no evidence about the tax consequences and costs involved in gifting the company to Song-Yi, and it seems to me that the onus was on the plaintiffs to adduce that kind of evidence, without which their claim could not properly be assessed. That the plaintiffs' experts chose to ignore it does not mean that the onus shifts to the defence, or that the court should also ignore it. It is not simply a matter of mitigation. It is fundamental to assessing the plaintiff's alleged loss based on the scenario they advanced--a scenario that included the disposition of the company.

[56] As it is, Mr. Hildebrand was quite clear that in general, at least by Canadian norms, the tax treatment of gains from the sale of an asset is much more favourable than the tax treatment of income. Moreover, he pointed out that any valuation of a business is invariably tied to its ability to produce income in the future. In his opinion, which I accept, a business owner with a viable business would be in a position to sell it now for an amount equal to the present value of any future stream of income he might expect to gain from it. In his view, the plaintiffs in essence take the so-called profits of the business and apply a no risk wage multiplier factor, but that is not at all how businesses are valued. As he put it:

If you have a business that's intact today and has a designated fair market value and an individual that was designated to lead that into the future and so in a continuum, it was assumed to be contingent on the same level of profitability, the level of expected profit from that business should equal whatever the true market value is of the business today or at any point in time.

So if you haven't lost the business and it's intact, then I just don't see where this discussion goes in terms of business loss. I mean, I just don't see it.

[57] I agree with Mr. Hildebrand. On the evidence, I do not see any pecuniary loss arising from the scenario put forward by the plaintiffs. What they lost through the tragedy of Song-Yi's death, I find, is not a future annuity from the business, because that can be fully replaced through the sale of the asset that they no longer have to transfer to Song-Yi, without having to take into account the income she would pay herself. Rather, what they lost is the intangible benefit of keeping the business they built in the family and helping their daughter succeed in it. As significant a loss as that is, regrettably it is not one for which the plaintiffs can be compensated under the Family Compensation Act; see in relation to a similar claim the discussion in *Dolker v Pekrul*, 2001 BCSC 681, rev'd in part 2003 BCCA 296.

4.3.2.2 An alternative scenario

- [58] Does it follow that the plaintiffs can claim nothing for loss of future dependency? As Mr. Hildebrand put it, the issue becomes what part of Song-Yi's future after-tax income, however earned, would go to her parents net of any amount they would spend on her. The defendant does not suggest that Song-Yi would have given nothing to her parents after their retirement, but maintains that the evidence does not support anything more than a nominal award.
- [59] Mr. Hildebrand reviewed 2015 labour market statistics for both Canadian and South Korean females, age 15-64. The negative contingencies, he found, were higher for Koreans than Canadians. He noted that the norm for South Korean females of Song-Yi's generation who have children was to have their first child around age 31. As I observed above, Song-Yi would have been 34 at the time of her parents' retirement in 2020. Mr. Hildebrand put forward a scenario whereby Song-Yi would have established a family by the end of 2023, but would have kept working. The result, however, would be that after she had a family, a much smaller proportion of Song-Yi's after-tax income would be made available to her parents.
- [60] Taking into account the joint life expectancies of Song-Yi and her parents, on a without-accident basis, Mr. Hildebrand's present value multiplier for each \$1,000 over the years 2021 through Song-Yi's 60th birthday comes (I calculate) to \$16,766. This does not take into account most labour market contingencies. Since we are dealing with a possible future contingent event of which I will have to assess the likelihood, I consider it appropriate to omit those labour market contingencies at this stage of the assessment.
- [61] But the question remains: what would Song-Yi have earned, and how much would she have donated to her parents? As to Song-Yi's potential income, I note that her mother earned between \$0 and \$35,200 in the years between 2009 and 2013, while her father earned between \$31,845 and \$66,000 in the years 2011, 2012 and 2013.
- [62] As to what amount Song-Yi would have donated to her parents, I am satisfied that it would have been relatively small. I find that any amount to be paid by Song-Yi would be either offset by the transfer of the company to her, as discussed above, or, in all probability, reduced by the fact that her parents' need was minimal as a result of their sale of the company.
- [63] Balancing also the needs of Song-Yi and any family she might have had, and taking into account Mr. Hildebrand's analysis of family expenditure for both with- and without children households, and allowing for the potential for an expanded family income, through marriage, that would tend to increase the amount available for parental support, I conclude that the evidence cannot support a dependency of more than \$3,000 per year over the time in question, the present value of which is \$50,300. This is based on a notional after-tax income of \$40,000, of which Song-Yi would distribute 7.5% to her parents. In this regard, I note from evidence put in by the plaintiffs that the taxation rates in Korea would appear to be fairly low. As discussed above, I also take into account the ability of the plaintiffs to fund their retirement through the sale of their business. Insofar as Song-Yi's family income would

