

CANADA / JUDGMENT

Smith v. Vance

2022 BCSC 12

COURT

Supreme Court of British Columbia

DECIDED

11 January 2022

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2022 BCSC 12 Smith v. Vance

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smith v. Vance,

2022 BCSC 12

Date: 20220111

Docket: S112912

Registry: Kelowna

Between:

Brian Ray Smith and Michelle Marie Smith

Plaintiffs

And

Lori Victoria Kathleen Vance, 338089 B.C. Limited doing business as

The Green Pub, 0854817 B.C. Ltd. doing business as

On the Roxx Show Lounge, 0733977 B.C. Ltd., XYZ Co. #1,

XYZ Co. #2, ABC Co. #1, ABC Co. #2, ABC Co. #3, ABC Co. #4,

Lindsey Joelle Lee, John Doe #1, John Doe #2, John Doe #3,

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

Defendants

And

Lori Victoria Kathleen Vance, 0854817 B.C. Ltd. doing business as
On the Roxx Show Lounge, 0733977 B.C. Ltd., XYZ Co. #1, XYZ Co. #2,
ABC Co. #3, ABC Co. #4, John Doe #3, John Doe #4, Jane Doe #1 and
Jane Doe #2

Third Parties

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Plaintiffs:

J.S. Kennedy

Counsel for the Defendants 338089 B.C. Limited. doing business as The Green Pub and Lindsey
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No other appearances

Place and Dates of Trial/Hearing:

Kelowna, B.C.

September 27-29, 2021

October 1, 2021

Place and Date of Judgment:

Kelowna, B.C.

January 11, 2022

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Introduction

- [1] The plaintiffs are the parents of Erin Smith ("Erin"). Erin died in a motor vehicle collision on October 23, 2014 at the age of 33 ("MVC").
- [2] The claim is advanced pursuant to the Family Compensation Act, R.S.B.C. 1996, c. 126. Specifically, the plaintiffs claim losses connected to an unfulfilled proposal that Erin purchase their home with the assurance that the plaintiffs could reside there for up to 25 years.
- [3] Liability has been resolved on terms not disclosed to the Court. The trial proceeded on the issue of damages with only three parties participating for the defence.

Background

- [4] Brian Smith ("Mr. Smith") is now aged 71 and Michelle Smith ("Ms. Smith") is 68. They are the parents of two children: Mark Smith ("Mark") born in 1984 and Erin born in 1981.
- [5] Mark has never been employed or lived independently. This is not the result of any diagnosed or specific health circumstance or condition. Mr. Smith described Mark's situation as a "failure to launch".
- [6] The plaintiffs purchased and have resided with Mark at the "family home" on Siwash Court in Kelowna, B.C. since 1999. Erin lived there from the date of purchase until she left home to attend nursing school in Saskatchewan between 2009 and 2011. After the completion of her nursing education, she returned to live in the family home until 2013 when she moved out to live independently.
- [7] Erin secured employment at Vernon Jubilee Hospital through the Interior Health Authority. She started working as a registered nurse on May 9, 2011 and had been working approximately 3.5 years at the time of the Accident.

- [8] Erin was single and had no children or dependents.
- [9] Erin's 2013 tax return showed a gross income of \$71,478. She had earned \$67,805 in 2014 to the date of the MVC. In addition to her regularly scheduled shifts, overtime shifts were frequently available to her. She took some but not all of the overtime available to her. She had minimal savings and assets.
- [10] At the date of the MVC neither of the plaintiffs were working. Their entire income was from CPP and Old Age Security. Their annual incomes in 2017 totalled approximately \$44,000.
- [11] Mr. Smith had worked as a lawyer, but in the years prior to the MVC was involved with start-up businesses seeking to become or recently having become publicly traded companies. Specifics of this work were not introduced into evidence. His last work was with a company which was not providing him with income and ultimately ceased active operations.
- [12] But for a brief return to work in 2016 to support the refinancing of the family home, Ms. Smith was retired prior to the MVC.
- [13] At the time of Erin's death the plaintiffs' assets and liabilities and net worth, as set out in one of the expert reports, were as follows:

Description

December 1, 2014

Market Value of Residence

\$750,000

Mortgage Balances

(156,971)

Line of Credit Balances

(14,808)

Credit Card and Bank Balances

(59,652)

Property Tax Balances

(8,452)

Total (net worth)

