IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Provost v. Bolton,*
2017 BCSC 1608

Date: 20170912
Docket: M125926
Registry: Vancouver

Between:

Quinn Provost

Plaintiff

And

David James Bolton, Dueck Downtown Chevrolet Buick GMC Limited, Kyle Katerenchuk and ABC Corporations # 1-3

Defendants

- and -

Docket: M142374
Registry: Vancouver

Between:

Brandy Brundige

Plaintiff

And

David James 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

David James Bolton, Minister of Justice for the Province of British Columbia, John Doe #1 and John Doe #2

Third Parties

And

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

Third Parties

- and -

Docket: M142533
Registry: Vancouver

Between:

Attorney General of Canada

Plaintiff

And

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

Defendants

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for the Plaintiff, Quinn Provost:	Alex Sayn-Wittgenstein Paul Bosco
Counsel for the Plaintiff Brandy Brundige:	Anthony Leoni David Eleff
Counsel for the Plaintiff, Attorney General of Canada:	David Kwan Lucy Bell Erica Louie
Counsel for the Defendant David Bolton:	Russell Robertson
Counsel for the Defendants/Third Parties Dueck Downtown Chevrolet Buick GMC Limited, and Kyle Katerenchuk:	Perry A. Mazzone
Counsel for Defendant/Third Party Minister of Justice for Province of British Columbia:	David Kwan Lucy Bell Erica Louie
Place and Date of Trial:	Vancouver, B.C. June 12 - 16, 19 - 22, 26 - 30, 2017
Place and Date of Judgment:	Vancouver, B.C. September 12, 2017

I. INTRODUCTION

[1] These three actions arise from events which occurred on the morning of April 24, 2012. The circumstances are unusual.

[2] David Bolton, a defendant in all three actions, stole a truck from the premises of Dueck Downtown Chevrolet Buick GMC Limited ("Dueck") which is also a defendant in all three actions. He was involved in three collisions.

[3] Constable Quinn Provost, the plaintiff in action M125926, is an officer of the Royal Canadian Mounted Police (the "RCMP") in the Richmond Detachment. His case is that he was injured when his vehicle was struck by the vehicle driven by Mr. Bolton. He alleges that the defendants, Dueck and Kyle Katerenchuk, an employee of Dueck at the time, were negligent in leaving the truck available to be stolen. (the "Provost Action").

[4] Brandy Brundige is the plaintiff in action M142374. Her vehicle was struck a short time later by Mr. Bolton. She was stopped at a Richmond intersection when this took place. She alleges negligence on the part of Mr. Bolton and Dueck. She also alleges negligence on the part of the police officers who were engaged in the pursuit of Mr. Bolton. She therefore brings a claim against the Minister of Justice for the Province of British Columbia who is vicariously liable for the conduct of the members of the RCMP (the "Brundige Action").

[5] The third action, M142533, is brought by the Attorney General of Canada, the owner of two police vehicles that were damaged in collisions with Mr. Bolton. The plaintiff in this action alleges negligence on the part of Mr. Bolton, Dueck, and Mr. Katerenchuk (the "Attorney General Action").

[6] Mr. Bolton died in 2016.

[7] Mr. Bolton is represented in this litigation by the Insurance Corporation of British Columbia, pursuant to its authority regarding uninsured motorists under s. 20 of the *Insurance (Motor Vehicle Act)*, R.S.B.C. 1996, c. 231. Mr. Bolton does not

deny that he stole the truck on the morning of April 24, 2012. He does not deny that he drove the truck dangerously later that day when he collided first with a police vehicle being driven by Sergeant Jeremy Anderson (who was a constable at the time), then with the Hyundai Sonata driven by Constable Provost, and later, with the Ford Explorer driven by Ms. Brundige. 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.

[11] The issues before me concern the liability of the defendants. Quantum will be addressed in a trial scheduled for November 2017.

II. THE FACTS

[12] Many of the facts are not in dispute. The events leading to these actions occurred on April 24, 2012, between 8:58 a.m., when Mr. Katerenchuk left the truck idling, and 11:11 a.m., when Mr. Bolton was arrested in New Westminster.

A. The Theft of the Truck

[13] Dueck operates a large car and truck dealership at 888 Terminal Avenue in the City of Vancouver. Mr. Katerenchuk worked there as the lot manager.

[14] At about 8:58 a.m. on April 24, 2012, Mr. Katerenchuk left an unlocked one-ton 2011 GMC Sierra K2500 pickup truck (the "Truck") outside a detail bay at the dealership Dueck. The Truck had been sold and was to be detailed that morning in preparation for delivery to the purchaser.

[15] The Truck was left outside the dealership detail bay by Mr. Katerenchuk with the keys in the ignition, the engine running, and the doors unlocked. The Truck was parked in an area open to public view. Anyone walking or driving along Terminal Avenue past the dealership could see the Truck, along with other vehicles on the lot, if they looked in that direction.

[16] The dealership is not fenced in. It is an open area where people can walk around the vehicles.

[17] A variety of persons frequented the area of the Dueck dealership. This includes homeless and marginalized individuals walking along Terminal Avenue. There is a bicycle and pedestrian path behind Dueck, to the north, running between Main Street, several hundred meters to the west of Dueck, and Home Depot, to the east of Dueck.

[18] Ryan Schram, the sales manager at Terminal Avenue, acknowledged that street people enter the Dueck lot. They go through the Dueck disposal bins which are located not far from the bay where the Truck was parked.

[19] The Truck remained parked outside, with the keys in the ignition, the engine running, and doors unlocked for about 40 minutes when the defendant, Mr. Bolton, got in the Truck and drove away.

[20] Rakesh Singh is a former employee of Dueck. On April 24, 2012, he was working in the detail bay, washing and detailing cars for delivery to customers.

