
CANADA / JUDGMENT

Roberts v. Morgan

2019 BCSC 2313

COURT

Supreme Court of British Columbia

DECIDED

19 February 2019

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2019 BCSC 2313 Roberts v. Morgan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Roberts v. Morgan,

2019 BCSC 2313

Date: 20190219

Docket: M157113

Registry: Vancouver

Between:

Mary Jackson Roberts in her own right,

as Personal Representative of Hugh Craig Roberts, deceased,

and as Executrix of the Estate of the said Hugh Craig Roberts,

and Colin Hugh Roberts

Plaintiffs

And

Richard Graham Morgan, Mercado Capital Corporation,

Pat Morgan Contracting Ltd., Patrick Leo Morgan, ABC Company #1,

John Doe #1, John Doe #2, John Doe #3, and John Doe #4

Defendants

Before: The Honourable Madam Justice Horsman

Oral Ruling on Jury Charge

Counsel for the Plaintiffs:

V.L. Hartney

N.J. Hartney

Counsel for the Defendants Richard Morgan and Mercado Capital Corporation:

L.J. Mackoff

H.K. Rai

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 15, 2019

Place and Date of Judgment:

Vancouver, B.C.

February 19, 2019

Introduction

- [1] This ruling addresses a dispute that has arisen between the parties as to the scope of damages that may be claimed as a matter of law in an action under British Columbia's Family Compensation Act, R.S.B.C. 1996, c. 126.
- [2] The plaintiffs, Mary Roberts and Colin Roberts, are the surviving spouse and son respectively of Hugh Roberts, who was killed in a motor vehicle accident in October of 2013. Given that the parties share the same last name, I will use their first names in this ruling for ease of reference.
- [3] Hugh was 65 years old at the time of the accident. He was riding a motorcycle along Highway 99 near Whistler when a logging truck driving in the opposite direction by the defendant, Richard Morgan, rolled over causing a load of logs to spill onto the highway, striking Hugh. The defendants have admitted liability for the accident.
- [4] At the time of Hugh's death, Mary was 68 years old and their only child, Colin, was 25. Mary and Hugh had been married for 28 years.
- [5] In this action, Mary seeks damages for loss of financial support from Hugh and loss of household services. Colin seeks damages for loss of care, education, training, and guidance. The availability of these heads of damages as a matter of law is not in dispute. The defendants concede that such claims are claims for pecuniary damages and thus permitted under the Family Compensation Act.

- [6] The dispute between the parties is whether Mary can, as a matter of law, additionally claim damages as a surviving spouse for what plaintiff's counsel referred to as "loss of love, care, guidance, and companionship". The plaintiff argues that the law permits such a claim by a surviving spouse to be advanced and that its evidentiary merit is a matter for the jury. The defendants argue that the claim is not one permitted under the Family Compensation Act as a matter of law, and for this reason the jury should not be instructed on it.

Claims under the Family Compensation Act

- [7] I will begin with a review of the conceptual foundation for claims under the Family Compensation Act.
- [8] At common law, there is no right of action for surviving family members in cases of wrongful death. The Family Compensation Act overcomes the common law bar by creating a statutory right of action for the recovery of damages by a deceased surviving spouse, parents, and children. Section 2 of the Act 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.
- [9] Although this provision speaks of "damages" and is silent on the nature and extent of compensation that can be awarded, it is well established in the jurisprudence that damages can be awarded for pecuniary loss only. As a matter of judicial interpretation, recovery under British Columbia's Family Compensation Act is limited to the actual or expected loss of pecuniary benefits arising from the relationship that would have continued if the wrongful death had not occurred. Put another way, the purpose of the Act is to put claimants in the economic position they would have been in but for the wrongful death.
- [10] In *Keizer v. Hanna*, [1978] 2 S.C.R. 342 [Keizer] at page 352, Justice Dickson, as he then was, stated that the award in a fatal accident claim should provide "a monthly sum at least equal to that which might reasonably have been expected during the continued life of the deceased." As observed in *Keizer* at page 352, an assessment must be neither punitive nor influenced by sentimentality; it is largely an exercise of business judgment.
- [11] The loss of financial support occasioned by the death of a family member, which is also referred to as loss of dependency, is a claim commonly advanced in fatal accident cases. The pecuniary nature of such a claim is self-evident.
- [12] In *St. Lawrence & Ottawa Railway Company v. Lett* (1885), 11 S.C.R. 422 [Lett], the Supreme Court of Canada recognized two further heads of damages in fatal accident claims:
- i. a claim by a surviving spouse for loss of household services; and

ii. a claim by surviving dependant children for loss of a parent's education and guidance.

