IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Vaughan* v. *Starko*, 2004 YKSC 29

Date: 20040413
Docket No.: 00-A0033
Registry: Whitehorse

Between:

LEONARD MELVIN VAUGHAN

Plaintiff

And

BONNIE LYNN STARKO

Defendant

Before: Mr. Justice L.F. Gower

Appearances:
Daniel S. Shier — For the Plaintiff
Ray G. Baril, Q.C. — For the Defendant

MEMORANDUM OF RULING

Introduction

[1] The plaintiff, Mr. Vaughan, suffered injuries as a result of a motorcycle accident just north of Watson Lake, Yukon, on June 20, 1998. At about 11:30 p.m. Mr. Vaughan was southbound on the Alaska Highway on his Harley Davidson motorcycle when he came upon a pick-up truck being driven by the defendant, Ms. Starko, heading towards him more or less in the southbound lane. At the time, Ms. Starko was in the process of overtaking another pick-up truck being driven by Alyssa Magun. It was dusk but not dark and all vehicles had their headlights on. Mr. Vaughan took evasive action by

manoeuvring his motorcycle onto the west shoulder of the highway, which was mostly of gravel surface. He eventually lost control and both Mr. Vaughan and his motorcycle ended up in the ditch. Ms. Starko pled guilty to a resulting charge of passing unsafely under the *Motor Vehicles Act*, R.S.Y. 2002, c. 153, and has admitted she was on the wrong side of the road. She is subject to a reverse onus of proof on these facts.

[2] Mr. Vaughan has applied for a summary determination of the following points pursuant to Rule 18A of the *Rules of Court*:

1. That Ms. Starko is solely liable in negligence for his injuries;

2. That he was wearing his motorcycle helmet at the time of the accident;

3. That he was not contributorily negligent.

[3] Ms. Starko's insurer is represented by Mr. Baril. He argues that this is not an appropriate case for a summary determination under Rule 18A. He says there are significant issues of fact in dispute, which may have a bearing on any damages payable by the insurer and which militate against severing the issues of liability and damages.

[4] First, Mr. Baril says there is evidence that Ms. Starko was in the process of completing her passing manoeuvre, and was moving her vehicle from the southbound lane back into the proper northbound lane when she first came upon Mr. Vaughan. Accordingly, Mr. Baril says that Mr. Vaughan could have steered his motorcycle toward the white "fog" line – the border between the southbound lane and the west shoulder - and decelerated without proceeding onto the gravel shoulder and losing control.

[5] Second, Mr. Baril says that when Mr. Vaughan was discovered in the ditch immediately after the accident, he was not wearing his helmet. Thus, it is possible that the helmet came off in the course of the accident. As I understand him, this gives rise to two further possibilities: either the design of the helmet was defective, or it was not properly used by Mr. Vaughan. In either case, Mr. Baril says that Mr. Vaughan would be contributorily negligent to some degree for his injuries.

Course of the Proceedings

[6] The Writ of Summons and Statement of Claim were filed on May 5, 2000. The Statement of Defence was filed on July 12, 2000. Examinations for discovery of Ms. Starko and Mr. Vaughan took place on August 20, 2001.

[7] Mr. Vaughan's current application for a Rule 18A summary trial was brought by a Notice of Motion filed December 30, 2003. Pursuant to Rule 18A(2), these proceedings must be set for a hearing in accordance with Rule 51A, unless otherwise ordered. Mr. Baril did not initially file a Response in Form 124(2) to the plaintiff's Notice of Motion, as required by Rules 44(6) and 51A. Rather, Mr. Baril filed a Notice of Motion on behalf of the defendant on March 1, 2004, setting out his opposition to the summary trial application.

[8] At the outset of the summary trial application on March 30, 2004, Mr. Baril apologized for proceeding in the fashion in which he did and noted that he had just that day filed the defendant's Response to the plaintiff's Notice of Motion. I gather that Mr. Baril felt that his Notice of Motion of March 1st was an adequate response to the plaintiff's application and that he would be allowed to refer to the evidence identified in

his Notice of Motion. Mr. Shier, co-counsel for the plaintiff, took issue with that position, but rather than risk an adjournment of the application, he did not strenuously press the point.

