

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *James v. Gillis*,  
2011 BCSC 826

Date: 20110624  
Docket: M075392  
Registry: Vancouver

Between:

**Roy James, Administrator of the Estate of Secret Sandi James (deceased),  
Sandi James, Devin Michael Treis, an infant by his Litigation Guardian,  
Michael (Mike) Treis, Larissa Alexis Law, an infant by her Litigation Guardian,  
Weston Law, Klay Richard Roy Cornet, an infant by his Litigation Guardian,  
Gary Cornet and the said Roy James**

Plaintiffs

And

**Baylen Gillis**

Defendant

And

**Insurance Corporation of British Columbia**

Third Party

Before: The Honourable Madam Justice Watchuk

## **Reasons for Judgment**

Counsel for Roy James, Sandi James, Klay  
Richard Roy Cornet, and Gary Cornet:

W. Mussio

No appearances for Baylen Gillis.

Counsel for the Third Party:

T. J. Decker

Place and Date of Trial:

Vancouver, B.C.  
November 15-18, 2010

Place and Date of Judgment:

Vancouver, B.C.  
June 24, 2011

**Introduction**

[1] This is an action for damages arising out of the death of Secret Sandi James. It is brought pursuant to the *Family Compensation Act*, R.S.B.C. 1996, c. 126. Secret James died in a motor vehicle accident on August 24, 2006. Liability for the accident was not in issue in this trial. The Defendant was not present or represented. ICBC defended the action pursuant to the provisions of the *Insurance (Motor Vehicle) Act*, RSBC 1996 c. 231.

[2] There are three remaining plaintiffs in the action: Gary Cornet, Ms. James' common-law spouse; Roy James, Ms. James' father; and Sandi James, Ms. James' mother.

[3] The claims brought for the benefit of Ms. James' three children Devin Treis, Larissa Law, and Klay Richard Roy Cornet have been or are in the process of being settled. Accordingly, no determination is required of the Court regarding those individuals.

**Issues**

[4] Ms. James' entire family suffered a tragic loss. Her children were young, 15, 4 and 2, at the time their mother died. Her parents' lives were changed forever by the accident. Mr. Cornet lost his partner. The law does not attempt to compensate her family for their immeasurable loss. It does however attempt to provide fair and adequate monetary compensation for their pecuniary losses.

[5] The issues in this matter are:

- a. Does Gary Cornet qualify as a "spouse" within the definition in the *Family Compensation Act*,
- b. If Gary Cornet is a spouse as defined, what compensation is he entitled to receive; and
- c. What compensation, if any, are Roy and Sandi James entitled to receive?

**Facts**

**Secret James**

[6] Ms. James was 36 years old at the time of her death. She was born on July 15, 1970. Her parents, Roy and Sandi James, have been married 41 years. Their daughters were Secret and Chanel, who is three and a half years younger than Secret. The sisters grew up in Merritt, British Columbia where the family lived until Mr. and Mrs. James moved from Merritt to Wyndel, ten minutes north of Creston, in 1999 when Mr. James retired.

[7] Ms. James moved out of the family home in Merritt at age 17 and lived with a girlfriend. She did not graduate from high school as she quit halfway through grade twelve.

[8] Her first child, Devin Michael Treis, was born on May 15, 1991. His father, Michael Treis, continued to be in his life after the separation, and Devin went to live with him after his mother's death in 2006.

[9] From 1990 to 2001 Ms. James worked at five different jobs in Merritt. She worked at the MacLeod's True-Value for four months in 1990 assembling displays and stocking shelves. For eight months from September 1995 she did reception and bookkeeping and was a chamber-maid at the Sportsman Hotel. After that job ended in May 1996 she worked as a server at the Homestead Diner until December 1996. From December 1996 until November 1998 she was a server and bartender at the Grasslands Cantina. Again from 1999 to 2001 she worked as a cashier and in customer service at the MacLeod's True-Value.

[10] Ms. James enrolled in a computer program at the Academy of Learning starting January 2, 2002, but withdrew from that program on January 28, 2002.

[11] Ms. James' second child, Larissa Law, was born on August 13, 2002. Her relationship with Larissa's father, Weston Law, ended in the summer of 2003.

[12] Ms. James' last job was at Extra Foods in Merritt in the first few months of 2006.

**Relationship of Secret James and Gary Cornet**

[13] Some of the facts regarding the relationship are not in issue. In addition to Mr. Cornet, the witnesses who testified about the relationship were: Laurie August, a close friend of the family who lived in Merritt; Mr. and Mrs. James, the parents of Secret; Tina Cornet, the sister of Mr. Cornet; and Robert Davey, a good friend of Mr. Cornet. Each of them was a credible and well-intentioned witness. Ms. August had the best opportunity to observe since she lived in Merritt and was a frequent visitor to the family home. Mr. Cornet was descriptive of events and history generally but had limited recall of dates. Mrs. Sandi James spoke frequently to her daughter by telephone but was not often in Merritt.

[14] From the evidence of these witnesses I make the following findings of fact. In a later section I will return to these facts and review them with regard to the issues that must be determined. One of the issues is the date that Mr. Cornet commenced living with Ms. James.

[15] Ms. James met Gary Cornet in 2002 when she was living with Weston Law. They started an affair a few months after they met. In the summer of 2003 they became a couple and Ms. James ended her relationship with Mr. Law.

[16] When Mr. Cornet moved in with Ms. James she was living with Larissa, then one year old, and Devin, who was then 12.

[17] In September 2003 Ms. James became pregnant with their son Klay.

[18] After Mr. Cornet moved in with Ms. James, Larissa, and Devin, he viewed the four of them as a family and treated her children as his children. He often went hunting and fishing with Devin, and saw himself as more or less Larissa's dad as Mr. Law was no longer actively involved in parenting. Mr. Cornet is described as being a good father to Ms. James' children.

[19] Mr. Cornet described his relationship with Ms. James as “a couple” and referred to her in public as his wife or “my old lady”. He loved her and he never fell out of love. Ms. James told her mother that he was “the one”.

[20] Their social life was together in Merritt and the surrounding area as a couple and a family. They often went to the lake, river, and swimming holes with friends, their families and children. Family photos show events including the family with baby Klay at their Auntie Tina’s, Klay’s first birthday, Klay as a baby with his father at Petite Creek, and the parents with Larissa and Klay at their home.

