SUPREME COURT OF YUKON

Citation: *Fuller* v. *Schaff et al,* 2009 YKSC 10 Date: 20081009
Docket S.C. No.: 05-A0075
Registry: Whitehorse

BETWEEN:

CHRISTOPHER LANCE FULLER

Plaintiff

AND:

DANIEL RICHARD SCHAFF, THE COMMISSIONER OF YUKON, HAROLD FRASER and the ATTORNEY GENERAL OF CANADA

Defendants

AND:

THE COMMISSIONER OF YUKON and HAROLD FRASER

Third Parties

Before: Mr. Justice L.F. Gower

Appearances:

Debra Fendrick	Counsel for the Plaintiff
Richard Buchan and Anne McConville	Counsel for the Defendants Daniel Richard Schaff and the Attorney General of Canada
Zeb Brown	Counsel for the Defendants the Commissioner of Yukon and Harold Fraser and the Third Parties

RULING ON QUALIFICATIONS OF GRANT AUNE

[1] GOWER J. (Oral): This is an action involving a motor vehicle accident where the plaintiff was following a snowplow driven by one Harold Fraser, an employee of the Yukon Government at the time. Mr. Fraser was driving northbound on the Alaska Highway near Marsh Lake. One of the defendants, Mr. Schaff, was driving

southbound. He passed by Mr. Fraser. He testified that he became engulfed in a cloud of snow and, ultimately, a collision with the plaintiff, Mr. Fuller, in the northbound lane.

[2] Mr. Buchan is counsel for Mr. Schaff and the Attorney General of Canada and tenders Mr. Grant Aune as an expert witness to testify in the areas of accident reconstruction, vehicle policy analysis regarding matters of safety, operation of heavy equipment such as snowplows, and the standard of care in such operation.

[3] Mr. Brown, who is counsel for the Commissioner of Yukon and Harold Fraser, objects to the admissibility of portions of Mr. Aune's written report; specifically at pp. 3 and 4 where Mr. Aune speaks of the standard of care, referring to the professional drivers industry and not the legal standard of care, and at p. 14, where Mr. Aune opines on what should have been in Mr. Fraser's mind after having performed a center sweep with his plow in the southbound lane and then returning to do a further sweep in the northbound lane, which is the context of the motor vehicle accident.

[4] The primary ground for the objection is necessity as referred to in the leading case of *R.* v. *Mohan,* [1994] 2 S.C.R. 9. This case sets out the four criteria for the admissibility of opinion evidence: (1) that the evidence be relevant to some issue in the case; (2) that the evidence is necessary to assist the trier of fact; (3) that the evidence does not violate an exclusionary rule; and (4) that the witness is a properly qualified expert.

[5] In their text *The Law of Evidence in Canada*, 2nd ed. (Markham: Butterworths, 1999), Sopinka, Lederman and Bryant state at p. 16 that “[t]hese criteria for admissibility

are interdependent and may overlap to admit or exclude expert evidence in a particular case." They continue at p. 622 - 623:

> "An expert is usually called for two reasons. The expert provides to the court basic information necessary for its understanding of scientific or technical issues involved in the case. In addition, because the court is incapable of drawing the necessary inferences on its own from the technical facts presented, an expert is allowed to state his or her opinion and conclusions."

[6] Although Mr. Brown did not specifically raise the issue of relevance, I would like to address that briefly as it does overlap, in my view, to some degree with the criteria of necessity. *Mohan, supra*, at para. 18 speaks of a two-step approach to relevance. First the Court needs to determine whether the evidence is logically relevant, insofar as it relates to a fact in issue and tends to establish that fact, and secondly, there must be some type of a cost-benefit analysis. In regard to the second step, Sopinka J., at para. 18, speaking for the Supreme Court of Canada, said as follows:

> "Cost in this context is not used in its traditional economic sense but rather in terms of it's impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability."

[7] With respect to necessity, Sopinka J., at paras. 21 and 22, referred to the earlier Supreme Court of Canada case of *R.* v. *Abbey*, [1982] 2. S.C.R. 24, and expressed the view that it is not sufficient that the evidence simply be "helpful," as that sets too low a standard. The Court held that the opinion must be necessary in the sense that it provides information which is likely to be outside the experience or knowledge of a

judge and jury, and that it allows the fact finder to appreciate the facts due to their technical nature or to form a correct judgment on a matter, if ordinary persons are unlikely to do so without the assistance of such experts. Although Sopinka J. stated that helpfulness was too low a standard, he also went on to say, “However, I would not judge necessity by too strict a standard.” Finally, he said, at para. 24, that there is a concern inherent in the application of this criterion, that experts not be permitted to usurp the function of the trier of fact.

