

COPY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20120713
Docket: S20980
Registry: Chilliwack

Between:

Gerald Boudreault

Plaintiff

And:

Hal MacLellan

Defendant

Before: The Honourable Mr. Justice Bernard

Oral Reasons for Judgment

Counsel for the Plaintiff:

H. Bains

Counsel for the Defendant:

P.G. Kent-Snowsell

Place and Date of Trial:

Chilliwack, B.C.
July 9-11, 2012

Place and Date of Judgment:

Chilliwack, B.C.
July 13, 2012

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[1] THE COURT:

A. OVERVIEW

[2] On July 7, 2009, the plaintiff, Gerald Boudreault, was struck by a minivan driven by the defendant, Hal MacLellan. The incident occurred on Highway No. 1 near Spences Bridge, British Columbia. Mr. Boudreault was a pedestrian who was attempting to cross the highway to visit a fruit stand across the road from where he had stopped his westbound vehicle.

[3] The issues of liability and damages were severed by order of Mr. Justice Joyce at a trial management conference held on June 14, 2012; accordingly, on July 9, 2012, the liability issue was litigated separately.

[4] At the liability trial, the plaintiff's position was that his injuries were caused solely by the defendant's negligence in the operation of his motor vehicle. The plaintiff said he was struck by the rear of the defendant's fishtailing van as he stood approximately three feet from the outer edge of the westbound lane.

[5] The defendant's position was that the plaintiff was solely at fault for his injuries for entering onto a highway and into the westbound lane of travel of Mr. MacLellan, without warning, and when Mr. MacLellan's vehicle was so close that he could not take reasonable steps to avoid colliding with Mr. Boudreault.

[6] It is common ground that it was the passenger side of the defendant's westbound minivan which came into contact with the plaintiff, and that after the collision, Mr. MacLellan stopped and came to Mr. Boudreault's aid. Mr. Boudreault was shaken but able to continue on his way. He purchased fruit from the fruit stand and drove off to visit with his grandchildren at Spences Bridge. Later, he stopped at the emergency ward in Chilliwack to get some minor medical attention and then reported the incident to an ICBC insurance adjuster the following day.

B. EVIDENCE

[7] Gerald Boudreault was the only witness called by the plaintiff. Mr. Boudreault is a retired heavy duty mechanic. He is 74 years of age and resides in Winnipeg, Manitoba. Mr. Boudreault has no obvious impairments or disabilities, and he appears relatively agile for his age. He is a man of average height and weight. He has raspy speech due to a bout of throat cancer, but otherwise appears to be in good health. He was alone and driving his 1998 Ford Expedition from Calgary to Spences Bridge on the day of the accident.

[8] The accident occurred approximately ten minutes east of Spences Bridge, at approximately 12:30 p.m., on a clear and sunny summer's day. At this location, the highway is two lanes wide, divided by a double solid yellow line for eastbound and westbound traffic. There is a six-foot paved shoulder demarcated by a single solid white line (the "fog line") on the inner edge, and a wide pullout for westbound traffic at its outer edge. The pullout is bordered by gravel and grass at its far edge.

[9] Mr. Boudreault recalled the events of July 7, 2009 as follows.

[10] He was travelling westbound along Highway 1. at approximately 12:30 p.m. when he saw a fruit stand on the opposite side of the highway and decided to stop to purchase berries. He pulled into a pullout across the highway from the fruit stand and parked his vehicle close to its far edge: that is, 17 feet from the edge of the highway. He checked his mirrors before alighting and saw no approaching traffic. He walked to the edge of the asphalt and stopped there. He looked to the left for westbound traffic and then to the right for eastbound traffic. He saw no vehicles and took two steps out onto the asphalt shoulder. He had not yet crossed the fog line when he heard the defendant's vehicle's horn sound just before he saw the vehicle. He jumped back one step but was caught by the rear passenger side of the minivan which was fishtailing at the time. He was thrown back to where his Expedition was parked, landing in the gravel/grass area at the far edge of the pullout.