[21] Mr. Cornet’s only vacations without Ms. James were on hunting and fishing trips with his good friend, Robert Davey. Ms. James went with the children approximately twice a summer to visit her parents in the Kootenays. She would drive with her father when he went home between his relief shifts at the mine near Merritt. Mr. Cornet, who worked during the summers, did not accompany her and the children on these trips.

[22] Mr. Cornet and Ms. James slept in the same bed. He did not have a physical relationship with any other person and he did not know of her having any physical relationship with any other person in the years they were together as a couple.

[23] Ms. James and Mr. Cornet had plans to marry. The evidence with regard to the date of the engagement is not clear. Mr. Cornet testified that he asked Ms. James to marry him when Klay was small, in 2003 or the winter of 2004, although he was not sure of the dates. He asked Robert Davey to be his best man. Ms. James’ mother testified that the engagement occurred in December 2003, as she had made a computer “Congratulations” card for Secret and Gary dated December 25, 2003. In February of 2004 Mrs. Sandi James purchased a wedding dress, anklet and sandals for Secret. I find that the engagement occurred in December 2003.

[24] Mr. Cornet gave Ms. James his mother’s engagement ring. She continued to wear the ring until her death.

[25] Mrs. Sandi James also made wedding invitations on her computer for her daughter. However, the wedding was postponed two or three times and did not take place largely due to financial reasons or Mr. Cornet's work schedule.

[26] The arrangements for taking care of the home and children were traditional. Ms. James did not work outside the home, and took care of most of the domestic chores including laundry and grocery shopping for the family. When Mr. Cornet was not away working, he assisted with the chores and cooking and did the outside maintenance.

[27] With regard to the financial arrangements in the family, Mr. Cornet testified that everything was combined. He paid the bills from his income as Ms. James was not working. He brought his earnings to the house and it was distributed according to the needs of the family. Although they kept separate bank accounts, Ms. James had the full use of Mr. Cornet's bank card without restriction.

[28] Mr. Cornet worked for two employers between 2003 and 2006: Craigmont Mines and Cortes Construction. At both of the jobs his work was seasonal, from early spring to late fall. During the work season he was home primarily on his days off, often sleeping at the work sites. He was laid off during the winter months and received Employment Insurance benefits.

[29] Ms. James was in receipt of Social Assistance benefits from August to November, 2003; in November and December, 2004; and from January to March and June to August, 2005. Mr. Cornet did not know of the Social Assistance payments made to Ms. James. She also had Court Orders for child support payments for Devin from February 2004, and for Larissa from November, 2003. Mr. Cornet was not aware of which child support payments were received by Ms. James.

[30] Klay was born a month early, on May 27, 2004. Mr. Cornet was present at the birth.

[31] The relationship became rocky in the months following Klay's birth.

[32] On October 22, 2004, Mr. Cornet was charged criminally with threatening Secret James, Devin James, and other persons; with the unlawful use of a rifle; and with causing suffering by choking to a cat. He was released on bail with terms which included that he was to have no contact with Secret James and Devin James; that he was not to be within 100 metres of the residence at 1698 Douglas Street, Merritt, or any other place where Secret James resided; and that he must reside with his sister, Tina Cornet, in Lower Nicola.

[33] Mr. Cornet did not abide by the bail term of no contact with Secret and Devin or with the term that he not go to the residence on Douglas Street. Mr. Cornet continued to have contact with Ms. James and the family, continued to spend nights at their residence on Douglas Street, and continued to provide financial support to Ms. James and the children. He did not move his household possessions from the Douglas Street residence.

[34] Throughout the period of the no contact order in the bail recognizance from October 27, 2004 to January 4, 2005, Mr. Cornet and Ms. James spent most of their time together. On December 6, 2004, he applied to vary his bail by removing the no contact condition with Secret James, his “common-law partner”, but the application was denied.

[35] He pled guilty to the three charges and was sentenced on January 4, 2005, to two years’ probation. The probation order included the term that he was to leave Ms. James’ presence on her request, but did not include a no contact order or an order prohibiting him from going to the residence. They resumed living together without restriction.

[36] The pre-sentence report prepared for the court at that time describes Ms. James as Mr. Cornet’s common-law partner, and indicates his hope to reconcile with her as soon as possible. Ms. James told the writer of the report that she would like Mr. Cornet to return home. The report indicates that Mr. Cornet and Ms. James have a five month old son, Klay, and that they commenced their common-law relationship “approximately one year ago”.

[37] On June 23, 2005, Ms. James was placed on Mr. Cornet's Great West Life benefits coverage with his employer, Craigmont Mines.

[38] In July of 2005 they separated and then reconciled in the fall of 2005. Mrs. Sandi James described the separation as arising from a "little tiff". In August 2005 Ms. James obtained an order from family court that Mr. Cornet pay child support for Klay. Her mother advised her to "get it on paper" and counsel representing Ms. James on that application was counsel for the Ministry of Human Resources. Ms. James received Social Assistance in June, July, and August of 2005.

[39] After their reconciliation in the fall of 2005 they remained together until January 2006. During that time, in October, Mr. Cornet applied for MSP coverage for Ms. James, Larissa and Klay.

[40] In January 2006 Ms. James moved out of the family residence with the children and took all of her personal possessions. She obtained her own residence in Merritt and worked at Extra Foods in Merritt.

[41] On February 1, 2006, Ms. James and Larissa were removed from Mr. Cornet's Great West Life benefit plan at Craigmont Mines at his request.

[42] Ms. James moved to Salmon Arm with the children to live with her sister in the spring of 2006. She took all of her possessions with her. Mr. Cornet visited occasionally to see Klay and remained on cordial terms with Ms. James. During the visits they discussed reconciliation.

[43] In March 2006 Mr. Cornet purchased the property at Mamette Lake in his own name. He testified that Ms. James saw the property before he completed the purchase.

[44] Three weeks before Ms. James' death on August 24, 2006, she and the children moved in with Mr. Cornet at the Mamette Lake trailer.

**Positions of the Parties**

[45] On behalf of the plaintiffs it is submitted that Ms. James and Mr. Cornet were in a marriage-like relationship from August or September of 2003 until her death in August 2006. The separations were mere cooling off periods and did not bring an end to their relationship.