[21] He testified that there are three bays, the service bay, the sales bay, and the detail bay, also known as the "wash bay". Each has a garage door with a window. The three bays are separated by curtains. He said that if one is working in the detail

bay and the door is closed, one cannot see out to the lot. He said the bays are not far from Terminal Avenue. He says there is nothing to stop a pedestrian on Terminal from entering the dealership lot.

[22] Mr. Singh began his shift at 8:00 a.m. He was detailing a vehicle in the detail bay. The Truck was outside the bay to be detailed, Mr. Singh testified he was unaware that the keys were in it, that it was running, and that the doors were unlocked. I accept Mr. Singh's evidence.

[23] Mr. Katerenchuk put forward various excuses for leaving the truck running. He also referred to his conduct as careless.

[24] It is clear that Dueck, as a matter of policy, requires that keys be kept in designated locations. What happened here is inconsistent with Dueck's policy. Dueck does not dispute that it is vicariously liable for any negligent acts of Mr. Katerenchuk.

[25] Mr. Singh testified that a co-worker informed him that the Truck had been stolen. He advised the dealership receptionist.

[26] At 9:44 a.m., the receptionist called Mr. Schram, then the assistant sales manager, and told him the Truck had been stolen. He was en route to the dealership at the time of the call.

[27] He arrived a few minutes later and called Phil Ens, a Vancouver Police Department Detective with whom he was acquainted. Detective Ens advised Mr. Schram to call 911.

[28] At 9:53 a.m. Mr. Schram called 911. Ten minutes later, he called OnStar. OnStar is a remote services system built into the Truck by its manufacturer. It includes a GPS tracking system.

B. Locating and Surveillance of the Truck

[29] The OnStar GPS system traced the truck to an area in Richmond. At approximately 10:32 a.m. members of the RCMP were dispatched to locate the Truck.

[30] Constable Nicholas Cotton was part of the Richmond detachment in April 2012. That morning, he was driving an unmarked, grey, Chevrolet Impala. He heard on the radio about the stolen Truck and that OnStar had located it on No. 1 Road at Steveston Highway.

[31] Constable Cotton was at the south end of No. 1 Road. He began driving north on No. 1. He drove past Steveston Highway to Blundell Road without seeing the vehicle. He concluded there was a delay relaying information from the GPS.

[32] He continued north to Westminster Highway. Looking east, he could see there was no truck all the way to No. 2 Road. He reached No. 3 Road on Westminster Highway and spotted the vehicle. He followed the vehicle into the left turn lane at Garden City Way and on to Garden City Way northbound. By the time they reached Sea Island Way, he was right behind the vehicle. He could see the driver through the large side-view mirror: a white male with brown hair.

[33] Constable Cotton did not want to be spotted. He knew another officer, Constable Iain Baird, was behind him and that the “kilo unit” was close by (the unit consisting of Sergeant Anderson, a trained dog handler, and a police dog). When the Truck turned left at Beckwith Road, Constable Cotton decided to abandon the pursuit so Constable Baird could carry on.

[34] Constable Cotton did not know that Constable Provost was in the area.

[35] Constable Baird and another officer in the vehicle, Constable Sean Tutt, were in plain clothes and driving a covert vehicle, a Toyota Sierra minivan. They saw the Truck go by northbound on Garden City Way, with Constable Cotton behind it. Constable Baird did a U-turn and followed right behind.

[36] The Truck was not doing anything exceptional. When it turned left at Beckwith Road Constables Baird and Tutt followed.

C. The Attempt at Arrest and the Provost Collision

[37] Constable Tutt observed the Truck turn left or south into an alley between Smith and Sexsmith Streets. They discovered the vehicle parked facing east on Douglas Street, on the left side. The Truck was unoccupied. No driver was in sight. The driver door was open.

[38] They decided to make an arrest.

[39] Constable Tutt got out of his vehicle to approach the Truck. However, he found that the suspect was back in the Truck. Constable Tutt pointed his pistol, identified himself as a police officer, and commanded the driver to stop.

[40] Mr. Bolton did not do that. Instead he backed into a police vehicle being driven by Sergeant Anderson. Constable Tutt then took cover, to protect himself from the path of the vehicle.

[41] Constable Baird reversed his vehicle out of the path of the Truck so the Truck could exit the area.

[42] Sergeant Anderson was with a police dog, Tyak, in an unmarked Chevrolet Tahoe. He was communicating by radio to persons involved in the surveillance. He directed that marked police cars stay away from the area. Sergeant Anderson did not want the thief to see uniformed police.

[43] As Constable Tutt exited the vehicle to attempt to arrest the suspect, Sergeant Anderson had just exited from the parking lot of the Hampton Inn. His vehicle was rammed by the Truck.

[44] Sergeant Anderson was injured. He was sore for several days and underwent physiotherapy.

[45] After striking the Anderson vehicle, the Truck went on to Smith Street and struck the vehicle of Constable Provost at approximately 10:53 a.m.

[46] Constable Provost was driving a covert vehicle. He learned from the dispatcher that the vehicle had come to a stop on Douglas Street. He heard that the driver was out of the car. Constable Provost was nearby, on Smith Street. When he heard that the driver was out of the car, he removed his seatbelt so he could get out quickly to effect an arrest, or to pursue the suspect on foot or to protect himself. He was slowly driving forward at about 7 to 10 kph. He was aware that the dog and dog handler were in the area.

[47] He then heard the dispatcher announce “PCMVI”. That indicated a police cruiser motor vehicle had been involved in an accident.

[48] This confused him. Very shortly thereafter, he saw the Truck driving toward him. It hit his vehicle head on. He was on the right side of Smith Street, driving south. His hand was on the gear shift preparing for a quick exit.