[11] A man who said he was a doctor came to Mr. Boudreault's assistance and asked him to sit in the driver's seat of his Expedition. He exchanged identification

and insurance information with the driver of the minivan. He waited an hour for police and/or ambulance to attend but when neither showed, he purchased berries and decided to drive to Spences Bridge. The defendant offered to follow him to ensure he arrived safely at Spences Bridge. At Spences Bridge he helped the defendant repair his rear passenger window and then they parted.

[12] Mr. Boudreault received some treatment at the emergency ward of Chilliwack Hospital and gave a statement to an ICBC adjuster the next day.

[13] In cross-examination, Mr. Boudreault agreed to the following:

- that he did not see the minivan at any time prior to hearing its horn sound;
- that when he was struck he was wearing sunglasses which attached by magnet to his regular glasses;
- that three to four seconds elapsed between the horn sounding and the impact;
- that there was no opportunity to judge the speed of the minivan;
- that in his July 8, 2009 statement and diagram he did not mention or draw the fog line which he said he had not yet crossed when he was struck;
- that there is no "dip" in the road near the accident site although in his ICBC statement he offered such as a possible explanation for not seeing the minivan approach from the east;
- that he cannot recall how noisy the nearby river was on July 7, 2009 but he visited the same area recently and noted that the rushing water was very loud and, perhaps, precluded him from hearing the minivan as it approached;
- that he could not be sure what caused his thumb injury, but he believed it was from contact with the ground as opposed to with the minivan;

- that he was certain that the minivan's passenger side mirror did not come in contact with him and, therefore, he could not have broken it;
- that no part of the minivan other than the right rear fender and swing-open window at the rear came into contact with him;
- that in his ICBC statement he did not use the term "fishtailing" to describe the movement of the van just prior to impact;
- that after the impact the minivan driver pulled over about 100 feet ahead and came back to speak to him;
- that he examined the right rear area of the minivan after he had purchased berries and saw some damage where he believed he had come into contact with it; and,
- that he did not look for damage elsewhere along the passenger side of the minivan because he was satisfied that only the rear portion of the minivan had struck him.

[14] Hal MacLellan was the only defence witness. Mr. MacLellan is a welder/mechanic/millwright who resides in Abbotsford, British Columbia. He is 53 years of age and has no apparent disabilities.

[15] On July 7, 2009, Mr. MacLellan was alone and driving his 1993 Dodge Caravan westward along Highway 1. Mr. MacLellan says he has driven this stretch of road approximately 100 times and is, thus, very familiar with it. He described the minivan as being in excellent mechanical condition with nearly new brakes and tires, and with no steering, braking, or wheel alignment issues.

[16] He recalled Mr. Boudreault's red Expedition passing him about five-to-ten minutes prior to the fruit stand where the accident occurred. He said he next saw the Expedition when the fruit stand came into his view from a higher point of the roadway to the east of the fruit stand. He said the Expedition was stopped across

the highway from the fruit stand with its driver's side tires resting on the outer edge of the shoulder marked on the inner edge by a fog line.

[17] Mr. MacLellan said he disengaged the cruise control function at the top of the hill and approached the area of the fruit stand at a speed of approximately 50-to-55 miles per hour. He said as he neared the Expedition, he moved slightly towards the centre line; however, without warning the driver's door of the Expedition opened and Mr. Boudreault exited, closed the door, stepped across the road shoulder and walked into the westbound travel lane without looking in the direction of Mr. MacLellan's oncoming minivan.

[18] Mr. MacLellan said he was "surprised and stunned" by Mr. Boudreault. He sounded his horn and applied his brakes immediately. He said Mr. Boudreault "just walked into the side of my van". He said only one-to-two seconds passed between sounding the horn and the impact. Mr. MacLellan said that the impact was out of his vision but he heard a thump on the side of his minivan. He estimates that Mr. Boudreault was two-to-three feet into the westbound lane of traffic when the impact occurred.

[19] Mr. MacLellan said that at no time was there a loss of control of his vehicle; that the brakes worked without problem; and, that the minivan did not fishtail or cross the fog line.