[9] In any event, I find that the plaintiff will not suffer any prejudice by allowing the defendant to respond to the summary trial application by relying on the evidence listed in the defendant's Notice of Motion. Indeed, on March 9, 2004, the plaintiff filed a Response to the defendant's Notice of Motion which stated that the plaintiff's response to the defendant's application should be heard as part of the plaintiff's application under Rule 18A.

[10] Mr. Baril raised a procedural objection of his own. He said that he had only just received the Affidavit of Stacey Whiteside and the second Affidavit of Mr. Vaughan, both of which were filed on March 26, 2004. Ms. Whiteside is a legal assistant employed by Mr. Paige, co-counsel for the plaintiff, and her Affidavit principally encloses an exchange of correspondence between Mr. Paige's office and the R.C.M.P. in an effort to obtain the police file relating to the accident. Mr. Baril did not feel it was likely that he would want to cross-examine Ms. Whiteside on that Affidavit. However, he felt that he would almost certainly want to cross-examine Mr. Vaughan on his second Affidavit. He also submitted, apparently upon more recent reflection, that he would like to cross-examine Ms. Magun on her Affidavit, filed December 30, 2003. Therefore, he asked for an adjournment of the summary trial application in order to complete those cross-examinations. In the alternative, he said he was prepared to proceed to argue whether, as a preliminary matter, this is an appropriate case for a Rule 18A procedure. If I were to find that this case is not appropriate for a Rule 18A determination, then there would be no need for

Mr. Baril to pursue his desired cross-examinations. On the other hand, if I rule that this is an appropriate case for the application of Rule 18A, then he would seek to adjourn the balance of the hearing, that is the determination of the merits, until he has completed his anticipated cross-examinations.

[11] Mr. Shier, for the plaintiff, indicated at the outset of the hearing that he preferred proceeding in the alternative fashion proposed by Mr. Baril, rather than arguing over a wholesale adjournment of the matter. Accordingly, I heard submissions from both sides on the preliminary question of whether this case is suitable for a Rule 18A determination on the question of liability.

[12] To summarize, I have only been asked to determine whether this is an appropriate case for a summary determination of liability under Rule 18A. I have not been asked to make any determination on the merits on the question of liability. If I find this case is appropriate for an 18A determination, then I must decide whether an adjournment of the summary trial application is appropriate. If so, I have been invited to make certain directions with respect to the cross-examination by the defendant's counsel of Mr. Vaughan (on his second Affidavit) and Ms. Magun (on her first Affidavit).

[13] Mr. Shier, for the plaintiff, urges a strict timeline of one month from the date of any such ruling, in order to expedite the summary trial of this matter. He also asks me to consider a costs sanction against the defendant, presumably because of the prejudice suffered by the plaintiff for the adjournment, if granted.

Issues

[14] In order to decide the general question of whether this is a suitable case for a summary determination of the issue of liability for the motor vehicle accident, I must be satisfied of the following:

1. Is there sufficient evidence for a chambers judge to be able to make findings on the extent of the defendant's alleged negligence and the extent of any contributory negligence by the plaintiff?

2. Is it appropriate in this case to sever the issues of liability and damages?

The Law

[15] *Inspiration Management Ltd.* v. *McDermid St. Lawrence Ltd*., [1989] B.C.J. No. 1003; (1989), 36 B.C.L.R. (2d) 202, is the leading case on Rule 18A applications. There, five members of the British Columbia Court of Appeal issued a judgment with separate but concurring reasons by McEachern C.J.B.C., for the majority, and Lambert J.A., for himself. McEachern C.J.B.C. confirmed that a matter may proceed under Rule 18A even where there are conflicting affidavits, providing the chambers judge is satisfied that the evidence before the court is sufficient for adjudication. McEachern C.J.B.C. cautioned against deciding an issue of fact or loss solely on the basis of conflicting affidavits, even where the chambers judge prefers one version to another. Nevertheless, he allowed that other admissible evidence might make it possible to find the facts necessary for judgment to be given. Alternatively, the chambers judge could adjourn the application and order cross-examination on one or more affidavits or make any of the

directions allowed by Rule 18A, rather than setting the case for a full trial. McEachern C.J.B.C. also noted Rule 1(5), which provides that the object of the *Rules of Court* is "to secure the just, speedy and inexpensive determination of every proceeding on its merits". Therefore, if a chambers judge were able to find the necessary facts on the conflicting evidence before the court, then it would be appropriate to proceed, providing justice can be done in that fashion. In deciding whether it would be just to do so, the chambers judge is entitled to consider, among other things:

> … [T]he amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.
> (p.9, Quicklaw report)

[16] Lambert J.A. simplified his analysis by stating that judgment should not be given under Rule 18A unless two questions can be answered in the negative:

1. Has any party been denied the opportunity to produce relevant testimony?

2. Is there a conflict in the evidence, which the judge cannot readily resolve, on a point of fact which could affect the result? (p. 13, Quicklaw report)

[17] Lambert J.A. also recognized that a chambers judge may adjourn an 18A application so that the deponent of an affidavit may be cross-examined or so that other pre-trial and summary procedures may be employed. Lastly, he noted "Rule 18A was intended to enhance the judicial process by preventing delay where delay could obstruct justice, and by reducing costs, where the costs of a full trial could deny justice".

[18] Rule 18A(11) states as follows:

> On the hearing of an application under subrule (1), the court may
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> (a) grant judgment in favour of any party, either on an issue or generally, unless
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> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application, …

[19] Thus, the first question is whether the court is able to make the necessary findings of fact. If not, then that is the end of the matter and the case must be set for a full trial. However, even if the chambers judge is able to make the necessary findings of fact, he or she must also be satisfied that it would not be unjust to decide the issues in that fashion. It is only in deciding whether it would be "unjust" that it is necessary to consider the factors just quoted in *Inspiration Management*: See also *Canadian Imperial Bank of Commerce* v. C*harbonnages de France International S.A.*, [1994] B.C.J. No. 1869 (B.C.C.A.).

[20] As I understand him, counsel for the defendant argues that where an application under Rule 18A involves an application for severance of the issues of liability and damages, the court must be satisfied not only that the factors in *Inspiration Management* have been considered, but also that there must be extraordinary, exceptional or compelling reasons for severance. Counsel relied upon *Legrand* v. *Canning*, [2000] B.C.J. No. 2250, a decision of the British Columbia Supreme Court which was an

application under Rule 18A. There, Scarth J. quoted *Westwick* v. *Culbert,* [1992] B.C.J. No. 2121, and concluded that it would be inappropriate to order that liability be determined pursuant to the summary trial procedure, because it had not been shown that there were “extraordinary, exceptional or compelling reasons for severance”. Scarth J. referred as well to the case of *Dudek* v. *Li,* [1996] B.C.J. No. 3171, a decision of the British Columbia Court of Appeal, as authority for the proposition that “the Court should lean against splitting issues of liability and damages” (*Legrand*, p. 3, Quicklaw report). I disagree with counsel for the defendant on this point for the following reasons.

[21] Firstly, *Westwick* was a case involving an application under Rule 39(29) and not under Rule 18A.

[22] Secondly, *Dudek* v. *Li*, was an application for leave to appeal from a decision of a chambers judge who dismissed the plaintiff’s application under Rule 18A for a determination of liability in a motor vehicle accident. Legg J.A. concluded that it had not been shown that the chambers judge was clearly wrong in the exercise of his discretion by directing “that the trial should take its normal course and that the issue of liability should not be split from the issue of damages where issues of credibility might arise” (para. 7, Quicklaw report). With the greatest of respect, this does not constitute an endorsement of the proposition that a court “should lean against splitting issues of liability and damages”, as suggested by Scarth J. in *Legrand*.

[23] Thirdly, *Mattu* v. *Mattu*, [2001] B.C.J. No. 423 (B.C.C.A.), decided after *Dudek* v. *Li*, makes it clear that the British Columbia Court of Appeal “would not be prepared to

add any qualifications to the use of Rule 18A beyond those expressed by [the] court in *Inspiration Management* …" (para. 9, Quicklaw report).