[49] Constable Provost testified that the airbags in his vehicle deployed and he felt dizzy. He spilled out of the vehicle onto the ground and got up and fell down. He recalls drawing his pistol and recalls that another officer put his hand on his back and said “You’re hurt. You need to lay down".

[50] Constable Provost suffered a fractured bone in his neck, a fractured bone in his left hand, and underwent surgery for an injury to the tibial plateau. He testified that he has not fully recovered.

D. The Subsequent Pursuit of the Truck and the Brundige Collision

[51] Kenrick Whitney was an acting corporal with the RCMP on the day in question. He testified that he was “just monitoring and that, you know, positioning myself". He was driving a fully marked RCMP SUV. He was listening to the dispatcher and heard Corporal Joseph Peters (who was acting sergeant at the time of the accident) say “reminder to members we will not engage in a pursuit, no

pursuit". He believes he also heard someone say at 10:30 "keep marked vehicles away". He said he understood the reason for that instruction. That is, usually when unmarked vehicles are surveilling a suspect to locate him, they do not want marked police vehicles in the area because that can "spook" the suspect.

[52] He heard the announcement of a "10-33" on the radio. This means "officer needs assistance". This was just after Mr. Bolton had stopped at Smith and Douglas.

[53] Constable Whitney testified that at that point he "started pursuit". He activated his lights and siren. He agreed that RCMP policy requires him to assess risk before commencing the pursuit. He was mostly concerned about his colleague, Constable Provost. As he put it: "he had already injured our guy".

[54] Constable Whitney was asked whether the theft of the Truck was a pursuable offence. He agreed that it was not. But, he said: "once he hit our member it was a reassessment at that point".

[55] Then, at 10:55:36 a.m., he said into his radio "Eastbound on River". His siren was on at that point. He was pursuing the Truck travelling east on River Road. He then heard Corporal Peters say the following:

> Watch commander advised, shut it down, shut it down. Will set up a quadrant.

[56] He turned off his emergency equipment but maintained pursuit. He did not follow the policy that requires him to stop and pull over. He maintained that the perceivable offence was that he hit "our member" and "injured our member".

[57] Constable Whitney subsequently received a reprimand for this conduct.

[58] Constable Felix Lee is a general duty officer in the Richmond detachment. On April 24, 2012 he was in uniform and driving a marked police vehicle. He was proceeding north on No. 5 Road about 10:30 a.m. He heard of the stolen truck and heard over the radio the direction to "keep marked vehicles away". He understood the reason for this: an unwillingness to spook the suspect. A high-speed flight could endanger the public.

[59] Constable Lee heard on his radio that the suspect had stopped at Smith and Douglas and that an arrest attempt was unsuccessful. He also heard the call for an ambulance at that location.

[60] Constable Lee then spotted the Truck for the first time on Bridgeport Road. He followed north on Shell Road. He saw Constable Whitney several car lengths ahead of him.

[61] The Truck turned right or east on River Road. The driver of the Truck was weaving in and out of traffic. Traffic was pulling off to get out the way.

[62] Constable Lee heard Corporal Peters say at 10:55:48 a.m. that the pursuit was to be shut down. He turned off his lights and siren but did not pull over and stop.

[63] When Constable Lee reached the intersection of River Road and No. 5 Road, he saw that a civilian vehicle, driven by Ms. Brundige, had been struck. He stopped.

[64] Corporal Robin Waldron was working in the serious crimes unit in Richmond on the day in question. He was monitoring events on his radio. He heard of the attempted arrest at 10:53 a.m. and heard the “10-33”. He testified that it sounded very serious and that the thief left the scene. He observed Constable Whitney’s pursuit of Mr. Bolton. He said that Mr. Bolton was proceeding on Garden City Way. Constable Whitney was in hot pursuit. Corporal Waldron testified that he made a “bad decision” and pulled across the centre lane. He said that he put himself and his passenger at risk in the heat of the moment. He then decided to follow Constable Whitney and put on his lights and siren. He also saw Constable Lee in front of him.

[65] Corporal Waldron testified that he did a risk assessment: his belief was that Mr. Bolton had seriously injured a police officer so it was no longer just a theft. To him it was aggravated assault. So he followed Constables Lee and Whitney onto Shell Road and turned right or north onto Shell Road. Then he heard on the radio that the pursuit was to be shut down. He turned off his lights and siren but did not pull over on River Road.

[66] Ms. Brundige testified that she was traveling in the vehicle with her son Tyler who was then five years old. He was in a car seat. She was stopped on No. 5 Road at the stop sign waiting to turn left onto River Road. She saw the large pickup truck (the Truck) coming towards her from her left. She said it was going “very fast”. She testified that seconds later the Truck smashed into her vehicle as it tried to turn right or south onto No. 5 Road at approximately 10:56:44 a.m.

[67] Ms. Brundige suffered serious injuries. The car was not drivable after the collision. It was not repaired but was written off.

[68] Two witnesses to the Brundige collision testified.

[69] Mehrad Samzadeh was driving in the area at the time of the accident. His recollection of events was not clear; however, he testified that he was passed by a dark pickup truck going at a high rate of speed. It appeared to Mr. Samzadeh that the police were trying to “chase” the Truck. About ten to fifteen seconds after being passed, he came upon the Truck and Ms. Brundige’s vehicle, having been in an accident at the intersection of River Road and No. 5 Road.

[70] Michael Laughlin was at a stop sign on River Road facing east, trying to make a left turn onto the No. 5 Road. River Road is a two lane road, one lane in either direction. The Truck in question passed him on the left. It went around the corner at No. 5 Road at a high rate of speed and struck Ms. Brundige’s vehicle. He testified that two marked cruisers were trailing the vehicle, almost bumper to bumper, about ten to twenty seconds behind the Truck. He testified that the two cruisers were travelling at a “high speed”.

