



ROBERT F. DELMAR
CRIMINAL, CIVIL LITIGATION

WELCOME TO OUR NEWEST ASSOCIATE

Mr. Delamar is a native of Chilliwack. After graduating from Chilliwack Secondary School, he attended Trinity Western University on a President's Scholarship. After a gap year spent abroad in Japan, he was accepted into the Faculty of Law at the University of British Columbia. While attending law school in Vancouver, he worked for a VC funded high technology start-up in Silicon Valley in a business development role. After completing law school, he articulated at Blake, Cassels & Graydon LLP in Vancouver.

Mr. Delamar was called to the bar of British Columbia in 2004. Immediately after his call, he returned to the high technology industry with Raysat, Inc. of Vienna, Virginia, a maker of sophisticated mobile satellite systems and antennas. At Raysat, he was responsible for North American and Asian business development. After leaving Raysat, Mr. Delamar was privileged to fulfill a lifelong dream

of working in the music business as the co-founder of a digital record label and mobile music distribution service based in Reston, Virginia and New York City.

After almost a decade of a peripatetic lifestyle which saw him commute between Vancouver, New York, Northern Virginia, Silicon Valley and Tokyo, Mr. Delamar decided to return full-time to the magnificent Fraser Valley and the practice of law, fulfilling a sincere desire to put down roots once again in his hometown with a view to making a positive contribution to life in the community.

Mr. Delamar joined Baker Newby LLP in March, 2009. His practice area is general litigation. Mr. Delamar's passions in life, outside the law, are politics, music and technology. In his spare time, he enjoys golfing, skiing and fishing amidst the incredible natural splendor of the Fraser Valley. ■

KUDOS



JASON FILEK

To Jason Filek who has been elected to the Board of Directors of the Canadian Home Builders Association of the Fraser Valley, the representative voice of the residential construction industry in the Fraser Valley region of British Columbia.



CRISTEN GLEESON
BREE HANKINS

We are pleased to announce the formation of the new Family Law Fraser Valley Section of the Canadian Bar Association based on the proposal put forward by Cristen Gleeson and Bree Hankins to the Provincial Council of the Canadian Bar Association.

MANAGING EDITOR *Trevin Rogers*
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Baker Newby LLP is committed to being the leading Fraser Valley law firm, providing a full range of quality, practical and effective legal services. Our team of lawyers and staff will continuously strive to serve with excellence, earning the respect, loyalty and trust of our clients, our community and our peers.



BY JASON FILEK
civil litigation, insurance litigation,
property disputes and estate litigation

DEATH IS NOT THE END PART 2

"Death is not the end. There remains the litigation over the estate."

- Ambrose Bierce

In the previous edition of the *Bailiwick*, I identified four main areas where litigation over an estate can arise. In this Article, I will discuss the second main area where litigation over an estate arises, namely a joint tenancy dispute.

A parent will often transfer his or her house or bank account into joint tenancy with one of his or her adult children. This may be done for convenience, or to avoid potential probate fees. No matter the reason, transferring your house or bank account into joint tenancy with an adult child can lead to unintended estate planning and to disputes among family members, both before and after your death.

In general, when a parent transfers a house or bank account into joint tenancy with one of his or her adult children, upon the death of the parent, those assets are automatically transferred into the name of the joint tenant adult child, and those assets would not form part of the estate. As a result, those assets would not be distributed pursuant to the terms of the parent's will or, if there is no will, pursuant to the *Estate Administration Act*.

For example, if a parent transfers an interest in joint tenancy in his or her

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BAILIWICK

bail-i-wick (ba'lewick). n. area of interest, skill, knowledge or expertise

FALL 2009



WRONGFUL DISMISSAL



BY CRISTEN GLEESON
civil litigation, family law

*In a decision called **Honda Canada Inc. v. Keays**, Mr. Justice Bastarache of the Supreme Court of Canada reduced the amount employers will pay for two types of damages commonly received for wrongful dismissal: (1) conduct in the manner of dismissal and (2) punitive damages.*

It is worth noting the facts of the case. Mr. Keays had worked for 11 years as an assembly line employee and later in data entry for Honda Canada. In 1997, Mr. Keays was diagnosed with chronic fatigue syndrome. Mr. Keays went off work in 1997 and received disability benefits from his employer's insurer until 1998 when he returned to work. When he returned to work, Mr. Keays was placed in a disability program that allows employees to take absences from work if they provide a doctor's note confirming their absences are related to their disability.

