

SUPREME COURT OF YUKON

Citation: *Fuller v. Schaff et al*, 2009 YKSC 9

Date: 20081007
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

Richard Buchan and

Anne McConville

Zeb Brown

Counsel for the Plaintiff

Counsel for the Defendants Daniel Richard Schaff
and the Attorney General of Canada

Counsel for the Defendants the Commissioner of
Yukon and Harold Fraser and the Third Parties

RULING ON QUALIFICATIONS OF TIMOTHY LEGGETT

[1] GOWER J. (Oral): Just by way of context, this is a case involving a motor vehicle accident in which the plaintiff was following a snow plow, being driven by an employee of the Government of Yukon, around a corner on the Alaska Highway adjacent to Marsh Lake just south of the Marsh Lake garbage dump road access. The

defendant, Mr. Schaff, was driving an oncoming vehicle and, some point after passing the snow plow, which was moving northbound, Mr. Schaff, being southbound, lost control of his vehicle, entered the northbound lane and had a collision with the plaintiff.

[2] Mr. Schaff is represented by counsel for the Attorney General of Canada, pursuant to what I understand to be reciprocal legislation which applies in this case because Mr. Schaff was, at the time of the accident, employed by the U.S. Air Force.

[3] Mr. Buchan is one of the two counsel representing the Attorney General of Canada, and he is tendering as part of his case an expert report which is entitled "Factors Affecting Snow Cloud Generation by Snow Plow," prepared by Mr. Tim Leggett, who is a professional engineer and accident reconstruction engineer.

[4] We are at the stage in this trial of assessing the qualifications of Mr. Leggett to express an expert opinion on that subject. More specifically, at p. 1 of the report which has been provided to me to review in anticipation of a hearing on its admissibility, Mr. Buchan asked Mr. Leggett:

"... to investigate this matter for the purposes of establishing the effect of a "snow cloud" created by plowing efforts and how this may have affected visibility for following and approaching drivers."

[5] Mr. Brown is counsel for the Yukon Government and objects to Mr. Leggett's qualifications to express opinions in this area, and in particular with respect to certain statements that are made in the report, which I will quote for the sake of completeness.

[6] At p. 12, Mr. Leggett says:

“The amount of pressure drop is inversely related to the intensity of the turbulent flow, and resultantly, the visibility obstruction created by the snow cloud. In other words, as the pressure drops, the intensity of the snow increases.”

Later:

“In other words, at greater plow speeds, greater snow splash is expected. Both splash and snow clouds, therefore, increase in intensity with increased plow speed.”

[7] Mr. Brown, in his submissions, has stated that his interpretation of this language is that it is tantamount to saying that the size of the snow cloud increases. In support of that submission he also drew my attention to a passage at p. 9 of the report.

“Since the snow cloud is associated with the turbulent flow around the plow, it follows that a greater snow cloud is created by higher plow speeds, as greater turbulence is associated with higher speed for any body moving through a medium.”

[8] However, it must be remembered that Mr. Leggett also qualified his opinion at p. 7, prior to the comments that I have just quoted, by stating:

“It is impossible to estimate precisely the duration and intensity of such a snow cloud; however, it is clear from the literature that a substantial visibility reduction of at least 5 seconds, and more likely tens of seconds, would have existed.”

[9] The law in this area begins with the decision in *R. v. Mohan*, [1994] 2 S.C.R. 9.

At para. 17 the Court stated:

“Admission of expert evidence depends on the application of the following criteria:

(a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; (d) a properly qualified expert.”

It is paragraph (d) that we are dealing with at this stage.

[10] In their text, *The Law of Evidence in Canada*, 2nd ed. (Markham: Butterworths, 1999), Sopinka, Lederman and Bryant state at p. 618 that the criteria for *Mohan* that I have just quoted "... are interdependent and may overlap to admit or exclude expert evidence in a particular case."

[11] In dealing with the issue of the qualifications of an expert, *Mohan, supra*, states at para. 27:

"... the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify."

