COURT OF APPEAL OF YUKON

Citation: *Postma v. Horizon Helicopters Ltd.*, 2016 YKCA 12

Date: 20160930
Docket: 15-YU776

Between:

Jonathan Postma and Raphael Roy-Jauvin

Respondents
(Plaintiffs)

And

Horizon Helicopters Ltd.

Appellant
(Defendant)

And

Paul's Aircraft Services Ltd. and Robinson Helicopter Company Incorporated

Defendants

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Newbury
The Honourable Madam Justice Bennett

On appeal from: An order of the Supreme Court of Yukon, dated March 8, 2016 (*Postma v. Horizon Helicopters Ltd.*, 2016 YKSC 15, Whitehorse Docket 14-A0011)

Counsel for the Appellant:	W.S. Taylor
Counsel for the Respondents:	J. Fiorante, Q.C. J.L. Thornback
Counsel for the Defendant Robinson Helicopter Company Incorporated	D. Fetterly
Place and Date of Hearing:	Vancouver, British Columbia June 24, 2016
Place and Date of Judgment:	Vancouver, British Columbia September 30, 2016

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Bennett

Summary:

On appeal from a stated case in which the judge refused to read into s. 50(4) of the Workers' Compensation Act, S.Y. 2008, c. 12 a cap on liability. The appellant argues the Legislature intended to limit employer liability to the amount payable under the liability insurance policy. Held: Appeal dismissed. The wording of s. 50(4) is clear and unambiguous in its terms. The legislative history does not support the appellant's position. There is no room for this Court to legislate a cap on damages in the insured vehicle exception.

Reasons for Judgment of the Honourable Chief Justice Bauman:

Introduction

[1] This appeal concerns the interpretation of a section in the workers' compensation legislation of Yukon. It qualifies the prohibition of actions by injured workers against other employers and workers where a work-related injury arises from the operation of a vehicle "the operation of which is protected by liability insurance".

[2] In such a case the legislation permits a cause of action and does not expressly limit the worker's recovery to the limits of the applicable insurance policy.

[3] This case asks: in applying the modern rules of statutory interpretation, should the court create a cap on recovery and thereby fill the alleged lacuna in the legislation?

[4] For reasons that follow, I would decline to engage in such law making.

Facts

[5] On 10 July 2012, the respondents, Jonathan Postma and Raphael Roy-Jauvin, were collecting grizzly bear hair samples as part of their work for the Yukon Government when they were injured in a helicopter accident. Mr. Postma and Mr. Roy-Jauvin were passengers at the time of the accident.

[6] The appellant, Horizon Helicopters Ltd. ("Horizon"), was the registered owner of the helicopter. The helicopter was piloted by Paul Rosset. Horizon paid Paul's

Aircraft Services Ltd. (“PAS”), a company wholly-owned by Rosset, for Rosset’s services as pilot. Horizon purchased liability insurance for the helicopter, and that liability insurance was in place at the time of the accident.

[7] PAS was not a registered employer with the Workers’ Compensation Health and Safety Board (the “Board”), and PAS did not pay assessments to the Board. Horizon included the amounts it paid to PAS as part of its total assessable payroll return that it remitted to the Board.

[8] Section 50 of the *Workers’ Compensation Act*, S.Y. 2008, c. 12 (the “*Act*”) provides:

> 50(1) No action lies for the recovery of compensation and all claims for compensation shall be determined pursuant to this Act.
>
> …
>
> (3) If a worker suffers a work-related injury and the conduct of an employer who is not the worker’s employer, or of a worker of an employer who is not the worker’s employer, causes or contributes to the work-related injury, neither the worker who suffers the work-related injury, nor their personal representative, dependent, or employer, has any cause of action against that other worker or other employer.
>
> (4) Subsection (3) does not apply when the work-related injury arose from the use or operation of a vehicle.

[9] Section 3(1) of the *Act* provides that: ““vehicle” means any mode of transportation the operation of which is protected by liability insurance”.

[10] Counsel for Horizon sought various determinations from the Board. The Board confirmed by letter that s. 50(4) would allow a claim by the respondents against Horizon to proceed.

[11] In a stated case, Horizon sought an interpretation of s. 50(4) that limits the quantum of recovery available in a claim under s. 50(4) to the amount payable under the liability insurance policy.

[12] Horizon argued that “protected by liability insurance” means that s. 50(4) only applies where there actually is an insurance policy in place (not just where one is

required). Horizon submitted that while the *Act* is silent on what may occur when an insurance policy is insufficient to meet an award of damages commenced under s. 50(4), the obvious intention is that liability insurance money, rather than funds of the employer, will be relied upon to pay damages.