[20] Mr. MacLellan said that he ran over to Mr. Boudreault to assist him after he stopped his minivan; that Mr. Boudreault had fallen to the ground near to where the impact had occurred but was back on his feet quickly; that he asked Mr. Boudreault repeatedly if he was all right; that Mr. Boudreault assured him that he was, hugged him and high-fived him for approximately five minutes; that the customers from the fruit stand gathered, one of whom was a doctor; that Mr. MacLellan left Mr. Boudreault with the doctor and returned to his minivan to shut off the engine and retrieve his registration and insurance papers; that Mr. Boudreault took down this information on a piece of paper; and, that Mr. Boudreault went over to the fruit stand for a while at the invitation of the owner.

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[21] Mr. MacLellan said that after some time passed, but before he had obtained needed information from Mr. Boudreault, he saw Mr. Boudreault get into his Expedition and drive off at a high rate of speed, and that Mr. MacLellan followed him in his minivan and eventually caught up to him at a gas station at Spences Bridge where he blocked the Expedition with his minivan until he got the information he needed.

[22] Mr. MacLellan said the passenger side of his van had old marks and dents but he believed that the impact from Mr. Boudreau caused: (a) a small crack in the lower right hand corner of his windshield; (b) broken glass in the side view mirror; and, (c) damage to the rear swing-out window, which had been open at the time. He said at the scene he noted that the passenger side mirror had been pushed inward and he presumed it was from a part of Mr. Boudreault's body coming in contact with it in the collision.

[23] In cross-examination, Mr. MacLellan agreed that he was not sure if the glass in the rear view mirror was broken in the accident or at some later date; that he had purchased the Caravan for \$600 within the past four to 18 months; that his assessment of the condition of the brakes was based on his own inspection and test; and, that he did not see exactly where Mr. Boudreault landed after he was struck but that it was not in the gravel near the grass as Mr. Boudreault had stated.

[24] Mr. MacLellan did not agree that he skidded across the fog line when he applied his brakes. He said that the skid was straight; that he was near the centre line when he applied the brakes; and that the road is "for all intents and purposes" straight at the point in question.

[25] I pause to note that the accident scene was not examined or photographed at the time, and there is no evidence of skid marks in the scene photos tendered.

[26] Photographs entered into evidence by agreement, depict the minivan of the defendant as it appeared on January 22, 2010, approximately six months after the event. The photos show relatively minor damage along the passenger side, including

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a broken side mirror, a fracture to the windshield near the lower right hand corner, several paint scratches along the side, and a dent in the area above the rear wheel well.

[27] Diagrams and photographs of the accident scene were also entered into evidence, by agreement. The diagrams show the shoulder (the area between the fog line and the edge of the asphalt) is 6 feet, 2 inches wide where Mr. Boudreault was struck and that the westbound traffic lane at this point is 12 feet, 3 inches wide. It is agreed that the speed limit in this portion of the highway is 100 kilometres per hour.

[28] The photographs capture the westward and eastward views of the highway at the spot where Mr. Boudreault was struck. They show a relatively flat and open area with no obstacles to obscure one's view of approaching vehicles from either direction from the point where Mr. Boudreault was struck. The vista is longer to the west than it is to the east. To the east the roadway curves slightly, and there is a gentle incline. There is a double solid centre line where Mr. Boudreault attempted to cross the road, indicating that it is not a suitable point for vehicles to pass by entering into the opposite lane of travel.

C. THE LAW

[29] The governing provisions of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 are as follows:

179 (2) A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.

180 When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle.

181 Despite sections 178, 179 and 180, a driver of a vehicle must

- (a) exercise due care to avoid colliding with a pedestrian who is on the highway,
- (b) give warning by sounding the horn of the vehicle when necessary

[30] The governing common law principles are found in the seminal case of *Walker v. Brownlee and Harmon* (1952), 2 D.L.R. 450 (S.C.C.) at paras. 46 through 49:

[46] The duty of a driver having the statutory right-of-way has been discussed in many cases. In my opinion it is stated briefly and accurately in the following passage in the judgment of Aylesworth J.A., concurred in by Robertson C.J.O., in *Woodward v. Harris*, [1951] O.W.N. 221 at p. 223: "Authority is not required in support of the principle that a driver entering an intersection, even although he has the right of way, is bound to act so as to avoid a collision if reasonable care on his part will prevent it. To put it another way: he ought not to exercise his right of way if the circumstances are such that the result of his so doing will be a collision which he reasonably should have foreseen and avoided."