be enhanced by her partner's earnings, if she married, I assume that there would also be an additional set of parents to support.

4.3.3 Assessing the likelihood

[64] I have already concluded that the scenario of Song-Yi's future put forward by the plaintiffs would yield no claimable loss. It is therefore unnecessary for me to assess the likelihood of her not only returning to Korea and working in her parents' business, but also taking it over and operating it successfully for the remainder of her parents' life.

[65] The alternative scenario, that in the years of her parents' retirement, Song-Yi would nevertheless have earned sufficient after-tax income, net of any support from her parents, to allow her to pay annual support to them of \$3,000, and that she would have paid it, is less problematic. Given the contingencies I have already taken into account, and those built in to the present value calculations, I assess the likelihood of this possibility at 75%, the principal questions being the likelihood of Song-Yi (a) achieving an after-tax income of \$40,000, given the level of earnings achieved by her parents, and (b) choosing to support them. Both parents testified that although it is common among their generation in Korea to support their parents, that has not proved to be the case with the younger generation.

[66] Applying a 75% likelihood factor yields a present-value loss of \$37,725.

4.4 The claim for expenses

[67] The Family Compensation Act provides in section 3(9)(b) for the recovery of: "reasonable expenses of the funeral and the disposal of the remains of the deceased person".

[68] Pursuant to this provision, the plaintiffs claim the following expenses that they incurred:

(a)

airfare for Mr. Park, Ms. Kim and their son to travel to Vancouver for Song-Yi's funeral and cremation service:

\$3,895.65

(b)

accommodation in Vancouver for that attendance:

\$1,636.06

(c)

cost of the funeral and cremation service in excess of \$2,500 received from ICBC:

\$72.92

(d)

food expense in Vancouver:

\$2,434.97

(e)

gasoline and taxi fare in Vancouver:

\$32.04

(f)

the cost of shipping Song-Yi's personal effects back to Korea:

\$426.00

TOTAL:

\$8,497.64

[69] In addition, the plaintiffs incurred medication expenses, uncompensated food costs while in Vancouver to attend their examination for discovery, and airfare and accommodation costs in Vancouver when they attended Mr. Ouh's criminal trial.

[70] At first glance, all of these expenses would appear arguably to have been incurred as a foreseeable consequence of Mr. Ouh's negligence with the exception of the costs relating to the plaintiffs' attendance for examination for discovery, which are a matter for conduct money, not damages, and the medication, the cause of which was unclear. But this is not a tort claim. To recover out-of-pocket expenses, the plaintiffs must bring them within section 3(9)(b) of the Family Compensation Act, as quoted above.

[71] Of the remaining costs, neither the travel expenses relating to Mr. Ouh's criminal trial, nor the cost of shipping Song-Yi's personal effects back to Korea, can be considered as "reasonable expenses of the funeral and the disposal of the remains of the deceased person".

[72] The question that remains is whether the balance of the expenses, particularly the airfare and accommodation costs, can properly be considered "reasonable expenses of the funeral ". The defendant argues that the "reasonable expenses of the funeral " cover no more than the actual cost of the funeral and cremation service, of which only \$72.92 remains unpaid. I disagree. In my view, the costs incurred by Song-Yi's family to travel to and stay in Vancouver for the purpose of arranging and attending her funeral and cremation service come within the description "reasonable expenses of the funeral and the disposal of the remains of the deceased person". It would be unreasonable to expect Song-Yi's family to remain in Korea and arrange for her funeral remotely. But for the need to arrange for and attend the funeral and cremation service, the expenses would not have been incurred. The defendant did not argue that there was anything about the expenses themselves that was unreasonable.