\$510,117

- [14] In the period of time leading up to the MVC date, the plaintiffs had become concerned that their financial circumstances would not allow them to retain the family home. Their incomes were not perceived as adequate to service their debts and maintain the family home.
- [15] After Erin secured employment, the plaintiffs had obtained her assistance to pay some of their expenses and service some of their debt. She had acquired a line of credit to allow her to do so. Between January 2012 and September 2014, Erin had written cheques to her mother totalling \$28,640 and incurred Visa expenses of \$803.45 to assist the plaintiffs financially.
- [16] The plaintiffs' concerns led them to present a proposal to Erin in early October 2014. In general terms it would have her purchase the family home, but allow them to occupy it for up to 25 years at a fixed rental rate. It would relieve them of their debt and the majority of their expenses.
- [17] In more specific terms, the proposal was that Erin purchase the family home for \$750,000. She would secure mortgage financing for a \$300,000 cash payment and provide a promissory note to the plaintiffs for the balance of \$450,000. The plaintiffs would be entitled to rent the residence from Erin for as long as they wanted at a fixed rental cost of \$1,500 per month and Erin would pay the plaintiffs \$1,500 per month toward the promissory note; a net zero exchange. These amounts were arrived at using a notional rental period of 25 years when the total of the exchanges would equal \$450,000.
- [18] The \$300,000 would be used to retire the plaintiffs' debts, pay off Erin's line of credit, and to complete some renovations (estimated at \$50,000) to the family home.
- [19] The plaintiffs and Erin discussed the proposal on at least two occasions. Mr. Smith made notes during the first meeting. I have attached a copy of those notes as Appendix A to these reasons, as they are demonstrative evidence of how the proposal was presented to Erin. Sometime after that meeting, Mr. Smith created documents that described the arrangement in greater detail and included drafts of what might be used to formalize the arrangement. The latter included a promissory note for \$450,000 and a lease agreement for their occupancy of the family home. He testified that his purpose in preparing the documents was to ensure Erin had a full understanding of the proposal and to serve as a reference for her to use in the anticipated discussions with banks or other lenders as she pursued the mortgage financing.
- [20] Within the notes from one of the meetings is a notation on the reverse side of one of the pages stating, "set up meeting". Each of the plaintiffs testified that Erin expressed willingness to pursue the proposal and the note was hers and referred to her plan to secure or at least begin the process of securing financing.
- [21] There was no evidence that Erin had met with any potential lenders before the MVC and no formal agreement was ever entered into.

- [22] As of the date of the trial the plaintiffs remain in the family home with Mark. They have borrowed additional funds secured by mortgages registered against the family home. Their mortgage debt increased by approximately \$326,000 between December 1, 2014 and May 31, 2021.
- [23] The agreed statement of facts filed in this trial indicates the value of the family home at the date of Erin's death was \$750,000. The value on April 2, 2021 was \$1,000,000.
- [24] The evidence at trial consisted of the viva voce testimony of the plaintiffs, Melanie Raby (a close friend of Erin's), and expert witnesses.
- [25] The expert evidence for the plaintiffs was provided by Rosanne Walters of BDO Canada LLP, Courtney Deshayes of Associated Property Management (2001) Ltd., and Robert Russo.
- [26] Ms. Deshayes' reports provided past and current (to June 8, 2021) rental market data for various categories of residential housing in the Kelowna area.
- [27] Mr. Russo is a licenced sub-mortgage broker. His opinion related to the prospects that Erin would have been able to secure the \$300,000 mortgage financing to proceed with the proposal and the potential costs of that mortgage financing.
- [28] Ms. Walters prepared a report entitled "Loss of Dependency Income of Erin Smith". Her report seeks to quantify the value of the fixed rental costs of the family home provided by the proposal to the plaintiffs over their expected lifetimes. She relied on the reports of Ms. Deshayes to determine the difference between market rates and the fixed rent (\$1,500 per month) the plaintiffs would pay under the proposal. She assumed Erin would secure the necessary financing, but otherwise did not consider the viability of the proposal from Erin's perspective.
- [29] Ms. Walters valued the past (for the period of December 1, 2014 to May 31, 2021) and prospective losses at \$711,825.
- [30] The defendants relied on the opinions of Karen Grogan of KPMG Forensics Inc. She described her mandate in her reports to be to review and comment on the plaintiffs' reports from BDO and Mr. Russo. The essence of her opinions is that the proposal made by the plaintiffs to Erin was not feasible.

Position of the Plaintiffs

- [31] The plaintiffs confirmed at trial that they are not pursuing some of the relief set out in their notice of civil claim. This includes the claims for management fees, tax gross up, special damages, exemplary damages, and punitive damages.

- [32] The plaintiffs say that their pecuniary loss is the benefit that they would have received from Erin's agreement to act on their proposal to transfer the family home to her. They say that the opinions of Ms. Walters provide the foundation for the assessment of their losses. They acknowledge, however, that there are many contingencies that must be taken into account and that ultimately the task of the Court is a more general assessment.
- [33] The plaintiffs assert that the proposal would have been a good deal for Erin. They say that, even if the transaction is viewed otherwise, the issue before the Court is whether Erin would have gone through with the transaction. They say there are a number of non-economic considerations that would have been her primary motivator. They say the considerations that support the likelihood that Erin would have proceeded to act on the proposal include the following:
1. the strength of the bond between Erin and the plaintiffs and Mark;
 2. Erin's love for and connection to the family home;
 3. her desire for the plaintiffs to remain in the home with Mark;
 4. the proposal afforded an opportunity for her to have home ownership early in her career, including the acquisition of substantial equity in the family home;
 5. she could leverage the equity she would acquire to purchase her own residence if she chose;
 6. she could live in the family home herself for as long as she wished;
 7. with anticipated increases in her income over time the financial burden of the proposal would decline;
 8. the immediate home ownership would insulate her against the risk that real estate markets would continue to go up, putting the associated down payment requirements home beyond Erin's reach (a fact they say the Court can take judicial notice of);
 9. Erin could extinguish her existing debts; and
 10. if the transaction did not go ahead, there would be little if anything left for anyone to inherit.
- [34] All of this, the plaintiffs argue, support making an award that is only a modest reduction to the calculation carried out by Ms. Walters. They say that, after taking into account the negative and positive contingencies, an award of \$500,000 is appropriate.

