IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Provost v. Bolton,*
2016 BCSC 2255

Date: 20161130
Docket: M125926
Registry: Vancouver

Between:

Quinn Provost

Plaintiff

And

David James Bolton and Dueck Downtown Chevrolet Buick GMC Limited, J. Doe and ABC Corporations #1- #3

Defendants

- and -

Docket: M142374
Registry: Vancouver

Between:

Brandy Brundige

Plaintiff

And

David Bolton, Dueck Downtown Chevrolet Buick GMC Limited, Minister of Justice for the Province of British Columbia, John Doe #1, and John Doe #2

Defendants

- and -

Docket: M142533
Registry: Vancouver

Between:

Attorney General of Canada

Plaintiff

And

David James Bolton and Dueck Downtown Chevrolet Buick GMC Limited and Kyle Katerenchuk

Defendants

Before: The Honourable Madam Justice Duncan

Reasons for Judgment

Counsel for the Plaintiff Provost:	A. Sayn-Wittgenstein P. Bosco
Counsel for the Defendant Bolton:	R. Robertson
Counsel for the Plaintiff Brundige:	A. Leoni
Counsel for the Defendants Dueck Downtown Chevrolet Buick GMC Limited and Katerenchek:	P. Mazzone
Counsel for the Plaintiff Attorney General of Canada:	D. Kwan E. Louie
Place and Dates of Trial/Hearing:	Vancouver, B.C. March 31, 2016 April 1, 2016 June 2-3, 2016
Place and Date of Judgment:	Vancouver, B.C. November 30, 2016

Table of Contents

Introduction

[1] On the morning of April 24, 2012, Kyle Katerenchuk, the lot manager at the Dueck Downtown Chevrolet Buick GMC car dealership on Terminal Avenue in Vancouver, parked a truck outside a service bay at the dealership. He left the truck running, with the keys in the ignition and the doors unlocked. Approximately 40 minutes later the truck was stolen.

[2] Once employees of Dueck realized the truck had been stolen, a representative of the dealership spoke with a police officer, called 911 and then notified OnStar, a company that provides onboard assistance to people in vehicles equipped with the service. The truck was equipped with GPS tracking and could be located through the OnStar service.

[3] With the information from OnStar, Richmond RCMP located the truck approximately 90 minutes after it was stolen. The defendant, David Bolton, was at the wheel. The truck was then involved in two separate motor vehicle collisions, first with Constable Quinn Provost and several police vehicles, then a few moments later with a vehicle driven by Brandy Brundige.

[4] The two collisions resulted in three actions.

[5] Cst. Quinn Provost commenced an action on September 27, 2012 (M125926) for injuries he suffered in the collision. His trial is set to be heard by a jury commencing on March 20, 2017.

[6] Brandy Brundige started an action on April 14, 2014 (M142374) seeking damages for injuries she suffered in a collision with the same truck, moments after it collided with Cst. Provost. The trial of Ms. Brundige’s action is set for 20 days commencing on June 12, 2017.

[7] The Attorney General of Canada commenced an action on April 23, 2014 (M142533) for recovery of damages caused to police vehicles owned by the

Government of Canada in the course of attempting to recover the stolen truck. No hearing date has been set for this matter.

[8] Dueck Downtown Chevrolet Buick GMC and Kyle Katerenchuk are either defendants or a further third party in the three aforementioned actions. They seek to have the negligence claims against them determined through a summary trial under Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

[9] Rule 9-7(15) states:

> On the hearing of a summary trial application, the court may
>
> > (a) grant judgment in favour of any party, either on an issue or generally, unless
> >
> > > (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,
> >
> > (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
> >
> > (c) award costs.

[10] The applicants submit the claims against them should be dismissed because they did not owe the plaintiffs a duty of care; the claims of the plaintiffs are too remote; and an intervening act of a third party (the police pursuit) broke the chain of causation.

[11] All of the respondents to this application are opposed to the determination of any of the issues raised by the pleadings through a summary trial process.