[73] I come to the same conclusion concerning a portion of the food, gasoline and taxi expenses. They are of a type that the family would have incurred in Korea in any event, and so I would attribute half of the amount claimed (\$1,233.51) to the necessity of spending time in Vancouver while arranging and attending the funeral and cremation service.

[74] Accordingly, I allow the claim for funeral expenses at \$6,838.14.

4.5 The claim of contributory negligence

[75] Section 1(1) of the Negligence Act, RSBC 1996, c 333, provides that if damage or loss is caused by two or more persons, "the liability to make good the damage or loss is in proportion to the degree to which each person was at fault".

[76] Here, the defendant asserts that negligence on the part of Song-Yi contributed to the damage or loss claimed here. The negligence alleged is that Song-Yi knew or ought to have known that Mr. Ouh had been drinking heavily before they left to drive home that night, and that it would be unsafe for her to ride with him. The onus of establishing this is on the defendant.

[77] On the basis of the expert evidence, there is no doubt, and I find, that Mr. Ouh had been drinking heavily and was significantly impaired. According to the plaintiffs' expert, Brian Image, Mr. Ouh's blood alcohol concentration ("BAC") at the time of the accident was in the range of 202-236 mg of alcohol in 100 mL of blood, (or 202-236 mg%), suggesting a minimum consumption of 12.5-16.2 eight ounce glasses of beer that evening if Mr. Ouh commenced his drinking at around 6:00 p.m. Mr. Image advised that at a BAC of 250-300 mg%, a person can become stuporous or comatose, while death can occur at BACs of 300 mg% or more due to depression of the respiratory centre of the brain.

[78] According to the defendant's expert, Carolyn Kirkwood, whose report was entered without her being required to attend for cross-examination, Mr. Ouh's BAC would have been 209-230 mg% at the time of the accident, suggesting the consumption of approximately 14 ounces of hard liquor, or 14 glasses of beer after 6:00 p.m. Ms. Kirkwood noted that this takes into account the fact that for each hour in a drinking timeframe, the individual must consume more alcohol to account for the elimination of alcohol from the body at a rate of approximately 15 mg% per hour (average) to 20 mg% per hour (heavy drinkers). According to Ms. Kirkwood, an individual with a BAC of 209 mg% would be incapable of the proper care and control of a motor vehicle.

[79] The opinions of these experts did not differ in any material respect, and I have no difficulty in accepting them.

[80] Constable Patricia Peck attended at the scene of the accident shortly after it happened. She spoke with Mr. Ouh there, stood with him, helped him walk across the intersection, and rode with him in the ambulance. Surprisingly, it was her evidence that she noted no signs of impairment on Mr. Ouh's part and smelled no alcohol until much later when she was with him in the hospital near the end of her shift. He did not appear to her to be intoxicated.