Position of the Defendants

- [35] The defendants acknowledge that the plaintiffs have shown an entitlement to an award, but the defendants take a much different view as to what that award should be.
- [36] The defendants argue that the proposal for Erin's acquisition of the home was not viable even if she were able to secure the financing. It would have imposed an unbearable burden on her cash flow at a time in her life when she was establishing her independence.

[37] As a result, they say the proposal does not serve as a useful reference point for assessing the loss. The defendants also point to a number of considerations in support of their arguments including the following:

1. Erin had not committed to pursuing the proposal and had not taken any formal steps or received any independent advice as to the wisdom or viability of the proposal.
2. The plan as presented was not financially viable. They argue that it was unlikely Erin would have qualified for mortgage financing through a conventional lender and that the costs associated in pursuing the proposal by obtaining mortgage financing through a private lender would have made the pursuit of the proposal unmanageable.
3. When the magnitude of the commitment she was being asked to make became fully clear to her, Erin would not have pursued it and her parents would not have pressed her to do so.
4. Erin had in fact moved out of the family residence to live independently. She was dating and wanted to have children and it was unlikely she would have chosen to return to the family home to reside with her parents.

[38] The defendants argue that even if Erin were able to and had chosen to proceed with the proposal, there are significant negative contingencies that the Court ought to take into account.

[39] They point out that despite Erin's passing the plaintiffs have been able to remain in the residence, in part because of the appreciating value of the family residence.

[40] In the circumstances, the defendants suggest an award for the loss of financial support, loss of household support, and other valuable services in the range of \$5,000 to \$25,000.

The Law

[41] The dispute between the parties is not in respect of the applicable legal principles but rather, in their application to the facts of this case.

[42] A useful overview of the relevant general principles is contained in *Ruiz v. Bouzaia*, 2001 BCCA 207. There the court reviewed several earlier authorities which make it clear that recovery is limited to actual or expected loss of pecuniary benefits and that the appropriate award is to be "neither punitive nor influenced by sentimentality". The task was described as "largely an exercise of business judgment". Specifically, at para. 76, the court stated the following:

[76] It is important, however, to note that the choice of an appropriate valuation method should not lead to a mechanical application of actuarial figures and the assumptions on which they are based. An element of judgment will always be involved in the assessment as Mr. Justice Dickson explained in considering a fatal accident claim in *Lewis v. Todd*, [1980] 2 S.C.R. 694 at 708-9:

... The award of damages is not simply an exercise in mathematics which a judge indulges in, leading to a "correct" global figure. The evidence of actuaries and economists is of value in arriving at a fair and just result. That evidence is of increasing importance as the niggardly approach sometimes noted in the past is abandoned, and greater amounts are awarded, in my view properly, in cases of severe personal injury or death. If the Courts are to apply basic principles of the law of damages and seek to achieve a reasonable approximation to pecuniary restitutio in integrum expert assistance is vital. But the trial judge, who is required to make the decision, must be accorded a large measure of freedom in dealing with the evidence presented by the experts. If the figures lead to an award which in all the circumstances seems to the judge to be inordinately high it is his duty, as I conceive it, to adjust those figures downward; and in like manner to adjust them upward if they lead to what seems to be an unusually low award.

[Emphasis added in Ruiz.]

- [43] The defendants provided a number of other cases that serve as examples of the application of these principles in the context of the loss of a child. Often modest awards are made. I will reference them in my analysis below.
- [44] Here the claim is founded on a hypothetical event that Erin would have acted on the proposal. The standard of proof for past facts and hypothetical events is discussed in the context of a loss of earning capacity claim in *Gao v. Dietrich*, 2018 BCCA 372 where the court stated the following:
- [34] With respect to past facts, the standard of proof is the balance of probabilities. With respect to hypothetical events, both past and future, the standard of proof is a "real and substantial possibility". The standard of a "real and substantial possibility" is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative.
- [35] In *Athey v. Leonati*, [1996] 3 S.C.R. 458, the Supreme Court of Canada addressed "the fundamental distinction between the way in which courts deal with alleged past events and the way in which courts deal with potential future or hypothetical events" (at para. 26). While past events must be proved on a balance of probabilities, hypothetical events and future events need not be proved on that standard.
- [36] A hypothetical or future event will be taken into consideration "as long as it is a real and substantial possibility and not mere speculation" (*Athey* at para. 27; see also *Rousta v. MacKay*, 2018 BCCA 29 at para. 17). Establishing a real and substantial possibility means that any employment loss must be shown to be realistic, having regard to what the plaintiff's circumstances would have been absent the injury: *Graydon v. Harris*, 2014 BCCA 412 at para. 27. There must be an evidentiary foundation to the plaintiff's claim: *Morlan v. Barrett*, 2012 BCCA 66 at para. 59.

Analysis

- [45] It is important at the outset to acknowledge that this claim, as with all claims of this nature, arises from tragedy. In relation to these plaintiffs, much could be said about the impact of that tragedy upon them from a personal and emotional perspective. The close and loving relationship between the plaintiffs and their daughter Erin is not in dispute. That is not, however, the purpose of this litigation or this decision. This claim is for the pecuniary loss to the plaintiffs as a result of that personal tragedy.
- [46] The plaintiffs argue that their pecuniary loss flows directly from the loss of being able to implement the proposal or some variant of it.