The Evidentiary Record

[12] The parties filed excerpts from the examination for discovery of several people including Mr. Katerenchuk, Mr. Schram and Mr. Upton. There was also affidavit evidence from a number of people including Ms. Brundige, Cst. Provost and Ms. Chand, a legal assistant.

[13] The applicants objected to the admissibility of the affidavits of Cst. Provost and Ms. Chand. Counsel for the applicants maintained Cst. Provost's affidavit contained inadmissible opinion evidence concerning car thieves and reckless driving as well as an opinion about the character of the neighbourhood in which the Dueck dealership was situated. The objection to Ms. Chand's affidavit was that it included newspaper articles and other material concerning car theft and its connection to reckless driving.

[14] In light of my conclusion on the suitability of this matter for summary trial I will not resolve these evidentiary objections.

Chronology of Events

[15] Dueck operates a car dealership at 888 Terminal Avenue in Vancouver. At 8:58 a.m. on April 24, 2012, Mr. Katerenchuk left an unlocked one ton 2011 GMC Sierra K2500 diesel pick-up truck parked outside a detail bay at the dealership. The truck had been sold and required detailing before it was handed over to its purchaser.

[16] The truck was running with the doors unlocked and the keys in the ignition. The truck was parked in an area open to the public view. Anyone walking or driving along Terminal Avenue past the dealership could see the truck, along with other vehicles in the lot. The dealership is not fenced in. It is an open area where people can walk around and view vehicles.

[17] Mr. Katerenchuk had to use a battery booster on the truck earlier that morning so he opted to leave the truck running with the keys in it so the detailer, Rakesh Singh, could access it easily without having to go to another part of the lot to retrieve the keys and possibly a battery booster. If the battery went dead again, Mr. Singh would have had a further delay in completing the job.

[18] Mr. Katerenchuk did not take any steps to secure the truck as he appears to believe he had passed off responsibility for the truck to Mr. Singh. There is no evidence Mr. Singh accepted responsibility for the truck.

[19] The truck sat with its engine running for about 40 minutes when someone, likely the defendant David Bolton, got in and drove away. By this time it was either 9:28 or 9:38 a.m., depending on the accuracy of the time clock on the security camera which captured, in a grainy resolution, the theft of the truck.

[20] Mr. Singh apparently observed the vehicle leaving the lot at a high rate of speed. I say “apparently” because there was no affidavit evidence from him in this application. Mr. Singh called Mr. Katerenchuk three times in short order at 9:28, 9:33 and 9:34 a.m. Mr. Singh then alerted the receptionist, Ms. Elias, to the situation.

[21] At approximately 9:45 a.m., Ms. Elias phoned Ryan Schram, the assistant sales manager, and told him the truck had been stolen. Mr. Schram was en route to the dealership. When he arrived he called Phil Ens, a Vancouver Police Department detective with whom he was acquainted. Detective Ens advised Mr. Schram to call 911 to report the theft.

[22] At 9:53 a.m., Mr. Schram called 911. Ten minutes later he called OnStar. The OnStar operator activated the GPS tracking system in the truck. The truck was traced to an area in Richmond and members of the Richmond RCMP were dispatched to find it.

[23] At approximately 10:52 a.m., police observed the truck near Douglas Road and Smith Street in Richmond. It was stationary. Police attempted to box the truck in with their vehicles. The truck reversed into one police cruiser and then drove head on into an unmarked police car driven by Cst. Provost. Cst. Provost suffered serious injuries.

[24] Three minutes later, the truck hit a second vehicle on River Road in Richmond. Ms. Brundige was the driver. She suffered serious injuries.

[25] It is a disputed issue whether the police were in pursuit of the truck at the time of the collision with Ms. Brundige and if so whether that caused or contributed to the collision.

[26] The truck fled the second collision scene. With the assistance of OnStar, the truck was recovered in New Westminster at 11:07 a.m. The driver, David Bolton, was taken into custody. He has since disappeared and was not examined for discovery.

