
CANADA / JUDGMENT

S.L.B. v. M.A. Estate

2016 BCSC 1193

COURT

Supreme Court of British Columbia

DECIDED

29 June 2016

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2016 BCSC 1193 S.L.B. v. M.A. Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.L.B. v. M.A. Estate,

2016 BCSC 1193

Date: 20160629

Docket: M131745

Registry: Vancouver

Between:

S.L.B.

Plaintiff

And

Estate of M.A. (deceased)

Defendant

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the Plaintiff:

K. Gourlay

Counsel for the defendant:

E. Lyszkiewicz

Place and Dates of Trial:

Vancouver, B.C.

November 16-19, 2015 and

March 11, 2016

Place and Date of Judgment:

Vancouver, B.C.

June 29, 2016

Introduction

- [1] This case is marked by tragedy. M.B., a 12-year-old girl, and her father, M.A., were killed in a motor vehicle accident when the vehicle driven by M.A. crossed the centre line of the Island Highway on Vancouver Island, B.C., and collided with a vehicle travelling in the opposite direction. The driver of the other vehicle was also killed. The Estate of M.A. has admitted liability in negligence for the accident, which caused the death of M.B.
- [2] This action is brought under the Family Compensation Act, R.S.B.C. 1996, c. 126, by S.B., the mother of M.B., who is seeking damages for the loss of household services she claims would have been provided by her daughter. S.B. alleges that M.B. intended to become a nurse and would have provided nursing services to S.B. for the balance of her life expectancy.

Background

- [3] M.B. is the daughter of M.A. and S.B. They met three years before the birth of M.B.; who was born on July 16, 1999, in Comox, B.C. S.B. also has another daughter, T.B., who was born on March 17, 1995.
- [4] Shortly after the birth of M.B., S.B. was treated on an emergency basis in hospital. S.B. was given a number of medical tests. Eventually, she was diagnosed with Lupus. For the first year of M.B.'s life, M.B. was cared for by the parents of M.A. at their home in Comox. This occurred because S.B. required ongoing medical treatment and suffered considerable exhaustion as a symptom of Lupus, necessitating help for the care of M.B. Care in her grandparents' home continued during M.B.'s second year for a couple of days per week, including overnights and weekends.
- [5] In 2004, M.B.'s parents moved from Comox to Cedar, B.C., near Nanaimo, to accommodate M.A.'s employment as a baker. S.B. was working at that time in Nanaimo at a spa for four to six hours per day, two or three days per week.

- [6] In the winter months of 2005, S.B. took both of her daughters on a family holiday to Mexico, where S.B. found the warm weather helpful to her in dealing with the symptoms of Lupus. M.A. did not attend on this holiday but stayed home to work on finishing floors in the family home.
- [7] In or about 2005, while living in Nanaimo, S.A. and M.A. separated.
- [8] In or about 2006, S.B. met K.W. in Comox. Shortly thereafter in 2007, S.B. entered into a new relationship with K.W. Approximately six months later, S.B. and K.W. began to live together in Langley, B.C.
- [9] S.B. and K.W. eventually moved with her two daughters to Sayulita, Mexico in May 2010. S.B. expected that the warm sunny weather in Mexico would improve her experience of the debilitating symptoms of Lupus. Prior to leaving for Mexico, it was arranged for M.B. to be schooled through the distance education program of the Fraser Valley Distance Education school board. However, the distance education program was not successful for M.B. while she was in Mexico. M.B. was failing her Grade 6 courses. She had also begun a relationship with a 19-year-old, Dani, whom she snuck out of her house to meet, leading to a conflict with S.B.
- [10] Prior to September 2011, it was agreed that M.B. would attend Grade 7 in Comox, where she lived with her grandparents. The grandparents paid for M.B.'s travel to Canada as well as all her educational expenses when she was attending school in Comox. It was unclear how long M.B. was to remain in school in B.C. The plaintiff testified that it was to last until M.B. could demonstrate self-discipline and improvement in her grades.
- [11] On October 16, 2011, M.B. and her father were killed in a car accident. At the time, the plaintiff was staying at a friend's home in Maple Ridge, B.C. After funeral services were completed, the plaintiff returned to Mexico for a time, where she experienced problems in her relationship with K.W. She ultimately returned to B.C. in early 2012 with T.B., living in multiple locations in the lower mainland before settling in the small town of Boston Bar in 2013. The problems between the plaintiff and K.W. eventually resolved, and they remain together in Boston Bar.
- [12] In terms of the current situation of the plaintiff, she testified that she has good days and bad ones. On a good day, the plaintiff is able to dress herself, go for a walk, read a book, perform miscellaneous household tasks such as laundry and prepare her own coffee, although she is limited with regard to cooking because she cannot concentrate. On a bad day, the plaintiff says she cannot go anywhere or open anything to make something for herself because all of her joints are inflamed.
- [13] The plaintiff said that M.B. used to help with kitchen preparation and would tend to her on her worst days. In the plaintiff's view, if M.B. had not been killed in the accident, she would have continued to help the plaintiff with day to day tasks such as getting out of the tub or making lunch, before eventually attending university and becoming a nurse like her