Value of the Proposal

- [47] I will begin my analysis with observations regarding the value of the proposal to the plaintiffs. This is separate from the contingencies and considerations that impact my assessment of whether the proposal or a version of it would have actually been implemented, or, if implemented, how long it would endure. I will address those separately below.
- [48] The plaintiffs rely on the report of Ms. Walters which calculates the value of the proposal as \$711,825, comprised of \$137,522 in past loss and \$574,303 in future loss. Her report describes the two calculations as follows:
32. The past loss Rent Differential Benefit is calculated as the difference in the market rent, as provided in the Professional Rental Assessment for the Residence at the DOD to the Report Date, less the agreed upon lease payment of \$1,500 per month to be paid by the Smith's to Erin from December 1, 2014 to May 31, 2021
 34. But for the Collision, the Smiths would have transferred ownership of the Residence and associated expenses at the Transfer Date to Erin and incur below-market rent. The future loss is calculated as the Rent Differential Benefit from June 1, 2021 to the estimated date the latter spouse passes away, with a maximum future loss period of 25 year[s] from the Transfer Date
- [49] For her calculations Ms. Walters relied on rental rates drawn from the unchallenged reports of Ms. Deshayes. Those reports provide the average rental rates in Kelowna for different categories of rental accommodations including condos/townhouses, single-family homes, and partial homes. The latter include upper main floors and lower walk-out basements. These obviously varied between the MVC and trial dates. Her summary up to the trial date is stated as follows:

2021 to date:

Condo/Townhouse- 2 bedroom/2 bathrooms \$2700

Single Family Home - 4 bedroom 2+ bathrooms \$4500

Partial Home (Upper/Main) 3 bedroom 2+ bathrooms \$3000

Partial Home (Lower/Walkout) 2 bedroom 2 bathrooms \$2500

[50] The loss calculations look at the value to the plaintiffs of the reduced rents over their anticipated lifetimes. They do not consider the disposal of the equity in the family home. In the proposal, the plaintiffs effectively dispose of their equity in the home to "acquire" the entitlement to those reduced rents. That equity can be viewed as the "purchase price" of those reduced rents. Any pecuniary benefit calculation must take into account both the positive impact of reduced rent expense over time and the cost of acquiring it.

[51] To illustrate I refer to Ms. Walters' report. She included a table that set out her calculation of the change in the plaintiffs' financial position since December 1, 2014 (an assumed date for implementation for the proposal). I referred to a part of this table in paragraph 14 above. She shows her calculation of the actual change in the plaintiffs' net worth following the MVC. It is a modest decline of \$22,922. That table can be extended to consider the change in the "balance sheet" if the proposal had been acted on.

[52] I discuss Mr. Russo's report further below, but in this illustration I will use Mr. Russo's first scenario. In this scenario there is no promissory note from Erin, which maximizes her potential to secure favourable mortgage terms. The result is that the plaintiffs would eliminate all of their debt, but also would dispose of their only asset. Their net worth would be zero, a decline from their December 1, 2014 position of \$510,117 and their actual May 31, 2021 position of \$487,195. I have adapted the table from Ms. Walters' report to include that information by adding the column "Difference with proposal":

Description

December 1, 2014

May 31, 2021

Difference

Difference With Proposal

1st Scenario

Market Value of Residence

\$750,000

\$1,000,000

\$250,000

(\$750,000)

Mortgage Balances

(156,971)

(483,770)

(326,800)

156,971

Line of Credit Balances

(14,808)

(15,085)

(277)

14,808

Credit Card and Bank Balances

(59,652)

(13,950)

45,703

59,652

Property Tax Balances

(8,452)

-

8,452

8,452

Total

\$510,117

\$487,195

(\$22,922)

(\$510,117)

[53] The plaintiffs stressed the benefit Erin would gain by acquiring the equity in the family home. They pointed out that they would "tear up" the promissory note and provide a gift letter for the equity in the home without hesitation if needed or helpful to facilitate their ultimate goal. That was assumed in Mr. Russo's first scenario and is illustrated in the chart above. It is fair to consider that possibility, but it cannot be forgotten that to the extent that

the equity is gained by Erin it is given up by the plaintiffs. It is a significant modification from the proposal presented to Erin.

- [54] The point I seek to make clear is that any gain or loss to the plaintiffs is necessarily a corresponding loss or gain to Erin, whether in relation to assets and liabilities or in relation to income and expenses. In reality both the value of the asset (the equity) and its income-earning capacity (in this case through rent potential) must both be looked at in assessing the plaintiffs' pecuniary loss.
- [55] This reveals an important merger or interrelationship between issues connected with the value of the proposal and the discussion of contingencies. The presence or absence of the promissory note is significant, but that is not all.
- [56] The family home contained no suite, that is to say it was a true single-family dwelling. Ms. Walters used the rental costs of a single-family home for her calculations. In my analysis of the contingencies below, I discuss the prospect that Erin would move back into the family home if the proposal were acted on. In that case, there would likely have been a need to construct a suite if the plan was to be durable. Irrespective of whether that suite would be for Erin or for her parents, the value of what the plaintiffs would be receiving would then need to be adjusted and calculated on the basis of a partial home. Ms. Deshayes included values for either upper main, or lower walk out arrangements. The difference in the calculation, before consideration of any other contingencies, is substantial. If the value of the rental in Ms. Walter's calculations was the equivalent of a partial upper main it reduces the rental value in the future by 33 percent, and, if it is a partial lower walk out, by 44 percent.
- [57] This substantially reduces the value calculation, but also impacts how other contingencies may be viewed. Specifically, in this example, the construction of a suite may have created a living situation that Erin may have been more willing to stay in for the long term. The effect would be to reduce the value of the rental accommodation the plaintiffs would receive but increase the durability of the arrangement.
- [58] This interrelationship of factors is key to my findings throughout this decision.