The Suitability of the Matter for Summary Trial

[27] In *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485, Madam Justice Griffin canvassed the principles surrounding summary trials, in particular where the summary trial addresses only some of the issues in the lawsuit. Griffin J. said:

> [109] The concerns that arise when considering whether to determine only some of the issues in a proceeding by way of summary trial, with other issues to be determined later, are in some ways similar to the concerns of a court in considering whether to grant any of the following applications: to strike pleadings; to determine questions of law or to determine an issue of fact or mixed fact and law; for judgment on part of a claim based on admissions; for severance and to try some issues before other issues in the proceeding: see Peter Behie, "Determination of an Issue Before Trial" (2005) 63 The Advocate 81; and *Ross River Dena Council v. Canada (Attorney General)*, 2013 YKCA 6.
>
> [110] In summary, the authorities in BC, including *Hryniak*, make clear that the factors the court must consider on applications to determine by summary trial only part of the issues in the lawsuit are:
>
> a) whether the court can find the facts necessary to decide the issues of fact or law;
>
> b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:
>
> i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:
>
> (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;
>
> (2) the potential for multiple appeals; and
>
> (3) the novelty of the issues to be determined;
>
> ii. the amount involved;
>
> iii. the complexity of the matter;
>
> iv. its urgency;
>
> v. any prejudice likely to arise by reason of delay; and

vi. the cost of a conventional trial in relation to the amount involved.

The Applicants' Position on Suitability for Summary Trial

[28] The applicants submit there are no facts in dispute that would prevent the determination of liability at this stage. If liability is resolved in their favour, they will not have to participate in two 20-day trials and a further trial involving the claims of the Attorney General of Canada. The other parties would also benefit as the trials would be shorter.

[29] The applicants resist the contention that determining their liability alone in a summary trial amounts to litigating in slices because if they are successful in having the claims against them dismissed the action would simply continue against the other defendants.

[30] The applicants acknowledge that while a car lot has a duty or responsibility to secure vehicles in its care or control, no duty of care exists on the facts of the three actions before me because the applicants owed the plaintiffs no private law duty of care; the claims of the plaintiffs are too remote; and the circumstances resulted from an intervening act of a third party, the defendant Bolton or the police, thereby breaking the chain of causation.

[31] Mr. Mazzone, counsel for the applicants, characterized the duty of care issue in this case as a unique one, due to the wildly disparate state of the authorities in cases involving the damage caused by improperly secured vehicles. As I will discuss later in these reasons, however, a recent decision of the Ontario Court of Appeal which was released after judgment in this matter was reserved appears to have reconciled the state of the law.

The Respondents' Positions on Suitability for Summary Trial

Cst. Provost

[32] Mr. Sayn-Wittgenstein, counsel for Cst. Provost, submits the applicants seek a determination of a discrete issue of liability in circumstances where the evidentiary

record may be different than that at trial. The defendant Bolton has not been examined for discovery, as his counsel has been unable to locate him. There is no evidence from Mr. Singh, a now former employee of Dueck, as to what transpired between him and Mr. Katerenchuk when the latter left the truck outside the detail bay. In a Notice to Admit, Dueck admits that Singh denies being told to watch the truck but he has not agreed to provide an affidavit of what transpired the morning of the theft.

[33] On the duty of care issue, counsel for Cst. Provost submits it is common sense that car thieves, upon discovery, will flee from police. But for the negligence of Dueck in leaving the truck unsecured, the plaintiffs would not have been injured. The injury was a real risk in this case and while the accident did not occur in the immediate aftermath of the flight from the theft, the temporal connection was tight. The accidents occurred within two hours of the theft in the course of police action to capture Mr. Bolton and the truck.

Brandy Brundige

[34] Mr. Leoni, counsel for Ms. Brundige, emphasized the caution in the authorities against litigating in slices, particularly in circumstances where there is a risk of inconsistent findings of fact which may impact the remaining litigants. He cited the same concern as did counsel for Cst. Provost about the lack of evidence from Mr. Singh.