...

[48] In applying this principle it is necessary to bear in mind the statement of Lord Atkinson in *Toronto R. W. Co. v. King*, 7 C.R.C. 408 at p. 417, [1908] A.C. 260 at p. 269: "Traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets."

[49] While the decision of every motor vehicle collision case must depend on its particular facts, I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was *fons et origo mali*.

[31] The parties agree that the foregoing principles apply to collisions between pedestrians and motor vehicles (see *McIntyre v. Morgan*, [1980] B.C.J. No. 2182 (S.C.) and *Christensen v. Gerber*, 2007 BCSC 1397).

[32] In *Christensen, supra*, Neilson J. (as she then was) made the following apposite remarks:

[50] ... The authorities as a whole, however, are clear that where a pedestrian leaves a place of safety and enters a roadway outside a crosswalk, the onus rests on the pedestrian to show on a balance of probabilities that the defendant driver had a reasonable opportunity to avoid

hitting him or her. Any doubt must be resolved in favour of the defendant, as the plaintiff was in a servient position and left the place of safety.

[33] Similarly in *Pacheco (Guardian ad litem) v. Robinson*, [1993] B.C.J. No. 154 (C.A.) the Court said at para. 18:

[18] In my opinion, when a driver in a servient position disregards his statutory duty to yield the right of way and a collision results, then to fix any blame on the dominant driver, the servient driver must establish that after the dominant driver became aware, or by the exercise of reasonable care should have become aware, of the servient driver's own disregard of the law, the dominant driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself. In such circumstance any doubt should be resolved in favour of the dominant driver....

[34] In *McIntyre, supra*, Toy J. (as he then was) dealt with a servient pedestrian who was struck by a motor vehicle. At para. 15 he said:

[15] ... The plaintiff has the burden of proving on the balance of probabilities that the defendant, Mr. Morgan, after becoming aware, or after he should have become aware, of the plaintiff's presence that he had sufficient opportunity to avoid striking the plaintiff. I have already observed that the defendant, Mr. Morgan, immediately applied his brakes on seeing the plaintiff, but it was in such a short distance impossible for him to stop. With respect to the second branch of the test, I do not think it is reasonable to conclude that the defendant Mr. Morgan should have seen the plaintiff alighting from the curb between the parked cars. Should the defendant Mr. Morgan have seen the plaintiff from a distance -- say of seven feet from the easterly curb? Running as he was, even if at an angle, having failed to observe the plaintiff for such a short distance that to assign that as a breach of duty would be tantamount to imposing a standard of perfection rather than what is reasonable....

D. FINDINGS AND ANALYSIS

[35] The only two eyewitnesses to the collision were Mr. Boudreault and Mr. MacLellan. Their versions are at odds with one another, both in critically important and inconsequential aspects.

[36] As to the former, Mr. Boudreault said that he parked his vehicle 17 feet from the edge of the highway, walked to the shoulder of the highway in plain view of approaching westbound traffic, stopped before he crossed the fog line, looked left and right, saw no approaching vehicles, took one to two steps towards the fog line,

heard a horn, looked to his left, saw a minivan fishtailing towards him, jumped back one step and was struck by the rear passenger side of the fishtailing minivan. He said the blow from the van threw him to the front passenger side of his Expedition where he landed in the gravel and grass. He specifically recalled using the front bumper of his Expedition to get back to his feet.

[37] Mr. MacLellan, on the other hand, said that Mr. Boudreault's Expedition was parked on the edge of the paved road: that is, where the road meets the pullout, rather than 17 feet into the pullout; that as Mr. MacLellan neared the Expedition, Mr. Boudreault opened the driver's door and walked out into his path of travel without any warning and without looking back to see Mr. MacLellan's minivan approaching at approximately 50 to 55 miles per hour; that Mr. MacLellan leaned on the horn and slammed on his brakes; that the minivan skidded forward without fishtailing and as it did so, Mr. MacLellan heard Mr. Boudreault's body come in contact with the side of the minivan; and, that Mr. Boudreault went down to the ground very close to where he was struck.

