SUPREME COURT OF YUKON

Citation: *Fuller* v. *Schaff et al.,* 2009 YKSC 58

Date: 20090826
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
(Costs)

INTRODUCTION

[1] This is an application to determine the payment of taxable court costs by the defendants to the plaintiff. The plaintiff, Mr. Fuller, was successful at trial in proving that the negligence of the defendants caused him loss and damage in relation to a motor

vehicle accident on February 1, 2005, along the portion of the Alaska Highway skirting Marsh Lake. Mr. Fuller's pick-up truck collided with Mr. Schaff's vehicle just after the latter had passed by an oncoming Yukon Government snowplow driven by Mr. Fraser. Mr. Fuller had been following the snowplow which was producing a significant snow cloud in its wake. In my Reasons for Judgment following the trial, cited at 2009 YKSC 23, I found Mr. Schaff 80% responsible for Mr. Fuller's damages and the Commissioner of Yukon and Harold Fraser (the "Government defendants") 20% responsible for those damages. The plaintiff's counsel has submitted a draft Bill of Costs claiming party and party costs under Appendix B of the *Rules of Court* at Scale C, which is for "matters of more than ordinary difficulty". This is opposed by both Mr. Schaff and the Government defendants.

ISSUES

[2] The issues on this application are twofold:

1. What is the correct scale of costs?
2. How should the costs be apportioned between Mr. Schaff and the Government defendants?

ANALYSIS

Issue #1: Appropriate Scale of Costs?

[3] In Appendix B to the *Rules of Court*, paragraphs 2(a) through 2(c) state as follows:

> "(a) Where a court has made an order for costs, it may fix the scale, from Scale A to Scale C in subsection (b), under which the costs will be assessed, and may order that one or more steps in the proceeding be assessed under a different scale from that fixed for other steps.
>
> (b) In fixing the scale of costs the court shall have regard to the following principles:

> (i) Scale A is for matters of little or less than ordinary difficulty;
>
> (ii) Scale B is for matters of ordinary difficulty;
>
> (iii) Scale C is for matters of more than ordinary difficulty.
>
> (c) In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:
>
> (i) whether a difficult issue of law, fact or construction is involved;
>
> (ii) whether an issue is of importance to a class or body of persons, or is of general interest;
>
> (iii) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied."

[4] The significance of the difference between Scale B and Scale C is that the former allows for $110 to be claimed for each unit allowed on an assessment, whereas the latter allows the successful party to claim $170 per unit.

[5] Prior to December 31, 2006, costs could be assessed on a Scale of 1 to 4, with Scale 3 being for matters of ordinary difficulty or importance and Scale 4 for matters of more than ordinary difficulty or importance. Therefore, caselaw referring to Scale 4 is applicable to what is now Scale C.

[6] One of the leading cases on determining the appropriate scale of costs is *566935 BC Ltd. dba Westcoast Resorts* v. *Allianz Insurance Company of Canada*, 2005 BCSC 1759. In that case, Parret J., held at paras. 4, 6 and 7:

> "4 To justify an award of costs on Scale 4, the trial judge must find either that the action involves legal issues of

> more than ordinary importance, or that the gathering of the facts and the relevant law involved more than ordinary difficulty. Either finding may support such an award. See *Bradshaw Construction Ltd.* v. *Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 at 318 and *National Hockey League* v. *Pepsi Cola Canada Ltd.* (1993), 102 D.L.R. (4th) 80 (B.C.S.C.) affirmed on other grounds 122 D.L.R. (4th) 121
>
> …
>
> 6 Importance as a factor is not considered in terms of importance to a particular litigant but rather importance on a broader basis to the public generally or to litigation of a similar nature (*Bradshaw*, supra, at p. 317).
>
> 7 The factors to be considered on such an application includes:
>
> (a) the length of trial;
>
> (b) the complexity of issues;
>
> (c) the number and complexity of pre-trial applications;
>
> (d) whether the matter was hard fought;
>
> (e) number and length of examinations for discovery;
>
> (f) number and complexity of expert reports; and
>
> (g) the extent of effort required in the collection of and proof of facts."

