

Marlatt v. Alberta (Public Trustee), 1999 ABQB 474

Date: 19990616

Actions No. 9701-09879// 9701-09998//9701-11401//9701-11402// 9701-12684//9701-12693

**IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY**

BETWEEN:

Action No. 9701-09879

DARYLL DOUGLAS FREDERICK MARLATT

Plaintiff

- and -

THE PUBLIC TRUSTEE FOR THE PROVINCE OF ALBERTA, ADMINISTRATOR AD
LITEM OF THE ESTATE OF WAYNE MICHAEL STANKO, Deceased, the said WAYNE
MICHAEL STANKO, Deceased, NORMAN F. MARLATT and JOANNE CLAIR MARLATT
and CO-OPERATORS GENERAL INSURANCE COMPANY

Defendants

AND BETWEEN:

Action No. 9701-09998

DARRYL DOUGLAS FREDERICK MARLATT

Plaintiff

- and -

THE CO-OPERATORS GENERAL INSURANCE COMPANY

Defendant

AND BETWEEN:

Action No. 9701-11401

JASON ARTHUR WELZ

Plaintiff

- and -

THE PUBLIC TRUSTEE FOR THE PROVINCE OF ALBERTA, ADMINISTRATOR AD
LITEM OF THE ESTATE OF WAYNE MICHAEL STANKO, Deceased, and JOANNE CLAIR
MARLATT and NORMAN FRED MARLATT

Defendants

AND BETWEEN:

Action No. 9701-11402

JASON ARTHUR WELZ

Plaintiff

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Defendant

AND BETWEEN:

Action No. 9701-12684

KURT KENNETH TANG

Plaintiff

- and -

THE PUBLIC TRUSTEE FOR THE PROVINCE OF ALBERTA, ADMINISTRATOR AD
LITEM OF THE ESTATE OF WAYNE MICHAEL STANKO, Deceased, the said WAYNE
MICHAEL STANKO, Deceased, NORMAN F. MARLATT and JOANNE CLAIR MARLATT

Defendants

AND BETWEEN:

Action No. 9701-12693

KURT KENNETH TANG

Plaintiff

- and -

DOMINION OF CANADA GENERAL INSURANCE COMPANY

Defendant

REASONS FOR JUDGMENT
of The Honourable Mr. Justice G.R. Forsyth

I. BACKGROUND

[1] This application is brought pursuant to Rule 221 of the *Alberta Rules of Court*. The applicants are Plaintiffs in a motor vehicle accident claim and seek to have this Court determine the legal effect of the addition of Sections 1(f.1) and 9.1 to the *Motor Vehicle Accident Claims Act* (c. M-21) (as amended on July 5, 1998).

[2] In short, the Plaintiffs wish to get judgment against the Administrator of the *Motor Vehicle Accident Claims Act* without jeopardizing their claim to damages in excess of the statutory limits prescribed in the *Act*.

[3] The Plaintiffs seek to sue and recover compensation from the Administrator of the *Motor Vehicle Claims Act* in lieu of an inadequately insured *tortfeasor* as permitted in the *Act*. Under the *Act*, the Administrator can only pay pursuant to a judgment (section 9(8)). Prior to the amendments, a judgment against the Administrator in lieu of a *tortfeasor* extinguished the claim against that *tortfeasor*. Consequently, after a judgment against the Administrator, a plaintiff was no longer legally entitled to further compensation and could not subsequently obtain the benefit of a family protection benefit endorsement, S.E.F. No. 44. Such an endorsement adds the insurer as a defendant to the tort action by consent in the event that a claim is not fully satisfied (legally) against the *tortfeasor*.

[4] Practically speaking, the Plaintiffs wish to access the money from the Administrator's General Revenue Fund without having to wait for a quantification of damages at trial. The Applicants argue that the amendments now permit such a recovery.