grandmother, at which point she would be able to provide more substantial care. During university, M.B. would have remained living at home and afterwards, she would have stayed near the plaintiff. It was also part of the plaintiff's evidence that M.B. intended to have children of her own one day.

- [14] The plaintiff also explained that M.B. and T.B. were different kinds of people. M.B. apparently was more attuned to her needs while T.B. was more independent and self-interested. This was elaborated on by other witnesses, including T.B. herself, who said M.B. was a compassionate person who wanted to take care of others. She said their family had a family-oriented way of taking care of the house, with both daughters doing various chores in exchange for an allowance. Currently, T.B. lives in Langley, away from the plaintiff, although she still sees her regularly and assists with various household tasks such as cooking and taking out the garbage when she visits.

Analysis

Credibility

- [15] The defendant submitted that S.B. was not a credible witness based on the following inconsistencies in her evidence: (a) the plaintiff testified that she could not apply for welfare because the drive to pick up a welfare cheque in Boston Bar was too far from her home, yet she purchased and insured a motor vehicle which she drives from Boston Bar to visit her daughter in Langley; (b) she failed to tell the Court that she had received funds to pay for M.B.'s funeral from ICBC, while complaining that her father-in-law failed to keep his promise to pay for the funeral; (c) she expressed concern that M.B. was in a relationship with a 19-year-old Mexican male, when in fact, according to T.B., that relationship continued with the approval of S.B.; (d) she testified that she is unable to work, but she failed to file income tax returns or produce evidence of her income for the years 2012 and 2013, which reflect a period when she was living in Mexico and, according to documents contained in the distance education schooling records, she was working all of the time; (e) her current income is said to be \$60 per month, even though her cigarette, marihuana and automobile expenses clearly exceed that income; and (f) she said she experienced improved health in the sunny climate of Mexico, while Dr. Shuckett, one of the plaintiff's expert witnesses, said that the plaintiff "really gets quite ill in the sun" (Exhibit 1, Tab 8, p. 9).
- [16] The defendant noted that the plaintiff failed to avail herself of any programmes offered by the Fraser Health Authority despite having been diagnosed with a significant medical disability. Further, it was noted that despite her significant disability, the plaintiff had failed to see a medical doctor with any regularity to set up and monitor a treatment plan. Dr. Shuckett affirmed that it was important for a person with Lupus to have a consistent treatment plan in place. As a result, the plaintiff's description of her symptoms was anecdotal and at times inconsistent.

- [17] The defendant also attacked the credibility of K.W. based on a full time job description which included care of 35 tomato plants, pepper plants and cucumber plants and miscellaneous gardening. K.W. owns three motor vehicles, all insured. He pays for the plaintiff's cell phone and all household expenses and only earns a total of \$11,000 through his employment as a tattoo artist. The defendant submitted that this financial picture was incomplete and not credible.
- [18] The Court found that K.W. tended to respond to a direct question with an elliptical response. For instance, he was asked if "M.B. was unhappy at a particular time?" The question was met with a response that all mothers and daughters have conflicts from time to time on a variety of matters, which lead to difficulties between them. The response was not an answer to the question. Further, K.W. told the Court that he had provided three hours of daily assistance to M.B. to complete her schooling in Mexico. K.W.'s evidence in this regard was not believable, given that she failed all of her Grade 6 courses even with this alleged assistance.
- [19] There were few decisions in this case which were based on the credibility per se of either of these witnesses, but I have concluded that the evidence which they gave was generally not credible and needs to be approached with significant caution.