[71] Constable Kimberley Hartigan also testified. She was driving a fully marked police vehicle and was in uniform on April 24. She was quite new to Richmond and not terribly familiar with the roads. She heard about the events on the radio and headed towards the north part of Richmond in case she was needed. She left the detachment (on No. 5 Road south of Steveston Hwy) and headed north on No. 5. When she heard about the “10-33”, she activated her lights and sirens. Then the

watch manager said shut it down so she killed the lights and sirens. She planned to pull over at the north end of No. 5 Road at River Road. She noticed a stop sign, turned right and then did a U-turn to park on the north side of River Road, just east of No. 5. She was looking south-west. She had a warning from Constable Whitney that the vehicle was coming towards her. The vehicle passed numerous cars and swerved, coming east on River Road and turned right and collided with Ms. Brundige's vehicle on No. 5 Road. She helped the victim.

[72] She said that Constables Lee and Whitney pulled out from traffic to pass other cars on River Road coming to the corner of No. 5 Road. They were about five seconds behind the Truck.

[73] There was an internal investigation into Constable Lee's conduct. Constable Lee accepts that he failed to carry out the instructions to terminate the pursuit. He testified that his judgment was clouded by the fact that another member had been struck.

[74] I find that Constable Lee was proceeding at a high rate of speed on River Road. I reached that conclusion from the following question and answer on his examination for discovery:

> 182Q. Are you able to estimate how fast you were able to get up to River Road as you continued the pursuit?
>
> A. I don't remember the speed, but I pushed the car hard. I would say that for sure. Yeah.

[75] At the trial, Constable Lee recalled that he was referring to his speed on Shell Road. I do not accept that. The question was clear on the examination for discovery. So was his answer. His recollection would have been better at the examination for discovery. It was closer in time to the accident.

[76] Corporal Waldron was also disciplined for his actions.

[77] After Ms. Brundige's vehicle was struck, Mr. Bolton proceeded south on No. 5 Road. Corporal Waldron testified that he followed.

E. The Events Leading to the Bolton Arrest

[78] Corporal Waldron was accompanied by Corporal Kyle Simpson. Corporal Simpson said that the Truck rolled away slowly from the Brundige collision. After that, the Truck went through a red light and turned east on Bridgeport. Corporal Waldron and Corporal Simpson followed at a distance. It went north on No. 6 Road then east on River Road. There was smoke billowing from the Truck. They were 200 to 300 meters back.

[79] Corporal Simpson learned then that the New Westminster police had put down a spike belt but the suspect avoided it. The suspect went over the Queensborough Bridge and proceeded onto Stewardson Way in New Westminster.

[80] Colin Adam is a constable with the New Westminster Police Department. He said on the day in question he learned from helicopter surveillance (Air One) that the vehicle was crossing the Queensborough Bridge towards where he was. It was described as a pick-up truck from which smoke was emitting. He testified that at 3rd and Stewardson Way the suspect got out of the truck and ran. Constable Adam yelled “Stop! Police!” The suspect went into the service bay area of Key West Ford, another dealership, and ran to an SUV trying to get into it. He was half way in when Constable Adam pulled him from the vehicle with Constable Gelderman. The suspect was handcuffed.

[81] Corporal Curtis Bassington is involved in the Air One program of the RCMP. This is a helicopter service which provides aerial surveillance and support to British Columbia police services. He learned of the pursuit in Richmond and listened to the police radio. When he was airborne he headed east and saw the Truck on the Queensborough Bridge. He saw it stop at Key West Ford and observed the driver jump out.

[82] In September 2012, Mr. Bolton pleaded guilty to a breach of s. 249.1(3) of the *Criminal Code*, R.S.C., 1985, c. C-46. Specifically, he admitted to causing bodily harm to Constable Provost by operating a vehicle in a manner dangerous to the public, contrary to s. 249(1) while being pursued by a peace officer operating a

motor vehicle and did fail, without reasonable excuse and in order to evade the police officer, to stop the vehicle as soon as it was reasonable in the circumstances.

[83] On the same day, he pleaded guilty to a breach of s. 249 (3) of the *Criminal Code*−dangerous driving causing bodily harm−arising from the collision with Ms. Brundige's vehicle.

[84] Mr. Bolton died on March 6, 2016 at the age of 35.

III. LIABILITY OF DAVID JAMES BOLTON IN THE THREE ACTIONS

[85] As outlined above at para. 7, Mr. Bolton does not deny that he stole the Truck or that he drove the Truck dangerously when he collided with the vehicle driven by Constable Provost and later with Ms. Brundige's vehicle. He concedes his negligent driving causing the two collisions and that he is liable to Constable Provost and Ms. Brundige.

[86] He claims that the RCMP are contributorily negligent for both collisions. Those claims are considered below.

IV. LIABILITY OF DUECK AND KYLE KATERENCHUK IN THE THREE ACTIONS

[87] The claims by the three plaintiffs are against Dueck and Mr. Katerenchuk in negligence. The component parts of negligence are well-established. In *Mustapha v. Culligan Canada Ltd.*, 2008 SCC 27, at para. 3, the Court stated that a plaintiff must establish:

1. that the defendant owed him a duty of care;

2. that the defendant's behaviour breached the standard of care;

3. that the plaintiff sustained damage; and

4. that the damage was caused, in fact and in law, by the defendant's breach.

[88] The contentious issue with respect to the liability of Dueck is whether Dueck owed Ms. Brundige, Constable Provost, and the Attorney General a duty of care. Before addressing this issue, however, I will address briefly the other elements of the tort of negligence as they relate to these actions.