Decision Under Appeal

[13] The judge found that there was no ambiguity in the wording of the provision. He held that the grammatical and ordinary meaning of s. 50(4), read together with the s. 3(1) definition, is that s. 50(4) defines an exception to the statutory bar to civil action. It makes no reference to the maximum quantum of damages available in such a court action. The meaning advanced by Horizon would require adding words such that s. 50(4) also sets a cap on civil liability at the level of existing liability insurance coverage. The judge found that reading in such a cap is too great a leap from the words “protected by liability insurance”.

[14] The judge interpreted the legislative intent in the context of the “historic trade-off” in which workers lost their right of action in exchange for gaining no-fault compensation that does not depend on an employer’s ability to pay. The judge traced the development of the legislative scheme in the Yukon, noting that it was not until 1992 that the *Act* barred actions against both the employer of the worker and co-workers, as well as against another employer and its workers. However, the exception for disabilities which arose from the use or occupation of a vehicle “protected by liability insurance” was also legislated in 1992. The judge found it clear that the 1992 changes were not intended to alter the historic balance, but since employers were not contributing enough to fund the expanded scheme, changes were necessary. The intent was never to limit employers’ liability under s. 50(4) to the insurance on the vehicle.

[15] The judge dismissed Horizon’s application to interpret s. 50(4) as limiting the maximum liability of the employer to the amount payable under the particular insurance policy.

Grounds of Appeal

[16] Horizon appeals on the grounds that the judge erred in his interpretation of ss. 50(3), 50(4), and 3(1) of the *Act*. Specifically, Horizon argues that the judge:

a) failed to interpret the *Act* in accordance with the modern principle of statutory interpretation which requires examination of what is necessarily implied by the words chosen in 1992 by the Yukon Legislature in light of the context, purpose, and intention of the *Act* and generally accepted principles of workers' compensation;

b) failed to properly understand the legislative evolution of the *Act*; and

c) erroneously treated Horizon as a third party to the workers' compensation regime.

Submissions

[17] The parties agree that the standard of review here is correctness.

[18] Horizon submits that it would be inconsistent with the nature and purpose of the *Act*, and contrary to the historic trade-off, to make the employer liable for any work-related civil damages that may be assessed over the insurance policy limits. Rather, in exchange for paying workers' compensation assessments, employers are generally shielded from civil actions concerning workplace-related incidents.

[19] The respondents argue that the historic trade-off does not require that all employers be protected from all suits by all workers. The historic trade-off was not about protecting the assets of employers. While Yukon's original workers' compensation legislation prohibiting workers from suing their own employers was enacted in 1917, the prohibition against suing other employers was not established until 1977. In 1992 that bar was removed where a worker's disability arose from the use or operation of a vehicle. Other jurisdictions have adopted different regimes, and the only overriding principle is the prohibition on actions against an employee's own employer.

[20] Horizon says that the intention of s. 50(4) is to provide access to insurance money, not access to the personal or corporate funds of the employer. There is no indication that the Legislature intended an employer to be personally liable.

[21] The respondents say that allowing an unfettered common law action to proceed is consistent with the purposes of the *Act*: to provide compensation for injured workers; to maintain a solvent compensation fund; and to treat workers and employers fairly. If liability were limited to the extent of an insurance policy, the legislative intent would be frustrated by employers that choose to underinsure. The assets of an employer who purchased adequate insurance are not at risk.

[22] Horizon argues that fairness is achieved in the case at bar by allowing injured workers access to insurance funds without jeopardizing the ongoing financial well-being of the contributing employer. In *Pasiechnyk v. Saskatchewan (Workers' Compensation Board),* [1997] 2 S.C.R. 890 at para. 26, Mr. Justice Sopinka said that "it would be unfair to allow actions to proceed against employers where there was a chance of the injured worker's obtaining greater compensation [through a civil action] and yet still to force employers to contribute to a no-fault insurance scheme."

[23] The respondents submit that there is nothing unfair about exposing an employer to liability beyond the limits of the private insurance policies it has purchased. Employers and their insurers are responsible for assessing their potential liability and purchasing adequate insurance. Employers are not put in "double jeopardy" because the assessments they pay do not include the costs of accidents recovered from third parties, including other employers.

[24] Horizon submits that the judge erred in finding that only in 1992 did legislation bar actions against all contributing employers— this occurred in 1978. The respondents agree that this error was made, but say it is not significant.

[25] Horizon submits that wording from the Nunavut and Northwest Territories legislation should be imported in order to narrow the Yukon *Act*. In those jurisdictions

the maximum liability for any employer or worker is the amount payable under the policy of liability insurance.

[26] The respondents point out that the Northwest Territories legislation was in place in 2007 when the Yukon *Act* underwent a comprehensive review. At that time the vehicle exception was raised as a concern by members of the public, but the Yukon Legislature chose to not modify the *Act*. The use of different words in Nunavut and the Northwest Territories indicates that a different meaning or purpose was intended. There is no legal norm allowing a court to read down a statute simply to make it consistent with certain other jurisdictions.