[46] The third party submits that the marriage-like relationship between Ms. James and Mr. Cornet did not begin until December 2003 at the earliest. The separation in October 2004 was not a cooling off period. The separation beginning in July 2005 was also not a cooling off period, but ended the relationship. The new relationship, which was attempted in the fall of 2005, ended in January 2006. The requirement that the relationship must have been in existence for a period of not less than two years is therefore not met.

[47] In addition, the third party submits that the requirement that the relationship be a “marriage-like relationship” is not met. Mr. Cornet therefore does not meet the definition of spouse.

**The Law**

[48] The relevant provision of the *Family Compensation Act* is the definition of spouse. It is as follows:

**"spouse"** means a person who

- (a) was married to the deceased at the time of death, or
- (b) lived and cohabited with the deceased in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, for a period of at least 2 years ending no earlier than one year before the death;

[49] In *Roach v. Dutra*, 2009 BCSC 229, the court considered the definition of spouse in the *Family Relations Act*, R.S.B.C. 1996, c. 128. Under s. 1(1) of the *Family Relations Act*, spouse is defined as:

**"spouse"** means a person who

- (a) is married to another person,

(b) except under Parts 5 and 6, lived with another person in a marriage-like relationship for a period of at least 2 years if the application under this Act is made within one year after they ceased to live together and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender,

(c) applies for an order under this Act within 2 years of the making of an order

(i) for dissolution of the person's marriage,

(ii) for judicial separation, or

(iii) declaring the person's marriage to be null and void, or

(d) is a former spouse for the purpose of proceedings to enforce or vary an order.

[50] The requirement in the *Family Relations Act* of “lived with another person in a marriage-like relationship for a period of at least two years” is substantially the same as the definition under the *Family Compensation Act* of “lived and cohabited with the deceased in a marriage-like relationship ... for a period of at least 2 years ending no earlier than one year before the death”. They are distinct only in that the *Family Compensation Act* has added the specific requirement of cohabitation. As discussed below, since cohabitation is already one of the factors to consider under the *Family Relations Act*, and since there were long periods of cohabitation in the present case, I find that the two sections are analogous for the purposes of this case. Accordingly I can take guidance from the courts treatment of the definition of spouse in the former when interpreting the latter.

[51] In *Roach*, Mr. Justice Pearlman summarizes and discusses the relevant law at paras. 62-66 as follows:

[62] In *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264 at 267-68, 1 R.F.L. (3d) 448 (C.A.), Lambert J.A. stated the test for determining whether a couple are living together as man and wife, and are therefore subject to the spousal support obligations of the *FRA*, in the following terms:

So I would ask whether the unmarried couple's relationship was like the relationship of the married couple in that the unmarried couple have shown that they have voluntarily embraced the permanent support obligations of s. 57. If each partner had been asked, at any time during the relevant period of more than two years, whether, if their partner were to be

suddenly disabled for life, would they consider themselves committed to life-long financial and moral support of that partner, and the answer of both of them would have been “Yes”, then they are living together as husband and wife. If the answer would have been “No”, then they may be living together, but not as husband and wife.

Of course, in the particular circumstances of any case, the answer to that question may prove elusive. If that is so, then other, more objective indicators may show the way. Did the couple refer to themselves, when talking to their friends, as husband and wife, or as spouses, or in some equivalent way that recognized a long-term commitment? Did they share the legal rights to their living accommodation? Did they share their property? Did they share their finances and their bank accounts? Did they share their vacations? In short, did they share their lives? And, perhaps most important of all, did one of them surrender financial independence and become economically dependent on the other, in accordance with a mutual arrangement.

[63] The plaintiff submits that the court should determine whether the parties were in a marriage-like relationship primarily by reference to objective factors. She refers to *Takacs v. Gallo* (1998), 157 D.L.R. (4<sup>th</sup>) 623, 48 B.C.L.R. (3d) 265 (C.A.), leave to appeal to S.C.C. dismissed, 26657 (October 22, 1998), where Huddart J.A., in her dissenting reasons for judgment, at para. 40, commented on the test in *Gostlin*:

... However, the emphasis on a mutual intention to provide life-long financial and moral support for each other overlooked a practical basis upon which many would agree support obligations should be premised: the fact that over the course of cohabitation finances become intertwined and financial dependency may emerge by the way the parties structure their relationship so that at its termination, one party is in need of support even in circumstances where neither party intended a lifetime commitment.

[64] Madam Justice Huddart then referred with approval to the objective test for determining whether a couple were cohabiting as man and wife first stated in *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.):

[46] A more comprehensive list of criteria was set out in *Molodowich v. Penttinen*... Trial Judges in two British Columbia cases found these criteria to be helpful in structuring their analysis of the facts: *Aktary v. Dobroslavic et al.* (1983), 48 B.C.L.R. 26 (S.C.) (under the *Family Relations Act*) and *Munro v. Rasmussen*, (*Administrator of the Estate of*), [1993] B.C.D. Civ. 4151-01 (under the *Estate Administration Act*). The *Molodowich* test for cohabitation has seven parts:

1. *Shelter*:

- (a) Did the parties live under the same roof?
- (b) What were the sleeping arrangements?

(c) Did anyone else occupy or share the available accommodation?

2. *Sexual and Personal Behaviour:*

(a) Did the parties have sexual relations? If not, why not?

(b) Did they maintain an attitude of fidelity to each other?

(c) What were their feelings towards each other?

(d) Did they communicate on a personal level?

(e) Did they eat their meals together?

(f) What, if anything, did they do to assist each other with problems or during illness?

(g) Did they buy gifts for each other on special occasions?

3. *Services:*

What was the conduct and habit of the parties in relation to:

(a) preparation of meals;

(b) washing and mending clothes;

(c) shopping;

(d) household maintenance; and

(e) any other domestic services?

4. *Social:*

(a) Did they participate together or separately in neighbourhood and community activities?

(b) What was the relationship and conduct of each of them toward members of their respective families and how did such families behave towards the parties?

5. *Societal*

What was the attitude and conduct of the community toward each of them and as a couple?

6. *Support (economic):*

(a) What were the financial arrangements between the parties regarding the provision of or contribution toward the necessities of life (food, clothing, shelter, recreation, etc.)?

(b) What were the arrangements concerning the acquisition and ownership of property?

(c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

7. Children:

What was the attitude and conduct of the parties concerning children?