Contingencies

- [59] As noted at the start of my analysis, this case is to determine the plaintiffs' pecuniary loss, not to measure the emotional loss. Despite that, the nature and quality of Erin's relationship with the plaintiffs is relevant. It is an important consideration in assessing the likelihood that Erin would have provided continuing financial assistance of any form to the plaintiffs.
- [60] As noted, I accept that there was a very strong bond between Erin and her parents and brother. In addition, the fact that Erin had already provided financial assistance of approximately \$29,000 is a further indication of her commitment to assist the plaintiffs.

- [61] Potentially acquiring the family home to allow the plaintiffs to continue to reside in it with her brother is one way in which she may have financially assisted the plaintiffs but for the MVC. The proposal made by the plaintiffs was, however, a new and much more significant commitment and a number of additional considerations must be taken into account.
- [62] The potential financial consequences and benefits to Erin are relevant in the assessment of whether she would have proceeded with some version of the proposal. The plaintiffs stress that it would not have been a decision driven by economic analysis. One can debate how much focus she would have had on the long-term financial impact, but it is certainly not something that she would, or could, logically have ignored. The inability to be precise as to how she would have weighted these considerations is itself an important contingency.
- [63] In that regard, the plaintiffs argue the proposal would have been a financial benefit to Erin primarily through her acquisition of or access to the equity in the family home. I have difficulty with that basic proposition. All of the benefit claimed relates to rental savings the plaintiffs would receive. Whatever that amount is determined to be, it must surely be a loss in rental value to Erin as the owner of the home. In that way it is a financial penalty or consequence to her.
- [64] I discussed the valuation above but, for the sake of this point, I will simply take the gross amount presented by Ms. Walters, which is \$711,525, for past and future losses. All of that is made up of rent differential between what the plaintiffs would pay in the open market over what they would have notionally or actually paid to Erin if the proposal went forward for the life of the longest surviving plaintiff. This amount is evidence of the rent that Erin would forego as the owner were she renting in the open market.
- [65] Erin would, or at least could, gain some benefit from the equity in the family home. That benefit would be to increase her net worth for further borrowing, including to acquire her own home. That itself is dependent on a number of contingencies. The proposal discussed with Erin involves Erin executing a promissory note in favour of the plaintiffs. That would make the equity an asset she would acquire over time and thus delay any benefit.
- [66] The plaintiffs say an intrinsic value to Erin would remain, given their assurance they would facilitate Erin using the equity for her benefit. This could include tearing up the promissory note. If the proposal were modified to eliminate the promissory note, then Erin would gain the specific benefit of it.
- [67] Based on the opinions of Mr. Russo, however, it is unclear just what that benefit would be in the short term. While it would provide a substantial increase to her net worth, her income would need to increase dramatically for her to be able to service and qualify for additional borrowing.

- [68] Even if one could find aspects of the proposal that Erin would have found fiscally advantageous, these must be viewed in the broader context. The simple reality is that she would have been making a major financial sacrifice to facilitate her parents' desire to live in the home.
- [69] The discussions that had occurred between Erin and the plaintiffs surrounding the proposal focussed on the impact it would have on her assets/liabilities. There is no evidence Erin had applied to get the necessary financing, and nothing to indicate the practical realities of pursuing the proposal had been analyzed. The notes refer only to an estimated monthly mortgage payment of \$1,500. There is no evidence of any discussion as to the impact it would have on Erin's cash flow. That impact is a direct result of providing the plaintiffs with the benefit of fixed and reduced rent together with the necessary mortgage and other home ownership expenses.
- [70] Mr. Russo confirms the obvious need to satisfy lenders that Erin had the cash flow to service the debt. He indicated that two ratios are used by prospective lenders. The gross debt service ("GDS") ratio looks at the combination of mortgage payments, property taxes, and heating expenses in relation to annual income. The total debt service ("TDS") ratio adds any other debt obligations to the equation.
- [71] The costs of servicing the proposed mortgage of \$300,000 would depend on whether Erin succeeded in getting a mortgage through a conventional lender such as a chartered bank, or whether she would have had to turn to a private lender. Mr. Russo opined that the prevailing interest rates through conventional lenders at the time would have been 3.09 percent, whereas interest rates through private lenders would be in the order of 7.9 percent. Private lenders also require payment of a lender and broker fee at the time the financing is put in place. Mr. Russo indicated these fees would approach \$9,000. Typically that amount would be deducted from the mortgage proceeds and thus paid from the mortgage proceeds.
- [72] If Erin had succeeded in obtaining a mortgage from a conventional lender, the evidence suggests monthly payments of principle and interest would be \$1,276.21, or \$15,134 annually. If she had borrowed from a private lender, the evidence indicates monthly payments would rise to \$2,150, or \$25,800 annually.
- [73] Mr. Russo calculated the GDS and TDS and opines on the likelihood of Erin obtaining the mortgage financing in three scenarios. "Scenario A" is on the basis that she would return to live at the family home and the plaintiffs provided a gift letter for the roughly \$450,000 in equity; that is to say there would be no debt by promissory note and no payment of rent. "Scenario B" assumes Erin continued to reside in her rental apartment and that the offsetting payments between she and her parents were made. "Scenario C" assumes Erin returned to live at the family home and the payments were made between her and her parents.

