

CANADA / JUDGMENT

Provost v. Dueck Downtown Chevrolet Buick GMC Limited

2021 BCCA 15

COURT

British Columbia Court of Appeal

DECIDED

14 January 2021

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2021 BCCA 15 Provost v. Dueck Downtown Chevrolet Buick GMC Limited COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Provost v. Dueck Downtown Chevrolet Buick GMC Limited, 2021 BCCA 15 Date: 20210114 Dockets: CA44808; CA44809; CA44810 Docket: CA44808 Between: Quinn Provost Respondent (Plaintiff) And Dueck Downtown Chevrolet Buick GMC Limited and Kyle Katerenchuk Appellants (Defendants) And David James Bolton and ABC Corporations #1-3 Respondents (Defendants)

- and - Docket: CA44809 Between: Attorney General of Canada Respondent (Plaintiff) And Dueck Downtown Chevrolet Buick GMC Limited and Kyle Katerenchuk Appellants (Defendants) And David James Bolton Respondent (Defendant)
- and - Docket: CA44810 Between: Brandy Brundige Respondent (Plaintiff) And Dueck Downtown Chevrolet Buick GMC Limited and Kyle Katerenchuk Appellants (Defendants/ Third Parties) And David James Bolton, Minister of Justice for the Province of British Columbia, John Doe #1 and John Doe #2 Respondents (Defendants/Third Parties) Before: The Honourable Madam Justice MacKenzie The Honourable Mr. Justice Butler The Honourable Madam Justice DeWitt-Van Oosten Supplementary Reasons to Provost v. Dueck Downtown Chevrolet Buick GMC Limited, 2020 BCCA 86. Counsel for the Appellants/ Respondents on Cross Appeal in CA44810: A. Mersey, Q.C. M. Sobkin E.J. Segal Counsel for the Respondent, Brandy Brundige: A. Leoni B.J. Colangelo Counsel for the Respondent/ Appellant on Cross Appeal in CA44810, Minister of Justice for the Province of British Columbia and Respondent, Attorney General of Canada: D. Kwan E.L.C. Louie Counsel for the Respondent, Quinn Provost: K. Gourlay P.J. Bosco Counsel for the Respondent, David James Bolton: T.S. Hawkins R.S. Bernard Place and Date of Hearing: Vancouver, British Columbia October 24 and 25, 2019 Place and Date of Judgment: Vancouver, British Columbia March 12, 2020 Written Submissions Received: November 10, 18, 24, and 30, 2020 Place and Date of Supplemental Reasons: Vancouver, British Columbia January 14, 2021 Supplementary Reasons of the Court Summary: Defendant/appellant, Dueck, succeeded in overturning finding of liability at trial and seeks costs from the plaintiffs. In the circumstances, a Sanderson order is warranted whereby Dueck's costs are payable directly

by the unsuccessful defendants, Mr. Bolton and the Minister. Mr. Bolton sought to shift blame to Dueck and the plaintiffs. Dueck was not blameless in the events leading to the plaintiffs' injuries. It would not be just or fair in the circumstances to erode the judgment funds of the plaintiffs based on liability disputes between defendants. The Minister is to pay costs of its unsuccessful cross-appeal. Supplementary Reasons for Judgment of the Court:

- [1] These Supplementary Reasons address the issue of costs following the successful appeal of Dueck Downtown Chevrolet Buick GMC Limited ("Dueck") against a finding of liability at trial in three actions concerning motor vehicle collisions: 2020 BCCA 86, leave to appeal ref'd 2020 CanLII 89595 (SCC). In its decision, the Court also dismissed the cross-appeal brought by the Minister of Justice for the Province of British Columbia (the "Minister") in one of the three actions. The parties were unable to agree on costs and the Court invited further submissions on costs that have now been received.