[47] These organizing questions permit a trial judge to view the relationship as a whole in order to determine whether the parties lived together as spouses. Reference to them will prevent an inappropriate emphasis on one factor to the exclusion of others and ensure that all relevant factors are considered. The importance of viewing a relationship as a whole was stressed by Madam Justice Prowse in *Wepruk (Guardian ad litem of) v. McMillan Estate* (1993), 77 B.C.L.R. (2d) 273 (C.A.).

[65] However, the majority in *Takacs* stressed the importance of the parties' intentions, stating:

[53] The starting point in this province for the analysis required in cases of this kind is the judgment of this court in *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264, and in particular, the comments of Lambert J.A. at 267-8 which are quoted in Madam Justice Huddart's judgment. I read those comments as focussing first on the intentions of the parties to live "as husband and wife", or in a marriage-like relationship. Such an intention may or may not include financial dependence. The various "objective indicators" referred to in *Gostlin* were advanced as a means of divining those subjective intentions where the latter "prove elusive". By the same token, of course, subjective or conscious intentions may be overtaken by conduct such that whilst a person living with another might not say he or she was living in a marriage-like relationship, the reality is that the relationship has become such.

...

[55] In both *Gostlin* and *Fitton*, the question of whether persons were living together as spouses notwithstanding that they were not legally married involved the court in an examination of their intentions and not simply an objective assessment of whether their financial and living arrangements were "intertwined".

[66] The court must be satisfied that the parties intended to live together in a marriage-like relationship. The objective factors identified in *Gostlin* and *Molodowich* will often assist the court in determining the parties' intentions, but may not be conclusive in themselves.

[52] The law with regard to the effect of separations on the determination of the continuity of a relationship is set out in *Kirk v. Hackl*, 2006 SKQB 526 at paras. 29-30:

[29] The law is well settled that the word "continuously" is not [to] be interpreted as without interruption. That is, a relationship can be interrupted by separations that do not necessarily amount to withdrawal from the relationship or termination of consortium for the purposes of the statutory definitions. To bring cohabitation to an end, there must be a physical withdrawal with intent to end the relationship. A brief cooling off period may not convincingly show a settled state of mind that cohabitation has terminated. However, where there is separation, the onus is on the applicant to prove that neither party intended that the separation be permanent. In the end, the Court must assess the effects of temporary separation by identifying the intention of the parties at the time. See *Bryant v. Bryant*, 2005 SKQB 298, 266 Sask.R. 98; *Taman v. Taman*, *supra*; and *McDonald v. Stone*, 2004 SKQB 69, 246 Sask.R. 310.

[30] The decision of *Boothe v. Gore* (1996), 20 O.T.C. 207 (Ont. Gen. Div.), (followed by McIntyre J. in *Bryant v. Bryant*, *supra*) is instructive. Desmarais J. stated:

[10] The law in Ontario recognizes that a man and a woman are considered to have continuously cohabited, despite that while living together, there might have been separations for varying periods of time before reconciling. Cohabitation does not terminate until either party regards it as being at an end, and, demonstrate convincingly that this is the party's intent. A brief cooling off period does not convincingly show a settled state of mind that cohabitation has terminated.

[11] "Cohabit" means to live in a "marriage like" relationship and, in order to bring it to an end, there must be a physical withdrawal together with an intention to end the relationship. When a temporary separation is no more than a period of reflection and reassessment, and there is no termination of the "consortium", the cohabitation is considered to be continuous.

[12] In an application for support by an unmarried "spouse", the onus is on the applicant to establish the existence of cohabitation over the requisite period of time and, if there is a break in continuity due to separation, the burden remains on the applicant to prove that there was no intention that the separation be permanent.

[13] The effects of temporary separations depends on the intention of the parties. When one party leaves the other and provides an objective basis to believe that they do not intend to resume cohabitation and the separation lasts for a meaningful period of time, the period of cohabitation could well have been interrupted.

### **Discussion**

[53] In order to determine whether Mr. Cornet is a spouse within the meaning of the *Family Compensation Act*, it must be determined when the relationship commenced, whether it was a marriage-like relationship, whether the separations ended the relationship, and if so, when the relationship ended.

### **Commencement of Relationship**

[54] The witnesses Gary Cornet, Sandi James, Lauri August, and Robert Davey all testified with regard to their recollections of the date that Mr. Cornet and Ms. James began to live together.

[55] Mrs. Sandi James testified that her daughter Secret lived with Weston Law until around the time of Larissa's first birthday, which was August 13, 2003. She had already been dating Mr. Cornet while she was living with Mr. Law. Very soon after she left Mr. Law, Mrs. Sandi James recalls that Secret moved in with Mr. Cornet briefly until they got a place together. She testified that Secret was living with Gary Cornet before she became pregnant with Klay. As Mrs. Sandi James was not living in Merritt during this time, her understanding of the timing comes from her frequent telephone conversations with her daughter once or twice a week.

[56] Lauri August has been friends with Gary Cornet for 26 years, as he is a friend of her brother. Ms. August testified that Ms. James and Mr. Cornet, who had met in 2002, got together in the summer of 2003. The relationship moved quickly and before the fall of 2003 Mr. Cornet was living with Secret and her two children Devin and Larissa. For the first month they lived in a small trailer in Lower Nicola and then moved across the highway to a house, and then moved to Merritt. Ms. August testified that they moved in together before the new school year in September, and before Ms. James became pregnant.

[57] Ms. August visited both at the trailer, where Secret's belongings had been moved in, and then later at the Merritt house. She recalls Secret's favourite possession, a huge china cabinet, in their joint residence.

[58] Mr. Cornet testified that his relationship with Secret James started in 2002 as a physical relationship and became something more a couple of months after that, while she was still living with Weston Law. They became a couple in the summer of 2003. He moved in with Secret three to four months before she became pregnant with Klay.

[59] Tina Cornet, Gary Cornet's sister, was not living in Merritt in 2003. She met Secret James in 2003 before Secret was pregnant and when Secret and Gary had just started residing together at a townhouse in Merritt. Ms. Cornet recalls that as being in October or November of 2003. She also recalls the family get-together at their joint home during Thanksgiving in 2003, where she met Secret's parents and sister. This would therefore place Ms. Cornet's recollections of Secret and Gary living together prior to Thanksgiving, 2003.