[35] Mr. Leoni also maintains that counsel for the applicants made improper objections at Mr. Schram's examination for discovery which further militate in favour of a full trial. One of those objections is contained in the following excerpt from Mr. Schram's examination for discovery:

> 314 Q And at the time were you aware that in a police chase it would be reasonable to assume that the thief would drive in a dangerous manner?
>
> Mr. Mazzone: Don't answer that question.
>
> Mr. Leoni: What's the nature of the objection?
>
> Mr. Mazzone: Well, first of all, there's no evidence that there was a police chase. So in that respect, it's totally irrelevant.

[36] Mr. Leoni maintains whether or not there was a police pursuit, and to what extent it contributed to the collision with Ms. Brundige, is a material issue to be determined and it is not amenable to resolution at a summary trial, particularly in light of the evidentiary basis. There is conflicting evidence from Ms. Brundige and the E-COMM 911 records that sirens and multiple statements to "shut it down" were heard before and after the collision in which she was injured. The objections at Mr. Schram's examination for discovery on issues relating to the police pursuit hamper a proper determination of liability.

Attorney General of Canada

[37] The Attorney General of Canada's position is that the issue of whether the applicants owed the plaintiffs a duty of care is not suitable for determination on a summary basis. Mr. Kwan noted the parties fundamentally disagree whether the law recognizes a pre-existing duty of care between car lot owners who fail to properly secure vehicles and drivers injured in subsequent collisions, or whether a duty of care analysis is required.

[38] In the latter case, a decision on the existence of a duty of care would require an analysis pursuant to the two-step test articulated in *Anns v. Merton London Borough Council*, [1978] A.C. 728. The Supreme Court of Canada summarized that test in *Hill v. Hamilton-Wentworth Regional Police Service Board*, 2007 SCC 41:

> 20 The test for determining whether a person owes a duty of care involves two questions: (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and (2) If so, are there any residual policy considerations which ought to negate or limit that duty of care? (See *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), as affirmed and explained by this Court in a number of cases (*Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, at paras. 25 and 29-39; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80, at para. 9; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69, at paras. 47-50; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18, at para. 47).) .

[39] Counsel for the Attorney General of Canada submits this type of determination is ill-suited for determination at a summary trial and, in any event, will not necessarily resolve the proceedings against the applicants. If the applicants are

found liable, there would still be a trial on apportionment and damages in each of the three outstanding actions. If the applicants are not found liable, the likelihood of appellate proceedings would potentially delay the outstanding trials.

Analysis of the Suitability of this Matter for Summary Trial

[40] The suitability of this matter for summary trial depends in part on the substantive law which applies to the determination of a duty of care and in part on the application of the factors articulated in *Bilfinger* and other cases. I will start with the substantive law issue.

[41] The majority of argument on the substantive law in this case was concerned with whether a car dealership owes a duty of care to persons who are injured in a collision with a vehicle stolen from a dealership because it was improperly secured. The parties tendered numerous authorities covering a broad range of scenarios.

[42] In *Kalogeropoulos v. Ottawa (City)*, [1996] O.J. No. 3449 (C.J.), an accident occurred in the course of the theft of an unsecured city road maintenance truck, left with its engine running. The trial judge found liability against the individual in charge of the truck as well as his employer because the truck was left running outside a coffee shop while he took a break in contravention of city policy and bylaws.

[43] In *Spagnolo v. Margesson's Sports Ltd.* (1983), 41 O.R. (2d) 65 (C.A.), a car was stolen from a parking lot and several days later was involved in an accident. The owners of the parking lot were absolved of liability.

[44] In *Cairns v. General Accident Assurance Co. of Canada*, [1992], O.J. 1432 (C.J.), car keys were stolen from a dealership and then used days later to steal a car that was involved in a fatal pedestrian collision moments after the theft. The trial judge found the dealership 20% responsible for the plaintiff's death because it was negligent in leaving the keys in its cars and in failing to secure the car upon learning the keys had been stolen.