The employer became concerned about the frequency of Mr. Keays' absences. The employer asked Mr. Keays to meet with an occupational medicine specialist in order to determine how Mr. Keays' disability could better be accommodated. Mr. Keays consulted his lawyer, who advised him not to meet with the specialist. In March of 2000, the employer gave Mr. Keays a letter stating that it supported Mr. Keays' full return to work, but that Mr. Keays' employment would be terminated if he refused to meet with the specialist. Mr. Keays remained unwilling to meet with the specialist and the employer terminated Mr. Keays' employment. Mr. Keays sued the employer for wrongful dismissal, and at trial received \$500,000 in punitive damages, in addition to dam-

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TIM WURTZ AT 604-792-1376 OR TWURTZ@BAKERNEWBY.COM

Chilliwack Office

P.O. Box 390, 9259 Main Street,
Chilliwack, BC V2P 6K2
Phone: 604-792-1376
Fax: 604-792-8711
e-mail: info@bakernewby.com

Abbotsford Office

200 - 2955 Gladwin Road,
Abbotsford, BC V2T 5T4
Phone: 604-852-3646
Fax: 604-852-5194
e-mail: info@bakernewby.com

DEATH IS NOT THE END PART 2

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house to one of his or her adult children, and the parent dies, the joint tenant child becomes the sole owner of the house, and the house does not form part of the estate. This is where the dispute often arises. It is not uncommon for a house to be the only significant asset owned by a parent, and as a result, if the house is not part of the estate, nothing would be left in the estate to distribute to the other beneficiaries, who are typically the other children. Not surprisingly, the other children of the deceased parent may contend that it was not the intention of their parent to give the house to the one child to the exclusion of the other children. They will likely contend that it was the intention of their parent that the house would form part of the estate.

Disputes can also arise before the death of the parent. If a parent transfers a house or bank account into joint tenancy with his or her child, and afterwards wishes to have the house or bank account transferred back into his or her own name, a dispute can arise if the child does not cooperate. It is easy to imagine this scenario if there is a falling out between the parent and the child.

Recently, the Supreme Court of Canada ruled on two cases involving elderly parents who had transferred their bank accounts into joint tenancy with an adult child. The Court held that where assets are held in joint tenancy between a parent and an adult child, the child will be presumed to hold those assets in trust for the estate of the deceased parent. This is called a resulting trust. Although the Court will presume that the assets are held in trust for the estate, that presumption can be rebutted if there is evidence that the parent intended to give those assets to that child alone.

On the other hand, if these assets are transferred to a child who is a minor at the time of the transfer, there is a presumption of advancement, which essentially means that the Court will presume that the parent intended the transfer as a gift to the minor child, to the exclusion of others. This presumption can also be rebutted if there is evidence of the parent's intention to the contrary.

The intention of the parent is central in these disputes. Unfortunately evidence showing the true intention of the parent is often difficult to find. Accordingly, it is very important that those intentions are documented clearly when assets are transferred into joint tenancy.

In the next addition of the *Bailiwick*, I will discuss the third main area where litigation over an estate can arise, namely when a person dies intestate (without a will).

Until then, I leave you to consider the following words of Niccolo Machiavelli: "A son can bear with equanimity the loss of his father, but the loss of his inheritance may drive him to despair." ■

To learn more about Jason Filek, his areas of practice and view other articles written by lawyers at our firm, visit us online at www.bakernewby.com



UNIDENTIFIED MOTORISTS

JACOB PARKINSON
civil litigation

Hit and run accidents are a big concern for most drivers, police, and law-makers. We have all heard the news stories about the tragic accidents, made more tragic when the driver doesn't stop, as is required by law. A lot of hit and run accidents are less newsworthy, although often no less upsetting for those involved.

We can all picture it. You are in traffic, perhaps waiting for the light to change or thinking about the day ahead. Suddenly, your car is struck; the other car speeds off.

This is a shock for most people, as we all expect other motorists to be as considerate (and law-abiding) as we all strive to be. Luckily, there are statutory provisions to help in cases of hit and run drivers, who are known as "unidentified motorists".

Section 24 of the *Insurance (Vehicle) Act* is entitled "Remedy for Damage in Hit and Run Accident". It sets out the framework where the driver, or owner, of the other vehicle cannot be identified following an accident. There are also Regulations which apply.

Importantly, the *Act* requires written notice to ICBC of the particulars of the accident "as soon as reasonably practicable" and in any event within six months. The idea behind this is to allow for an opportunity to investigate, before the trail goes cold. In one case, a person who waited for two months to report the accident was held by the Courts to have failed to meet the notice requirement. Further, the *Act* requires that there be "reason-

able efforts" to identify the other driver. As you can imagine, this has led to a lot of argument as to what is reasonable in the circumstances. Suffice to say, it is important to make every effort to obtain the contact information and license plate number of the other driver at the accident scene.

In some cases, where perhaps the person who was struck was in shock, it may be necessary to return to the scene of the accident and post signs asking for witnesses, or even canvass the neighbourhood to see if anyone saw anything. While there may also be a separate duty to report the accident to the police, a police report may not be enough by itself to qualify as "reasonable efforts".