[60] Robert Davey is an old friend of Gary Cornet who describes Gary as being "like my brother". His evidence was that Secret and Gary started to live together not long after they got together as a couple.

[61] Other than Mr. Cornet and Ms. James, Ms. August had the best opportunity to observe the relationship. Her evidence is that they started to live together before Ms. James became pregnant and before the new school year. Mrs. Sandi James and Mr. Cornet testified that Gary and Secret became a couple in August 2003, around the time of Larissa's first birthday, when Ms. James left Mr. Law to be with Mr. Cornet. With the exception of Mr. James, who places the date months earlier and was not as involved with his daughter at that time, most of the witnesses recall that Secret and Gary lived together shortly after they became a couple.

[62] In addition, the witnesses Sandy James, Tina Cornet and Lauri August recall being at the home of Secret James and Gary Cornet with the children Devin and Larissa for a family Thanksgiving celebration in October 2003. By that date they had established a joint household.

[63] I conclude on the evidence of all of the witnesses that Secret and Gary commenced cohabitation after Larissa's first birthday and before Secret was pregnant with Klay, which is understood to be September 2003. I therefore find that Secret James and Gary Cornet commenced cohabitation on or about September 1, 2003.

[64] In making this finding I have considered the evidence relied upon by the third party that Ms. James was in receipt of Social Assistance benefits in 2003 for August, September, October, and November. As will be discussed in further detail below, I do not find her receipt of Social Assistance benefits determinative of whether or not she was living with Mr. Cornet at the time of receipt.

[65] I have also considered the evidence that the writer of the pre-sentence report included the information that Mr. Cornet had commenced a common-law relationship with Secret James “approximately one year ago”. The report was written between November 17 and December 16, 2004 when Klay was five months old as the writer states. However, the writer of the report obtained information for the report from Gary Cornet, Richard Jackson, a substance abuse counsellor, Secret James, and Tina Cornet. The source of the information as to the time of commencement of the common-law relationship is not known. As this was not a factor on which the pre-sentence report relied, I place little weight on this approximate time reference in the pre-sentence report in the context of the evidence as a whole.

### **Marriage-Like Relationship**

[66] In order to determine whether Ms. James and Mr. Cornet lived in a marriage-like relationship, the Court must consider whether the parties intended to live together in a marriage-like relationship with reference to objective factors. In so doing I will have reference to the factors identified in *Gostlin* and *Molodowich*.

[67] Ms. James and Mr. Cornet lived under the same roof. They moved their residence a number of times but from September 1, 2003 as determined above, their residence was joint. The presence of Ms. James’ favourite possession, the china cabinet, in Mr. Cornet’s home as described by Ms. August is descriptive of their joint residence. When Mr. Cornet was away working during the summer months he returned to his home with Ms. James and the children on his days off. They shared the same bed.

[68] Mr. Cornet testified that they were faithful to each other and did not have sexual relationships with others. There was no evidence that either was seen to

have other relationships in the relevant time period. Mr. Cornet confided in Ms. James. That they bought gifts for each other on special occasions is demonstrated by Mr. Cornet's evidence and his giving his mother's ring to Ms. James.

[69] Domestically they were a traditional family. When Mr. Cornet was not away working, they shared meals. Ms. James usually did the cooking and cleaning. Mr. Cornet did the yard work and helped with the cooking. They shared parenting duties with Mr. Cornet taking on the role of father to Larissa and step-father to Devin and then becoming an involved father to Klay.

[70] There is evidence from Mr. Cornet, Ms. August and Mr. Davey that they participated together as a couple in Merritt activities. Mr. Cornet referred to Ms. James as "my old lady" which means his wife. Both families were involved in their lives as evidenced by family photos, cards sent on special occasions and the Thanksgiving dinner in 2003. Their friends and family saw them as a couple and as a family.

[71] With regard to the economic arrangements, Mr. Cornet assumed the traditional role of breadwinner for the family while Ms. James stayed home with two and then three children. Although they did not share a bank account, Ms. James had unrestricted use of his debit card and his bank account. Her receipt of Social Assistance payments was not known to Mr. Cornet and there is no evidence of how she used those funds. He was aware that there were Court Orders for the fathers of Larissa and Devin to pay child support but there is no evidence of what payments were made pursuant to those orders. Ms. James and the children were covered by his employer's benefit plan until February 2006. Ms. James was financially dependent on Mr. Cornet who had the intention of supporting her and the children.

[72] The *Gostlin* factors are included in the seven part test in *Molodowich*. Having examined that seven part test, the answer to the question put in *Gostlin*, "did they share their lives?", is in the affirmative. Ms. James and Mr. Cornet shared their lives

in Merritt as a couple, within their immediate and broader families and in the community.

[73] The evidence on which I rely above was uncontroverted at trial. The third party referred to additional evidence that Ms. James and Mr. Cornet had different mailing addresses and that they each declared themselves as being single in their income tax returns for the 2003 to 2005 taxation years. While some documents show different addresses for each, it is not clear how and when those addresses were obtained or used. Mr. Cornet did not know if Ms. James had kept her previous mailing address or obtained a new one after they moved in together. Mrs. Sandi James testified that some of Mr. Cornet's mail went to her daughter's mailbox. With regard to the income tax filing on a "single" basis, Mr. Cornet thought there was a tax advantage. There is no evidence as to Ms. James' reason for so filing. Consideration of these circumstances does not alter the conclusion that Mr. Cornet and Ms. James shared their lives.

[74] I am satisfied on the evidence that Ms. James and Mr. Cornet intended to and did live in a marriage-like relationship. The issue remaining for determination is the date it ended, whether on her death in August 2006 or at a date earlier than that.

**Times of Living Apart – Separations – End of Relationship**

[75] There are three periods of separation: October, 2004 to January, 2005 while there was a bail order; from approximately July to August, 2005; and from January to August 2006.

[76] The bail order following the criminal charges of October 22, 2004, had a term that Mr. Cornet not go to the family residence and that he have no contact with Ms. James or Devin. It was in place until the sentencing on January 4, 2005. During this time Mr. Cornet was to be living with his sister Tina.