[45] Based on the authorities tendered at the hearing of this matter, it was not clear that there was a pre-existing duty of care owed in circumstances analogous to those before me. That conclusion was crystallized after this matter was reserved when Mr. Mazzone brought to my attention the decision of the Ontario Court of Appeal in *J.J. v. C.C.*, 2016 ONCA 718.

[46] J.J. and his friend C.C. were teenagers. They found an unlocked car behind Rankin's Garage, a motor vehicle sales and service business. The keys were in the ashtray of the car. C.C. decided to take the car. He did not have a licence and had never driven a car. J.J. got in the car. C.C. crashed the car. J.J. suffered a catastrophic brain injury.

[47] J.J. sued C.C., C.C.'s mother D.C. and Rankin's Garage for negligence. He conceded through his litigation guardian he was partially responsible for his injuries.

[48] The action was heard by a jury. The trial judge instructed the jury that the garage owed J.J. a duty of care "because people who [are] entrusted with the possession of motor vehicles must assure themselves that the youth in their community are not able to take possession of such dangerous objects." The jury found negligence against all the defendants and J.J. contributorily negligent. The jury apportioned liability to the garage at 37%.

[49] The garage appealed the finding of negligence against it. Mr. Justice Huscroft reviewed the authorities noted earlier in my reasons at paragraphs 42 to 44 as well as other cases where courts have considered whether a duty of care is owed to a third party injured by a stolen vehicle. Huscroft J.A. disagreed with the trial judge's conclusion and reflected in her charge to the jury that a pre-existing duty of care existed, based on *Spagnolo* and *Kalogeropoulos*. He determined the application of the *Anns-Cooper* test was required to determine whether a duty of care could be found in the circumstances.

[50] Huscroft J.A. found there was ample evidence of the practices at the garage, as well as the history of theft in the area, from which to conclude the owner knew or

ought to have known of the potential risk of theft. That evidence satisfied the foreseeability requirement.

[51] As to proximity, the garage owner had care and control of many vehicles for commercial purposes, which carried with it a responsibility to secure them against minors. Securing the vehicles was not an onerous obligation. Proximity was established and a *prima facie* duty of care was made out.

[52] Finally, Huscroft J.A. found no residual policy considerations operated to negate the *prima facie* duty of care and dismissed the appeal.

[53] *J.J. v. C.C.* has a different factual matrix than the matter before me but I am satisfied it is clear, albeit not binding, authority for the need to conduct an *Anns-Cooper* analysis. The question then is whether that analysis is possible or appropriate in a summary trial.

[54] In *The Owners, Strata Plan LMS 4443 v. Travelers Guarantee Company of Canada*, 2013 BCSC 296 Mr. Justice Pearlman dismissed an application for a summary trial brought to determine some issues concerning a warranty prior to trial. He relied on the factors summarized by Mr. Justice Masuhara in *RC Hotel Ventures Ltd. v. Meristar Sub 2C, L.L.C.*, 2008 BCSC 918 that applied to the predecessor to Rule 9-7 summary trials:

> [13] There are various factors in the authorities that have been considered as to whether a summary trial is suitable. They include:
>
> (a) A court should be reluctant to decide isolated issues in the absence of a full factual matrix and should not decide issues on the basis of assumed facts.
>
> (b) While the court may in certain circumstances resolve issues and find facts in the face of conflicting evidence, it should be reluctant to do so where there are direct conflicts in affidavit evidence, the resolution of which will require findings with respect to credibility.
>
> (c) A court should be reluctant to resolve factual issues in the absence of admissible evidence where such evidence may well be tendered in admissible form at a subsequent trial.
>
> (d) A court should be reluctant to “slice off” and decide isolated issues and circumstances where resolution of those issues will