II. ISSUE

[5] This Court is asked to determine the following legal issues in light of the amendments to the *Motor Vehicles Accident Claims Act*:

1. Does a partial judgment consented to by the Administrator of the *Motor Vehicle Accident Claims Act*, but not consented to by the SEF 44 insurers, permit the Plaintiffs in the relevant actions to continue their respective claims against
 - A. the defendant against whom the partial judgment is obtained, and
 - B. any other defendant or defendants to the actions.
2. Does such a partial judgment preserve and permit the continuation of the plaintiff's respective claims for indemnity against their SEF 44 insurers and does it preserve the SEF 44 insurers obligation to indemnify the plaintiffs for their claims in excess of the amount awarded to each plaintiff in the partial judgment.

DECISION

[6] The answer to both questions is "Yes".

LAW

[7] Prior to the amendments, the statutory authority governing the ability of the Administrator to offer a judgment to a plaintiff pursuant to the *Motor Vehicle Accident Claims Act* was Rule 169(2) of the *Alberta Rules of Court*.

[8] Under this statutory authority (i.e., prior to the amendments), as decided in *Dahl v. The Administrator of the Motor Vehicle Accident Claims Act* [1997] A.J. No. 733, the Administrator had no liability independent of the *tortfeasor* but stood solely in his or her place. The result was that a judgment against the Administrator for the statutory limits (now \$200,000 plus costs) would leave a plaintiff without a legally valid claim against his S.E.F. 44 insurer for excess damages. This was so, even if the plaintiff had proceeded to prove his damages and obtained judgment for more.

[9] On June 10, 1997, The Alberta Court of Appeal upheld the decision of Justice McMahon in *Dahl*, but stated that the proper solution would be to amend the legislation and the *Rules* to allow a continued claim against other parties (including S.E.F. 44 insurers) for damages in excess of the maximum recoverable from the Administrator.

[10] The amended Sections read as follows:

1(f.1) "partial judgment" means a judgment

- (i) that is for the maximum prescribed by this Act or the regulations that may be paid out of the General Revenue Fund with respect to all claims arising out of one accident, and
- (ii) that permits the plaintiff to continue the action against

- (A) the defendant against whom the partial judgment is obtained,
- (B) and any other defendant or defendants to the action,

to the extent that the plaintiff has claims against them for an amount in excess of the amount awarded in the partial judgment;

- 9.1**
- (1) Where, under section 6, the Administrator consents to a partial judgment against a defendant or makes an offer of partial judgment against a defendant, a court shall award partial judgment in either case on the application of the plaintiff,
 - (2) When the Administrator is a defendant under section 9, the Administrator may consent to a partial judgment, or make an offer of partial judgment, a court shall award partial judgment in either case on the application of the plaintiff.

REASONING

[11] Rule 169 only permits a plaintiff to proceed with an action for any claims not covered by the judgment or any claims against other defendants. As discussed, a judgment against the Administrator (in lieu of inadequately insured *tortfeasor*) before the amendments to the *Act* extinguished the claim against the *tortfeasor* in whose place the Administrator stood.

[12] The wording of the amendments is clear. The amendments now permit the Administrator to consent to a ‘partial judgment’ which by definition allows the plaintiff to continue the action, including against “the defendant against whom the partial judgment is obtained”. The judgment requirement of section 9(8) is also satisfied by the following definition.

1 (a.1) “judgment” includes a partial judgment;

[13] Therefore under the amendments, the claim against the *tortfeasor* in whose place the Administrator stands is not extinguished by the partial judgment and the plaintiff is legally entitled to recover damages from the *tortfeasor* in excess of the maximum prescribed in the *Act*.

[14] Consequently, a plaintiff can now obtain a partial judgment against the Administrator without jeopardizing his claim against his S.E.F. insurer. The contractual obligation on an S.E.F. 44 insurer to indemnify is preserved where the insurer promises to indemnify the insured for the amount the insured is legally entitled to recover from an inadequately insured *tortfeasor*.

[15] Costs may be spoken to if required.

DATED at Calgary, Alberta, this 16th day of June, 1999.

COUNSEL:

E.S. Pipella, Q.C., R.J. Mueller,
W.W. Kubitz and D.W. Fetherston
for Plaintiffs

M.J. Kelly, Q.C.,
and N.L. Lecours
for Defendants