[89] If there is a duty, Dueck breached the standard of care: leaving the truck running and unlocked, contrary to its own policy, was careless. There was a clear failure to take reasonable care in the circumstances.

[90] Ms. Brundige, Constable Provost, and the RCMP vehicles all sustained damage. The quantum is to be determined in the November trial. Factual causation of the damage in the context of liability is straightforward. The question is whether “but for" the actions of Dueck, the collisions would have occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17. That test is clearly met here.

[91] With respect to so called legal causation, Dueck raises issues concerning remoteness and *novus actus interveniens* or intervening acts. I will address these issues in more detail after reviewing the duty of care issue.

A. Duty of Care Owed to the Plaintiffs

[92] Ms. Brundige, Constable Provost, and the RCMP argue that it was foreseeable to a reasonable person in Dueck’s circumstances that the Truck in the hands of a thief would be a significant danger to members of the public using the road.

[93] They argue that Dueck's employees should have had users of the road in their mind when they considered security measures respecting the Truck. Dueck and Mr. Katerenchuk had care and control of many vehicles for commercial purposes and a corresponding responsibility of securing them against thieves. Vehicles in the hands of thieves are potentially dangerous.

[94] Dueck’s position is that it owed no duty of care to the plaintiffs as it is unforeseeable that they would have sustained damage given the circumstances.

[95] The starting point for determining whether a duty of care exists in a particular case is to consider whether such a duty has been recognized in prior similar cases: *Cooper v. Hobart*, 2001 SCC 79 at para. 36; *Mustapha* at para. 5. Owners/operators of vehicles negligently secured have been found to owe a duty of care to persons injured by a car thief. However, as will be seen, the case law is not settled.

[96] Counsel referred me to several cases where a stolen vehicle was involved in a collision and where the issue was whether the owner (or other person who had care and control) of the vehicle was negligent. I will describe them briefly in the order in which they were decided.

[97] In *Walker v. Blakely* (1968), 67 D.L.R. (2d) 613 (Man. C.A.), the plaintiff's adopted son, who had a history of stealing their vehicle without permission, stole the vehicle and was involved in an accident.

[98] The court did not address the duty of care as it was not an issue in the case. Rather, the issue was whether the damage in the accident was caused by the collision or by the theft for the purposes of the plaintiff's insurance policy. While the court held that the damage was caused by the collision and not the theft, Freedman J.A. noted at 615:

> … I consider first whether the damage to the car was caused by the theft. I confess to great difficulty in saying that it was. The theft of an automobile need not in the ordinary case cause any damage. The automobile may be returned or recovered undamaged. A different situation might arise if the vehicle were the object of hot pursuit. A thief pursued by the police might well act in desperation, he might drive at high speed and with complete recklessness, and an accident might thus occur. Damage to a vehicle in such circumstances could with some reason be said to have been caused by the theft, for a causative link between the theft and the damage would there be discernible. The reckless driving giving rise to the accident would be an incident of the theft, one aspect of it, in a sense part of the *res gestae*. But nothing like that is present here. There was no hot pursuit. Indeed the automobile had not even been reported as stolen, for the plaintiff himself was unaware of the theft. All we know is that following the theft an accident occurred, and there is nothing to link the accident causatively to that theft. A whole day, possibly, has elapsed and many miles have been travelled. Now a collision takes place with an army vehicle, and we are asked, without more, to say that the resultant damage was caused by the theft. Again I say I am unable to do so.
> [Emphasis added.]

[99] In *Stavast v. Ludwar,* [1974] 5 W.W.R. 380 (B.C. Co. Ct.), the defendant left a vehicle running when he went into a beer parlour to inform his parents that he was there and ready to drive them home. The defendant was in the establishment for less than a minute. When he came back out he realized that the vehicle was stolen. The thief in the stolen vehicle caused an accident with the plaintiff.

[100] The case predates the modern Canadian approach to duty of care as set out in *Anns Merton v. London Borough Council,* [1978] A.C. 728 (H.L.) and developed in *Cooper*. However, the judge held that the defendant was negligent in leaving his vehicle as he did, particularly in regards to the time and place, saying “it is rather difficult to conceive of a riskier place to leave a motor vehicle with its engine running than at night on the street ten feet away from the door of a beer parlour": *Stavast* at 383. The judge held that the defendant’s negligence was the “effective cause” of the damage to the plaintiff’s vehicle.

[101] In *O'Reilly v. C,* [1979] 3 W.W.R. 124 (Man. C.A.), the defendant stole the keys from a vehicle on the lot of the dealership. The dealership noticed that keys had been stolen and locked the car doors as a precaution. The thief returned later that night and stole a car. He was involved in an accident the following day after being pursued by police in a high-speed chase causing injury to the plaintiff.

[102] The court, citing the decision in *Nova Mink Ltd. v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241 (N.S.S.C.), said that there is a duty of care where “the circumstances of time, place, and person would create in the mind of a reasonable man in those circumstances such a probability of harm resulting to other persons as to require him to take care to avert that probable result”: *O'Reilly* at 127.

[103] However, the court held that, while leaving the keys in an unlocked car and not taking other steps to minimize the possibility of a theft once the keys were found to be missing was negligent, there was no duty of care owed by the dealership to the plaintiff as “it would be an unreasonable extension of the duty concept to hold that [the dealership] owed a duty of care to the plaintiffs to have done more than it did to protect its vehicles from theft”: *O'Reilly* at 127.

[104] In *Hollett v. Coca-Cola Ltd.*, [1980] 37 N.S.R. (2d) 695 (S.C), the defendant, Coca-Cola, left a van in its secure lot with keys in the ignition. The van was stolen by an intoxicated youth. He struck two vehicles some hours after the theft.