[13] The plaintiffs in Lett were the husband and dependant children of a woman who was killed through the negligence of employees of the defendant railway company. The deceased did not work outside the home, but the evidence indicated that she had "managed the whole business of the house" and contributed to the education of her children. The issue before the Supreme Court of Canada was whether the loss of such services was of sufficiently pecuniary nature to support an action under fatal accident legislation.

[14] A majority of the Supreme Court of Canada concluded that such losses were recoverable in a fatal accident case. At page 433, Chief Justice Ritchie stated:

I am free to admit that the injury must not be sentimental or the damages a mere solatium, but must be capable of a pecuniary estimate; but I cannot think it must necessarily be a loss of so many dollars and cents capable of calculation. The injury must be substantial; the loss, a loss of a substantial pecuniary benefit, and the damages are not to be given to soothe the feelings of the husband or child, but are to be given for the substantial injury.

[15] On the facts of Lett, the court concluded that there was a pecuniary benefit in the services provided by the deceased to her family. The foundation for the award is explained by Chief Justice Ritchie at page 436:

The evidence in this case shows that the husband was receiving benefits and advantages from the services of his wife capable of pecuniary computation, and had such reasonable expectation of pecuniary benefit from the continuance of such services by the continuance of the wife's life as would entitle him to damages under the statute; and, as to the children, I agree with Mr. Justice Armour that there is an education in religion, morals and virtue which, owing to the peculiar confidence inspired by the relationship of mother and child, can be imparted to the children by the mother alone; I think that such education is a benefit and advantage to the child and is capable of being estimated in money, and that the deprivation of a mother's superintendence and care of the children, occasioned by the death of the mother, is a pecuniary loss to the children.

[16] In *Vana v. Tosta*, [1968] S.C.R. 71, the Supreme Court of Canada affirmed the availability of an award of loss of care and guidance to a dependant child in a fatal accident case in Canadian law, despite contrary authority from other jurisdictions. Chief Justice Ritchie, dissenting in part on other grounds, reiterated at page 86 that the loss to the children of the care and guidance of their mother is "to be regarded as a loss of a pecuniary nature which is to be assessed as a separate head of damage."

[17] After Lett, claims by dependant children for loss of care, education, training, and guidance by a parent have been routinely advanced under the Family Compensation Act. In exceptional cases, damages may also be awarded under this head of loss to a surviving spouse who is unusually dependent on the deceased.

- [18] *Haczewski v. British Columbia*, 2012 BCSC 380, is one of the few cases to provide an example of such award. Mr. Justice Grauer awarded \$15,000 to a surviving spouse for loss of guidance in circumstances where the claimant had immigrated to Canada from Poland shortly before her husband's death and relied on her husband to facilitate her cultural integration into her new country of residence. Mr. Justice Grauer held at para. 143:
- [143] In the circumstances of this case, I am satisfied that Paula was reliant upon Albert for guidance beyond the degree normally to be expected of a spouse, given his familiarity with Canadian culture, and her lack thereof.
- [19] In the present case, the plaintiff does not argue that Mary relied on Hugh for guidance beyond the degree ordinarily expected of a spouse. What the plaintiff contemplates in the jury charge she requests me to make is an expansion of the current law as it relates to this category of loss. The expansion is not a small one. Plaintiff's counsel fairly concedes that there is nothing to distinguish Mary's circumstances from the circumstances of other spouses in long-term marriages who lose the anticipated companionship of their spouse as the result of a wrongful death.
- [20] This expansion is most evident in the inclusion of concepts of "love" and "companionship" in the proposed charge. I will therefore turn to how the current law treats such claims in the context of fatal accident legislation.