[7] I will address each of the factors to be considered, as set out above.

Length of Trial

[8] To date, the trial has taken 10 ½ days, with eight days devoted to the presentation of evidence and two evidentiary rulings; two days of submissions on liability and damages; ½ day of submissions on the current issue of costs. While that may not be an overly lengthy trial in the experience of courts in southern Canada, in this jurisdiction it is longer than the average trial.

Complexity of Issues

[9] Mr. Schaff's counsel points out that there was only a single cause of action in this matter and that in many respects it was prosecuted and defended as a routine personal injury case arising out of a motor vehicle accident. In large part, I would have to agree with that submission, subject to a few notable exceptions.

[10] Overall, there were three groups of issues as outlined in my Reasons for Judgment, 2009 YKSC 23, at para. 5. The first major issue was whether Mr. Schaff had discharged his evidentiary burden by explaining that the accident was caused by the snow cloud thrown up by the snowplow and whether that explanation was equally consistent with the absence of negligence on his part as with his negligence. The second group of five sub-issues dealt with the action by Mr. Fuller against the Government defendants and the counterclaim by Mr. Schaff, principally dealing with the duty of care and the standard of care. The third general group of four sub-issues all related to Mr. Fuller's damages.

[11] One of the issues I found to be quite complex related to the question of whether the Government defendants owed a duty of care to Mr. Fuller and Mr. Schaff. At the close of the trial, counsel for the Government defendants made submissions on what I have referred to as the "policy" and the "statutory bar" defences. Counsel for Mr. Schaff objected to those defences being raised at that point, as neither of the defences, nor the material facts in support of them had been pled by the Government defendants. Counsel for Mr. Fuller also objected on those grounds, but only with respect to the statutory bar defence. Those objections necessitated an adjournment to allow all parties to provide further written submissions on what was referred to as the "pleadings issues". By my

count, the submissions of all parties on these issues totaled some 37 pages, including initial submissions from each of the three parties, a reply submission by the Government defendants, a rebuttal to that reply by Mr. Schaff and a sur-reply submission by Mr. Fuller. The parties also referred to numerous related authorities. I issued a ruling on the applicability of the policy and statutory bar defences, cited at 2009 YKSC 22, in a written decision of some 22 pages. Part of that ruling involved a determination that it is unnecessary to consider the existence of a common law duty of care when a statutory duty of care exists. That, I believe, is the first time the issue has been addressed in the Yukon. In addition, the ruling dealt with a relatively novel question of whether settlement privilege had been waived with respect to a communication made by counsel for the Government defendants in the context of a without prejudice settlement conference.

[12] Another issue which I found to be relatively complex was the question of whether the Insurance Corporation of British Columbia ("ICBC") was entitled to make a subrogated claim against the defendants for the no fault benefits it paid to Mr. Fuller. Unfortunately, the relatively scant attention paid to this question by counsel for Mr. Fuller and counsel for Mr. Schaff did not make my attempt to resolve it any easier.

[13] The last issue which I found to be somewhat complex was the question of Mr. Fuller's loss of future income. That was due in part to the somewhat confusing evidence from Mr. Fuller as to his intentions regarding his business and his prospective retirement date. It was also complicated by an expert report prepared by an economist, Douglas Hildebrand, and tendered by Mr. Schaff's counsel. Mr. Fuller's counsel did not require Mr. Hildebrand to attend the trial for the purposes of cross-examination and Mr. Schaff's counsel did not call him as a witness. While I recognized that was likely with a view to

saving trial costs, it created a disadvantage for me, as there was no opportunity for Mr. Hildebrand to elaborate on the concepts and approaches he employed. As a result, I found it challenging to understand certain aspects of his report and its impact on what was already a relatively complex factual area.

Number and Complexity of Pre-trial Applications

[14] This was not a factor in this case, as there were no pre-trial applications *per se.* Although four pre-trial orders were issued, one of those was without notice and the other three were by consent.

Whether the matter was hard fought?