- [74] Mr. Russo concluded that Erin would have succeeded in obtaining mortgage financing from a conventional lender in Scenario A. The transfer of the equity to her would have resulted in favourable GDS and TDS ratios.
- [75] In Scenario B he noted that conventional lenders would have needed to make exceptions from their normal assessment parameters to approve the mortgage. If they had chosen not to do so, he opined that a private lender would have approved the application.
- [76] Finally, in Scenario C, approval from conventional lenders would again be possible if they exercised their discretion viewing the transaction as a whole. If they were unable to approve the mortgage, he opined that a private lender would have approved the mortgage.
- [77] In all scenarios Mr. Russo used Erin's year-to-date 2014 income and extrapolated from that to arrive at an annual income of \$83,000. The parties disagree if the analysis should be based on Erin's 2013 income of roughly \$71,000, or on the extrapolation of her income in 2014. Which number would have been used by the prospective mortgagees would obviously influence the potential need to rely on private lenders. That is part of the basis for the parties' disagreement as to the likelihood that Erin would have obtained mortgage financing at all and, if so, whether it would have been through a conventional lender or a private lender.
- [78] Ms. Grogan's report provides calculations of Erin's available after-tax income using her 2013 income. This takes into account other payroll deductions (including union dues and pension contributions) and her student loan payments and contributions to a modest mutual fund investment. What remained is \$2,717 per month. Ms. Grogan states:
52. The remaining \$2,700 would be available to cover other living expenses such as transportation, meals and entertainment, groceries, personal hygiene, clothing, etc. and any additional saving for her future. As such, it does not appear that Ms. Erin would have been in a position to provide additional financial assistance to the Plaintiffs as implied by the BDO Reports.
- [79] That statement is compelling, given the monthly payments of principle and interest as set out above of \$1,276.21 (conventional lender) or \$2,150 (private lender); the remaining \$600 to \$1,400 per month is simply not much money for a 33-year-old to have left.
- [80] If the extrapolation from her 2014 income is used, that number would rise by approximately \$9,500 (\$12,000 less income tax at the tax rate used by M. Grogan). This does not incorporate any other payroll reductions. This adds roughly \$800 per month to her disposable income.
- [81] Would that be enough for Erin? Would she have abandoned her investments in mutual funds to free additional monies? When would her income increase and by what amount? These are all difficult questions with no clear answers.

- [82] Which scenario would have been available to Erin depends on whether conventional lenders would have been prepared to make the exceptions referenced by Mr. Russo and whether Erin would have made the decision to return to the family home or continue to live independently.
- [83] It is also relevant that Erin was living in inexpensive rental accommodations, which she may have decided were less desirable than she wished on a longer term. She was paying \$1,100 per month. Ms. Deshayes' report was that the costs of a two-bedroom condominium unit had risen from \$1,650 in 2018 to \$2,700 in 2021. If for any reason she moved, her rental costs to live independently were going to increase.
- [84] All of this shows that Erin's ability to pursue the proposal by obtaining the necessary financing is a key contingency in assessing the plaintiffs' claim, but it is far from being the only one.
- [85] Whether she would choose to proceed and still further the durability of the arrangement if she did, would depend on important additional factors. All are inter-related and, for Erin, would logically have provided a foundation for a very important and very personal decision; a decision that would be subject to ongoing assessment.
- [86] What decision or decisions she would have made is central to this decision. It would be naïve to suggest that the likelihood of whether she would have proceeded with the specific proposal can be calculated. Further, as the plaintiffs stressed, there were other variations of the proposal that may have emerged. Add to that the reality that even if some version of the proposal were undertaken, Erin may have decided at a later point not to continue. It is impossible to know when such a revaluation may have occurred.
- [87] There are a host of events and circumstances that may have arisen at any stage of Erin's life and career that could impact the value of her assistance to the plaintiffs. It is impossible to identify all of what would have influenced Erin's decision making or how she would have weighed those considerations. They are clearly inter-related and can generally be grouped into personal and/or emotional considerations on one hand, and financial and pragmatic features on the other.
- [88] In the former group, and not purporting to be exhaustive, I would include the following:
- a) her love and affection for her parents and her desire to assist them;
 - b) how much pressure would the plaintiffs have exerted on Erin and what duty would she have felt to proceed;
 - c) her connection to the home;
 - d) the fact that she recently moved out to live independently, separate from her parents, despite that love, affection, and attraction to the home;
 - e) her desire in the longer term to have children;

