SUPREME COURT OF YUKON

Citation: *Humphrey v. Tanner, et al & McDougall*, 2015 YKSC 27

Date: 20150515
S.C. No.: 11-A0076
Registry: Whitehorse

BETWEEN:

ADAM HUMPHREY

PLAINTIFF

AND

JENNIFER KIM TANNER aka KIM TANNER, BRIAN McWATTERS and RONALD SCOTT McDOUGALL aka SCOTT McDOUGALL

DEFENDANTS

AND

JENNIFER KIM TANNER aka KIM TANNER and BRIAN McWATTERS, and RONALD SCOTT McDOUGALL, aka SCOTT McDOUGALL

THIRD PARTIES

Before the Honourable Mr. Justice R.S. Veale

Appearances:
Michael Preston — Counsel for the Plaintiff
R. Justin Matthews — Counsel for Tanner & McWatters
Kurtis Kruse — Counsel for McDougall

REASONS FOR JUDGMENT

[1] VEALE J. (Oral): This is an application by the plaintiff, Adam Humphrey, for an advance payment of $104,173.14, which was reduced to $90,000 during the application.

[2] Mr. Humphrey was injured in a motor vehicle accident on December 12, 2009. The defendants have admitted liability and have already advanced $100,000 in a previous adjournment, which took place in September 2014.

[3] The defendants submit that the Court should only order the applied-for advance if Mr. Humphrey has established the special circumstances required in granting such an exceptional and extraordinary remedy.

[4] This application arises from the adjournment of the March 2015 trial, which was adjourned on December 12, 2014, to the new trial dates of February 15 to March 11, 2016.

Law for advance payments

[5] Section 155(1) of the *Insurance Act*, R.S.Y. 2002, c. 119, reads as follows:

> If an insurer makes a payment on behalf of an insured under a contract evidenced by a motor vehicle liability policy to a person who is or alleges to be entitled to recover from the insured covered by the policy, the payment constitutes, to the extent of the payment, a release by the person or their personal representative of any claim that the person or their personal representative or any person claiming through or under them or because of the *Fatal Accidents Act* may have against the insured and the insurer.

[6] Section 155 does not expressly provide that the injured person may apply for such advance payments. However, the case of *Serban v. Casselman*, [1995] B.C.J. No. 254, 297, at paras. 8 through 11, establishes the following discretion, which I summarize:

1. There is jurisdiction under Yukon Rules 1(15) and 41(8) to order an advance payment.

[7] Rule 1(15) states as follows:

> When making an order under these rules the court may impose terms and conditions and give directions as it thinks just.

[8] Rule 41(8) states:

> The court may order the adjournment of a trial or fix the date of trial of an action or issue, or order that a trial shall take precedence over another trial.

2. The terms of such an order must be just in all of the circumstances.

Specifically, the order that the payment be made on account of damages prior to the assessment of damages must be a just one. There must be a proper exercise of discretion to make such an order.

3. The rule on advance payments is not restricted to circumstances where the adjournment is brought about by the fault of one party or where the conduct of the litigation demands such an order.

4. An order for advance payments should only be made in special circumstances and should not be made unless the judge who makes it is completely satisfied that there is no possibility that the assessment of damages will be less than the amount of the advance payments.

[9] Counsel for the defendants submit that the test set out in *Bexson v. Williams*, [2014] A.J. No. 713 (A.B.Q.B.) at paras. 9 and 10, should apply.

[10] Paragraph 9 of *Bexson* states:

> There was considerable argument regarding the applicant's burden of proof to succeed with this application, taking into account the social policy objectives of section 581(5) of the *Act*, that allows an applicant continuing access to justice where the very injury sustained might impede recovery because they have placed the applicant in a precarious financial position.

[11] Paragraph 10 states:

> The applicant need not prove his case on a balance of probabilities at this early stage, but the applicant must, at least, demonstrate that on a balance of probabilities his inability to meet the necessities of life is probably or more likely caused by the accident. In other words, the applicant must demonstrate on a balance of probabilities and with the evidence available to the Court that he will probably meet the civil standard of proof at trial for the recovery he seeks. The applicant's authorities support this conclusion.

[12] These paragraphs are clearly based on s. 581(5) *Insurance Act*, RSA 2000, c.I-3 and s. 5.6(3) of the *Fair Practices Regulation*.

[13] Section 5.6(3) reads as follows:

> The Court may make an order under section 581 of the Act ... where the Court is satisfied that
>
> (a) as a result of the injuries of the claimant, the claimant is unable to pay for the necessities of life, or
>
> (b) the payment is otherwise appropriate.