In addition to the above, there are also other technical requirements, such as that the accident must have occurred on a "highway", as that term is defined at law. The term highway includes not only the Trans-Canada, and all public roadways, but can even include private parking lots where the general public is invited or has access. In addition, there are separate considerations where the accident occurs outside of British Columbia.

Certainly, this is an often technical area of the law where the assistance and guidance of counsel can be of immeasurable help. Should you have any questions regarding unidentified motorists, or another personal injury matter, contact the Law Offices of Baker Newby LLP. ■

To learn more about Jacob Parkinson, his areas of practice and view other articles written by lawyers at our firm, visit us online at www.bakernewby.com

"THERE IS AN IMPLIED
OBLIGATION IN EVERY
EMPLOYMENT CONTRACT
FOR THE EMPLOYER TO GIVE
REASONABLE NOTICE OF AN
INTENTION TO TERMINATE
ITS RELATIONSHIP WITH THE
EMPLOYEE IN THE ABSENCE
OF JUST CAUSE."

WRONGFUL DISMISSAL

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ages for conduct in the manner of dismissal. Mr. Keays' total award was \$610,000 which included an extension of the notice period to 24 months.

The Ontario Court of Appeal, reviewing the trial judge's decision, reduced the period of damages award to \$100,000 and otherwise upheld the trial level decision.

Before discussing the decision in *Keays v. Honda Canada* further, it might be useful to outline some of the basic principles of wrongful dismissal. What is wrongful dismissal? There is an implied obligation in every employment contract for the employer to give reasonable notice of an intention to terminate its relationship with the employee in the absence of just cause. If an employer fails to provide reasonable notice of termination to the employee, the employee may have a claim for wrongful dismissal.

The Supreme Court of Canada in *Keays v. Honda Canada* established that only a contract intending that a party secure a psychological benefit requires damages to be awarded for mental distress as the result of a breach of the contract. The Supreme Court of Canada described a contract of employment as being one that is subject to cancellation on notice without regard to the ordinary psychological impact of the decision. The Court reasoned that because dismissal is a clear legal possibility at the time the employment contract is formed, the parties do not contemplate psychological damage at the time of forming the employment contract. For this reason, the Court stated that additional damages for the manner in which the employee was terminated are not generally available in the context of employment contracts. This constitutes a clear shift in the law from wrongful dismissal cases decided prior to *Keays v. Honda Canada*.

The Court stated that damages will be available for the manner in which an employer dismisses its employee only where the employer is clearly unfair

or acts in bad faith by being, for example, untruthful, misleading or unduly insensitive, attacking the employee's reputation by declarations made at the time of the dismissal, misrepresentation regarding the reason for the dismissal or dismissing an employee to deprive the employee of a pension benefit or other right. The Court also clarified that where damages are awarded for the manner in which the employer dismissed the employee, the Court should not use an extension of the notice period to calculate the amount of the award, but should simply fix the amount of damages by picking an appropriate dollar amount which the Court considers to be adequate compensation.

The Supreme Court of Canada, unlike the trial decision and that of the Ontario Court of Appeal, found that Mr. Keays was not entitled to damages for the manner in which Honda Canada had dismissed him from his employment.

The Supreme Court of Canada also addressed punitive damages. Prior to the decision in *Keays v. Honda Canada*, employees who successfully sued their employer for wrongful dismissal frequently received damages for both the manner of the dismissal and punitive damages.

Punitive damages preceding the decision in *Keays v. Honda Canada* were not only awarded frequently, but they were often significant. Mr. Keays' \$500,000 punitive damages award provides only one such example.

Punitive damages are restricted to damages for advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. The Supreme Court of Canada clearly set out that a trial judge must first assess the amount of damages already awarded in determining whether or not to award punitive damages and must be alive to the fact that damages already awarded have a punishing effect against the employer in their own right.

The trial judge in *Keays v. Honda Canada* had found the following conduct by Honda Canada warranted punitive damages:

The fact that Honda Canada discriminated against Mr. Keays by asking him to bring in a doctor's note to justify each absence;

The insinuation that Mr. Keays should consider taking a position with a lighter physical component; and

The conclusion by the trial judge that Honda Canada had cancelled its accommodation of Mr. Keays to retaliate against Mr. Keays for his decision to retain a lawyer.

The Supreme Court of Canada overturned the punitive damages award, thereby eliminating Mr. Keays' \$500,000.

The decision in *Keays v. Honda Canada* is the Supreme Court of Canada's largest step away from the traditional very high liability of the employer for punitive damages and damages for conduct in the manner of dismissal. Even despite this decision, however, an employer's liability for wrongful dismissal can be significant.

Employers must be cautious in treatment of employees. Seeking independent legal advice from an experienced lawyer is recommended. Employees should be aware that they are entitled to due notice prior to any termination by their employer that is without just cause.

To learn more about Cristen Gleeson, her areas of practice and view other articles written by lawyers at our firm, visit us online at www.bakernewby.com