Background

- [2] The factual background and procedural circumstances of the dispute are complicated. In April 2012, David James Bolton stole a truck from Dueck and caused a series of accidents. In the first accident, Mr. Bolton collided with and caused damage to an RCMP vehicle. In the second accident, he collided with another RCMP vehicle driven by Constable Quinn Provost. In the third accident, Mr. Bolton collided with a vehicle driven by Brandy Brundige.
- [3] The Attorney General of Canada (the "AG"), Cst. Provost, and Ms. Brundige (together, the "plaintiffs") all commenced actions for damages. The AG claimed against Mr. Bolton and Dueck for the costs of the two damaged RCMP vehicles and advanced a subrogated claim to recoup benefits paid to Cst. Provost (the "AG Action"). Cst. Provost claimed against Mr. Bolton and Dueck for injuries, damage, and expense suffered by him (the "Provost Action"). Ms. Brundige claimed against Mr. Bolton, Dueck, and the Minister for vicarious liability for the conduct of members of the RCMP (the "Brundige Action").
- [4] The liability trials were heard together in June 2017. In reasons indexed as 2017 BCSC 1608, the trial judge found the defendants liable and apportioned fault:
1. The AG Action: Mr. Bolton and Dueck were found jointly and severally liable to the AG, with liability apportioned 85% to Mr. Bolton and 15% to Dueck. The AG was awarded costs payable by Mr. Bolton and Dueck.
 2. The Provost Action: Mr. Bolton and Dueck were found jointly and severally liable to Cst. Provost, with liability apportioned 85% to Mr. Bolton and 15% to Dueck. Cst. Provost was awarded costs payable by Mr. Bolton and Dueck.
 3. The Brundige Action: Mr. Bolton, Dueck, and the Minister were found jointly and severally liable to Ms. Brundige, with liability apportioned 70% to Mr. Bolton, 15% to Dueck, and 15% to the Minister. Ms. Brundige was awarded costs payable by Mr. Bolton, Dueck, and the Minister.

- [5] The quantum trials took place in November-December 2017. In reasons indexed as 2018 BCSC 1090, the judge awarded Cst. Provost \$461,142.29 and the AG \$23,051.53 for vehicle damage and \$43,500.69 in medical/rehabilitative costs for Cst. Provost. In separate reasons indexed as 2018 BCSC 1843, the judge awarded Ms. Brundige \$784,375.98 in damages, reduced by \$102,450.11 pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231.
- [6] Dueck filed notices of appeal in all three actions seeking to set aside the liability findings of Justice Kelleher. The Minister filed a notice of cross-appeal in the Brundige Action in respect of the judgment apportioning liability to the Minister. Dueck's liability appeal and the Minister's cross-appeal were heard together before a division of this Court.
- [7] Dueck and Mr. Bolton also filed notices of appeal in the Provost Action and the AG Action raising a single ground of appeal: whether the trial judge erred by concluding that the AG has an equitable right of subrogation for the wage loss benefits paid by the RCMP to Cst. Provost and by including the amount of those benefits in his assessment of damages. The hearing of that appeal is set for February 2021.

Issues

- [8] It is not contentious that Dueck, the successful party on appeal, is entitled to costs of the appeal and the proceedings below. It seeks an order that their trial and appeal costs be paid equally by each of the three plaintiffs (Cst. Provost, Ms. Brundige, and the AG). Mr. Bolton supports this position.
- [9] The plaintiffs all support a Sanderson or Bullock order whereby Dueck's costs of defending the three actions in the liability and quantum trials and in the liability appeal are payable by the unsuccessful defendant(s). As a result of Dueck's successful appeal, Mr. Bolton is now 100% liable in the Provost and AG Actions; Mr. Bolton and the Minister are liable in the Brundige Action. We will address the parties' submissions in greater detail in our analysis below. First, however, we will address two preliminary matters. Subrogation Appeal
- [10] Cst. Provost submits that the issue to be addressed is costs for the liability trial and appeal, but not for the quantum trial and appeal. We do not agree. The sole issue in the quantum appeal is whether the trial judge erred in finding that wages paid by the AG to Cst. Provost were subject to an equitable right of subrogation. The decision in that appeal will not affect Dueck's liability to any of the plaintiffs. Moreover, Dueck would not have been involved in the quantum proceedings if the correct result had been achieved at the liability trial. Any order for costs of the ongoing appeal will not affect Dueck's right to trial costs, which will be considered below. Costs of the Minister's Cross-Appeal