[14] The Alberta Court of Appeal in *Shannon v. 1610635 Alberta Inc.*, 2014 ABCA 393, confirms at para. 11 that "satisfied" is the test for causation, neediness, and otherwise appropriate grounds.

[15] In my view, this narrower test for advance payments is based upon s. 581(5) of the *Insurance Act* in Alberta rather than the principles set out in *Serban v. Casselman*, which applies the test that the judge must be completely satisfied that there is no possibility that the assessment of damages will be less than the amount of the advance payments.

[16] In the case at bar, the jurisdiction arises under Rules 1(15) and 41(8), as previously set out, and does not require the direct causation between the injury and the

inability to pay for necessities of life that counsel for the defendant seeks to apply in the case at bar.

[17] I find that the criteria in this jurisdiction should be:

1. Jurisdiction arises from the adjournment or other appropriate order and the power to impose terms and conditions;
2. Liability must be admitted or liability has been decided;
3. The length of delay must be significant;
4. The delay will cause financial hardship; and
5. The judge must be completely satisfied that there is no possibility that the assessment of damages at trial will be less than the amount of the advance payments.

[18] In *Van Gils v. Grandmaison*, 2013 BCSC 613, at para. 13, Schultes J. describes the fifth criterion as "a negative assessment - identifying the point below which the damages award will not fall."

[19] In the case at bar, there is no dispute with respect to criteria 1, 2, and 3 set out above. The main dispute focuses on criteria 4 and 5, that is, the financial hardship and whether the "completely satisfied test" has been met.

The injuries

[20] Mr. Humphrey was injured in a motor vehicle accident caused by the crash of the two defendants' vehicles causing the McDougall vehicle to hit the driver side of Mr. Humphrey's vehicle.

[21] There are three injuries:

1. The back injury

[22] This can be described as a neurologic deficit with numbness and weakness in his left leg from the L5 and S1 nerve root. He has chronic radiculopathy and pain. It is agreed that the back injury is permanent but there is a major dispute about causation.

[23] Dr. Hirsch, a specialist in physical medicine and rehabilitation, on behalf of Mr. Humphrey, says:

> It is my opinion that in the absence of the subject motor vehicle accident, Mr. Humphrey would not have developed low back pain, left shoulder pain, left knee pain, or sensorimotor symptoms involving his left lower extremity.

[24] To the contrary, Dr. DiPersio, a specialist in physical medicine and rehabilitation -- a defence expert -- says that the back condition developed post-accident, not at the time of the accident, and his total disability from all work started in April 2013, three years after the accident. He suggests that the ruptured disc did not occur in the accident.

[25] Dr. Turnbull, a neurosurgeon for the defence, has read the medical file and he agrees with the interpretation of Dr. DiPersio.

[26] Dr. Turnbull states:

> … It is highly probable that the degenerative changes that led to Dr. Humphrey requiring surgery would have evolved in a similar fashion had the subject MVA never occurred.

2. The shoulder injury

[27] Mr. Humphrey had a significant pain in his left shoulder and consulted an orthopaedic surgeon, Dr. Regan, in October 2010 for an anterior and posterior labral tear, impingement syndrome, and paralabral cyst. On December 16, 2010, Dr. Regan

performed an arthroscopic anterior and posterior labral repair, cyst excision, and arthroscopic subacromial decompression. Mr. Humphrey still has residual problems and is at risk of developing degenerative arthritis in his left shoulder and decline in his left upper extremity function.

[28] Dr. DiPersio agrees that the shoulder injury was caused by the accident.

3. The knee injury

[29] Mr. Humphrey experienced a pain in his left knee and a tear causing locking. It was mostly resolved by the summer of 2012. There is no disagreement that the accident caused the knee injury.

[30] Because there is a great deal of controversy about the cause of his back injury and his disability from working arising in April 2013, counsel for Mr. Humphrey has put forward an assessment of damages based on the shoulder injury alone to meet the completely satisfied or negative assessment test. Counsel for the defendants submits that the entire injury and causation issue must be considered.

[31] I take no issue with addressing the shoulder injury alone in the particular circumstances of this case because it simplifies the negative assessment analysis without distorting it in any way.

[32] Counsel for the defendants submits that the Court must include in its consideration that Mr. Humphrey's back injuries are symptoms that are related to pre-existing degenerative conditions that would have developed whether or not the accident occurred.

[33] They say:

> It is not beyond possibility that the loss of income was largely caused by his low back problems, not the accident.