[105] In that case, the court, following the decision in *O'Reilly,* concluded that there was no duty of care. The court concluded that while it was reasonably foreseeable that the car would be stolen or moved by people who were not authorised to move them, it was not reasonably foreseeable that sometime later, and some distance away, the thief would drive negligently.

[106] In *Canada (Attorney General) v. LaFlamme* (1982)*,* 44 B.C.L.R. 45 (Co. Ct.), the owner of a Camaro left the vehicle running and unlocked when he stopped to pick up groceries. The vehicle was stolen and in the course of a pursuit was intentionally rammed by a police vehicle. The Attorney General brought a claim for damage to the police vehicle.

[107] Judge Perry of the County Court found there was no duty of care on the part of the defendant to the federal crown.

[108] In *Spagnolo v. Margesson's Sports Ltd.* (1983), 145 D.L.R. (3d) 381 (Ont. C.A.), rev'g (1981), 127 D.L.R. (3d) 339 (Ont. C.C.), a parking lot attendant left keys in the vehicle which was thereafter stolen. The stolen vehicle was in a collision with the plaintiff six days later. Margesson's Sports Ltd. was the owner of the vehicle. It was parked in a parking lot operated by Y&R Properties Limited. The trial judge had found the defendant, Y&R Properties Limited, wholly responsible for the resulting damage. With respect to the duty of care, the trial judge stated at 334:

> Starting back at [*Donoghue v. Stevenson*, [1932] A.C. 562], it is clear that one must take reasonable care to avoid acts or omissions which one can reasonably foresee would likely injure one's neighbour i.e. persons who are so closely and directly affected by the act that one should have them reasonably in contemplation as being affected by the acts or omissions which are called in question. The statistical evidence to which I have already referred supports a finding that the owners of parking-lots should be aware of the risk of theft inherent in leaving motor vehicles unlocked and unattended, with an even greater risk when keys are available in the vehicles. The risk extends to damage occurring as a result of the theft.

> Professor Linden, as he then was, in *Canadian Tort Law* (1977) at p. 265, states:
>
> > In other words, the court should hold that a duty arises wherever some harm is reasonably foreseeable, unless good policy reasons exist for denying such a duty.
>
> In the instant case, the policy reasons are on the side of finding a duty. It is good public policy to prevent the theft of motor vehicles and the damage which can result therefrom. The City of Toronto by-law is an apparent attempt by the municipality to implement this policy. In concluding that there was a duty of care, was the proper standard of care exercised? Security measures to prevent theft in this particular parking-lot were woefully inadequate. Much can be said as to what the security system should have been but suffice to say that there was no security system whatsoever and Y & R Properties Limited did not satisfy the standard of care required of it in the security of its co-defendant's motor vehicle.

[109] The Ontario Court of Appeal reversed the trial judge's decision. The appellant argued that while the parking lot may be liable to the owner for the damage to its vehicle, the damages to the plaintiff were too remote. The court agreed with that submission and held that it was not reasonably foreseeable to the owner of the vehicle that a thief would cause a motor vehicle accident and ensuing damage six days after the theft. However the Court of Appeal said this at 383:

> Without doubt, the position of Y & R Properties Limited would be made more difficult if the damage to the plaintiffs had occurred in the course of the theft or even in the course of the immediate flight therefrom. It would be easier to argue that damage to third parties in these circumstances is reasonably foreseeable as an ordinary consequence of the nervousness and panic which may accompany the theft…

[110] In *Moore v. Fanning*, 60 O.R. (2d) 225 (H.C.J.) a police officer, pursuant to custom, left his keys in his vehicle in the police parking lot in order to facilitate its removal in the event that it blocked other cars. The thief, who was mentally ill, stole the vehicle from the lot and was involved in an accident.

[111] The judge, commenting on the judge's decision in *Spagnolo*, stated at 235:

> In *obiter* that learned judge was of the view that it would be easier to argue liability if the accident had occurred in the course of a theft or a flight thereafter, because an accident to third persons might be "an ordinary consequence of the nervousness and panic which may accompany the theft".

[112] The court held that there was no nervousness or panic leading to the thief's behaviour. It was not a probable or reasonably foreseeable result that a thief would injure third parties by his driving any more than any other driver: *Moore* at para. 47.

[113] In *Cairns v. General Accident Insurance Co. of Canada*, [1992] O.J. No. 1432 (Ont. C.J.), a car dealership left keys in several unlocked vehicles on the lot. A group of young people including the defendant driver stole the keys with the intention of returning later to steal vehicles. They returned in broad daylight and took a vehicle. In the course of driving away from the dealership, the driver struck and killed a pedestrian.

[114] The court found the car dealership liable as the young persons leaving the premises were in a state of some panic and the accident occurred in the immediate flight after the theft: *Cairns* at para. 23.

[115] In *Kalogeropoulos v. Ottawa (City)*, [1996] O.J. No. 3449 (Ont. C.J.), a city employee left a truck unlocked and running in the view of a late-night restaurant where the employees had gone for a break. An intoxicated thief stole the vehicle and the city employees pursued it. The thief was driving erratically and caused an accident with a third party taxi driver.

[116] The court held that it was reasonably foreseeable that the stolen vehicle would cause damage to a third party and that City employees should have foreseen that in the event the truck was stolen in the manner and circumstances described, a chase would ensue which would further add to the “nervousness and perhaps panic of the thief”: *Kalogeropoulos* at para. 52.

[117] In *Tong v. Bedwell,* 2002 ABQB 213, the defendant vehicle owner left his vehicle unattended with the keys in the ignition in order to chase a vandal. In the meantime the vehicle was stolen and crashed into a parked car owned by the plaintiff.

