

CANADA / JUDGMENT

Brook v. Tod Estate

2013 BCSC 330

COURT

Supreme Court of British Columbia

DECIDED

1 March 2013

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2013 BCSC 330 Brook v. Tod Estate IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Brook v. Tod Estate, 2013 BCSC 330 Date: 20130301 Docket: 44456 Registry: Kamloops Between: Shawna Rae Brook Plaintiff And Mona Ruth Tod as executor of the estate of James Francis Tod, deceased, and Kora Goodrick Defendants Before: The Honourable Mr. Justice Affleck Reasons for Judgment Counsel for Plaintiff: R. L. Garner Counsel for the Defendant Tod: J. D. Morin R. N. Beckmann Counsel for the Defendant Goodrick J. A. Hemmerling S. M. Moring Place and Date of Trial: Kamloops, B.C. November 20-22, 2012 Place and Date of Judgment: Kamloops, B.C. March 1, 2013

- [1] This is a personal injury action for damages arising out of a motor vehicle accident. In reasons indexed at 2012 BCSC 1947, I found the defendant Kora Goodrick solely liable for the collision that occurred on July 2, 2008. The parties were granted leave to make written submissions with respect to the issue of costs. These are my reasons on the costs issues.
- Background Facts
- [2] On July 2, 2008, a collision occurred on the Trans-Canada Highway between a Dodge pickup truck, driven by Colin James Brook and a Toyota Camry, driven by James Francis Tod. Mr. Tod was killed in the collision. The plaintiff was a passenger in the Dodge pickup truck.
- [3] The plaintiff commenced an action naming Kora Goodrick, Mona Ruth Tod as Executrix of the Estate of James Francis Tod (the "Tod Estate") and Colin James Brook as defendants. By consent, the action against Mr. Brook was dismissed. I will refer to Ms. Goodrick and the Tod Estate collectively as "the defendants".
- [4] On June 22, 2012, the plaintiff sent the defendants a notice to admit that the accident occurred as a result of one or both of their negligence and that they are individually or jointly and severally 100% liable for any injuries and losses suffered by the plaintiff.
- [5] Ms. Goodrick formally made these admissions on June 25, 2012. The Tod Estate admitted these facts on July 9, 2012.
- [6] On October 10, 2012, the Tod Estate offered to settle the issue of liability by accepting 51% of the liability (the "offer to settle").

- [7] On November 20, 2012, I heard three days of evidence to determine liability. The issue of quantum of damages was ordered to be tried separately.
- [8] At the conclusion of the liability hearing, I found Ms. Goodrick to be solely responsible for the accident and dismissed the claim against the Tod Estate. I found that Ms. Goodrick attempted to move into the fast or passing lane without seeing Mr. Tod's vehicle travelling in that lane. Ms. Goodrick's lane change caused Mr. Tod to make a hard swerve to his left which ultimately led to the accident.
- [9] Costs normally follow the event. Therefore, the person whose position prevails is entitled to costs. The plaintiff was successful against Ms. Goodrick. Accordingly, she is entitled to her costs with respect to the issue of liability. Mr. Tod, as the successful defendant, is also entitled to costs. The issues I must determine are as follows:
- (1) Should Ms. Goodrick pay the costs of the Tod Estate directly?
 - (2) Is the Tod Estate entitled to double costs after the date of the offer to settle? Issue 1: Should Ms. Goodrick pay the costs of the Tod Estate directly?