[15] I have no hesitation in concluding that this matter was hard fought. The dispute over the pleadings issues is perhaps the best example of the degree of litigiousness in this dispute. Indeed, although counsel for Mr. Schaff submitted that this case was not necessarily a “slam dunk” for the plaintiff, I would nevertheless suggest that it was one which was eminently amenable to settlement. Having said that, I recognize that the defendants are not to be penalized for forcing the plaintiff to prove his case and that whether a matter is hard fought is not, on its own, sufficient reason for concluding that it is of more than ordinary difficulty.

Number and Length of Examinations for Discovery

[16] The number and length of examinations for discovery in this case were significant, and included:

a) the examination of Mr. Schaff by counsel for Mr. Fuller and the Government defendants on December 4, 2006, at 115 pages;

b) the examination of Mr. Fuller by counsel for Mr. Schaff and the Government defendants on December 4 and 5, 2006, at 153 pages;

c) the examination of Mr. Fraser by counsel for Mr. Schaff and Mr. Fuller on December 5, 2006, at 93 pages; and

d) the examination of Stuart Purser by counsel for Mr. Schaff and Mr. Fuller on March 3, 2008, at 147 pages.

[17] There were also a significant number of read-ins from these examinations for discovery introduced as evidence at the trial.

Number and Complexity of Expert Reports

[18] There were ten expert reports tendered at trial and lengthy cross-examinations were conducted of five of the eight expert witnesses. The reports were as follows:

i) Visibility and Safe Following Distance by Tim Leggett, P. Eng.;

ii) Factors affecting snow cloud generation by Tim Leggett, P. Eng.;

iii) Rebuttal report regarding safe following distance by Kurt Ising, P. Eng.;

iv) Standard of Care and Causation by Grant Aune;

v) Costs of Future Care by Kevin Turnbull, economist;

vi) Estimate of Earnings Loss by Kevin Turnbull;

vii) Medical Assessment by G.H. Hirsch (subsequently updated);

viii) Cost of Future Care by Wade Scoffin, occupational therapist;

ix) Functional Capacity Evaluation by Mandy McClung; and

x) Cost of Future Care/Loss of Future Earnings by Douglas Hildebrand (Columbia Pacific Consulting), economist.

In particular, I found the expert evidence on the reconstruction of the accident and the opinions as to the loss of future earnings to be quite complex.

Extent of Effort Required in the Collection of and Proof of Facts

[19] In my view, there was a significant amount of time and effort expended in the retention of experts with a view to reconstructing the facts of the motor vehicle accident and in determining the likely impact of the snow cloud. There was also a good deal of examination for discovery in that regard. As well, much attention was paid to the “Silent Witness” data, in which an onboard computer recorded the speed and functioning of the snowplow before and after the time of the accident.

Conclusion on Issue #1

[20] I recognize that the factors listed in *Allianz Insurance*, cited above, are to be considered as a whole and that no single factor should be determinative of whether a matter is considered to be of more than ordinary difficulty. Having said that, keeping in mind the wording of para. 2(3)(a) of Appendix B, quoted above at para. 3, I have indicated that there were several issues of law and fact which I found “difficult” in this case:

(a) the accident reconstruction;

(b) the impact of the snow cloud;

(c) the loss of future earnings;

(d) the waiver of settlement privilege;

(e) the subrogated claim by ICBC; and

(f) the whether a common law duty of care applies when a statutory duty of care already exists.

Finally, in the context of para. 2(3)(b) of Appendix B, the determination of the duty of care issue, given that it has not previously been decided in this jurisdiction, may well be one of importance or general interest to those using Yukon highways.

[21] For all these reasons, I am satisfied that the plaintiff should be entitled to his costs at Scale C.

Issue #2: Apportionment of the Costs?

[22] Mr. Schaff's counsel made oral submissions at the costs hearing that this trial was protracted in part because of the defences raised by counsel for the Government defendants relating to the statutory duty of care and the policy-operations dichotomy. These defences were not pleaded and gave rise to the rather voluminous written submissions under what has been termed the "pleadings issues". Mr. Schaff's counsel conceded that this portion of the trial did have some complexity and he submitted that the Government defendants should bear a proportionate amount of responsibility in costs for having caused the trial to be longer than it otherwise might have been.

