BC Court Of Appeal Discusses In Trust Claims And Document Disclosure Requirements

Reasons for judgement were released this by the BC Court of Appeal discussing two important legal principles in the context of personal injury claims, "In Trust" Claims and Document Disclosure requirements.

By way of brief background, in this week's case (Dykeman v. Porohowski) the Plaintiff was injured in two motor vehicle accidents. Her matter went to trial and a Jury awarded $44,000 in total damages. The Plaintiff was seeking substantially greater damages and she appealed alleging the trial judge made multiple errors.

The BCCA granted the appeal and ordered a new trial. In doing so the Court made some useful comments about the above areas of law.

1. In Trust Claims

Generally speaking when a person is injured through the fault of another and has limits they can be compensated for hiring others to help them with their limits. If the help is provided free of charge by family members a claim can still be made and this is called an 'in trust' claim.

In today's case the trial judge refused to put the "in trust" claim to the jury reasoning that injuries were not "grievous" enough for an in trust claim. The Court of Appeal agreed that this was incorrect and that "grievousness" is not required to advance an in-trust claim. The Court provided the following useful summary of the law:

[28] Since Kroeker, it has been settled law in this province that "housekeeping and other spousal services have economic value for which a claim by an injured party will lie even where those services are replaced gratuitously from within the family." In Kroeker, such recovery was allowed under the heading of 'loss of future ability to perform household tasks', but obviously, damages for loss of such ability prior to trial may also be properly claimed and recovered: see, e.g., McTavish v. MacGillivray, 2000 BCCA 164 at paras, 43, 51-7, perHuddart J.A.; West v. Cotton (1995) 10 B.C.L.R. (3d) 73 (C.A.) at para. 25; and Campbell v. Banman 2009 BCCA 484. The reasoning in Kroeker has been extended beyond "spousal" services to services rendered by other members of a family: see Boren v. Vancouver Resource Society, Dufault, McTavish v. MacGillivray; Bystedt v. Hay, all supra. Such awards are colloquially referred to as "in trust" even though it is the plaintiff who recovers them, and British Columbia courts do not generally impose trust terms in their orders, regarding the loss as that of the plaintiff: see Feng v. Graham (1988) 25 B.C.L.R. (2d) 116 (C.A.) at 9-10; McTavish, supra.

[29] The majority in Kroeker was alive to the possibility that awards for gratuitous services by family members of plaintiffs could "unleash a flood of excessive claims" (supra, at para. 29) and for that reason, urged courts to be cautious in making such awards. In the words of Gibbs, J.A.:

… as the law has developed it would not be appropriate to deny to plaintiffs in this province a common law remedy available to plaintiffs in other provinces and in other common law jurisdictions. It will be the duty of trial judges and this Court to restrain awards for this type of claim to an amount of compensation commensurate with the loss. With respect to other heads of loss which are predicated upon the uncertain happening of future events measures have been devised to prevent the awards from being excessive. It would be reasonable to expect that a similar regime of reasonableness will develop in respect of the kind of claim at issue in this case. [At para. 19; emphasis added.]

I do not read Kroeker or Ellis, however, as establishing a threshold of "grievousness" in terms of the injuries which may necessitate such services. A plaintiff who has a broken arm, for example – presumably not a "grievous" injury – and who is obliged to seek assistance in performing various household tasks should not be foreclosed from recovery on this basis. This was recognized in Ellis in the quotation reproduced above. Thus I disagree with the trial judge's reference to grievous injury as a threshold that the plaintiff was required to surmount if her claim was to go to the jury. Instead, claims for gratuitous services must be carefully scrutinized, both with respect to the nature of the services – were they simply part of the usual 'give and take' between family members, or did they go 'above and beyond' that level? – and with respect to causation – were the services necessitated by the plaintiff's injuries or would they have been provided in any event? Finally, if these questions – which I would have thought are appropriate for determination by a jury – are answered affirmatively, the amount of compensation must be commensurate with the plaintiff's loss. The assessment of such loss has been the subject of several considered judgments in this province, most notably McTavish and Bystedt, both supra.