- f) the fact that she was dating and certainly looking at a future that involved a long-term partner; and
 - g) the logical desire any 33-year-old starting out in a career and profession seeks to enjoy, the benefit of a meaningful income, and the freedom to live life to its fullest.
- [89] As to the latter, again without purporting to be exhaustive, I would include the following:
- a) whether through a conventional mortgage or, certainly to a greater extent, if a private lender was the only source of funds, the burden on Erin's monthly cash flow would be significant, particularly if she wished to remain living independently;
 - b) while she could in theory utilize any potential equity that a lender would consider to be hers to buy her own home in the future, acquiring that would increase monthly debt servicing requirements;
 - c) other significant life events and decisions with a major impact on her capacity to finance the proposal such as major purchases (e.g., vehicles), holidays/travel, economic downturn, personal health; and
 - d) the pure financial impacts of the proposal.
- [90] As the proposal may have progressed toward possible implementation, predicting with any confidence what would have happened is very difficult. Certainly from the plaintiffs' perspective, Erin's past display of willingness to help out financially and the strength of their relationship does support the proposition that she would want to continue to provide assistance. At the same time, it is entirely possible that Erin may have paused at the prospect of what she was being asked to undertake.
- [91] While the proposal could have positive financial impacts for both the plaintiffs and Erin, any gain or loss to the plaintiffs is necessarily a corresponding loss or gain to Erin. Erin was being asked to make a very large and long-lasting financial commitment.
- [92] Having listened to the plaintiffs testify, it is difficult to imagine that they would have exerted real pressure on Erin to proceed if she did indeed find cause to be hesitant. This observation is supported by the fact that, in my view, the urgency to act at the time as expressed by Mr. Smith in his testimony seems largely unsupported.
- [93] There is no doubt that the plaintiffs were finding the burden of their debt difficult given their incomes. At the same time, they had approximately \$450,000 in equity and the ability to carry on without involving Erin. That is abundantly clear because as of the date of the trial they continued to own the home, albeit having borrowed additional funds to make it happen. It is also of note that they spent approximately \$60,000 on renovations after Erin's passing. While this was justified as needed for the potential sale of the family home, it is at least some indication of the degree of their perceived financial stress.

- [94] Further, had Erin found herself hesitant or concerned about the long-term commitment, selling the home remained a viable option at any point in time. The net proceeds available to the plaintiffs, together with their secure incomes, would certainly have provided them with an ability to find suitable housing. In that scenario it is possible that Erin might have provided some lesser assistance when the need arose. Aside from their emotional attachment to the family home, which I do not denigrate, there was no specific need or requirement for them to retain the home.
- [95] It is my conclusion that Erin would not have wanted to move back into the family home, certainly not on any long-term basis. This raises the prospect that even if the proposal went ahead, serious questions might arise as to the durability of the arrangement. This was not a home with a suite, such that either Erin or the plaintiffs or Mark would have the ability to live separately under the same roof.
- [96] Construction of a suite may have provided an answer to this, but I have no clear evidence as to the cost or viability of that as an option.
- [97] In their testimony the plaintiffs imagined the possibility that Erin would not marry, would chose to have a child by in vitro fertilization, and would live at home to have the assistance of her parents in raising the child. This is a scenario that, with the greatest respect to the feelings of the plaintiffs as grieving parents, is unlikely. As unlikely as it is, the possibility reveals the challenges of the proposal. Erin was 33 years old, so logically she would wish to have children relatively soon. Any chance of a significant increase in her income before having children was therefore limited. The financial burden of maternity leave, the cost of in vitro fertilization itself, and additional expenses would only make continuing the arrangement more challenging.
- [98] In sum, I accept that Erin would likely have been able to obtain the mortgage financing in order to pursue the arrangement, but whether it would be through a conventional lender or a private lender is much less clear. The latter would be influenced by her willingness to move back home. For a person at her age and stage in career in life, even if she was willing, there is a real question and doubt in my mind as to whether such an arrangement would be durable.
- [99] The plaintiffs argue that Erin could have leveraged the equity in the home to purchase her own residence. That would require a down payment. In any of the scenarios her free cash to save would be severely constrained. Even if she could overcome that hurdle, the amount of income that Erin would need before she would have the capacity to carry another mortgage on a home she purchased for herself would be significant. Even in today's real estate market, the cost of homes and residences in the Kelowna area are very high. It is difficult to conceive an opportunity to purchase a home without a mortgage much larger than the \$300,000 that she might be carrying for her parents' home. The TDS ratio would be very high.

[100] In their argument, the plaintiffs noted that the specific proposal put forward by Mr. Smith was a starting point and some of the uncertainties may cause adjustments to be made. I agree generally with that proposition. But, the realities make prediction of what the end point of the dialogue may have been and whether it included the purchase of the home at all uncertain.

Appropriate Compensation

[101] The parties agree that if I find that there was a substantial possibility that Erin would have provided assistance to the plaintiffs, they are entitled to compensation in this claim. I have no doubt that Erin would have provided assistance to the plaintiffs. At a minimum it might have consisted of providing payments to bridge her parents' financial needs until the property was sold. However, what might have been required in that scenario is unclear. As has been evidenced by events since Erin's passing, the plaintiffs have been able to secure additional mortgage financing so their needs may have been modest, or they may have simply decided to sell the property much earlier.

[102] While I do find there was a possibility Erin would have proceeded with the acquisition of the home, I am unable to find it would have been on the basis of the proposal relied on as the foundation of the plaintiffs' arguments. Some variant of it may have evolved and it may have continued for some period of time but the uncertainty precludes use of the proposal as the foundation for any assessment of the plaintiffs' loss.