Damages under the Family Compensation Act

- [20] Damages under the Family Compensation Act are limited to pecuniary or economic losses only. The plaintiff is only seeking compensation for loss of household services in this case.
- [21] The current claim raises a wide variety of questions because the path that M.B. might have followed in her future cannot be known with any degree of certainty due to her untimely death.
- [22] The calculation of damages under the Family Compensation Act for the death of a child is particularly difficult because of the number of contingencies that must be taken into account, such that "the claim may be pressed to extinction by the weight of multiplied contingencies": *Barnett v. Cohen*, [1921] 2 K.B. 461 at 472; *Chudleigh v. Ross*, [1955] 4 D.L.R. 437 (B.C.S.C.).
- [23] In the case at bar those contingencies include the real possibility that M.B. may have spent considerable periods of time living away from the plaintiff, perhaps for work or education or other reasons, which would affect the amount of care M.B. would be able to provide the plaintiff. Her sister, T.B., moved away from home not long after attaining the age of majority. At the time of her death, M.B. was already living apart from the plaintiff and may have continued to do so for a number of years while she was attending school.
- [24] There was no evidence led about whether there is a high school in Boston Bar, or whether high school students from that town are bussed to or otherwise housed in another town to complete high school. In order to follow her interest in nursing, it is likely M.B. would have required high school science courses, often coupled with science laboratory work, which is

not readily achievable in home schooling settings. Assuming after she graduated from high school she was able to enroll in a university, she would have to move because there are no universities near Boston Bar. Regretfully, no evidence was led by the plaintiff concerning where and how M.B. might complete university. It is mere speculation for this Court to attempt to assess how many years and of those years how much time M.B. would have even been available to provide services for her mother. Most universities have residency requirements and university degrees of the sort required to obtain a nursing credential would not readily lend themselves to distance learning. Shortly put, it is more likely than not that M.B. would not reside in Boston Bar while she was attending university, even if she did attempt to attain a degree or qualification in nursing.

- [25] Based on M.B.'s history of beginning a romantic relationship with Dani, her then 19-year-old boyfriend in Mexico, and later having another boyfriend in Comox, it is apparent she was interested in relationships with members of the opposite sex. This was supported by the evidence of M.B.'s mother, sister and grandfather. One might easily anticipate in the future that M.B. might form a long term familial relationship with another person. Assuming M.B. married or entered into a marriage-like relationship in the future, there could be no guarantee that M.B. and her spouse would reside near to S.B. or be in a position to provide a physical presence to support S.B. on a daily or regular basis. Thereafter she might, given her interest in babies, have children of her own, and be needed to care for her own children, reducing her availability to care for S.B.
- [26] On the other hand, there is the possibility that M.B. may have provided the plaintiff with increased care for certain periods of time, such as when the plaintiff was feeling particularly ill. In submissions, the plaintiff also speculates that "S.B. will find herself homeless in the future." However, since this proposition was never put to the plaintiff when she testified, it would be inappropriate to consider it as a factor in the calculation of damages.
- [27] In order to assist the Court in assessing damages in this case, the plaintiff provided a report by Robert Corcoran, who is an occupational therapist. He determined that the only care aide service provider offering services to Boston Bar is NurseNextDoor, which charges \$32.95 per hour for three sessions per week.
- [28] Darren Benning, an economist, was asked to calculate the cost of replacement services based on the rates contained in Mr. Corcoran's report and a life expectancy for the plaintiff of 76.7 years. The plaintiff's annual losses in this regard were either \$16,537 based on 2 hours of care per day over 3 days per week, resulting in a lifetime total of \$489,798; or \$26,780 based on 4 hours of care per day over 3 days per week, resulting in a lifetime total of \$793,226.
- [29] Mr. Benning explained how to use the modifiers contained in his report to deduct the amounts provided for household assistance prior to M.B. turning 19 years of age. At a minimum, in my view, such amounts must be deducted from the Court's assessment of damages. As mentioned, M.B. was not living with the plaintiff at the time of the accident; an