[38] As to the latter: that is, the inconsequential aspects, Mr. Boudreault said that when he felt well enough to carry on, Mr. MacLellan kindly offered to follow him to Spences Bridge to ensure that he arrived there safely. Mr. MacLellan, on the other hand, said that Mr. Boudreault departed without warning and before he had an opportunity to get insurance and registration information from him; and, that Mr. MacLellan pursued Mr. Boudreault to Spences Bridge for this purpose.

[39] The significance of the critically important differences in Mr. Boudreault's account is that it allows him to argue that with the exercise of due attention and prudent driving by Mr. MacLellan, the collision would not have occurred. In other words, if the events unfolded as described by Mr. Boudreault, then Mr. MacLellan ought to have (a) seen Mr. Boudreault walking across 17 feet of pullout; (b) surmised that he was heading to the fruit stand across the street; (c) reduced his speed and distanced himself from Mr. Boudreault who was standing on the shoulder; and, (d) anticipated that Mr. Boudreault might step into his path.

[40] Mr. Boudreault's version of events is, however, very troubling in several respects.

[41] I will begin with the observation that it is not in issue that the photographs of the area in question are an accurate depiction of it. They establish that the area is relatively flat and open with clear views of the highway for reasonable distances to the left and right for any sighted person in the position of Mr. Boudreault. The weather was clear and the traffic was very light at the time.

[42] Given these circumstances, it is a virtual certainty that if Mr. Boudreault had looked to his left as he claims, he would have seen Mr. MacLellan's approaching minivan. If he had seen Mr. MacLellan's minivan, then it would have been sheer folly for him to step onto the roadway, even if he remained within the shoulder area. Mr. Boudreault had not only just driven the same roadway but he had also driven it many times before. He knew that it was a relatively narrow section of the highway that is only two lanes wide, and that the speed limit was 100 kilometres per hour.

[43] It is also noteworthy that on Mr. Boudreault's version of events, he would have had a clear view of westbound traffic as he walked between the point where he says he parked his Expedition and the edge of the roadway. It makes little sense, then, that Mr. Boudreault would have walked 17 feet, stopped at the very edge of the pavement, and then looked for traffic approaching from his left and right. From the moment he exited his vehicle, his only destination was the fruit stand on the far side of the highway.

[44] It is of great significance that Mr. Boudreault can offer no explanation for failing to see Mr. MacLellan's minivan until it was virtually upon him. The only rational conclusion for this failure is that Mr. Boudreault did not look to his left before he began to cross the highway.

[45] The failure to see the minivan also calls into question Mr. Boudreault's testimony that he parked his vehicle 17 feet into the pullout. More probative on this question, however, is his testimony that when he was struck by the minivan he was

thrown to the passenger side of his Expedition. On Mr. Boudreault's evidence he would have to have been thrown approximately 20-to-25 feet. In this regard, it is noteworthy that Mr. Boudreault specifically recalled that he used his front bumper as support to get back to his feet.

[46] I am satisfied that if Mr. Boudreault had been struck with enough force to throw him 20-to-25 feet, then it is most unlikely that he would have survived the collision, let alone risen to his feet, dusted himself off, and, after a brief rest without any medical treatment, driven off. Also, if the minivan had struck Mr. Boudreault with such force, one would expect to see significant corresponding damage to the minivan, yet no such damage exists. For these reasons, I conclude that Mr. Boudreault is in error about where he parked his vehicle.

[47] In relation to the inconsequential matters, Mr. Boudreault said that Mr. MacLellan left the accident scene with him, and simply followed to ensure he arrived at Spences Bridge safely. This is strangely at odds with Mr. MacLellan's version of chasing down Mr. Boudreault because he had left the scene without giving insurance information to Mr. MacLellan. It is strange because there would be little purpose for Mr. MacLellan to concoct a different scenario when the one given by Mr. Boudreault reflected rather well on him.