[24] Plaintiff's counsel cited *Lee (Committee of)* v. *Chan* (1997), 29 B.C.L.R. (3d) (B.C.S.C.) as a case very similar to the one at bar, which was disposed of by a summary trial. It involved a motor vehicle accident resulting in catastrophic brain injuries to the plaintiff. The defendant driver had no memory of the accident. There were only two witnesses to the accident. Two other passengers injured in the accident were also plaintiffs in separate lawsuits. The total damages claimed in the three lawsuits were in the range of $6,000,000.00. The plaintiff applied under Rule 18A for judgment on the question of liability. The defendants opposed for two reasons: first, that they ought to be able to cross-examine the witnesses at trial; second, that there were other possibilities for the cause of the accident which did not involve negligence on the part of the defendants.

[25] In *Lee,* Loo J. acknowledged the defendants had a reverse onus of proof. He also said the large sum sought in damages was not a sufficient reason to decline to decide the issue. He held that since the defendants were of the view that one of the two principal witnesses had given conflicting evidence, they ought to have previously applied to cross-examine her on her affidavit (para. 19, B.C.L.R.). He proceeded with the summary trial.

Analysis

[26] The first question I have to answer is whether there is sufficient evidence for adjudication of the questions of the defendant's alleged negligence and the plaintiff's

contributory negligence, if any. Further, if there is sufficient evidence, whether it would be just to decide these issues on this application. I must also examine the overlapping question of whether it is appropriate to sever liability from damages. I am not to be discouraged from my task simply because there are conflicting affidavits, providing there is sufficient admissible evidence to make it possible to find the facts necessary for judgment to be given. I am instructed by *Inspiration Management* to "be careful but not timid in using Rule 18A for the purpose for which it was intended". I will focus on the following main points relating to this analysis.

The Guilty Plea

[27] The defendant pled guilty to the offence under s. 145 of the *Motor Vehicles Act*. A copy of the Information or Summary Offence Ticket for that charge was not provided in evidence. However, what was then s. 145 reads as follows:

> A driver shall not drive to or upon the left of the centre line of a highway in overtaking and passing another vehicle or an obstruction unless
>
> (a) the left side is clearly visible, and
>
> (b) is free of oncoming and overtaking traffic,
>
> for a sufficient distance to permit overtaking and passing to be completely made without interfering with the safe operation of another vehicle.

[28] It is apparent from the wording of the section that an admission of guilt for this offence includes an admission that the offender, in this case Ms. Starko, interfered "with the safe operation of another vehicle", that is Mr. Vaughan's motorcycle.

[29] Counsel for the defendant argues that the guilty plea is in no way an admission that the defendant caused the accident or is responsible for the plaintiff's injuries. Specifically, he submits:

> the fact [she] had crossed the centre line to pass the slower moving Magun Pick-up is not conclusive in the determination of negligence as between the parties. The issue of contributory negligence is still alive, notwithstanding the reverse onus provisions of the *Motor Vehicle* [as written] *Act"* (Defendant's Chambers Brief, page 12, para 20.).

I have some difficulty with that submission. Ms. Starko's guilty plea could be taken as an admission that she interfered with the safe operation of Mr. Vaughan's motorcycle. While that may not rule out the possibility of contributory negligence by Mr. Vaughan, it could at least rule out the possibility that Ms. Starko was totally free of any negligence.

The Signal Light

[30] Further, there is no evidence that Ms. Starko activated her signal light, thereby failing to indicate her intention to return from the southbound lane to the northbound lane while she was passing Ms. Magun. This relates to the evidence of Mr. Vaughan that, at the time he initially noticed the Starko vehicle, he had to make a split second decision on his evasive manoeuvre. He says he had no way of knowing at the time whether the oncoming Starko vehicle would return to the northbound lane, continue to come straight ahead, or potentially even veer off further to the west side of the highway in an attempt to avoid him. Ms. Starko admitted at her examination for discovery that Mr. Vaughan may have already been "veering toward the shoulder when [she] first noticed [the motorcycle]" (page 93). That evidence could assist the chambers judge in making a

determination of whether Mr. Vaughan was contributorily negligent in failing to avoid the accident.