arrangement that was to carry on for an undefined period. As noted above, S.B. and K.W. did not seem to be able to provide sufficient educational support for M.B. to succeed in elementary school. There is no basis on the evidence to support the assumption that together they would have sufficient skills or knowledge to lead M.B. through the more difficult courses in high school. During that time period, M.B. would have been unable to provide any assistance to the plaintiff. Once their time together resumed, the pecuniary benefit to the plaintiff of M.B.'s assistance would likely be offset by the expenses associated with raising M.B. and providing her with basic necessities.

- [30] Similar evidence given by Mr. Benning has been accepted as expert evidence in a number of decided cases. In the case at bar, plaintiff's counsel tendered Mr. Benning's report simply as a demonstration of applied mathematics. Defence counsel took no objection to this evidence as it was being given at trial, but subsequently objected in closing submissions on the basis that the report was an expert report and Mr. Benning had not been qualified as an expert. This issue did not require a ruling, given that no objection was taken to the report at the time it went into evidence; and courts do not take a strictly mathematical approach to the assessment of damages in Family Compensation Act cases, so the report was not decisive to the ultimate conclusion.
- [31] A limitation of these reports is that no opinion by anyone with specialized knowledge has been provided on the issue of whether the number of hours per day of homecare services recommended in the reports is appropriate, necessary, or in keeping with the needs of the plaintiff. Such a specialist would also have been able to testify concerning the availability of necessary services through the public health system and its specialized agencies assisting those with disabilities. The report of Mr. Corcoran, which is relied upon for Mr. Benning's calculations, is based on the assumption that two to four hours of care for three days per week will be required. The weight of those reports and the figures contained therein will thus be affected by the extent to which that assumption accords with the evidence adduced at trial.
- [32] Dr. Shuckett was the only expert who actually assessed the plaintiff, and her report merely concludes that the plaintiff needs help with activities of daily living for the long term. Her conclusions are based, at least in part, on the plaintiff's self-reporting of her daily routine, her symptoms and their effects. As mentioned, I view the plaintiff's evidence with caution.
- [33] In addition, the contributions of K.W., an apparent long-term significant caring presence in the life of S.B., have not been included in any computation contained in the submissions of S.B. concerning the calculation of damages.

- [34] Turning to the authorities provided to the Court, in *Cox v. Fleming* (1995), 15 B.C.L.R. (3d) 201 (C.A.), the trial judge's \$8,000 award for damages under the Family Compensation Act was found to be inordinately low and a \$20,000 award was substituted by the Court of Appeal. The deceased was 18 years old and was attending a general arts program at a college at the time of his death. He had recently been accepted into a two-year music program and ultimately intended to become a professional musician.
- [35] Mr. Justice Finch (as he then was) reviewed the Family Compensation Act cases referred to by counsel, which contained awards ranging from \$20,000 to \$50,000. In his view, those cases were at the upper end of the range, although three were somewhat dated, and many involved families of ethnic or cultural origins where there was evidence of a strong tradition of the child providing financial assistance to the parents.
- [36] In assessing the damages in that case, Finch J.A. provided the following list of factors to consider at para. 9:

These cases and others are, of course, highly fact specific and the awards depend not only upon such factors as cultural traditions of support and dependency but as well on the particular family circumstances, the age of the deceased and of other children, the age and health of the parents or other survivors, their means, the relationship between the deceased and his survivors, the deceased's education, training, and vocational prospects, and in addition the predictions as to what all of those factors may lead to in the future.