> not resolve the litigation or will only resolve the litigation if answered in a particular way. In such circumstances, the 18A applicant will be required to demonstrate and the court expected to decide that the administration of justice including the orderly and effective use of court time will be enhanced by dealing with the separate issue brought forth by the applicant.
>
> (e) The matter will not be suitable for resolution by Rule 18A where resolution of a particular issue or issues in the summary trial will require that the court make findings or rulings which will impact on parties or issues which are not before the court on the application. In particular, the court hearing the summary trial must not decide the issues on the basis of facts which might be inconsistent with the findings of the judge at trial.
>
> (f) In some cases, the complexity of the issues raised or the volume of the material before the court may be such that the matter is unsuitable for resolution by summary trial.

[55] Pearlman J. concluded that the application to resolve a partial interpretation of the warranty would not resolve the litigation or conclusively determine liability. As such, it amounted to litigating in slices and was unlikely to materially reduce the time required for the trial. Pearlman J. also found the issue raised on the application was significant to both parties and, if resolved at a summary trial, would likely result in an appeal and loss of a trial date set to commence within a few months of the summary trial.

[56] I am alive to the danger of litigating in slices in the application before me. If I were to find the applicants liable in negligence based on the *Anns-Cooper* test, an appeal might follow, disrupting the trial dates for the Provost and Brundige actions. Even if there were no appeal, the applicants would still be required to call evidence at those trials on the apportionment of negligence.

[57] On the other hand, if I were to find no negligence on the part of the applicants, appeals by the plaintiffs would likely result. Surgical excision of the applicants' liability without some disruption to the other parties is not possible. It also raises the difficulty that findings of fact made at the summary trial stage to resolve one issue might embarrass trial judges in the subsequent trials of the remaining issues.

[58] I am also mindful that the plaintiffs have been unable to examine the defendant Bolton and have very limited information about what Mr. Singh may say about the transfer of responsibility for the truck to him from Mr. Katerenchuk. While Mr. Mazzone maintains that the plaintiffs could have done more to get this evidence and in his view it does not alter the analysis, it does leave an evidentiary gap.

[59] Another issue with the evidence before me concerns the issue of a police pursuit to apprehend Mr. Bolton. The applicants rely in their pleadings on the police pursuit to break the chain of causation, but objected to questions about the police pursuit at Mr. Schram's examination for discovery, stating there was no evidence of a police pursuit.

[60] In *Lougheed v. Wilson*, 2014 BCSC 2073, Madam Justice Dardi analyzed the authorities concerning litigating in slices and concluded that a more fulsome evidentiary record was required to determine the issues:

> [104] Moreover, in my view, the evidentiary record before me is not sufficiently complete so as to allow this Court to come to a reliable conclusion concerning the issue of whether Janke, acting diligently, should have done more than he did. Although credibility ultimately may not be a central focus for determination, I am nonetheless persuaded that the trier of fact should have the benefit of *viva voce* testimony and corresponding cross-examination in assessing the probative value of the evidence on this point. Cross-examination, in addition to providing an opportunity to assess credibility, may also cast a different light on the evidence and may disclose further relevant information thus enabling the court to be more fully informed of all pertinent evidence (*Mayer* at para. 81).

[61] Those observations apply to the circumstances before me. The interplay between Mr. Schram's decision to call the police and engage the services of OnStar to locate the truck may be relevant to the issue of the police pursuit. Cross-examination at trial in areas counsel raised objections to may assist the trier of fact.

[62] On a final note, while the decision in *J.J. v. C.C.* provides some clarity in the application of the law, it engages different factual considerations. It may cause the parties to consider the need to call additional evidence to address aspects of the analysis.

[63] In summary, I am not persuaded that it would be just to decide the issue by way of summary trial in light of the potential for inconsistent findings, the potential for multiple appeals and the novelty and complexity of the issue to be determined. The application is dismissed.

"Duncan J."

_____

The Honourable Madam Justice Duncan