[27] Horizon submits that there would be no reason to include the term "protected by liability insurance" in the definition of a "vehicle" if the intention was to make employers liable. Why would the assets of the employer who purchased insurance be at risk, while those of an employer who did not purchase insurance not be at risk? Horizon argues that the policy goal of providing an alternative source of compensation may be accomplished by looking to the insurance policy as the first payor under s. 50(4), and to the workers' compensation fund (rather than the employer) for any shortfall.

[28] The respondents say that the language of the *Act* is clear – where an injury arises from the use of a vehicle, the bar in s. 50(3) does not apply. Unlike other jurisdictions, the *Act* does not limit the damages available in the common-law cause of action. This was a choice made by the Legislature, and it is not for the courts to interfere.

[29] The respondents submit that the only potential ambiguity lies in the definition of "vehicle", but this appeal need not definitively establish what would happen in the case of an accident involving a vehicle that ought to be insured but is not. In any case, there is no basis for adding in a limitation on recovery. Rather, "mode of transportation" in the definition of "vehicle" could be read as referring to a class of transport rather than to specific examples from that class. Alternatively, the words

"required to be" could be read in before "protected by liability insurance" in the definition of "vehicle".

[30] The defendant Robinson Helicopter Company Incorporated takes no position on this appeal provided that the result does not affect the ability of the respondents to recover from other defendants any losses sustained above Horizon's insurance policy limits which are attributable to the fault of Horizon. If Horizon is successful in obtaining protection from damages above its insurance coverage, the consequences that follow should be left for full argument on another day in a different forum.

Analysis

[31] Notwithstanding the very comprehensive and sophisticated submissions of the parties, in my view this case cries out for a simple resolution.

[32] At bottom, Horizon asks this Court to add, not interpret, a not insignificant number of words to s. 50(4) of the Yukon legislation. The Northwest Territories' cap on damages in its insured vehicle exception aptly represents what Horizon would ask this Court to add to s. 50(4).

[33] Sections 62(3) and (4) of the *Workers' Compensation Act*, S.N.W.T. 2007, c. 21 provide:

> (3) Subsection (1) does not apply to an action against
>
> (a) a worker who was not acting in the course of his or her employment;
>
> (b) an employer who was not acting in the course of its business; or
>
> (c) an employer who is not the employer of the worker who suffered the personal injury, disease or death, or another worker in the employ of such other employer, if the injury, disease or death is attributable to a vehicle or other mode of transportation and is insured by a policy of liability insurance.
>
> (4) The maximum liability for any employer or worker referred to paragraph (3)(c) is the amount payable, under the policy of liability insurance, in respect of the personal injury, disease or death.

[34] To give effect to Horizon's submission, we would judicially add these words (or others to like effect) to s. 50(4) of the Yukon legislation:

> (4) Subsection (3) does not apply when the work-related injury arose from the operation of a vehicle, provided however that the maximum liability for any employer or worker referred to in subsection (3) is the amount payable under the policy of liability insurance in respect of bodily injury or death.

[35] In aid of its submission, Horizon refers to *Sullivan on the Construction of Statutes* 6th ed. (Lexis Nexis Canada Inc., 2014), and in particular this discussion of "reading down" and "reading in" (at 194-198):

> The term "reading down" and "reading in" are used in both statutory interpretation and Charter application. In statutory interpretation, they refer to interpretive techniques designed to give effect to the intended scope of legislation…In both contexts, however, reading down refers to narrowing the scope of a legislative provision, while reading in refers to expanding its scope.
>
> The point to be made here is that reading down and reading in may *both* require the interpreter to add words to the legislative text. The difference lies in the impact of the added words: reading down adds words of *restriction or qualification*, whereas reading in adds words that *expand* the reach of the legislation…
>
> As an interpretation technique, reading down merely makes explicit what the court finds to be implicit in the legislative text. It is impossible for drafters to spell out every qualification or limitation that might appropriately apply in a given set of circumstances. Otherwise, provisions would go on for pages. Modern legislation is drafted in general terms, effectively delegating to official interpreters the work of adapting the language to particular facts and reading down its scope when there is a good reason to do so...
>
> Contextual interpretation is the very tool required to determine whether reading down is permissible, that is, to determine whether it can be justified as interpretation or must be condemned as amendment…
>
> Reading down...is a legitimate interpretive technique provided the reasons for narrowing the scope of the legislation can be justified. The fact that an interpretation requires the addition of words to a text is not in itself a reason to reject it. [emphasis added by Horizon]

[36] "Reading down" to the extent it is permissible "… merely makes explicit what the court finds to be implicit in the text." The problem with this submission here is stark: there is nothing in the text of ss. 50(3), (4) and 3(1) (or generally in the *Act*) that supports the view that the words chosen by the Yukon Legislature implicitly call

for a cap on damages in a cause of action which s. 50(4) sanctions. The words of these subsections are clear and unambiguous.