The Helmet

[31] While I do not intend to get into a fact finding exercise at this preliminary stage, it strikes me that there are a limited number of possibilities to explain why the helmet was apparently not found on Mr. Vaughan's head when he was first discovered in the ditch after the accident. Those possible explanations may make it more or less likely that Mr. Vaughan was contributorily negligent.

[32] First of all, there is evidence from both Ms. Starko and Ms. Magun that Mr. Vaughan was wearing his helmet as he passed by them on the gravel shoulder immediately before leaving the roadway. It would not seem likely that the helmet would have come off Mr. Vaughan's head prior to impact without any apparent reason. Therefore, it appears that there are two possible alternatives. Either the helmet may have come off after the initial impact or at some point during Mr. Vaughan's tumble in the ditch, or Mr. Vaughan could have taken it off.

[33] If a chambers judge was to find the latter, then there would be no contributory negligence on the part of Mr. Vaughan. However, that alternative also seems unlikely, on a balance of probabilities, because there is evidence that Mr. Vaughan appeared to be unconscious immediately after the accident. There is also evidence that he had a broken right collarbone and his right arm was seen to be behind his back as he was laying face down in the ditch. Admittedly, there is no evidence at this stage that Mr. Vaughan was right-handed.

[34] If a chambers judge was able to find, on a balance of probabilities, that the helmet came off at some point after the initial impact and before Mr. Vaughan came to rest, then it is possible that Mr. Vaughan could have suffered a blow or blows to his unprotected head. That would have to be assessed in light of all the evidence at the time of the summary trial, including the other physical evidence, the apparent damage to the helmet and the injuries to Mr. Vaughan's head and face.

[35] Further, if the helmet came off because it was not properly strapped on by Mr. Vaughan, then that could provide a basis for finding that he was contributorily negligent. That is something the defendant may wish to pursue in further cross-examination of Mr. Vaughan. Alternatively, if the helmet came off because its design was defective, then that may also constitute contributory negligence on Mr. Vaughan's part - for using a defective helmet. However, the defendant will have the onus of proving either alternative.

[36] I note that the helmet was made an exhibit at Mr. Vaughan's examination for discovery and could be examined by an expert to determine whether it is defective in any respect.

The Investigating Officer's Evidence

[37] Mr. Baril, for the defendant, argued strenuously that there is a missing piece of evidence in this case to date, that being the evidence of the investigating R.C.M.P. officer, Cst. Houston. Mr. Baril submits that he has attempted to obtain an affidavit from Cst. Houston, but counsel for the R.C.M.P. has refused to comply with that request, taking the position that any such evidence from Cst. Houston would have to be given

orally in court and compelled through a subpoena. Thus, says Mr. Baril, to use the words of McEachern C.J.B.C. in *Inspiration Management*, there is an "absence of an affidavit from a principal player in the piece", which should cause me to conclude that a chambers judge could not find the facts necessary to decide the issues, or that it would be unjust to do so. I disagree for the following reasons.

[38] Firstly, the defendant could have applied to the court for production of any additional information from the R.C.M.P. file not already disclosed. Secondly, the defendant could have applied to the court for an order under Rule 28 for pre-trial examination of Cst. Houston. Thirdly, it is apparent from the Affidavit of Stacey Whiteside that a good portion of the R.C.M.P. file has already been disclosed to counsel in this matter.

[39] In particular, the "accident report" was disclosed to Mr. Paige, for the plaintiff, by a letter from the R.C.M.P. dated October 2, 1998. It appears that the accident report referred to in that letter was in fact the "Yukon Motor Vehicle Traffic Incident Police Investigation Report", found in the defendant's materials (Appendix to the Daren Forensic Engineering Report, Tab A). Further, the letter from the R.C.M.P. to Mr. Paige dated October 28, 1998, states that "a scene diagram was not completed". This was confirmed in the letter from the R.C.M.P. to Mr. Paige dated December 15, 1998. That letter in turn referred to an "Accident Reconstruction Report" having been forwarded to Mr. Paige by the R.C.M.P. on October 2, 1998. However, this appears to have been a referential error, as the October 2nd letter did not enclose an Accident Reconstruction Report, but rather the previously referenced Yukon Motor Vehicle Traffic Incident Police Investigation Report. Ms. Whiteside's Affidavit deposed at paragraph 10 that the

plaintiff's counsel received 85 pages of material from the R.C.M.P. following his application under the *Privacy Act*. Those 85 pages have been listed in the Plaintiff's List of Documents.