- [11] As a second preliminary matter, Dueck seeks an order for "costs of defending the AG cross appeal" as "100% payable by the AG". As joint counsel for the AG and Minister notes, the cross-appeal was brought by the Minister as a respondent in the Brundige Action, not the AG (the plaintiff in the AG action). Counsel does not otherwise dispute Dueck's position and notes that any order of costs relating to the cross-appeal should be against the Minister and not the AG.
- [12] However, we note that only Mr. Bolton and Ms. Brundige opposed the cross-appeal. Dueck was not a respondent on the cross-appeal: at paras. 4, 94. Dueck did not file a respondent's factum in the cross-appeal although it stated in its reply factum that it supported the position of Ms. Brundige and adopted her submissions in response to the Minister's cross-appeal. We therefore decline to award Dueck its costs of defending the cross-appeal. We will return to the matter of cross-appeal costs below. Discussion and Analysis Statutory Provisions
- [13] Under s. 23 of the Court of Appeal Act, R.S.B.C. 1996, c. 77: 23 Unless the court or a justice otherwise orders, the party who is successful on an appeal is entitled to costs of the appeal including the costs of all applications made in the appeal.
- [14] Rule 14-1(9) of the Supreme Court Civil Rules specifies that costs of a proceeding must be awarded to the successful party unless the court otherwise orders.
- [15] Rule 14-1(18) of the Supreme Court Civil Rules states:
- (18) 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. Sanderson and Bullock Orders
- [16] It is not disputed that Dueck, as the successful party, is entitled to its trial and appeal costs. The question is whether these costs should be paid by the plaintiffs (Cst. Provost, the AG, and Ms. Brundige) or by the unsuccessful defendants (Mr. Bolton and the Minister) under Rule 14-1(18) of the Supreme Court Civil Rules, which provides the basis for what are commonly referred to as Sanderson and Bullock orders. As this Court noted in *Davidson v. Tahtsa Timber Ltd.*, 2010 BCCA 528:
- [50] In *Fraser, Horn & Griffin, The Conduct of Civil Litigation in British Columbia*, 2nd ed. looseleaf (Markham: LexisNexis, 2007), the authors explain at para. 38.19: Rule 14-1(18) provides that the court may order that a successful plaintiff pay the costs of a successful defendant and recover such costs as a disbursement against an unsuccessful defendant. Such order is commonly known as a Bullock order. The Rule also provides that the court may, as an alternative, order that the unsuccessful defendant pay the costs of the successful defendant directly. Such order is commonly known as a Sanderson order. A court may make such order where there is more than one defendant in an action and also where actions have

been consolidated for trial or ordered to be tried at the same time. 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. If the unsuccessful defendant is insolvent, then the Bullock form of order imposes a hardship upon the plaintiff who may recover nothing from the unsuccessful defendant and yet has to pay the successful defendant. A Sanderson form of order, on the other hand, imposes the hardship upon the successful defendant. Where the successful defendant is blameless, the courts have generally refused to make a Sanderson order. [Emphasis added.]

- [17] The threshold test for a Sanderson or Bullock order is whether it is reasonable for the plaintiff to have joined the successful defendant in the action. If this is satisfied, the question becomes whether it "would be just and fair in the circumstances" for the unsuccessful defendant to pay the successful defendant's costs: Davidson at paras. 53-56. In Grassi v. WIC Radio Ltd., 2001 BCCA 376 at para. 32, Justice Southin described the secondary consideration as whether the unsuccessful defendant "ought" to pay the costs of the successful defendant. The decision to award a Sanderson or Bullock order is a matter of discretion, which must be exercised judicially based on the judge's assessment of the circumstances of the case: Robertson v. North Island College Technical and Vocational Institute (1980), 119 D.L.R. (3d) 17 (B.C.C.A.) at para. 14.
- [18] In Grassi, Justice Southin noted that "[t]here 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": at para. 33 (emphasis added). Justice Southin elaborated: 34 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.
- [19] In Davidson, this Court held that "a Sanderson or Bullock order requires some conduct on the part of the unsuccessful defendant in order to justify the award": at para. 54. There, even though the Court found that it was reasonable for the appellant to have joined both defendants in one action, it was not just and fair in the circumstances to make a Sanderson or Bullock order because there was no credible evidence to support the claim against the successful defendant: at para. 56.

Analysis

- [20] In all three actions, the threshold question is easily satisfied. Given Dueck's actions, it was eminently reasonable for the plaintiffs to join Dueck as a defendant. The trial judge held Dueck liable for breaching the requisite standard of care, and while Dueck's liability was overturned on appeal, it was on the basis that Dueck did not owe a duty of care to Cst. Provost, Ms. Brundige, or the AG. Dueck did not dispute the standard of care on appeal and whether Dueck owed the plaintiffs a duty of care would not have been certain at the outset.