[48] Mr. MacLellan testified that Mr. Boudreault's Expedition was parked at the edge of the roadway and that Mr. Boudreault exited without warning and began to cross the highway without looking to his left. Mr. MacLellan said that Mr. Boudreault walked into the side of his van and that this caused him to fall to the ground close to where he came into contact with the minivan and close to his parked Expedition.

[49] Mr. MacLellan's testimony is consistent with: (a) Mr. Boudreault's relatively minor injuries; (b) the damage to the van including the pushed-in rear view mirror; and, (c) Mr. Boudreault's recollection that he used the front bumper of his Expedition to pull himself to his feet after the collision.

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[50] Mr. MacLellan was specific about the location of Mr. Boudreault's Expedition in relation to the shoulder. He said the driver's side tires were on the unpainted line which marked the outer edge of the shoulder. The shoulder was 6 feet wide.

[51] It is noteworthy that Mr. Boudreault specifically recalled checking his mirrors before exiting his Expedition. If Mr. Boudreault were parked 17 feet into the pullout, then there would be little purpose in such a check; whereas, if Mr. Boudreault were parked at the edge of the highway, then checking his mirrors before alighting from his vehicle would make some sense. The mirror check likely explains why Mr. Boudreault did not look to his left after he exited his vehicle. Having just checked his mirrors and determined, albeit incorrectly, that there was no approaching traffic, he decided it was safe to cross the road. He was clearly wrong.

[52] In summary, in relation to how this event unfolded, I accept the testimony of Mr. MacLellan and reject the testimony of Mr. Boudreault where it differs from that of Mr. MacLellan, for all the foregoing reasons.

[53] When Mr. Boudreault testified, he seemed genuinely convinced of the truth and accuracy of his version of events. While I do not think that Mr. Boudreault has deliberately lied to this Court, I am satisfied that he either seriously misperceived the events as they unfolded, or inaccurately reconstructed the events in the aftermath.

[54] In relation to Mr. MacLellan's driving, there is no evidence that it was careless or imprudent or that it in any way caused or contributed to the collision. Mr. MacLellan's evidence is that he was driving under the speed limit in order to preserve what little gas he had left until he reached the next gas station. There is no evidence to the contrary, and I accept Mr. MacLellan's evidence in this regard. Mr. MacLellan is an experienced driver and I am satisfied that he was well in control of his minivan at all material times. There is no evidence of mechanical failure or shortcoming in the operation of the minivan, and I accept the evidence of Mr. MacLellan that the minivan's brakes and tires were in good condition.

[55] Mr. MacLellan said he observed Mr. Boudreault's parked Expedition from a considerable distance and as he approached it, he moved towards the centre line. This was reasonable and prudent. He had a view of the area as he approached. He noted that the area was quiet. He saw some parked cars on the opposite side of the highway, but saw no pedestrians. I accept his evidence in this regard. Mr. Boudreault did not suggest otherwise.

[56] Mr. MacLellan said that there was no warning that Mr. Boudreault would alight from his vehicle and walk onto the roadway without looking to his left for westbound traffic. I accept Mr. MacLellan's evidence in this regard and find that Mr. Boudreault's sudden and unexpected moves were not reasonably foreseeable.

E. CONCLUSION

[57] In view of the foregoing findings and principles of law, I conclude that Mr. Boudreault was in the servient position *vis-à-vis* Mr. MacLellan; that Mr. Boudreault disregarded his statutory duty to yield the right-of-way to Mr. MacLellan; that Mr. Boudreault has failed to prove that Mr. MacLellan had a sufficient and reasonable opportunity to avoid hitting him - an opportunity of which a reasonably careful and skilful driver would have availed himself; and, that Mr. Boudreault is, thus, entirely at fault for the collision in question.

F. DISPOSITION

[58] The plaintiff's case is dismissed. If the parties cannot agree upon the issue of costs, then they are liberty to make written submissions.



The Honourable Mr. Justice Bernard