[34] In my view, that is a somewhat speculative submission and cannot and should not be determined on this application. In any event, it would not result in a reduction of the assessment of damages for the shoulder injury, which was treated separately from the back and knee injuries by Dr. Regan in December 2010. Dr. Regan's follow-up examination on October 19, 2011, found that Mr. Humphrey still had some impingement syndrome in his left shoulder. Dr. Hirsch concluded on October 7, 2013, that he was still experiencing intermittent pain in his left shoulder.

The impact on his income

[35] Mr. Benning's report shows that Mr. Humphrey's income rose from 2006 at $109,932 to 2009 at $194,399, and then fell dramatically in 2010 onwards. He had to reduce his work week by 50 percent in October and November 2010. He was unable to work at all from the surgery in December 2010 and a rehabilitation period of six months. The calculation of the wage loss is dependent upon the accuracy of Mr. Benning's calculations of a loss of $15,201 net income per month. That loss of earnings claim is $91,206.

[36] Counsel for the defendants submits that he moved his business to downtown Whitehorse from the suburb of Riverdale, so that the net income loss may not be a valid assumption. In my view, there's no evidence to support that submission and I accept the income loss at a claim of $91,206.

Financial hardship

[37] Mr. Humphrey has provided a detailed affidavit to support his application. He states that he has not worked since April 7, 2013. In August 2013, he had to close his chiropractic business.

[38] I point out that there is no claim for the income loss incurred after April 2010 in this application, so the back injury and the close of his business are not part of his application for the $90,000 advance payment.

[39] However, he has no income but for his wife's maternity leave income of $2,000 per month and he has a rental income of $1,600 per month. His wife apparently will be returning to work and the rental property was purchased after the accident. Counsel for the defendants submits it cannot be part of the hardship claim.

[40] The defendants further submit that Mr. Humphrey's wife will return to work in the near future with a gross income of $5,400 per month, less taxes and daycare expenses, so it is not really a comparison of $3,600 per month income as opposed to the household expenses of approximately $7,204 per month.

[41] His debt, however, includes:

(a) $68,000 in personal loans from family and friends;

(b) credit card balances totalling $24,000;

(c) $29,500 on an RBC five-year term loan at $700 per month; and

(d) $350,000 home lines of credit to purchase the income generating property.

[42] And I interject here to say that the purchase of the rental property is not part of my evaluation of his financial hardship.

[43] He has monthly medication and therapy expenses totalling $1,740 per month and he acknowledges he will have to cut back on those.

[44] He has monthly expenses that may not be met, such as:

(a) $9,400 in home repairs;

(b) $4,700 in vehicle repairs; and

(c) $6,000 for a lease-to-own sleep apnea machine.

[45] The emotional impact of all this debt and his injuries are taking a toll on his marriage.

[46] The first advance of $100,000 in June 2014 was applied to approximately $20,000 in disbursements paid to his previous counsel; $10,000 placed in a cash account; and $70,000 paid on the RBC lines of credit. He provided the detail of these expenses and I take no issue with those payments.

[47] The monthly household debt of $7,204 is broken down into categories of:

- medical: $1,700;
- home, home taxes, and expenses: $865;
- utilities: $947;
- vehicle: $373;
- financial and loan obligations: $2,436; and
- miscellaneous: $1,750.

[48] Counsel for the defendants point out that some of these are soft numbers without receipts. But in my view, a critical review of these would still result in a monthly expense of $6,000. While his wife's return to work may result in an improvement in his financial situation on a monthly basis, it would not completely resolve his monthly

problems nor would it absolve his personal debt obligations, excluding the rental property.

[49] The worst-case scenario, or negative assessment, is calculated as follows:

1. Past loss of income for the shoulder injury: $91,206;
2. Non-pecuniary damage for the shoulder (based on two cases between $50,000 and $70,000 dollars): $60,000;
3. Special damages (Exhibit L) for the shoulder injury with detail provided: $19,131.96; and
4. Incurred disbursements for shoulder (Exhibit K), which I assess at: $13,601.55.

[50] I have excluded the $19,558.63 disbursements paid to his previous lawyer, as they were not shoulder specific. The $13,601.55 relates specifically to the shoulder injury.

[51] The total is $183,939.51, which I round to $184,000.

Conclusion

[52] I am completely satisfied that there is no possibility that the assessment of damages will be less than $184,000. Deducting the $100,000 advance payment, already made, leaves $84,000, which I order to be paid to Mr. Humphrey as an advance payment as a condition of the December 12, 2014 adjournment. The advance payment is conditional on Mr. Humphrey providing a release for that amount.

[53] I point out to counsel that the advance payments are not to be raised at trial, according to s. 155(3), and perhaps counsel should consider carefully whether that is a

requirement in this particular court action to avoid inadvertent reference to the advance payments.

[54] [DISCUSSION RE COSTS]

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VEALE J.