- [81] On the other hand, the emergency physician who attended Mr. Ouh, Dr. Nicholas Rose, had no difficulty smelling alcohol on Mr. Ouh's breath when Dr. Rose first assessed him on the stretcher.
- [82] The plaintiffs argue that no claim for contributory negligence arises because the evidence does not establish that there were signs of impairment that Song-Yi ought to have recognized.
- [83] The defendant contends that regardless of what signs of impairment may have existed, Song-Yi must have known that Mr. Ouh had been drinking heavily, because she was with him throughout the evening.
- [84] On the evidence of Mr. Ouh, which I accept as to the sequence of events that evening, I find that Song-Yi had been out at a party for a friend of hers who was returning to Japan. She called Mr. Ouh to pick her up, which he did at about 6:00 p.m. or a little later. He then drove Song-Yi and her friend to Malone's where they ordered beer and remained until about 9:30 p.m. Neither side challenges Mr. Ouh's evidence about the timing of these events. What is in question is his evidence concerning his drinking.
- [85] Mr. Ouh testified that he had nothing to drink before picking up Song-Yi, but had in fact been sleeping. He said that he had one puff of marijuana before leaving to collect Song-Yi. While at Malone's, he testified, he could not recall having more than one beer. I am unable to accept his evidence about what amount of marijuana and beer he consumed. It is plain from the expert evidence that he cannot be believed in this regard. Given the unreliability of his evidence about the amount of his drinking, I am also cautious about his evidence concerning when he drank.
- [86] After leaving Malone's, Mr. Ouh drove Song-Yi and her friend over to North Vancouver, where they dropped off the friend. Mr. Ouh and Song-Yi then returned downtown where they stopped at a restaurant to have sushi. They arrived there at about 10:30 p.m. and remained until about midnight. Mr. Ouh testified that he did not drink at the sushi restaurant because he was driving. Once again, I am unable to accept that evidence as accurate.
- [87] It is clear from the expert toxicological evidence that Mr. Ouh must have had a great deal to drink that evening. What is not entirely clear is over what period of time he consumed the alcohol.
- [88] But whenever Mr. Ouh started drinking, I find that the only reasonable inference, based upon the toxicological evidence, is that he must have consumed a substantial amount of alcohol in the period between 6:00 p.m. and 12:30 a.m. when Song-Yi was with him. Otherwise, given the rate of elimination, he would have had to have been near comatose, if not near death, when he picked Song-Yi up in order to have a blood alcohol level of .209 -.230 more than six hours later without any further consumption of significance.

- [89] Although I accept that Cst. Peck's evidence was accurate as to her observations in the aftermath of the accident, I do not accept that, before this horrific accident (which split Mr. Ouh's Audi in half), no signs of impairment would have been discernible. This again arises by necessary inference from the toxicological evidence, supported by the evidence of Dr. Rose. I also take into account the following factors, which may have masked signs of impairment Cst. Peck might otherwise have observed: the effect of the shock of the accident on Mr. Ouh; the facial injury he had suffered; the fact that English is his second language; and the fact that their interaction was outdoors. The toxicological experts were very clear that the blood alcohol level they found would give rise to signs of significant impairment in all but the most seasoned of hard drinkers who had developed very high tolerance levels. There was no evidence that Mr. Ouh was such a person.
- [90] But even if, as suggested by the plaintiffs, Mr. Ouh must be taken to have been a seasoned heavy drinker with a high tolerance to alcohol who would show few signs of impairment, I am satisfied on a balance of probabilities that he consumed a sufficient amount of alcohol in the presence of Song-Yi to make it unreasonable for her to drive with him.
- [91] Accordingly, this case is quite unlike *Butterfield (Litigation Guardian of) v Butterfield Estate* (1996), 23 MVR (3d) 192 (Ont CA), where the evidence did not establish when the defendant driver consumed alcohol, or whether the deceased passenger was with him when he did. Here, I have found that Song-Yi was with Mr. Ouh at a time when he consumed a significant amount of alcohol. That is the only reasonable inference that can be drawn from the undisputed evidence.
- [92] This circumstances here are also distinguishable from those before the court in cases such as *Dennis v Gairdner*, 2002 BCSC 1289, *Gagnon v Phillips*, [1993] BCJ No. 1283 (SC), and *Reekie v Messervey* (1986), 4 BCLR (2d) 194 (SC), aff'd (1989), 36 BCLR (2d) 316 (CA), where no contributory negligence was found.
- [93] In *Reekie*, there was direct evidence from witnesses that before the accident, the defendant driver did not appear impaired. Moreover, much of his drinking had taken place before the injured plaintiff joined him. The sort of expert evidence adduced at this trial was not before the court there.
- [94] In *Gagnon*, as in *Reekie*, witnesses testified that the defendant driver did not appear impaired before the accident, and there was evidence that he was by habit a heavy drinker who showed little outward signs of impairment. His BAC was significantly lower than that of Mr. Ouh in this case.
- [95] In *Dennis*, the defendant driver was again found to be an experienced heavy drinker with a high tolerance to alcohol who, according to witnesses, displayed few signs of impairment prior to the accident. Although he had been on a drinking binge the night before, there was no evidence to establish that the injured plaintiff was aware of the degree of his alcohol consumption.