- [37] *Redden v. Maxon*, 2004 BCSC 510, involved an action by a mother for the death of her 16-year-old son, Buddy. At the time of his death, Buddy was a Grade 10 student who was doing well in school. He assisted his disabled mother with some of her personal care as well as domestic chores and maintenance of certain rental properties that she relied on for income. In support of her claim for compensation for the loss of household services, Buddy's mother submitted an economist's report that calculated the damages based on two hours of services per day at an hourly replacement wage of \$12.71 per hour, totalling \$182,016.
- [38] Madam Justice D. Smith (as she then was) ultimately concluded that \$36,000 in damages for loss of household assistance was appropriate, reasoning as follows:
- [64] Taking into account the factors considered in *Cox*, I am satisfied the evidence supports a finding that a substantial possibility existed that Buddy would have continued to provide services to his mother. The family was close and Buddy had a close bond with his mother. He was an attentive son and hard-working teenager whose efforts were recognized in the community. I think it a substantial possibility that he would have followed in his brothers' footsteps by remaining in or returning to Lillooet to live and work, in which case he would have continued to provide some services to his mother with the assistance of his brothers.
- [39] In terms of the factors set out in *Cox*, and applied in *Redden*, I would first note the relative ages of the deceased in those cases as compared to the deceased in the present case. A 12-year-old child's future is much less defined than a 16 or 18-year-old's future, which are

themselves subject to numerous contingencies. M.B.'s relative youth also impacts upon her education, training, and vocational prospects. M.B. had little time to establish herself in any of these respects. She had never worked a job or received any training; her educational performance to the date of her death had not been promising, although perhaps it would have improved during her time in B.C.

- [40] Like the mother in Redden, the plaintiff here has a condition that requires care, and that is a factor to consider in assessing compensation. But this case lacks the cultural tradition of support seen in some of the other cases and referred to in Cox.
- [41] *Cahoose v. I.C.B.C.* (1999), 63 B.C.L.R. (3d) 265 (C.A.), is a case where that cultural tradition of support was present. Mr. Justice Hall declined to vary the trial judge's award of \$100,000 for loss of household services for the death of the plaintiff's 16-year-old daughter. The plaintiff was a single mother of aboriginal descent who suffered from arthritis, lupus and frequent headaches, which prevented her from performing many household tasks. The deceased regularly assisted her mother at home and would arrange for her transportation when needed. At trial, she was found to be the primary caregiver for her mother and was specially equipped for this task. Although she was only moderately successful in school, the deceased hoped to finish her schooling and intended to remain in the reserve area where the family lived to assist her mother. A negative contingency was applied, however, due to the fact that the deceased was beginning to experiment with a social life that would have been at odds with her ability to fulfill her commitment to care for her mother full time, as well as the fact that she may have left the area for work or developed a relationship with someone who was not willing to share a home with her mother.
- [42] In terms of the proper approach for assessing damages, Hall J.A. stated:
- [8] In a recent Family Compensation Act case in this court, *Sum v. Kan* (1997), 44 B.C.L.R. (3d) 250, Donald J.A. pointed out that the loss suffered in each case must be estimated having regard to the facts of the individual case. He observed that "although pecuniary claims often involve inference and educated guess work, and a strict mathematical approach is undesirable, the subject matter is essentially economic in nature". That case also concerned the death of a young person. The loss of a child is inevitably a terrible tragedy for parents and of course no amount of money can compensate for such a loss. However, a court faced with deciding a case brought under the Family Compensation Act is limited to a consideration of economic loss and is not permitted to award damages for purposes such as alleviating sorrow or addressing emotional loss. The burden lies upon the plaintiff in such a case to prove compensable losses flowing from the death of the deceased. See *Skelding v. Skelding* (1994), 95 B.C.L.R. (2d) 201 (C.A.).
- [43] As for the \$100,000 in damages for loss of household services awarded by the trial judge, Hall J.A. provided the following comments:

[11] I must confess that having regard to the relatively young age of the deceased and the many contingencies that could impact on her ability or willingness to care for her mother in future, the award of \$100,000 for loss relating to housekeeping services seems to me to be on the high side. However, the learned trial judge had the advantage of seeing and hearing the witnesses and although I consider the award for loss of housekeeping services to be on the generous side, I am not able on any principled basis to conclude just what lower award would be more appropriate. It seems to me that it would be relatively rare for a case arising out of the death of a teenager to attract an award of this magnitude but the circumstances of this case involving as it does in part cultural factors and a severely disabled plaintiff living in a remote area is rather out of the ordinary. Therefore, on the particular facts of this case, I am not disposed to interfere with the award of \$100,000 made on account of loss of housekeeping services.