- [21] At the second stage, there are a number of factors which favour a Sanderson or Bullock order. We will consider each of the underlying actions and the parties' individual submissions separately below. However, we will first address two general points which apply to all plaintiffs.
- [22] First, it is clear that the actions of Mr. Bolton caused the successful defendant, Dueck, to be brought into the litigation: Grassi at para. 34. Mr. Bolton's theft of the truck and his actions in evading the police were central to the liability considerations involving Dueck and the actions of the police officers.
- [23] Second, we do not accept Mr. Bolton's assertion that he did not actively attempt to attach any blame to Dueck. He submits that "at no time during the Liability Trial or appeal did Bolton assert that Dueck should bear liability to any of the plaintiffs". He concedes that "the negligence of Dueck was pled" but asserts that this position was never "actively pursued" at trial. He notes that in his trial briefs, he took the position that he would not be denying liability at trial.
- [24] In his response to civil claim in the Brundige Action, Mr. Bolton submitted that the accident occurred solely as a result of Ms. Brundige's negligence in driving her motor vehicle. In the alternative, he submitted that the accident occurred solely as a result of the negligence of the defendant Dueck. In the further alternative, Mr. Bolton submitted that the accident occurred as a result of the negligence of the defendant police officers and, separately, the Minister. In other words, the allegations made by Mr. Bolton in his pleadings attempted to shift blame onto each of Ms. Brundige, Dueck, and the Minister for the actions of the RCMP.
- [25] At the liability trial, Justice Kelleher described Mr. Bolton's position:
- [7] He concedes that his negligent driving caused the motor vehicle collisions which are the subject of this case, and that he is liable to the plaintiffs for their damages. He submits however, that he is not the only person liable to the plaintiffs.
- [8] Mr. Bolton submits, like Ms. Brundige, that the collision with her car would not have occurred but for the RCMP engaging in a dangerous police pursuit.
- [9] Moreover, Mr. Bolton alleges that the RCMP created a dangerous situation when officers attempted to arrest him at gun point. The RCMP, Mr. Bolton alleges, breached the standard of care owed to people in the immediate vicinity, including their employee, Constable Provost.
- [10] Dueck denies liability for any of the accidents. It submits that Constable Provost was contributorily negligent for his injuries for not wearing his seatbelt at the time of the collision. By the time of the trial, Mr. Bolton no longer actively sought to shift blame on Dueck but continued to do so with respect to the actions of the RCMP officers and Cst. Provost.

- [26] While Mr. Bolton did not make submissions about Dueck's liability at trial or on appeal, it is clear that he did not have to do so to obtain the benefit of a finding in that regard. Mr. Bolton's pleadings alleged that Dueck was at fault. He even issued a third party notice against Dueck in the Brundige Action. Dueck's liability was always going to be a live issue at trial, given that the plaintiffs all claimed against Dueck. As such, it did not matter at that point whether Mr. Bolton, too, explicitly sought to blame Dueck. Dueck's liability would be fully considered at trial, and on appeal after Dueck was found liable in negligence at first instance.
- [27] With this in mind, we turn to the individual actions below. Brundige Action
- [28] Ms. Brundige submits that she was forced to trial due to a contest between defendants in apportioning liability. She notes that Mr. Bolton initially attempted to blame Dueck; that Dueck blamed Mr. Bolton and the Minister; and that the Minister blamed Mr. Bolton and Dueck. All defendants filed Third Party Notices against each other. Despite the fact that Mr. Bolton and Dueck were both insured and represented by ICBC, and that there was no divergence of interest between Mr. Bolton and Dueck on quantum of damages, there were two sets of counsel instructed by ICBC in attendance at the quantum trial.
- [29] Ms. Brundige says the outcome of the liability contest was of no import to her other than establishing the liability of Mr. Bolton, which was a foregone conclusion. Due to the defendants' refusal to admit fault (until Mr. Bolton conceded fault at trial while seeking liability on the part of the Minister), lengthy trials were required. Ms. Brundige notes that Sanderson or Bullock orders are frequently granted where defendants seek to shift blame onto each other. That occurred in this case both at trial and on appeal, even if Mr. Bolton did not have to actively advance the case against Dueck.
- [30] In our view, the submissions of Ms. Brundige have considerable merit. It would not be just or fair in the circumstances to require her to pay costs stemming from the multiple trials and appeal which occurred because of the defendants' attempts to shift blame. Although Dueck was ultimately found not to owe a duty of care in the unique circumstances of this case, they were not "blameless" in a sense that would mitigate against a Sanderson order: Davidson at para. 50. From Ms. Brundige's perspective, given that Mr. Bolton's liability was a foregone conclusion, it mattered not whether Dueck and/or the Minister were also liable. As Ms. Brundige notes, she should not see her judgment funds potentially eroded as a result of costs awards flowing from a liability dispute between defendants that was of little concern to her.
- [31] We would accordingly make a Sanderson order in Ms. Brundige's favour. Dueck's trial and appeal costs will be payable directly by the unsuccessful defendants, Mr. Bolton and the Minister, according to the proportion of liability allocated to each of them. A Sanderson order is preferable to a Bullock order because it avoids circuitousness: Davidson at para. 50. Having arrived at this conclusion, we need not consider Ms. Brundige's request for leave to adduce evidence of "without prejudice" settlement communications.