[12] In *The Law of Evidence in Canada*, the authors state with respect to this issue 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. The expert's usefulness in this respect is circumscribed by the limits of his or her own [experience]. Before a court will receive the testimony on matters of substance, it must be demonstrated that the witness possesses special knowledge and experience going beyond the trier of fact. The test of expertise so far as the law of evidence is concerned is skill in the field in which the witness' opinion is sought."

The text then goes on to quote the case of *Rice v. Sockett* (1912), 8 D.L.R. 84 (Ont. C.A.), where Falconbridge C.J. was quoted as saying at para. 22:

"The derivation of the term "expert" implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether

such knowledge has been acquired by study of scientific works or by practical observation.”

This is a quote within a quote, originally from *State v. Davis* (1899), 33 S.E. Repr. 449, and cited in *Words and Phrases Judicially Defined*, vol. 3, p. 2595.

[13] As I noted, there is an overlap between the four *Mohan* factors, and the overlap that is applicable here relates to the issue of necessity in assisting the trier of fact. In that regard, *Mohan* quoted the earlier case of *R. v. Abbey*, [1982] 2 S.C.R. 24, at para. 21, where Justice Dickson spoke about “scientific information which is likely to be outside the experience and knowledge of a judge or jury.”

[14] Now, having reviewed the report of Mr. Leggett in anticipation of there being an issue on its admissibility, I am persuaded that it contains scientific information which is likely outside my experience as a judge and may be of assistance to me in understanding the scientific and technical issues involved in this case, including the effect of certain forces in the context of a motor vehicle collision in winter road conditions involving a snowplow.

[15] I credit Mr. Brown with making a valiant attempt at trying to limit the scope of this expert’s expertise in the manner in which he has done, and I think he has said everything that could be said on that point in his submissions in this objection. The difficulty I have with the submissions at the end of the day is that Mr. Leggett does not clearly purport to opine on the size, or shape, or necessarily the location of the snow cloud which he concludes to have been generated in this case.

[16] Notwithstanding the way the question is worded by Mr. Buchan, at p. 1 of the report, talking about the effect on visibility for following and approaching drivers, the title of the report and, I understand, the area in which Mr. Buchan seeks to qualify the expert is, "Factors Affecting Snow Cloud Generation by Snow Plow." And I repeat Mr. Leggett's concession that it is impossible to estimate precisely the duration and intensity of such a snow cloud.

[17] So at the end of the day, the balance, in my view, tips in favour of finding that Mr. Leggett, whose qualifications I have not gone into but are set out in great detail in Appendix A of the report, are sufficient to qualify him as an expert in the area suggested by Mr. Buchan. If Mr. Brown feels that, in the course of his testimony, Mr. Leggett is going beyond the scope of his expertise, he is free to repeat his objection, and certainly he is free to cross-examine him on the issues raised in his submissions during this objection.

[18] So that is my ruling on the issue of qualification.

[19] Now, are there further issues with respect to relevance, necessity and so on?

[20] MS. FENDRICK: Not from plaintiff, My Lord.

[21] THE COURT: Pardon me?

[22] MS. FENDRICK: Not from the plaintiff, My Lord.

[23] THE COURT: Okay. Mr. Brown?

[24] MR. BROWN: Well, I did have a further submission on necessity. Perhaps I should just go ahead and tell you what my submission is, if you'll hear it.

[25] THE COURT: Sure.

[FURTHER SUBMISSIONS ON NECESSITY BY MR. BROWN]

[26] THE COURT: So for the record, you are withdrawing your objection based on necessity?

[27] MR. BROWN: I'll do that so that we can proceed.

[28] THE COURT: Thank you. For the record, Ms. Fendrick, do I understand that you take no issue with the admissibility of the report on any ground?

[29] MS. FENDRICK: Yes, particularly following this last discussion, My Lord, and my submissions would be as to weight.

[30] THE COURT: Right.

[31] MS. FENDRICK: As opposed to admissibility.

[32] THE COURT: Thank you for that clarification.

GOWER J.