[40] Mr. Baril, for the defendant, assumes that Cst. Houston, as the main investigator in this case, may have taken critical measurements at the scene immediately after the accident. However, since there was no scene diagram prepared by the R.C.M.P., that seems unlikely. Putting it another way, if measurements had been taken, then one would logically expect them to be reflected in a diagram or sketch of the scene. Further, it is clear that beyond the completion of the Yukon Motor Vehicle Traffic Incident Police Investigation Report, no additional accident reconstruction report was prepared. Thus, it does not appear that the R.C.M.P. attempted any accident reconstruction investigation. Finally, we know that Ms. Starko plead guilty to the offence under s. 145 of the *Motor Vehicles Act* on December 1, 1998. Therefore, there would have been no need for the R.C.M.P. to pursue further investigation after that time.

[41] The only evidence which has not been placed before me on this application from the R.C.M.P. file is the defendant's statement to the R.C.M.P. on the day of the accident. Plaintiff's counsel suggests that this is already in the possession of Mr. Baril, the defendant's counsel, who has refused disclosure of that statement on the grounds that it is privileged under s. 98 of the *Motor Vehicles Act*. Plaintiff's counsel has referred to a decision from this Court, *Gordon* v. *Waite,* [2002] Y.J. No. 40, as authority for the proposition that the statement can be produced to the plaintiff, at least for purposes of initial inspection, if not for admissibility as evidence in the case. However, the plaintiff has not yet specifically made an application for production of that statement. In any

event, since this is a portion of the police investigation which the defendant already has knowledge of, it does not form part of the complaint by Mr. Baril relating to the absence of evidence from Cst. Houston. In summary, the absence of Cst. Houston's affidavit has been adequately explained and would not affect the ability of the chambers judge to find the necessary facts to decide the issues in this case; nor would it be unjust to do so on that basis.

Conclusion

[42] I find that there is sufficient evidence for a chambers judge to make a determination of Ms. Starko's alleged negligence one way or the other. There is the guilty plea and the admission by Ms. Starko that she was travelling on the wrong side of the road, which gives rise to a reverse onus of proof at common law: See *Lee* v. *Chan,* cited above, at para. 26, and *Walker* v. *Brownlee*, [1952] 2 D.L.R. 450 (S.C.C.). A reverse onus also arises by operation of s. 87(1) of the *Motor Vehicles Act* (now s. 91(1)). There are the examinations for discovery of both Mr. Vaughan and Ms. Starko. There are the two Affidavits of Mr. Vaughan, the Affidavit of Ms. Starko, and most significantly there is the Affidavit of the independent eyewitness, Alyssa Magun.

[43] This is not to say that there are no discrepancies in the various pieces of evidence. However, I am of the view that there is sufficient evidence for a chambers judge to make the necessary findings of fact and law.

[44] To the extent that there may be some ambiguities in the evidence of Alyssa Magun, I would expect that those ambiguities, if any, could be clarified or minimized by cross-examination of Ms. Magun on her Affidavit.

[45] To the extent that there are any outstanding questions by the defendant of Mr. Vaughan, those could be asked during the defendant's anticipated cross-examination of Mr. Vaughan on his most recent Affidavit.