- [32] Separately, Mr. Bolton and Ms. Brundige are awarded their costs of defending the Minister's cross-appeal in the Brundige Action, to the extent that those costs are distinct from their costs of the main appeal and may be ascertained as such. Provost Action
- [33] Cst. Provost's situation is analogous to that of Ms. Brundige. In his pleadings, Mr. Bolton denied liability and alleged that Dueck and Cst. Provost were at fault. As in the Brundige Action, the liability contest in the Provost litigation was between Mr. Bolton and Dueck. While Cst. Provost argued that both defendants should be found at fault, the question of liability as between the defendants was not of practical significance to him.
- [34] In these circumstances, it is appropriate to order Mr. Bolton to pay Dueck's costs. Like Ms. Brundige, Cst. Provost should not have the potential for his judgment funds to be eroded by the liability contest between Mr. Bolton and Dueck. Dueck was not blameless in the events leading to his injuries, and the conduct of Mr. Bolton was such that it is just and fair for him to pay Dueck's costs. We would also make a Sanderson order in favour of Cst. Provost. AG Action
- [35] The AG seeks a Sanderson order and cites a number of factors that support such an order: in the course of litigation, Mr. Bolton continued to attribute fault to Dueck and issued a third party notice against Dueck; before and at trial, Mr. Bolton and Dueck attempted to attribute fault to the police; and Dueck's conduct was not absolved in any way in litigation, but liability was avoided based on the absence of a duty of care. Moreover, as between Dueck (who carelessly stored its vehicle) and the Crown (whose servants were not blameworthy in damage caused by Mr. Bolton's conduct), the risk of recovery of costs from Mr. Bolton ought to fall to Dueck and not the AG.
- [36] We accept that these considerations favour a Sanderson order. There is a distinction between the AG's role in the subrogation claim, and as owner of the damaged property, from that of the Minister as respondent in the Brundige Action. With that in mind, it is just and fair in the circumstances for Mr. Bolton to pay Dueck's costs directly. Again, Dueck is not blameless in the events leading up to the damaged vehicles, and there was no negligence on the part of Cst. Provost or the other police officers working with him at the time of that collision. Mr. Bolton should pay Dueck's trial and appeal costs in the AG Action. Summary and Disposition
- [37] In summary, we make Sanderson orders in favour of all three plaintiffs. Mr. Bolton is ordered to pay Dueck's costs of the liability and quantum trials and the liability appeal in the AG and Provost Actions. The Minister and Mr. Bolton shall pay Dueck's costs in the Brundige Action, based on their respective shares of liability. This order is without prejudice to any costs award made following the appeal on the subrogation issue in the Provost Action as the decision in that appeal will not affect Dueck's liability or this order for trial costs. We also order the Minister to pay costs to Mr. Bolton and Ms. Brundige for its unsuccessful cross-appeal in the Brundige Action. "The Honourable Madam Justice MacKenzie" "The Honourable Mr. Justice Butler" "The Honourable Madam Justice DeWitt-Van Oosten"

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Prepared on 29 October 2026 · Esheria