[118] The court held that it was not reasonably foreseeable that a stolen vehicle would cause damage to a third party's vehicle in the circumstances of the case: *Tong* at para. 56.

[119] In *Johnston v. Day*, 2013 ABQB 512, a taxi driver left an intoxicated passenger in her vehicle with the keys in the ignition while she purchased some fruit at the market. The customer drove the taxi into a group of people. In that case, the judge ultimately found the taxi driver liable, although little was said concerning the existence of a duty of care.

[120] In *Matharu v. Manheim,* 2014 ONSC 3459, the defendant driver stole a vehicle from a car lot owned by the defendants' auction company. Ten days later, the plaintiffs were injured in a motor vehicle accident with the thief.

[121] The court declined an application for summary dismissal on the basis that the decision in *Spagnolo* allowed for factual situations in which liability could be found for a car lot operator: *Matharu* at para. 24.

[122] The most recent decision on point is that of the Ontario Court of Appeal in *J.J. v. C.C.,* 2016 ONCA 718. In that case, a garage owner left a vehicle unlocked on an unsecured lot with the keys in the ashtray. The vehicle was stolen by two minors and they were involved in an accident in which the passenger suffered a catastrophic brain injury.

[123] One of the issues was whether the plaintiff garage company owed a duty of care to the passenger. The trial judge had held, citing *Spagnolo* and *Kalogeropoulos*, that the case law had already established a duty.

[124] While the Court of Appeal ultimately dismissed the appeal. But it held that the trial judge erred in concluding that the appellant owed a duty of care on the basis of prior case law: *J.J.* at para. 27. The court held as follows:

> 22. The trial judge concluded that a duty has already been recognized in the case law. In my view, the case law does not support her conclusion that the appellant owed a duty of care to J.J. The two cases cited by the trial

> judge concern injuries to third parties — people who were unconnected to the theft of the vehicle. The circumstances of this case are not analogous.
>
> …
>
> 27. In my view, the trial judge erred in concluding that the appellant owed a duty of care on the basis of these cases. Not only are the circumstances of this case different, but the cases cited are not determinative of the duty of care even in the context of third parties.
>
> [Emphasis added.]

[125] The court went on to note that a finding that a duty of care is owed to a third party is relatively rare in cases arising out of the theft of a vehicle, citing many of the cases noted above:

> 28. The finding that a duty of care is owed to a third party is relatively rare in cases arising out of the theft of a vehicle. A duty was found in *Cairns v. General Accident Assurance Co. of Canada*, [1992] O.J. No. 1432 (Ont. Gen. Div.). In that case, a pedestrian was killed by a vehicle stolen moments earlier from the defendant car dealership. The keys to the vehicle had been stolen from the dealership a few days earlier. The trial judge found that the dealership was negligent in leaving the keys in its cars and in failing to take precautions to secure the cars once the keys were stolen. Theft by young people with little experience in driving in these circumstances was reasonably foreseeable, and the accident occurred in the course of the theft (during the flight thereafter). The trial judge found that the dealership was 20% responsible for the plaintiff's injuries.
>
> 29. In most cases, however, a duty of care to a third party has not been found, usually because injury to the third party was not a reasonably foreseeable consequence of the theft: see e.g. *Hollett v. Coca-Cola Ltd*. (1980), 37 N.S.R. (2d) 695 (N.S. T.D.); *Canada (Attorney General) v. LaFlamme* (1982), [1983] 3 W.W.R. 350 (B.C. Co. Ct.); *Moore v. Fanning*, [1987] O.J. No. 620 (Ont. H.C.); *Norgard v. Asuchak*, [1984] A.J. No. 394 (Alta. Q.B.); *Aldus v. Belair*, [1992] O.J. No. 3908 (Ont. Gen. Div.); *Werbeniuk v. Maynard*, [1994] 7 W.W.R. 704 (Man. Q.B.); and *Tong v. Bedwell*, 2002 ABQB 213 (Alta. Q.B.).

[126] It can be seen that the results in these cases are largely fact-driven. Liability has more frequently been imposed on commercial enterprises than on private individuals. A duty has not been found in cases where several days elapsed between the theft and injury. On the other hand, a duty of care has been generally found where “nervousness and panic" which might accompany the theft should have been reasonably foreseeable to the owner.

[127] However, as set out above and noted in *J.J.*, there are a number of cases where no duty of care has been found to exist. Thus, there is some uncertainty given the competing case law.

[128] Therefore, it is prudent to engage in what has been called the "*Anns/Cooper* analysis" to determine if a novel duty of care should be recognized. This is a reference to the decisions in *Anns* and *Cooper*. The test is set out at paras. 30-31 of *Cooper*:

> 30. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in Yuen Kun Yeu, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.
>
> 31. On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.

[129] The Court goes on to say at paras. 32-33:

> 32. On the first point, it seems clear that the word "proximity" in connection with negligence has from the outset and throughout its history been used to describe the type of relationship in which a duty of care to guard against foreseeable negligence may be imposed. "Proximity" is the term used to describe the "close and direct" relationship that Lord Atkin described as necessary to grounding a duty of care in *Donoghue v. Stevenson*, *supra*, at pp. 580-81:

> Who then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.
>
> I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.
>
> [Emphasis added in *Cooper*.]

33. As this Court stated in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24, per La Forest J.:

> The label "proximity", as it was used by Lord Wilberforce in Anns, supra, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.
>
> [Emphasis added in *Cooper*.]