[77] The evidence of Tina Cornet and Mr. Cornet is that he did not comply with the terms of the bail order with regard to the no contact, the no go and the residence provisions. He had continuing contact including sexual relations with Ms. James, he

visited the family residence, and he did not continually reside at his sister's. Their evidence is consistent with the Pre-Sentence Report which states that Mr. Cornet wanted to reconcile with Ms. James and that she wanted him to return home.

[78] I find that there was no intent to end the relationship during the period of the bail order.

[79] The next separation was from approximately July to the early fall of 2005. This is the time frame that Mrs. Sandi James referred to as a cooling off period as a result of a "little tiff". There is evidence of some rocky periods in the relationship and this is one of them.

[80] It was during this separation that Ms. James obtained the Family Court Order that Mr. Cornet pay support for Klay effective July 1, 2005. Counsel for the Ministry of Human Resources acted for her at a time that she was receiving Social Assistance. Mrs. Sandi James told her daughter to obtain the child support order because it was better for her to have a Court Order.

[81] Mr. Cornet's evidence regarding this separation is lacking in detail but clear in his statement that the relationship was not over. They were always still seeing each other. He did not move his possessions from the family home. He continued to support Ms. James and the children.

[82] Again I find that there was no intent to end the relationship in the months from July to the early fall of 2005.

[83] Ms. James and Mr. Cornet separated in January, 2006. I find that this separation was intended to and did end the relationship between them. The reconciliation in August, 2006 was the commencement of a new relationship.

[84] Ms. James and the children moved out of the family home to a new residence in Merritt in January 2006. She took all of her possessions. Ms. James began work at Extra Foods in an attempt to become self-sufficient. In February 2006, Mr. Cornet requested of his employer that Ms. James and Larissa be removed from his benefit

plan. Mr. Cornet described the relationship as in a “little break-up”. The actions of both he and Ms. James indicate a break-up.

[85] A few months later Ms. James moved with the children to her sister’s home in Salmon Arm. She sought work there and prepared a résumé and covering letter for potential employers.

[86] She and Mr. Cornet continued to communicate and visited when he came to visit Klay. She went with him to look at the Mamette Lake trailer park where he subsequently purchased property in his own name. However, the nature of the relationship substantially changed after January, 2006. It was no longer a marriage-like relationship.

[87] When Ms. James moved in with Mr. Cornet at the Mamette Lake trailer in early August 2006, she took about 75% of her possessions. Her death occurred later that month when she was driving with Klay and Larissa on the Coquihalla Highway home from a visit with Mr. Cornet at his work site.

[88] With regard to the Social Assistance payments received by Ms. James, they are not consistent with the time periods that she and Mr. Cornet were cohabiting. As there was no evidence with regard to her application or statements to the Ministry with regard to her living circumstances it is not possible to draw conclusions with regard to the accuracy of any representations made.

[89] Ms. James received Social Assistance from August to November, 2003. It is not known if she had received such payments prior to that date. As the preponderance of the evidence indicates that cohabitation had commenced by September 1, 2003, Ms. James continued to receive Social Assistance while living with Mr. Cornet. In November and December 2004 she received Social Assistance during part of the period covered by the bail order.

[90] In 2005, Ms. James received payments for Social Assistance in the first three months of the year while she and Mr. Cornet were living together. I note that in these months Mr. Cornet was not employed but receiving Employment Insurance. Again in

June, July and August Ms. James received Social Assistance although they were together in June as indicated by his placing her on a benefit plan on June 23, 2005. The reconciliation had not taken place by September, but she did not receive Social Assistance for that month. There is no evidence that she received Social Assistance in 2006 when she had moved out of the family home and was living alone with the children or with her sister.

[91] The Social Assistance payments are not determinative of the times when Ms. James was living or cohabiting with Mr. Cornet. There are times that they were together as spouses and she was receiving the payments; there are also times that they were apart and she did not receive Social Assistance.

### **Conclusion – Mr. Cornet as spouse**

[92] Ms. James and Mr. Cornet commenced cohabitation or living together in a marriage-like relationship on or about September 1, 2003. Their separations in October, 2004 and July, 2005 did not end the relationship. The relationship ended when they separated in January, 2006. At that time they both had an intent to end the relationship. I therefore find that the test in the *Family Compensation Act* is met as Mr. Cornet was a spouse within that definition for two years, from September 2003 to January 2006, and the relationship ended not earlier than one year prior to Ms. James' death.

### **Assessment of Damages**

[93] The law with regard to the assessment of damages in cases of this nature is set out in *Ruiz v. Mount Saint Joseph Hospital*, 2001 BCCA 207, as follows:

[53] *Skelding* supports the proposition that the normal tort measure of damages is to apply to fatal accident cases as it does to non-fatal accident cases. The basic principle is that the injured person is to be compensated for the full amount of his actual loss and no more, as Gibbs J.A explained at para. 18:

... Whereas, when the injured party does not survive, the loss for which the claimants are entitled to be compensated is, as Dickson J. said in *Keizer v. Hanna* the amount which will provide at least the equal of what might have been expected to have been provided by the deceased person but for the

accident. The assessment of the appropriate amount is to be "neither punitive nor influenced by sentimentality. It is largely an exercise of business judgment."

[54] In summary, in a family compensation claim, family members may claim damages proportioned to the pecuniary loss they suffered as a result of the loss of a relationship with a loved one. The loss of anticipated benefit that must be compensated has been called globally "dependency" and it must be assessed by the exercise of "business judgment."

[55] A precise formula for exercising that business judgment has proven elusive. Innumerable authorities have considered how to approach the assessment of the loss of dependency. Many were cited to us. One of the most succinct statements of the basis for awarding compensation under fatal accident legislation is that of Cartwright J. in *Proctor v. Dyck*, [1953] 1 S.C.R. 244 at 249:

To entitle a claimant to damages under the *Fatal Accidents Act* it is not essential that he should have been financially dependent upon the deceased or that the deceased should have been under any legal liability to provide for him or that he should have enjoyed any benefits from the deceased in his lifetime. It is sufficient if it is shown that the claimant had a reasonable expectation of deriving pecuniary advantage from the deceased's remaining alive which has been disappointed by his death.

[56] The legal goal, then, is to ascertain the true value of the pecuniary advantage each claimant lost because Mrs. Ruiz did not remain alive. ...

### **Claims of Gary Cornet**

[94] Gary Cornet claims damages under two headings: loss of financial support, both past and future; and loss of household services, both past and future. Damages under these headings are the subject of two reports prepared by economists to assist the Court. Mr. Cornet also claims for a loss of inheritance which will be dealt with separately below.