Legal Framework

- [10] Under Rule 14-1(18) of the Supreme Court Civil Rules, the court has the discretion to order that the costs of one defendant be paid by another defendant. Rule 14-1(18) states: Costs of one defendant payable by another If the costs of one defendant against a plaintiff ought to be paid by another defendant, the court may order payment to be made by one defendant to the other directly, or may order the plaintiff to pay the costs of the successful defendant and allow the plaintiff to include those costs as a disbursement in the costs payable to the plaintiff by the unsuccessful defendant.
- [11] Under Rule 14-18(1), an order may be granted that an unsuccessful defendant pay the costs of the successful defendant directly. This is known as a Sanderson order, after *Sanderson v. Blyth Theatre Co.* [1903] 2 K.B. 533 (CA). Alternatively, the court may order that the plaintiff pay the successful defendant's costs, and claim that amount as a disbursement in the assessment of costs against the unsuccessful defendant. This is known as a Bullock order, after *Bullock v. London General Omnibus Co.* [1907] 1 K.B. 264 (CA).
- [12] Determining whether or not a Sanderson/Bullock order is appropriate requires a two-stage analysis. At the first stage, the court must determine whether it was reasonable for the plaintiff to sue the successful defendant together with the unsuccessful defendant. This is the threshold question: *Davidson v. Tahtsa Timber Ltd.*, 2010 BCCA 528 at para. 52. If the threshold question is answered affirmatively, the court moves to the second stage of the analysis to exercise its discretion to determine whether a Bullock/Sanderson order is just and fair in the circumstances. The court is to determine whether the circumstances of the case warrant having the unsuccessful defendant pay the costs of the successful defendant.

- [13] In *Robertson v. North Island College Technical & Vocational Institute* (1980), 26 B.C.L.R. 225 at 227 (C.A.) at para. 24, Lambert J.A. described the second stage of the analysis as follows: Once the threshold question is answered affirmatively then the discretion of the trial judge arises. Of course, he may exercise it either way. It is a true discretion. Whether he grants a Bullock order, or not, must depend on his assessment of the circumstances of the case. In my opinion it is inappropriate to trammel that discretion by endeavouring to extract principles from those cases where the discretion was exercised and from those cases where it was refused. The threshold question must be answered affirmatively; the discretion must be exercised judicially; and that is all.
- [14] Some authorities suggest that a Bullock/Sanderson order requires "some conduct" on the part of the unsuccessful defendant to justify the award of costs.
- [15] In *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 at paras. 33-34, Southin J.A. stated: There must be something which the unsuccessful defendant did, such as asserting the other defendant was the culprit in the case, to warrant his being made to reimburse the plaintiff for the successful defendant's costs. That was what happened in *Bullock v. London General Omnibus Co.* The omnibus company asserted the cart driver was the cause of the accident. But orders under Rule 57(18) [now Rule 14-1(18)] are not restricted to cases where the unsuccessful defendant in the course of the litigation has blamed the successful defendant but may extend to acts of the unsuccessful defendant which caused the successful defendant to be brought into the litigation.
- [16] In *Davidson*, after citing the above passages from *Grassi*, the court held: Accordingly, a Sanderson or Bullock order requires some conduct on the part of the unsuccessful defendant in order to justify the award. Discussion
- [17] For the reasons that follow I conclude that a Sanderson order is appropriate in this case.
- [18] In my view, the threshold question is easily met. It was reasonable for the plaintiff to name both the Tod Estate and Ms. Goodrick as defendants in this litigation. The action arises as a result of the injuries the plaintiff sustained in the accident. The vehicle the plaintiff was travelling in collided with Mr. Tod's vehicle. The plaintiff's pleadings claim that Mr. Tod's vehicle lost control while he was overtaking Ms. Goodrick's vehicle. The plaintiff maintained that she sustained injuries as a result of either, or both of the defendants' negligence. Therefore, the claims against the Tod Estate and Ms. Goodrick are inextricably linked to one another.
- [19] Further, the plaintiff was aware that prior to commencing this lawsuit, Mr. Brook, her husband, settled his own claim for damages arising out of the accident. The funds Mr. Brook received were paid on behalf of the Tod Estate by Mr. Tod's primary insurer. Additionally, on October 10, 2012, the Tod Estate made an offer to settle the action by accepting 51% responsibility for the accident. These factors, coupled with the circumstances of the accident make it reasonable for the plaintiff to have joined and maintained the action against the Tod Estate.