[8] Mr. Brown submitted the case of *British Columbia (Public Trustee)* v. *Asleson*, [1993] B.C.J. No. 837, 102 D.L.R. (4th) 518 (C.A.), where Southin J., speaking for the majority of the British Columbia Court of Appeal, spoke at paras. 30 through 33 about motor car negligence cases. There she said that those cases differ significantly from all other actions in which one person alleges that the acts or omissions of another, in breach of a duty of care, have done him injury. She spoke of motor car operation and the rules of the road as an "aspect of ordinary life". She went on to say that experts are not called to prove the standard of care which is appropriate, because each judge can bring into court his or her own notions of what constitutes driving with reasonable care. At para. 33, she said, “To put it another way, in motor car cases the judge is his or her own expert.” However, Southin J. also continued:

> “That is not to say that there could not be expert evidence on the proper way, for instance, for the driver of a mammoth transport vehicle to drive.”

[9] With respect to Mr. Aune's report, I tend to agree with Mr. Brown that most of what he says at pp. 3 and 4 under the title "Standard of Care" are arguably generic statements that professional drivers, especially those operating snowplows, need to

exercise special care because of the inherent risks arising from their activities and in the conditions in which they operate. However, there is no issue that Mr. Aune has a formidable resumé of experience within the areas of accident reconstruction and motor vehicle safety, especially regarding heavy commercial vehicles, including snowplows. He has particular expertise assisting municipal governments and private contractors in developing policy manuals regarding standards of care for such operations. It must also be remembered that a significant part of Mr. Aune's opinion relates to the adequacy of certain Yukon Government policies regarding snowplows and operator training, and he makes comments in that regard which, in my view, are intertwined with his expertise regarding the standard of care.

[10] For example, at p. 12 of the report, in discussing the “Snowplowing and Sanding Policy #6.10”, he says:

> “This document meets industry standards related to best practices and deals proactively with potential hazards and situations that can lead to incidents on the highway. The most significant portions which relate directly to this incident are under the operational section dealing with speed.”

Later:

> “The task of snow plowing can also affect friction/traction values due to the dynamics of plowing the snow and the potential for loss of control.”

Still further, on p. 13:

> “When a snow plow is making the center line pass it has the potential to encroach into the oncoming lane and if the lane markings are obscured, this could also be an issue for the oncoming traffic. By slowing down the snow plow operator has more distance and time to react to potential hazards.”

[11] Also, Mr. Aune opines on the nature of the motor vehicle accident and the extent to which Mr. Fraser may have contributed to it. At p. 14, he states:

> "In this incident, Mr. Fraser had plowed the road southbound to Jakes Corner on his southbound trip and needed to understand that any traffic which is southbound as he made his northbound pass will tend to follow the path he plowed to maintain equal traction on both sides of the vehicle. He needed to be aware of this fact and use extra caution in road position and speed as he made the second center line pass."

At p. 15, Mr. Aune opines:

> "The snowplow operator (Mr. Fraser) created a situation which contributed to Mr. Schaff's loss of control and encroachment into the northbound lane."

And later:

> "Mr. Fraser was making his return north bound center line pass and failed to adjust his speed upon entering into a blind right hand curve. Mr. Fraser's speed and lane position combined with the limited visibility of the curve, created a situation which caused Mr. Schaff to make a rapid (less than 4 seconds of perception time) adjustments to his lane position and speed."

Still further, in talking about traction and friction issues:

> "Snowplow operators must take this into consideration when they make their return centre line pass because there will be a tendency for traffic to be hugging the center line where the snowplow made its first pass."

And finally:

> "Speed is a critical factor in this situation, and must be considered, particularly on the return centre line pass."

[12] Once again, it seems to me that Mr. Aune's opinions here are inextricably related to his expertise on standard of care. Thus, I am persuaded by Mr. Buchan's position that this is one of those cases where it would be unwieldy at best, and unfair at worst, to

attempt to surgically excise those portions of the report regarding the standard of care and to prevent Mr. Aune from giving evidence on the standard of care when it would seem to form a significant basis for the other opinions he expresses. Indeed, Mr. Brown fairly concedes that he is not saying here that the operation of snowplows are within the realm of common experience.

[13] In the result, I am satisfied that Mr. Aune's evidence on standard of care is both relevant and necessary, and I am going to allow it.

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GOWER J.