Claims for loss of love, care and companionship

- [21] Although some provinces have enacted express provision in their fatal accident legislation to permit the recovery of damages for loss of "guidance, care, and companionship", British Columbia's Family Compensation Act has no such provision.
- [22] In *Bianco Estate v. Fromow* (1998), 56 B.C.L.R. (3d) 12 (C.A.) [*Bianco Estate*], our Court of Appeal held that damages for "love", "affection", and "companionship" are not recoverable under the Family Compensation Act. On the issue of the non-recoverability of damages for loss of companionship, then-Chief Justice McEachern, writing for the court, explained at paras. 11 to 12 as follows:
- [11] . . . In my judgment, companionship is not a recoverable head of damages because such damages must necessarily be for the loss of the life of the deceased. This distinction was well identified by Parrett J. in *Loyie v. Erickson Estate* [citation omitted] where that learned judge reviewed the authorities and decided at 37 that "it is the loss of the 'services' of the deceased rather than the loss of the deceased himself which provides the theoretical framework for this type of award."

- [12] I have no doubt that the father has suffered a loss of companionship. I also have no doubt that in some cases a bereaved father might employ a substitute companion and suffer an actual pecuniary loss in that respect. But returning to the question of characterization, I am persuaded that an actual or potential loss of companionship is not a recoverable head of damages under the Family Compensation Act.
- [23] The Court of Appeal applied *Bianco Estate in Zeleniski Estate v. Fairway* (1998), 60 B.C.L.R. (3d) 76 (C.A.) [*Zeleniski Estate*], a judgment which was released a few months after *Bianco Estate*. The jury had awarded a sum of damages to a surviving parent for "loss of care and companionship" arising from the death of a child. In setting aside this award, the Court of Appeal stated at paras. 45 to 47:
- [45] The claim for care, guardianship and companionship is normally associated with a young child's loss of a parent, although it is not strictly limited to that class. For instance, in *Lian v. Money Estate* [citation omitted], an immigrant mother was dependent on her daughter for care and guidance in adjusting to the new world. However, that example is an exception that proves the rule, namely, that usually the head of damage compensates for the loss of the unique and usually irreplaceable role of a parent or close relative in nurturing and shaping another's life. In the present case, the dependency went the usual way: the son needed the mother to deal with life's circumstances.
- [46] There was no evidence of loss of care, other than the financial support and household services accounted for separately. Can the award be sustained on loss of companionship?
- [47] The jury's confusion reflected in their question to the court was understandable. They were told on the one hand not to give anything for emotional loss but on the other they were instructed that they should compensate the plaintiffs for items that looked like the same thing.
- [24] The Court of Appeal in *Zeleniski Estate* then applied *Bianco Estate* in concluding that the jury award for care and companionship could not be upheld.
- [25] In the present case, the plaintiff argues that the decision of our Court of Appeal in *Bianco Estate* was implicitly overruled by the Supreme Court of Canada in *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 [*Ordon Estate*]. The primary issue in *Ordon Estate* was whether provincial fatal accident legislation could constitutionally apply to a maritime negligence claim in light of exclusive federal jurisdiction over navigation and shipping under s. 91 of the Constitution Act, 1867.
- [26] The specific provincial legislation in issue in *Ordon Estate* was Ontario's Family Law Act, R.S.O. 1990, c. F.3. Section 61(2)(e) of this Act expressly permits the surviving family member of a deceased to recover:

- (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.
- [27] As I have noted, the British Columbia Family Compensation Act contains no similar provision.
- [28] The amendment of Ontario's Family Law Act to include express provision for damages for loss of companionship has been interpreted as an expansion of the pre-existing categories of recovery: see *Mason v. Peters* (1982), 39 O.R. (2d) 27 (C.A.) [Mason]. In *Mason* at page 32, the Ontario Court of Appeal noted that loss of companionship has not generally been considered a pecuniary loss for which compensation may be granted under fatal accident legislation. The addition of s. 61(2)(e), originally enacted through legislative reform in 1975, was interpreted in *Mason* to expand the scope of recovery in fatal accident cases to include damages for loss of guidance, care, and companionship which are "essentially non-pecuniary in nature": *Mason* at pages 37 to 38.
- [29] It is true that the Supreme Court of Canada in *Ordon Estate* ultimately addressed the question of the constitutional applicability of the Ontario Family Law Act to maritime negligence claims by modifying maritime negligence law to permit recovery of damages for loss of guidance, care, and companionship. This allowed the law to accord to "contemporary conceptions of loss": *Ordon Estate* at paras. 101 to 102. Given the finding that a survivor's maritime negligence claim for loss of guidance, care, and companionship could be brought without the need to resort to the Ontario Family Law Act, the question of constitutional applicability then did not require final resolution.
- [30] In modifying maritime negligence law, it is unclear whether the Supreme Court of Canada intended to expand the scope of recoverable loss beyond that recognized in *Lett and Vana v. Tosta*, which were cases expressly referenced by the court with apparent approval at para. 101 of *Ordon Estate*.
- [31] In any event, the modification of the law affected by *Ordon Estate* pertained to the interpretation of "damages" under the Canada Shipping Act in relation to maritime accident claims. The court in *Ordon Estate* did not purport to overrule and indeed did not reference the decision of our Court of Appeal in *Bianco Estate*. The Supreme Court of Canada did not address at all the case law from this jurisdiction as to the available scope of damages under British Columbia's Family Compensation Act.