[46] As for whether proceeding with a Rule 18A determination would be "unjust", I must consider the factors set out in *Inspiration Management*. The amount of damages involved in this case is unspecified, but presumably could be significant given the allegations of traumatic brain injury. However, while the amount of damages is important, it should not alone be determinative: See *Lee*, cited above. The facts of the accident are not complex, as acknowledged by the defendant. There is no particular urgency in the matter, although the plaintiff says that a summary determination on the issue of liability will likely lead to an earlier settlement. The plaintiff does not allege any prejudice from further delay of the proceedings, other than to note the reduced likelihood of settlement and the risk that some of the witnesses to the accident may be unavailable in the future. The plaintiff says that the cost of proceeding to a conventional trial will be significant. Apparently all of the witnesses, with the exception of Ms. Magun, reside outside of the Yukon. The plaintiff estimates a full trial would take approximately 16 days. A summary determination of the liability issue could reduce that estimate by approximately seven days. The plaintiff says there is nothing in the course of the proceedings that would make a summary trial on the issue of liability inappropriate.

[47] The defendant's submissions on this point focused not so much on the factors set out by McEachern, C.J.B.C. in *Inspiration Management*, but rather on the two questions posed by Lambert J.A. Those were: (1) has any party been denied an opportunity to produce relevant testimony? (2) Is there a conflict in the evidence, which the judge

cannot readily resolve, on a point of fact which could affect the result? The defendant submitted that the answer to both of those questions was ‘yes’. It is likely apparent from my earlier reasons that I disagree with the defendant’s position in that regard.

[48] It is important to remember that *Inspiration Management* also directed the chambers judge to consider any other matters which arise for consideration on the question of whether it would be just to proceed on a summary basis. In that regard I return to the objective of the *Rules of Court* being to secure the just, speedy and inexpensive determination of every proceeding on its merits. I also agree with Lambert J.A.’s view that Rule 18A was intended to enhance the judicial process by preventing delay where that could obstruct justice, as well as by reducing costs, if the costs of a full trial could deny justice. In my view, it would not be unjust to decide the issue of liability on a summary basis. Although implicit in that conclusion, I also find it would be appropriate in this case to sever liability from the issue of damages.

Summary and Directions

[49] I conclude that this is an appropriate case to determine the issue of liability on a summary trial basis under Rule 18A. Consistent with that conclusion, it is also appropriate to sever the issues of liability and damages. Indeed, I agree with plaintiff’s counsel that severance of these issues is more likely to expedite the resolution of this conflict.

[50] The balance of this summary trial application will be adjourned. Counsel should approach the Trial Coordinator for a date for the continuation of this hearing.

[51] At the request of the parties, I will direct that counsel for the defendant complete the cross-examination of Mr. Vaughan on his second Affidavit and the cross-examination of Ms. Magun on her first Affidavit within six weeks of the date of this ruling.

[52] Should the defendant wish to undertake an expert examination of Mr. Vaughan's motorcycle helmet, I direct that any resulting expert written opinion be provided to plaintiff's counsel within six weeks of the date of this ruling pursuant to Rules 18A(3)(e)(i) and 18A(4.1), which in turn reference Rule 40A(5).

[53] I will not make any order for the pre-trial examination by the defendant of Cst. Houston, as the defendant has not yet made such an application. In any event, if that application is made, I expect that defendant's counsel will provide notice to the R.C.M.P., as they have expressed an interest in this matter.

[54] I am not persuaded that the costs sanction sought by the plaintiff would be appropriate in the circumstances. The plaintiff has not been prejudiced by the manner in which this summary trial application has commenced. The argument heard thus far would presumably have been made in any event, as part of the overall application. I have already noted that the plaintiff's own Response, filed March 9, 2004, anticipated that his responsive argument to the defendant's Notice of Motion, filed March 1, 2004, would be heard as part of the plaintiff's application under Rule 18A. Therefore, I order that costs shall be in the cause.

[55] It is open to me to seize myself of this matter pursuant to Rule 18A(10.2). Given my familiarity with the somewhat voluminous materials in this matter filed to date, as well as having had the benefit of a full day of argument by counsel at the outset of this

hearing, I feel it would be appropriate to do so. However, I did not specifically seek the parties' submissions on this point. If either counsel have any objection to my continuing to hear the balance of the summary trial application, I direct that they file and exchange written submissions within six weeks of the date of this ruling, including any responsive written submissions.

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GOWER J.