[37] In calling on this Court to implement what Horizon says must have been the intent of the Yukon Legislature – namely, to cap recovery in an insured vehicle action against another employer or employer's worker – Horizon makes much of the so-called "historic trade-off" at the birth of workers' compensation legislation in this country. This trade-off saw workers lose their cause of action against employers but gain no-fault compensation that did not depend on the employer's ability to pay. Horizon's characterization of the historic trade-off paints it in absolute terms and in a manner that may not be reflective of the experience of individual jurisdictions.

[38] It is enough to observe that in the case of Yukon, and indeed other jurisdictions, it was not initially the case that workers were prohibited from suing "other employers and their workers". Indeed in the Yukon, it was not until 1978 that this prohibition was added to the scheme. This is so despite the opportunities the Legislature had to add it earlier: in particular, in 1953 and 1973 when extensive changes to the legislation were promulgated.

[39] Horizon's argument relying on the "historic trade-off" loses its force when the actual legislative record is reviewed.

[40] Horizon's interpretation also lacks support in the legislative history of the insured vehicle exception. The insured vehicle exception to the immunity from suit of other employers and workers was added in the 1992 amendments to the Yukon legislation. The Yukon Legislature again reviewed the legislation extensively in 2008.

[41] That review was facilitated by the Workers' Compensation Act Review Panel. It gathered input from various interested parties and identified some 88 issues to be considered for potential amendment.

[42] Among the issues considered was the insured vehicle exception. In addressing its concerns with the exception, the panel wrote:

> The current Act defines "vehicle" as "any mode of transportation the operation of which is protected by liability insurance." This definition is too broad and has in fact permitted current WCB Policy to pursue subrogated actions against "Employers" and "Workers" if a disability or claim is as a result of a "vehicle" accident. This is absolutely contrary to the basic tenants of the Worker Compensation System (the Meredith principles involving the historic compromise and the Bar to Suit). Employers are put into a double jeopardy situation of paying compulsory WCB Premiums and then being sued. We know this was not the original intent of Sec. 41 (4) of the Act but given the broad wording used in the definition of "vehicle" in the Act has permitted current WCHSB Policy (GC-01: Subrogated Claims (Amended 1995/03/07) to actively pursue actions against "Workers" or "Employers" whenever a motor vehicle is involved.
>
> We believe the simple and effective corrective action is to change the definition of vehicle in the Act to read: "vehicle" means any mode of transportation, the operation of which is by someone other than an Employer or Worker as defined in this Act, and which is protected by liability insurance.

[43] We are told that the Review Panel's recommendations were clearly before the Yukon Legislature during the debate on amendments. No amendments were eventually made to s. 50(4). True, the recommendation did not identify the precise issue with s. 50(4) that is before this Court, but the section itself and the suggestion that it was somehow inconsistent with the "historic trade-off" were in the minds of members of the Legislature.

[44] To the extent that one may cautiously note the proceedings before a legislative body as informing the interpretation of eventual legislation, this history is relevant.

[45] Horizon also points to a potential absurdity if s. 50(4) is not interpreted so as to include a cap on liability. In particular, it says that the exception does not apply to uninsured vehicles, which means that employers who fail to insure their vehicles are in a better position than those who do.

[46] This argument calls for this Court to divine legislative motivations that go beyond the legislative intent *as expressed in the words of the statute*. Nonetheless,

in my view this is not the implication of s. 50(4), as I have interpreted it in these reasons.

[47] Horizon concedes that rising costs associated with the workers' compensation program were conceivably a factor behind the insured vehicle exception. Respectfully, cost savings would likely be the *main* driver behind any step to carve out a situation where the collective fund will not provide compensation. In drafting the exception, the Legislature presumably operated on the assumption that most people insure their vehicles—both to comply with insurance legislation (whether provincially for motor vehicles or federally for aircraft) and to cover the risk of third party claims. They were not thinking about employers looking for loopholes to avoid compensating workers.

[48] To the extent that employers run the risk of leaving their vehicles uninsured to take advantage of any such loophole, that is a policy question for the Yukon Legislature to address.

[49] I repeat, in my view s. 50(4) is clear and unambiguous in its terms; there is no room for this Court to literally "legislate" a cap on damages in the cause of action it sanctions. Although it is by no means clear that it does, if that leads to unacceptable results from a policy perspective, it is a matter for the Yukon Legislature.

[50] I would dismiss the appeal.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice Bennett"