[30] The trial judge's second reason for not putting the claim to the jury in this case was that the services which were the subject of the in-trust claim were not personal or household services but were related to the business operated by the plaintiff's family. As mentioned above, counsel evidently agreed that the plaintiff's parents' claim for 'business losses' had not properly been made. It is not correct to say, however, that the plaintiff herself could not claim for assistance provided by family members in a family enterprise (see Johnson v. Miller, supra) or that there was no evidence of personal or household services having been provided by Ms. Dykeman's parents to her. The mother testified that she was "supposed to spend" a third of her time on the farm – in accordance with the partnership agreement in evidence – and had planned on going back to practice on a part-time basis. Instead, she found herself spending at least 10 to 12 hours per week assisting in the business and babysitting her grandchildren when her daughter had medical appointments or migraine headaches. At the time of trial, she testified, she was caring for her grandchildren "pretty well every day" plus assisting in the equestrian business. The plaintiff's migraines had become less frequent, but the medication she took for them essentially 'knocked her out' for 12-14 hours – during which Ms. Dykeman's mother slept in the same room with her granddaughter. The thrust of her evidence was that at least until her grandchildren were in school, she would not be able to return to practice even on a part-time basis. Mr. Dykeman's services, on the other hand, related almost entirely to "physical work" in the Freedom Fields Farm operation.

[31] In all the circumstances, it seems to me that there was evidence of household and other assistance provided by Ms. Dykeman's parents that could have been the basis of an award and that the trial judge erred in effectively granting a 'no evidence' motion in respect thereof. I would allow the appeal on this ground.

2. Document Disclosure Obligations

The second area highlighted in this case relates to document disclosure. In pre-trial investigation the Defendants gathered a number of Internet postings apparently written by the Plaintiff. They listed these documents as '*privileged*' and did not reveal them until shortly before trial. In describing the privileged documents they labelled them as a "*diskette containing an index to the Plaintiff's web postings*".

The Plaintiff objected to these documents being used in cross examination but the trial judge allowed the cross examination. On appeal the BCCA found that this was an error finding that the documetns were not properly described and this may have pejudieced the Plaintiff. Specifically the BCCA said as follows:

[41] Applying these observations to the case at bar, can it be said that the descriptions reproduced above were such as to enable the plaintiff and her counsel, or a judge in chambers, to assess the validity of the claim of privilege? In my opinion, none of the items was sufficiently described for this purpose. Item 77, an index to the plaintiff's "web postings", could contain any number of "writings" posted on any number of websites, relevant or irrelevant to the case. With respect to item 78, one does not know who wrote the "articles" regarding the plaintiff's equestrian business or the date of such articles; with respect to item 79, there is no description of the "pictures printed out from the Internet regarding horse riding", where they are from or what connection, if any, the plaintiff had with them; and with respect to item 80, there is again no description of the "articles", who wrote them or when. Counsel told the court below that the postings had all been written by the plaintiff, but even that was not apparent from the disclosure document. Thus I disagree with the trial judge's ruling that the postings had been adequately "listed" for purposes of R. 26. (For a discussion of 'e-discovery' generally, see The Sedona Conference Working Group 7, The Sedona Canada Principle: Addressing Electronic Discovery (2008).) If the defence had been more forthcoming, counsel for Ms. Dykeman might well have challenged the claim of privilege asserted by Mr. Harris – via the Form 93 filed by Mr. Gibb.

[42] Assuming, then, that the defence failed to make proper discovery of the Internet documents, the next question is whether it can be said the trial judge nevertheless properly exercised his discretion under the opening words of R. 26(14) to permit Ms. Dykeman to be cross-examined on some of those documents. In Stone v. Ellerman, the majority stated that the factors relevant to the exercise of such discretion include the question of prejudice to the party being cross-examined, whether there was a reasonable explanation for the other party's failure to disclose, whether excluding the document would prevent the determination of the issue on its merits, and whether in the circumstances of the case, the ends of justice require that the document be admitted. In this case, counsel did not provide <u>any</u> "explanation" for the non-descriptiveness of Mr. Gibb's list and argued only that disclosure <u>had</u>been sufficient. The trial judge therefore had no explanation to consider, even if he had been of the view that the listing was deficient.

[43] It is difficult to square the trial judge's ruling on this second question with his prior ruling that the documents had been properly disclosed or 'listed'. If the latter was correct, there was no need to 'balance' the interests of justice in avoiding trial by ambush against the interests of justice in assessing Ms. Dykeman's credibility by cross-examining her on the Internet postings. Given that her lawyer had only half an hour to discuss the 124 pages with her, it cannot be said with any certainty that she was not prejudiced by what transpired. At the end of the day, I am not confident that the apparent exercise of the trial judge's discretion was fair to the plaintiff or rested on a correct understanding of the Rule. I would therefore allow the appeal on this basis as well.

This case contains some other interesting comments which are worth reviewing, particularly with defence statements to the jury regarding adverse inference. I urge all personal injury lawyers in BC to read this case in full as it thoroughly canvasses many areas that routinely arise in injury prosecution in this Province.