[Emphasis added.]

[44] Nonetheless, the assessment of damages in Family Compensation Act cases is a fact-specific inquiry, which is not "capped" at an amount of \$100,000.

[45] The plaintiff submits that Cahoose is the case most factually similar to the one at bar, but that the following factors weigh in favour of a higher award for loss of household services here:

- The plaintiff is much younger than Ms. Cahoose, so will arguably require care for a longer period.
- The plaintiff lost one of her two children, whereas Ms. Cahoose lost one of her six children, which leaves the plaintiff with fewer dependants to care for her.
- There were subsidies available for Ms. Cahoose on her reserve, but there is no evidence that such subsidies are available for the plaintiff.
- The evidence indicated that Ms. Cahoose required domestic assistance at a rate of \$10 per hour, whereas evidence adduced by the plaintiff suggests a figure of \$32.95 per hour, plus travel time.
- Inflation means that the \$100,000 award affirmed by the Court of Appeal in 1999 would be more substantial now.

[46] In my view, those factors do not significantly alter the comment from Cahoose that it would be relatively rare for a case such as this one to attract an award of \$100,000, bearing in mind the effect of inflation and the requirement that each case must be decided on its own facts. Those factors are not unique and are not of the "relatively rare" character arising out of the death of a teenager which would attract the quantum of award sought by the plaintiff.

- [47] M.B. had not yet reached her teenage years when she died, increasing the impact of the many contingencies that must be applied when dealing with cases of this nature. All of the other cases that have been provided to this Court involve older children whose futures would have been less uncertain. The increased duration of care the plaintiff requires, while undoubtedly relevant to the assessment of damages, must be assessed with this uncertainty in mind.
- [48] In addition, even though the mother in Cahoose had more remaining children to provide her care in the deceased's absence, she was raising those children alone. Here, the plaintiff has K.W. to assist in her care along with her remaining daughter. While all relationships are to some extent uncertain, the plaintiff and K.W. have been together (with a several-month period of separation) since 2007. Further, one important reason for the large amount of Ms. Cahoose's award was the fact that her surviving children were "not truly available and willing" to assume the responsibility of providing household services to Ms. Cahoose: *Cahoose v. I.C.B.C.* (1997), 40 B.C.L.R. (3d) 33 at para. 16 (S.C.) [*Cahoose BCSC*].
- [49] With respect to the subsidies available to Ms. Cahoose, those were "available for housing on the reserve"; as well, there was "some income assistance" available: *Cahoose* at para. 6. Those factors are not relevant in the present case, given that the plaintiff is not claiming an amount for loss of financial support. As for the housekeeping services available to Ms. Cahoose, those would potentially impact on the award for loss of household assistance. However, as the value of those services was not articulated in the reasons for judgment, it is not possible to determine the extent those subsidies were factored into the award for housekeeping services or, by extension, the extent those subsidies differentiate the case of Ms. Cahoose from the case at bar.
- [50] Lastly, although a lesser hourly rate for domestic assistance was adduced in *Cahoose*, the figures provided in that case were calculated on the basis of three hours of care per day, every single day: *Cahoose BCSC* at para. 15. Here, the figures are calculated on the basis of three days of care per week. Nonetheless, I do accept that there are increased costs for replacement care based on the plaintiff's rural location and its proximity to services. At some point, however, she may move to a more urban location where services can be obtained more easily and at a lower cost. She gave evidence that she would not have moved to Boston Bar if M.B. had not died, and her other daughter, T.B., currently lives in Langley.
- [51] In any event, as mentioned, the Court's task is to assess damages, not mathematically calculate them, and the cases do not bind the Court's determination in this regard.
- [52] The plaintiff also relied upon the case of *Ulmer v. Weidmann*, 2011 BCSC 130, which is significantly distinguishable from the case at bar. *Ulmer* involved the death of the plaintiff's 60-year-old spouse, not a 12-year-old child. The couple had been married for 38 years at the date of the husband's death. The deceased had provided extensive household services for a number of years and was found to be "the chief gardener and home handyman": *Ulmer* at para. 274. He re-painted portions of the home, built shelves, renovated the bathroom and