Charge to the jury

- [32] In light of the current state of the law, I am of the view that it is not proper to instruct the jury in this case that Mary may recover damages for loss of love, guidance, care, and companionship, as requested by plaintiff's counsel. The decisions of our Court of Appeal in *Bianco Estate* and *Zeleniski Estate* direct that damages for love and companionship are not available under the British Columbia Family Compensation Act as a matter of law. It seems

to me that any change to the law would require a legislative amendment or alternatively reconsideration of this issue by our Court of Appeal. In providing direction to the jury on the law, I am bound by decisions of our Court of Appeal that have not been overturned.

- [33] With respect to the proposed direction on Mary's claim for loss of "guidance" and "care", I have already noted that such claims are typically limited to dependant children. Plaintiff's counsel acknowledged there is no evidence that Mary falls within the exceptional category of case in which a surviving spouse is unusually reliant on the deceased spouse so as to warrant an award for loss of care and guidance. Plaintiffs' counsel does not rely on existing law, but rather seeks a change to the law to ground such a claim. For the reasons I have already stated, I do not consider such a change to the law to be properly within the role of a trial court.
- [34] Plaintiffs' counsel argues that this claim should be left with the jury and that it is sufficient to include an instruction that the jury is limited to assessing pecuniary loss. However, it is unclear to me what pecuniary loss Mary actually seeks to recover under these heads of loss that is not already captured by the claims for loss of financial support and loss of household services. I am concerned that leaving a claim for "loss of love, guidance, care, and companionship" with the jury will lead to the very confusion that affected the jury in Zeleniski Estate. On the one hand, the jury would be instructed to award only pecuniary damages, while on the other hand they would be instructed to consider heads of damages that appear largely non-pecuniary in nature.
- [35] I do not believe that the plaintiff's proposed charge should be simply left with the jury. It is my role to ensure that the jury is properly instructed on the law, and the law does not presently recognize the heads of loss that the plaintiff seeks to have included in the charge.
- [36] Before concluding, I must comment on the plaintiff's reliance on the decision of our Court of Appeal in *Brown v. Finch* (1997), 42 B.C.L.R. (3d) 116 (C.A.). In that case, the Court of Appeal held that the trial judge had erred in failing to account for positive contingencies in assessing damages in a fatal accident case. Among the positive contingencies overlooked by the trial judge was that as the couple grew older, the deceased's spouse may have devoted more of her time to household duties, including caring for the deceased's spouse in the event that his health declined. The Court of Appeal reasoned at para. 19:
- [19] Had Mrs. Brown survived and been available to look after Mr. Brown in his declining years, there might have been a very substantial pecuniary saving in avoiding the cost of being looked after by others, [including] at home or in a "rest home". These are in the nature of imponderables but they arise from the known circumstances and, having regard to the respective ages and other circumstances of the couple, justify the conclusion that the positive contingencies could well have outweighed the negative.

- [37] This is one of the limited examples offered by the plaintiff as to the pecuniary loss that might be embraced by a claim for loss of love, care, guidance, and companionship. Notably, such loss was not treated as a separate head of damage in *Brown v. Finch*, but rather as a positive contingency that ought to have been accounted for in the overall pecuniary award. *Brown v. Finch* provides no support for the existence of a head of damage under the Family Compensation Act for loss of love, care, guidance, and companionship.
- [38] For the foregoing reasons, I will not instruct the jury that they should assess damages for Mary under the heading "loss of love, care, guidance, and companionship".

"Horsman J."

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