### ***Financial Support and Household Services***

[95] Mr. Cornet claims that he has suffered and will continue to suffer economic loss as a result of the death of Ms. James. Based on the report of Mr. Daren Benning, the economist relied upon by the plaintiffs, he claims the following amounts:

Past Loss of Financial Support:	\$6,000
Future Loss of Financial Support:	\$36,378
Past Loss of Household Services:	\$36,000
Future Loss of Household Services:	\$101,539
Income Tax Gross-Up:	\$0
<b>Total:</b>	<b>\$179,917</b>

[96] Mr. Benning stated that in preparing his report he made the following assumptions in assessing the loss to Mr. Cornet for financial support and household services.

1. In the absence of the accident Ms. James would have otherwise earned \$10,000 per year through to September 2009, at which time she would have commenced employment as a care-aid. Ms. James would have then earned employment earnings commensurate with those experienced by the average B.C. female seeking employment as a care-aid [between \$27,000 and \$43,000 per year];
2. Mr. Cornet would have otherwise realized ongoing employment income commensurate with his average earnings over the 2004-2009 period [which was \$45,763 per year in 2010 dollars]; and
3. In the absence of the accident Ms. James and Mr. Cornet would have otherwise performed household services commensurate with the amount of such services performed by the average Canadian female and male in their employment and domestic situations.

[97] The only assumption which is an issue in the reports is the estimate of the future income of Ms. James.

[98] The economist, Mr. Douglas Hildebrand, who provided a report on behalf of the third party, based his estimates on a lower earnings projection for Ms. James. He estimated her gross earnings to be \$19,005 as the result of an assumption of employment as a retail sales person, sales clerk, food and beverage server or

cashier. Child support payments for the two older children were included as income to Ms. James.

[99] It is necessary to estimate the future income of Ms. James. Her past income was:

2000:	\$15,443
2001:	\$13,848
2002:	\$3,363
2003:	\$4,722
2004:	\$649
2005:	\$873

[100] As set out above, Ms. James' work history was as a retail clerk and cashier, and as a server, bartender and chamber maid. Her résumé from early 2006 indicates an objective of employment in the customer service industry.

[101] It is likely that when her children were older she would have gone back to work. At the time of her death, she had some materials indicating an interest in completing her GED and a volunteer package from Victim Services. Her mother describes her as being good with people and liking to help people. Mr. Cornet said that she was thinking of home care work but she had not set up any plans. There is no evidence that when she died in August 2006 she had any immediate plans to return to school or any job prospects.

[102] I find it unlikely given her past history of education, earnings and employment together with her circumstances at the time of her death that she would have pursued education and training to the level of becoming a care-aid, which Mr. Benning described as a designation of a Licensed Practical Nurse with a salary from \$27,000 to \$43,000 per year.

[103] Based on my findings that the likelihood of future employment and earning capacity of Ms. James is not in accord with the assumption provided to Mr. Benning,

I accept Mr. Hildebrand's estimate of \$19,000 per year as the most reliable base from which to assess the impact of future economic loss.

[104] Mr. Benning agreed that a 12% reduction should be applied to his estimates of past and future financial support due to the inclusion of two factors: that Ms. James had been in receipt of child support from the two fathers of her oldest children prior to her death, and that after her death those two children no longer reside with Mr. Cornet, thus leaving more income for himself as a result of the reduced family expenses.

### ***Separation Contingency***

[105] In calculating the estimates of past and future losses of financial support and household services, Mr. Benning applied four contingencies. The scenario of most relevance and applicability to the circumstances is the fourth contingency, which is an estimate subsequent to divorce and remarriage. This contingency assumes that Mr. Cornet and Ms. James would separate and Mr. Cornet would remarry.

[106] Both economists state that the remarriage and divorce contingencies, in their estimates, are based on legal marriages and divorces only. They agreed that including common-law relationships and separations would increase the contingencies. The statistical contingency should therefore be increased due to the fact that Ms. James and Mr. Cornet were in a common-law relationship.

[107] Neither economist was aware of the volatile nature of the relationship of Mr. Cornet and Ms. James, the circumstances of their relationship at the time of her death, or of Mr. Cornet's common-law relationship with Ms. Rachel Cammidge since May 2010. Thus in addition to the general contingency accounted for in the table amounts and the statistical increase for common-law relationships, the circumstances of the Cornet-James relationship and the present relationship of Mr. Cornet present specific contingencies. The Court must consider the specific circumstances of the parties. As Madam Justice Bennett wrote in the recent decision of *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 92:

[92] In assessing past wage loss and loss of future income-earning capacity, a trial judge must take into consideration any contingencies which affect the loss. General contingencies may be positive, such as the possibility of promotion, or negative, such as the possibility of lay-off. Additionally, there may be specific contingencies that arise on the particular facts of the case.

[Emphasis added].

[108] At the time of Ms. James' death in August 2006, she and Mr. Cornet had been living together again for three weeks after the separation from January, 2006. On the limited evidence available regarding this period I cannot come to the conclusion that they had then commenced a new marriage-like relationship. Although this does not impact on the finding that Mr. Cornet is a spouse, it is of considerable significance in determining the economic losses to Mr. Cornet.

[109] I am satisfied that Mr. Cornet is entitled to an award of damages. The amounts estimated for the general contingency for future losses in the "Subsequent to Divorce and Remarriage Contingencies" in the Benning report are applicable with increased specific contingencies for the present circumstances of Mr. Cornet.

[110] It is possible that Mr. Cornet may have resumed the previous marriage-like relationship with Ms. James and he would have suffered the losses claimed. However, the projections of the economists must be discounted to take these facts into account. It is not possible to deal with these matters with precision. In the circumstances I will discount past and future losses by 50% to take into account common-law relationships generally, the volatile common-law relationship of Mr. Cornet and Ms. James from 2003 to 2006, and the fact that at the time of her death they had recently reconciled and it is not known if the relationship at that time was a marriage-like relationship.

