

SUPREME COURT OF YUKON

Citation: *Minet et al. v. Kossler*, 2009 YKSC 18

Date: 20090310
S.C. No. 03-A0182
Registry: Whitehorse

Between:

LENORA MINET AND HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Plaintiffs

And

NORBERT KOSSLER

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

David A. Huculak
André W. L. Roothman

Counsel for the Plaintiffs
Counsel for the Defendant

REASONS FOR JUDGMENT (Outside Counsel Costs)

INTRODUCTION

[1] This is an application by the plaintiff for outside counsel costs, meaning travel and hotel disbursements for lawyers that are not resident in Yukon. “Outside” is an historic Yukon term that is more appropriate than the usual reference to “out of town” counsel.

[2] In this personal injury action, the plaintiff’s lawyer lives and works in Edmonton.

[3] The plaintiff suffered a serious facial injury resulting from a blow struck in what I characterized as a domestic dispute in a small Yukon community. Both liability and damages were in issue. The trial lasted five days. The plaintiff succeeded in recovering

\$45,000 on general damages and approximately \$40,000 in a subrogated health claim. The plaintiff's damages were reduced by 20% for contributory negligence and 10% for failure to mitigate her damages.

FACTS

[4] There are approximately 60 resident lawyers in private practice in the Yukon. Of the approximately 10 lawyers doing personal injury work, five are specialists who devote the majority of their time to this practice area.

[5] The plaintiff made two attempts to retain a local lawyer. The first lawyer was known to her. He did not do personal injury work and declined to act in any event as he was too busy and had a conflict.

[6] The second lawyer that she contacted, whose name she could not recall, required a retainer of \$2,000-\$3,000, which she was unable to afford.

[7] After this effort, she perused the Yellow Pages in the Northern British Columbia and Yukon phone directory and learned about a law firm which, in a full two page colour promotion, advertised that they specialized in personal injury claims. The firm is located in Edmonton. Another factor in retaining this firm was the fact that the plaintiff was being treated for her injuries in Edmonton. The plaintiff's first meeting with her lawyer took place in Edmonton.

[8] There is no evidence that the plaintiff contacted the Law Line, a public service operated by a lawyer to answer general inquiries by the public, nor did she call the Law Society of Yukon to obtain a lawyer referral.

[9] The costs claimed are \$4,061.97, representing the permitted cost units, travel and hotel costs. The initial claim included agency fees and law society fees. I have arbitrarily

excluded the law society fees as a cost of doing business. I arbitrarily excluded the agency fees relating to filing and other matters as counsel for the defendant provided significant agency services for counsel for the plaintiff at no charge.

DECISION

The Law

[10] Rule 60 of the Yukon *Rules of Court* provides the following:

60(2) On an assessment of party and party costs, the clerk shall allow those fees under Appendix B that were proper or reasonably necessary to conduct the proceeding.

...

60(4) In addition to determining the fees that are to be allowed on an assessment under subrule (1) or (3), the clerk must

- (a) determine which expenses and disbursements have been necessarily or properly incurred in the conduct of the proceeding, and
- (b) allow a reasonable amount for those expenses and disbursements.

[11] The general rule is that the onus is on the party incurring outside counsel costs to satisfy the court that they have been necessarily or properly incurred. The case law is very fact specific.

[12] In *Trans North Turbo Air Limited v. North 60 Petro Ltd.*, 2003 YKSC 59, the issue was whether Vancouver counsel could recover substantial outside counsel costs of approximately \$125,000. The case involved the fire loss of an aircraft hangar at the Whitehorse Airport. The three month trial was conducted by outside counsel on both sides. There were complex factual and legal issues requiring experts from Vancouver, Edmonton, Los Angeles and Boston. The plaintiff acknowledged that there were competent local firms and counsel but the real question was one of the capacity of local

firms to take on a case that required two full-time counsel for lengthy discoveries and trial as well as administrative backup. The following additional factors were considered:

- (1) The plaintiff's firm had expertise in the area of valuations of aircrafts and associated equipment.
- (2) The firm had a relationship with the aviation and property underwriters.
- (3) The inconvenience and costs of changing counsel after the initial investigation work.
- (4) The firm had the capacity to have two lawyers as well as associates and research staff assigned to the case from the fall of 2001 to August 2002.
- (5) None of the experts were from the Whitehorse area and, therefore, costs were saved in retaining and instructing experts nearby to counsel in Vancouver.

[13] I concluded that outside counsel costs were necessitated and properly incurred “...on the basis of capacity, location of experts, initial involvement in the investigation and expertise on managing long and complex trials...” (para. 20).

[14] I also concluded with the following at para. 22:

I do want to say, in my years on the bench and in private practice, I am not aware of a similarly lengthy and complex case having been dealt with in the Yukon by local counsel. Thus, it is not every case where outside counsel is employed that those extra expenses may be recovered. In my view, it is only in those cases of exceptional length and complexity and expertise where it will be appropriate.

[15] My comment is somewhat case specific in that there should clearly be room for outside counsel costs in less complex cases where counsel with a speciality is required or there are reasons why local counsel are not available or unable to act for conflict or other reasons.

[16] It is also useful to consider the Northwest Territories practice as the issue arises there regularly. In *Peterkin v. Union of Northern Workers*, 2006 NWTSC 58, Vertes J. summarized the law as follows in paras. 18 and 20:

[18] The use of non-resident counsel, and the ability to recover as disbursements on a Bill of Costs the additional expenses incurred as a result, has been the subject of numerous cases in this jurisdiction. The applicable principle, as reflected in those cases and in Rule 648(4), is that the travelling and living expenses of counsel who reside outside of the Territories are not recoverable unless (a) the expertise required to perform the particular service is not available from counsel resident in the Territories; or (b) conflicts of interest prevent local counsel from acting in the matter. Generally speaking, some special circumstance must be demonstrated to justify the retention of non-resident counsel if recovery for the additional costs of doing so (such as travel expenses) is sought from the other side: see, for example, *Seeton v. Commercial Union Assurance Company et al*, (1999) 41 C.P.C. (4th) 361 (N.W.T.S.C.).

...

[20] As I have said in previous cases where this issue has come up, a client can choose any lawyer he or she wants but that does not automatically mean that the other side is going to pay for it. The traditional rule was that the client is responsible for putting his or her counsel at the place of trial. Here, as well, the firm advertises as providing legal services in the Northwest Territories. If it chooses to do business in the jurisdiction from an office out of the jurisdiction then the additional costs of doing business that way is something it or its clients must bear: see, for example, *MacNeil v. MacNeil-Norris*, [2005] 7 W.W.R. 578 (N.W.T.S.C.), at para. 15.

[17] In the case at bar, counsel for the plaintiff seeks to justify outside counsel costs on the basis that the plaintiff was not particularly sophisticated in legal matters, and after attempting to find local counsel, chose counsel in Edmonton.

[18] While I do not wish to penalize a litigant who chooses outside counsel, it is equally fair not to visit the additional travel and hotel expenses on the defendant absent special circumstances. It may be that the existence of a very large colourful advertisement in the Yukon phonebook suggested that the Edmonton firm had a Yukon practice. That is a matter between the plaintiff and her counsel.

[19] I can find no basis that it was either necessary or proper to retain outside counsel in this circumstance. The recovery of travel and accommodation expenses incurred by an outside lawyer can only be justified on the basis of conflict, lack of local expertise or other special circumstances.

VEALE J.