finished the basement. He also developed and maintained the backyard area and washed the outside of the home and the couple's vehicles. Finally, he cooked most of the meals and shared in the house-cleaning for the couple's large home. At para. 364, Mr. Justice Truscott concluded that based on the evidence of the effort and accomplishments of Mr. Ulmer around the home, "the quality of his efforts should be considered as beyond the statistical average as should the amount of time that he was spending." The value of the claim for loss of household services was assessed at \$250,000. Ulmer is of no assistance in deciding the case before this Court given the complete contextual difference between the cases.

- [53] The plaintiff in the present case seeks damages for loss of household services in the range of \$250,000 to \$500,000. This range is wholly inconsistent with the vast range of contingencies to be applied against such a claim and wholly inconsistent with any other cases dealing with the death of a child in this jurisdiction.
- [54] Nonetheless, I am satisfied that the evidence supports a finding that M.B. would have provided a certain amount of assistance to the plaintiff, which requires compensation. Having reviewed the evidence given at trial, the submissions of counsel as well as the cases cited therein, I have determined that the appropriate award for loss of household assistance under the Family Compensation Act in this case is \$42,000.
- [55] The parties have also agreed to special damages in the amount of \$7,016.56.

Mitigation

- [56] The defendant submits that any amount awarded for damages must be reduced due to the plaintiff's failure to take reasonable steps to minimize the losses she suffered. A plaintiff has a duty to take all reasonable steps to mitigate his or her damages, including undergoing treatment to alleviate injuries.
- [57] The law regarding mitigation was set out by Madam Justice Gray in *Power v. Carswell*, 2011 BCSC 1672, as follows:
- [220] The defence bears a heavy burden in establishing a reduction in damages on the basis of failure to mitigate. The applicable law is well-summarized in *Fox v. Danis*, 2005 BCSC 102 at paras. 35-37, *aff'd* 2006 BCCA 324.
- [35] There is no dispute that every plaintiff has a duty to mitigate his/her damages, and that the burden of proving a failure to fulfil that duty rests with the defendant, the standard of proof being the balance of probabilities: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.
- [36] In this case, the Defendant submits that the Plaintiff failed to mitigate her loss in that she failed to exercise as recommended by her family doctor.

[37] To succeed in proving these submissions, the Defendants must establish, on the balance of probabilities, that the Plaintiff failed to undertake this recommended treatment; that by following the recommended treatment she could have overcome or could in the future overcome the problems; and that her refusal to take that treatment was unreasonable: *Janiak v. Ippolito*, *supra* and *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131 (C.A.).

[Emphasis added.]

[58] In the defendant's submission, the following facts support the contention that the plaintiff has failed to mitigate. First, the plaintiff has not been assessed by anyone from the Fraser Health Authority regarding her eligibility for home services or community care. Second, the plaintiff admitted to Dr. Shuckett that she only sees her doctor irregularly. At trial, Dr. Shuckett testified that it is important to set up and monitor a treatment plan with physicians. Third, the defendant submits that the plaintiff's failure to obtain social assistance constitutes a failure to mitigate, in that those payments would have allowed the plaintiff to obtain rehabilitative services that would likely have led to an improvement in her condition.

[59] In my view, while the defendant has established that the plaintiff has failed to undertake some recommended treatments or courses of action, the efficacy of those treatments or courses of action has not been established. There is insufficient evidentiary support for this Court to conclude that the plaintiff would likely have qualified for home services, or that more visits to the physician would make any appreciable difference to the plaintiff's condition. Finally, it is simply speculation to assume that the increased funding available to the plaintiff through welfare would have reduced her need for supportive care.

[60] Accordingly, the defence has not met its burden to demonstrate that there has been a failure to mitigate. There will not be a reduction of the award on this basis.

Conclusion

[61] In sum, damages will be awarded as follows:

Loss of household services:

\$42,000.00

Special damages:

\$7,016.56

Total:

\$49,016.56

[62] If the parties are unable to agree on costs, they are at liberty to apply.

"Ball J."

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