### ***New Relationship Contingency***

[111] It is the submission of the third party that, due to the relationship with Ms. Cammidge, no amount should be awarded for future loss of financial support or future loss of household services. The case of *Skelding v. Skelding*, (1994), 95 B.C.L.R. (2d) 201 (C.A.), is cited in support. As Mr. Justice Gibbs wrote at para. 20:

As to the first head, there is no evidence that the housekeeping services provided to the children since the remarriage on April 7, 1990 are or will be any less, by any standard of measurement, than those provided prior to the death of the mother. Accordingly there is no factual foundation for the future loss award. It must be set aside.

At para. 24 he added that “[w]here the court can proceed on the footing of reality rather than speculation it should prefer the former”. Here, in the third party’s submission, the reality is that Mr. Cornet has effectively replaced the contributions he would have received in this area from Ms. James with his new common-law partner.

[112] Given his history of separations from Ms. James and the number of relationships in the past 5 years, it cannot be said with statistical certainty that Mr. Cornet will remain in any marriage or common-law relationship indefinitely. In deriving the remarriage contingency the Benning report assumed that the probability that Mr. Cornet will remarry or enter into another common-law relationship is equivalent to the average contingency or remarriage applicable to B.C. males as derived from the Statistics Canada Remarriage Tables. As Mr. Cornet exceeded the statistical probability for remarriage a higher contingency should be applied. Statistically, he will also likely exceed the probability for divorce so that some loss will occur in the future.

[113] Since the death of Ms. James in August, 2006, Mr. Cornet has had three relationships, including the common-law relationship with Ms. Cammidge who is separated from her husband. She stays home with the children and takes care of the house and domestic duties of the family. They live with her seven year old son and Klay, who is now six years old. Ms. Cammidge has no plans to divorce her husband and she and Mr. Cornet have no plans to marry. At the present time however Mr. Cornet has no financial loss.

[114] The assessment of damages for future losses of household services is reduced by a further amount of 25% for this contingency to reflect the present reality of Mr. Cornet’s new relationship.

[115] The remarriage contingency also assumes that the new partner will provide the same level of support as the deceased. If the new partner provides more or less support an adjustment would be required. The evidence indicates that Mr. Cornet's present relationship with Ms. Cammidge provides a similar level of support in that she has assumed the role of caregiver for the children and does not earn income or work outside the family home. No adjustment is therefore required in this regard.

### **Assessment**

[116] With regard to the assessment of past loss of financial support, Mr. Benning estimates \$6,521. Although the assumption that Ms. James would earn \$10,000 per year until September 2009 is reasonable, the amounts attributed to her for the balance of 2009 and for 2010 are based on the assumption that she would earn the salary of a care-aid which is not an assumption which is reasonable in the circumstances set out above. It is agreed that the 12% reduction should be applied. The 50% reduction is also applied. I therefore assess damages for Mr. Cornet's past loss of financial support at \$2,800.

[117] Past loss of household services is estimated by Mr. Benning at \$39,715. From this amount the 50% reduction is applied. I assess damages for Mr. Cornet's past loss of household services at \$20,000.

[118] Future loss of financial support must take into account the 12% reduction as agreed, the reduction of Ms. James' future income from that which was assumed as a care-aid, and must also take into account the 50% reduction. The amount claimed was \$36,378. Ms. James future earnings are estimated at two thirds of the amounts based on the assumption in the plaintiff's report. From that, 12% and 50% is to be deducted. \$11,000 is assessed under this heading.

[119] Future loss of household services is estimated at \$101,539. From this there will be reductions of 50% and 25% as set out above. I assess damages under this heading at \$38,000.

**Loss of Inheritance**

[120] Ms. James had accumulated very little in assets during her life. With her future employment prospects and the needs of a family it is unlikely that there would be a significant inheritance to be left in the future. The contingency for the nature of their relationship is also to be applied here. I assess a nominal amount of \$3,500 to Mr. Cornet for loss of inheritance.

**Loss of Love, Guidance, and Affection – Mrs. Sandi James**

[121] In order to award damages under this heading there must be guidance which was provided and is now lost.

[122] Mrs. Sandi James testified that she relied on her eldest daughter Secret for guidance in their frequent telephone calls and in their visits. Although it is clear that Secret relied more on her mother, I accept the evidence of Mrs. Sandi James that she received guidance from Secret James on an ongoing basis. I assess damages for Mrs. Sandi James in the amount of \$7,500.

**Parents' Claim for Economic Loss**

[123] The parents of Ms. James claim losses of \$20,000 each for their economic loss as a result of their daughter's death.

[124] Mr. and Mrs. James both testified they expected that Secret as their eldest daughter would be the one who would take care of them if needed as they aged. Their expectation in this regard is a reasonable one based on their conversations with Secret, although the reality of reliance on a daughter who was also a mother of three children living in a different area of the province may have limited her ability to assist her parents.

[125] Mr. James worked during the summer at Island Valley Copper in Logan Lake. When he was there, he lived with Ms. James and would eat meals with her and the family. This was a financial benefit to him which was lost on her death.

[126] I conclude that a nominal award to each of the parents is justified. I assess the loss to Mrs. Sandi James at \$5,000 and to Mr. James at \$7,500.

### **Special Damages**

[127] There will also be an award for expenses incurred in the immediate aftermath of the accident and the costs associated with the funeral services and burial. The costs for Mr. and Mrs. James to attend the various court proceedings involving the Defendant Mr. Baylen Gillis are not appropriate damages in this action.

[128] There is therefore an award of \$2,075.59 for special damages.

### **Conclusion**

[129] In summary, I award the following amounts of damages:

<b>Mr. Cornet</b>	Past loss of financial support	\$2,800.00
	Past loss of household services	\$20,000.00
	Future loss of financial support	\$11,000.00
	Future loss of household services	\$38,000.00
	Loss of inheritance	\$3,500.00
<b>Mrs. Sandi James</b>	Loss of guidance	\$7,500.00
	Economic loss	\$5,000.00
<b>Mr. Roy James</b>	Economic loss	\$7,500.00
<b>Special Damages</b>		\$2,075.59

[130] The awards for past loss of financial support and past loss of household services are prior to an allowance for court ordered interest.

[131] The *Family Compensation Act* provides in s. 3 that the total award must be assessed and then, once any costs not recovered from the Defendant have been subtracted, distributed among the parties as the court directs. As this was not addressed by counsel, if further orders are required the matter can be brought back before me.

[132] Unless there are matters of which I am not aware, the Plaintiffs are entitled to costs on Scale B.

“Watchuk J.”