- [20] Having met the threshold question, the next determination is whether Ms. Goodrick ought to pay the costs the Tod Estate is entitled to obtain from the plaintiff. Throughout the liability proceedings Ms. Goodrick asserted that Mr. Tod was the "culprit in the case". Ms. Goodrick argued, throughout, that the accident occurred solely as a result of Mr. Tod's negligence. Ms. Goodrick maintained that she never left her lane of travel, which was rejected at trial. Ms. Goodrick's uncompromising position made settlement of the proceedings impossible and prolonged the liability trial. Therefore, it is fair and just to have Ms. Goodrick bear the costs of the Tod Estate directly.
- [21] I find that a Sanderson order is preferable to a Bullock order in these circumstances. In Davidson at para. 50, the court cited with approval the following passage from Fraser, Horn & Griffin, *The Conduct of Civil Litigation in British Columbia*, 2nd ed. looseleaf (Markham: LexisNexis, 2007):
- [22] Where all parties are solvent, it does not matter much which form of order is made. The advantage of a Sanderson order in such a case is confined to avoiding circuitousness. Issue 2: Is the Tod Estate entitled to double costs from the date of the offer to settle?

Legal Framework

- [23] An offer to settle may be relevant in determining cost awards. Rule 9-1(4) of the Supreme Court Civil Rules state:
- (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.
- [24] Rule 9-1(5)(b) grants the court power to award double costs after an offer to settle has been made:
- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following: ...
- (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
- [25] Rule 9-1(6) sets out the factors the court should consider when awarding double costs:
- (6) In making an order under subrule (5), the court may consider the following:
- (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
- (b) the relationship between the terms of settlement offered and the final judgment of the court;
- (c) the relative financial circumstances of the parties;
- (d) any other factor the court considers appropriate. Discussion

- [26] The main issue to be determined is whether the offer to settle was one that ought reasonably to have been accepted at the time the offer was made. In *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27, the court held: The first factor - whether the offer to settle was one that ought reasonably to have been accepted - is not determined by reference to the award that was ultimately made. Rather, in considering that factor, the court must determine whether, at the time that the offer was open for acceptance, it would have been reasonable for it to have been accepted [citations omitted].
- [27] The offer to settle was made to both the plaintiff and Ms. Goodrick. I find that the offer to settle was not one that "ought reasonably to have been accepted" by the plaintiff. The plaintiff was not in a position to compel Ms. Goodrick to accept the offer. Without Ms. Goodrick's acceptance, there was little incentive for the plaintiff to accept the offer. The plaintiff would have still had to proceed to trial over the remaining 49% liability. This is impractical given that the parties already admitted to being individually or jointly and severally 100% liable for the accident. In *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 88, the court held "...plaintiffs should not be penalized for declining an offer that did not provide a genuine incentive to settle in the circumstances."
- [28] I am not able to arrive at the same conclusion with respect to Ms. Goodrick. I find that the Tod Estate's offer to settle was one that ought reasonably to have been accepted by Ms. Goodrick. Ms. Goodrick should have known there was a risk she could be found over 49% liable. Some witnesses placed Ms. Goodrick's vehicle into the fast/passing lane and Ms. Goodrick admitted fault right after the accident. Ms. Goodrick's insistence that the accident was solely due to the negligence of Mr. Tod made settlement impossible and prolonged the conclusion of the liability issue.
- [29] Turning to the relationship between the offer and the judgment. The Tod Estate offered to accept 51% of the liability, leaving Ms. Goodrick to accept 49%. At trial, Ms. Goodrick was found to be 100% liable for the accident. This is a dramatic difference.
- [30] The next factor I must consider is the relative financial circumstances of the parties. Although Ms. Goodrick is insured, Rule 9-1(6) does not invite consideration of insurance coverage: *Danicek v. Li*, 2011 BCSC 444 at para. 34. Given the very limited information about the parties' financial circumstances, it is my view that this factor is neutral in the assessment of whether or not double costs should be awarded.
- [31] Considering all the factors, I conclude that the Tod Estate is entitled to double costs from Ms. Goodrick as of October 10, 2012.

Conclusion

[32] In summary, I conclude as follows: · The plaintiff is entitled to her costs with respect to the issue of liability against Ms. Goodrick. · The costs of the Tod Estate are to be paid by the defendant, Ms. Goodrick directly through a Sanderson order. · The Tod Estate is entitled to double costs as of October 10, 2012, against Ms. Goodrick. "Affleck J."

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