[23] At the costs hearing, counsel for the Government defendants said that he was taken by surprise by that argument and was not prepared to deal with it. He therefore suggested that I should not consider the submissions I have just referred to by Mr. Schaff's counsel. I reject that suggestion. The submission on this point made by Mr. Schaff's counsel is not unfair or improper and it is one which should reasonably have been anticipated by counsel for the Government defendants.

[24] I pause here to note that I did refuse to accept the written submissions tendered by Mr. Schaff's counsel on the costs hearing, as those were filed just prior to the hearing in contravention of my earlier direction at a case management conference, and also

because of the objection of Mr. Fuller's counsel. I have attempted to disabuse my mind of anything I might have read in those submissions, but I have not rejected anything said by Mr. Schaff's counsel in his oral submissions at the costs hearing.

[25] Pursuant to s. 3 of the *Contributory Negligence Act*, R.S.Y. 2002, c. 42:

> "Unless a judge otherwise directs, the liability for costs of the parties in an action under this *Act* is in the same proportion as their respective liability for the damage or loss."

Thus, unless I direct otherwise, the Attorney General of Canada, on Mr. Schaff's behalf (pursuant to the provisions of the *Visiting Forces Act*, R.S.C. 1985 c. V-2), would be responsible for 80% of Mr. Fuller's taxed court costs, and the Government of Yukon, on behalf of the Government defendants, would be responsible for 20%. However, in my view, there is reason to consider an adjustment to that apportionment. As I stated in my ruling on the applicability of defences, at 2009 YKSC 22, para. 45, there was no apparent justification for the Government defendants not to specifically plead the statutory bar and policy defences. Their failure to do so led to a significant expenditure of additional time and resources by the opposing parties. I have very roughly calculated that additional time to be the equivalent of one day of trial, which, according to Items 24 and 25 of the Tariff, would entitle the plaintiff to claim to total of 15 units. Under Scale C, the unit value is $170, which results in an amount of $2,550. That is just over 5% of the subtotal of costs proposed by Mr. Fuller's counsel of $48,110 (before G.S.T. and disbursements) in her draft Bill of Costs. In my view, it is appropriate that the Government defendants should be additionally responsible for approximately that portion of the overall costs.

[26] If the Government defendants were to pay 20% of the suggested subtotal of $48,110, that would translate to an amount of $9,622. If I add to that the sum of $2,550

for one day of trial, that results in a sum of $12,172, or approximately 25% of the suggested subtotal of $48,110.

[27] Therefore, it seems appropriate to order that the costs be apportioned as between the defendants with the Attorney General of Canada, on Mr. Schaff's behalf, paying 75%, and the Government of Yukon, on behalf of the Government defendants, paying 25%.

POST SCRIPT

[28] One remaining issue was touched upon by Mr. Schaff's counsel and counsel for the Government defendants at the costs hearing, which arises from the counterclaim by Mr. Schaff against the Government defendants for his property damage. Mr. Schaff's counsel submitted that this needs to be resolved before the final order signifying the completion of this trial can be entered. He suggested that the question "should be left open" in case the Attorney General of Canada and the Government defendants can not resolve it. Counsel for the Government defendants seemed content to adjourn that issue. My concern here is that justice for Mr. Fuller should not be delayed any further because of this residual dispute between the defendants. In relative terms, the likely amount of Mr. Schaff's property damage in relation to the $604,206 in total damages which I have awarded to Mr. Fuller would seem quite small. Further, in my Reasons for Judgment, at para. 81, I found Mr. Schaff to be 80% contributorily negligent in his counterclaim against the Government defendants. Therefore, the potential quantum of damages Mr. Schaff is likely to receive for his counterclaim would seem to be almost insignificant in the context of the case as a whole. Therefore, I would strongly urge counsel for the defendants to attempt to resolve this matter as soon as possible. If it cannot be resolved within 30 days

of the date of these reasons, then I direct that the matter be returned before me at the earliest possible date.

Gower J.