[103] The defendants point to decisions where modest amounts have been awarded based on more general findings that losses were incurred. They argue that given all of the uncertainties, a similarly modest award is warranted in this case.

[104] In *Park v. VW Credit Canada Inc.*, 2017 BCSC 1733, the Court dealt with a claim founded on the plaintiff parents' expectation that their daughter would have taken over the family business as a gift and provided them with an annuity in consideration of that gift. Given that the plaintiffs retained the business and had the ability to sell it to replace the annuity, Justice Grauer found there to be no loss connected to the inability to transfer the business. Grauer J. went on, however, to consider what the plaintiffs' daughter might have contributed from her income to the plaintiffs. He awarded \$37,725: at paras. 35-36, 57, 103.

[105] In *Dolker v. Pekrul*, 2001 BCSC 681, aff'd 2003 BCCA 296, the plaintiff father claimed his son was expected to run the family business when the father and his wife retired. As shareholders in the business, the plaintiff and his wife expected to draw income from the business once retired, and eventually, the plan was that their son would purchase the business from them. The plaintiff claimed they expected the business to double or triple in sales when their son took over, as the plaintiff would be free to "aggressively market" their products. Justice Wong found this claim highly speculative, finding it was unlikely the plaintiff would relinquish control of the company and that there was no plan in place for sales expansion. Wong J. awarded \$30,000 as a "reasonably generous" award for the loss of

gratuitously performed or undervalued services of their son: at paras. 7, 23, 25, 27.

- [106] The plaintiff in *S.L.B. v. M.A. Estate*, 2016 BCSC 1193 sought \$250,000 to \$500,000 in compensation for the loss of household services after the death of her 12-year-old daughter. The plaintiff suffered from lupus and claimed her daughter planned to become a nurse and care for her. Justice Wall found the amount claimed by the plaintiff wholly inconsistent with the other existing cases and the vast range of contingencies present. The plaintiff's daughter was young, and many uncertainties existed regarding her future. Wall J. awarded the plaintiff \$42,000 in compensation: at paras. 2, 39, 53-54.
- [107] The Court of Appeal in *Cox v. Fleming*, 1995 CanLII 3127 BCCA, 13 B.C.L.R. (3d) 201, increased the trial judge's award for the loss of the plaintiff's son from \$8,000 to \$20,000. The plaintiff's son was an arts student and he was expected to pursue a career in music and support his ailing parents as they grew older. Notably, in this case the court observed that awards ranging from \$20,000 to \$50,000 were at time, the upper end of the range for compensation: at paras. 3, 6, 10.
- [108] The plaintiff in *Bianco Estate v. Fromow*, [1996] B.C.J. No. 2885, [1996] B.C.W.L.D. 2030 (B.C.S.C.) was awarded \$53,000 in pecuniary damages for the loss of his son. The plaintiff's son lived with him and spent considerable time with him. The son contributed to household expenses, and always assisted the plaintiff. Justice Holmes assessed the future loss of dependency to be \$75,000, but taking into account contingencies, he reduced the award to \$50,000 and increased it by \$3,000 for tax gross up: at paras. 15, 47.
- [109] An award of \$100,000 for the loss of household services was upheld in *Cahoose v. Insurance Corp. of British Columbia*, 1999 BCCA 302. The plaintiff's deceased daughter was found to be the primary caregiver of her mother who suffered from numerous disabilities. The daughter, who was 16 years old at the time of her death, planned to remain on the reserve where they lived to assist her mother. The court observed that the amount was high and relatively rare for the death of a teenager, but chose not to interfere with the trial judge's award. Additional damages were awarded at trial namely, \$50,000 for the loss of future financial support and \$15,000 for the loss of guidance and companionship. The court found these awards to be in error. The court set aside the award for future financial support as considerable financial support existed for the plaintiff already, and the plaintiff had five other children who could support her. The award for loss of guidance and companionship was reduced to \$5,000: at paras. 5, 11, 13, 17.
- [110] In this case, there are many variables and contingencies. A precise calculation of loss is simply not possible. As was suggested by the defendants in argument, the evidence of the proposal does not provide "the firm anchor" that allows for a more concrete assessment. As can be seen, there are a wide range of possible paths the plaintiffs and Erin may have followed. They range from a decision not to proceed to retain the home at all, to some form of arrangement loosely based on what was proposed by the plaintiffs. In my view, there is no evidentiary foundation to calculate the likelihood of any particular scenario in any

mathematical way.

Conclusion

[111] I have no doubt that Erin would have provided assistance to the plaintiffs and that her death has resulted in a pecuniary loss to them. The fact of Erin's actual assistance and her willingness to consider the proposal support this conclusion. Having regard to all of what is set out above including the authorities discussed, I assess that loss at \$90,000.00.

[112] During the course of the trial there was reference to benefits received by the plaintiffs as a result of Erin's death. I did not receive any submissions regarding deductions, if any, from my award. I am not suggesting there ought to be any, but I do not wish to preclude the same if they exist and the parties were awaiting this decision to address the issue. If there is a need to appear before me on such issues or to address costs, the parties should inform Supreme Court Scheduling within 14 days of the release of this decision.

"D.A. Betton J."

Appendix A

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