- [96] In this case, as I have observed, there was no evidence that Mr. Ouh, at the age of 26, was an experienced heavy drinker with a high tolerance to alcohol. Nor was there any evidence that, before the accident, he exhibited few or no signs of impairment. Notwithstanding the evidence of Cst. Peck, whose observations were all made after the accident and inconsistent with those of the emergency physician, I am satisfied that given Mr. Ouh's BAC, he would have exhibited signs of impairment before driving home that night. But even if there were few signs of impairment, Song-Yi must certainly have been aware of the significant amount I find he had consumed. The situation here, then, is reminiscent of those discussed in *Earnshaw v Despina* (1990), 45 BCLR (2d) 380 (CA), *Ridsdale v Taberner*, 1991 CarswellBC 1886, and *Grewal v Simoncioni Estate* (1993), 78 BCLR (2d) 69 (CA).
- [97] In *Earnshaw*, Southin J.A. concluded that evidence that the plaintiff passenger, the defendant driver and the defendant owner had been drinking together at a "drinking party" was sufficient to support the jury's finding of contributory negligence. Her Ladyship observed at p. 387:
- Suffice it to say that there was evidence upon which the jury could conclude that these young men, who were all acquainted with one another, knew very well what they were doing and what they were doing was having a drinking party followed by driving.
- [98] In *Ridsdale*, Tyrwhitt-Drake J. observed that the only evidence he had as to the plaintiff passenger failing to take reasonable care for his own safety was that of the defendant driver, to the effect that he and the plaintiff had spent some hours drinking together immediately before the accident occurred. He likened this to the "drinking party" in the *Earnshaw* case, and found the plaintiff contributory negligent to the extent of 30%.
- [99] In *Grewal*, the Court of Appeal upheld a finding of contributory negligence where the trial judge had found that the injured plaintiff had been with the impaired defendant driver all evening. The trial judge had concluded that the plaintiff must have made the same observation as another member of their party who testified that the defendant had consumed a substantial amount of alcohol.
- [100] Like Southin J.A. in *Earnshaw*, I consider that here, too, Song-Yi must be taken to have known what she was doing, which was spending several hours with Mr. Ouh while he was drinking significant amount of alcohol, followed by driving. That, I find, constitutes a failure to take reasonable care for her own safety.
- [101] As we have seen, Tyrwhitt-Drake J attributed 30% of the fault to the plaintiff passenger in *Ridsdale*. A like amount was attributed on a similar basis to the plaintiff passenger in *Houlton v MacKinnon*, 2005 BCSC 41. In *Grewal*, the plaintiff was found to have been 35% at fault. A assessment of contributory negligence to the degree of 50% was upheld in *Pharress (Guardian ad litem of) v Wallace*, 1989 CarswellBC 1365 (CA), but there, the injured plaintiff's negligence consisted of failing to wear a seatbelt as well as travelling with the defendant when he was impaired and his vehicle was defective.

[102] In this case, taking into account the egregious fault of Mr. Ouh (smoking marijuana, consuming a great deal of alcohol and driving with extreme recklessness), I consider Song-Yi's relative degree of fault to be considerably less, and I apportion fault 20% to her and 80% to Mr. Ouh.

5.0 CONCLUSION

[103] In all of the circumstances of this very tragic case, I find on the evidence that the plaintiffs have suffered no pecuniary loss arising from the collapse of their plan to gift their business to their daughter upon their retirement in return for an annuity. I find, however, that the evidence does establish a real and substantial possibility of future loss of dependency with a present value of \$50,300. I assess the likelihood of this possibility at 75%, yielding a loss of \$37,725. I also assess the plaintiffs' "reasonable expenses of the funeral and the disposal of the remains of the deceased person" within the meaning of section 3(9)(b) of the Family Compensation Act at \$6,838.14.

[104] These damages must be reduced by 20% to take into account what I find to have been contributory negligence on the part of Song-Yi as a result of her driving with Mr. Ouh after spending the evening with him while he was drinking heavily. This results in an award of \$30,180 for future loss of dependency, and \$5,470.51 for section 3(9)(b) expenses.

[105] The parties are at liberty to speak to costs.

"GRAUER, J."

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