[130] There is further guidance as to the relationship between reasonable foreseeability and proximity in *Childs v. Desormeaux,* 2006 SCC 18 at paras. 11-13:

> 11. In *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), Lord Wilberforce proposed a two-part test for determining whether a duty of care arises. The first stage focuses on the relationship between the plaintiff and the defendant, and asks whether it is close or "proximate" enough to give rise to a duty of care (p. 742). The second stage asks whether there are countervailing policy considerations that negative the duty of care. The two-stage approach of *Anns* was adopted by this Court in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, at pp. 10-11, and recast as follows:
>
> (1) is there "a sufficiently close relationship between the parties" or "proximity" to justify imposition of a duty and, if so,
>
> (2) are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise?
>
> 12. In *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69, the Court affirmed the *Anns* test and spoke, *per* Iacobucci J., of three requirements: reasonable foreseeability; sufficient proximity; and the absence of overriding policy considerations which negate a *prima facie* duty established by foreseeability and proximity: para. 52. Some cases speak of foreseeability being an element of proximity where "proximity" is used in the sense of establishing a relationship sufficient to give rise to a duty of care: see, e.g., *Kamloops*. *Odhavji*, by contrast, sees foreseeability and proximity as separate elements at the first stage; "proximity" is here used in the

> narrower sense of features of the relationship other than foreseeability. There is no suggestion that *Odhavji* was intended to change the *Anns* test; rather, it merely clarified that proximity will not always be satisfied by reasonable foreseeability. What is clear is that at stage one, foreseeability and factors going to the relationship between the parties must be considered with a view to determining whether a *prima facie* duty of care arises. At stage two, the issue is whether this duty is negated by other, broader policy considerations.
>
> 13. The plaintiff bears the ultimate legal burden of establishing a valid cause of action, and hence a duty of care: *Odhavji*. However, once the plaintiff establishes a *prima facie* duty of care, the evidentiary burden of showing countervailing policy considerations shifts to the defendant, following the general rule that the party asserting a point should be required to establish it.

[131] I will first address foreseeability and then turn to proximity and then any residual policy considerations.

1. Foreseeability

[132] As set out in prior cases, it is useful to break this down into two further questions: (1) whether theft was foreseeable; and (2) whether injury to Constable Provost and Ms. Brundige and damage to the RCMP's vehicles was foreseeable.

[133] I have no difficulty with the notion that it was reasonably foreseeable that the Truck could be stolen given the circumstances.

[134] Dueck’s policy was that vehicles should not be left as it was. Rather, keys were to be placed in a specific location. Mr. Schram, the sales manager at Terminal Avenue, was assistant manager at the time of the theft. He agreed that leaving the Truck unsecured was a “bad idea".

[135] There is a mixed clientele of persons who frequent the area around the dealership. This includes homeless and marginalized individuals walking along Terminal Avenue. There is a bike and pedestrian path behind Dueck, running between Main Street, several hundred meters to the west of Dueck, and Home Depot, to the east of Dueck.

[136] Mr. Schram acknowledged that street people enter on the Dueck lot to go through the Dueck garbage bins not far from the bay where the Truck was parked.

[137] Mr. Katerenchuk said the following on discovery:

> 126 A. why would we normally block it? In case we had called away, and we forget that we left the car.
>
> 127 Q. to prevent it from being stolen.
>
> A. yes
>
> 128 Q you realize that is a real risk that a vehicle – leaving a vehicle with the engine running –
>
> A. unattended, yes.
>
> 129 Q. unattended, that it can be stolen. Aware that if a vehicle gets stolen, that it – it can lead to not only loss of the – it can lead to loss of the vehicle for the dealership?
>
> A. yes

[138] Clearly, it was foreseeable that the Truck could be stolen. This finding is consistent with prior cases. In *J.J.*, for example, the Ontario Court of Appeal held that is was reasonably foreseeable that minors might take a car from the garage given the lack of security measures and the fact that the garage lot was easily accessible by anyone: *J.J*. at paras 52-53.

[139] The second question is whether injury to Constable Provost and Ms. Brundige and damage to the vehicles of the RCMP were reasonably foreseeable.

[140] The precise sequence of events does not have to be foreseeable. The applicable standard was recently described by our Court of Appeal in *Bergen v. Guliker*, 2015 BCCA 283:

> [67] The precise sequence of events does not have to be foreseeable to determine if a particular individual or class of individuals are a legal neighbour; rather, it must only be foreseeable that the individual or class of individuals may be in a position where the defendant's wrongful conduct could reasonably cause them harm. At that point, the individual who may be harmed by the defendant's conduct is a foreseeable plaintiff and falls within the boundaries of the duty. As was noted in *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753:
>
> > [59] … As a matter of tort law, a duty of care must always be owed by one person to another. Negligence cannot exist in the abstract. <u>There must be a specific duty owed to a foreseeable plaintiff, which is breached, in order for negligence to arise</u>. … [Emphasis added in *Bergen.*]

[141] Before the collision, it was widely reported that there was a risk of injury to the public resulting from stolen vehicles being driven carelessly by thieves.

[142] Mr. Blair Upton, the General Manager of the Dealership at the time, gave evidence that Dueck was a member of the Canadian Automobile Dealers Association (“CADA"). CADA is an organization that represents dealerships when dealing with the government, industry and the public.

[143] As far back as 2010, CADA recognized that stolen vehicles in the hands of a fleeing criminal present a grave danger to the public.

[144] Moreover, I heard evidence that on December 6, 2007, hearings were conducted by Parliament's Standing Committee on Justice and Human Rights. The committee was considering amendments to the *Criminal Code*, on motor vehicle theft. A provincial police officer who was unit commander of the provincial auto theft team testified:

> The safety and security of our communities requires our dedication and determination, and I am dedicated and determined to enlighten all those who will listen to the fact that auto theft is not merely a property crime, but that auto theft in the possession of a stolen vehicle in the hands of a fleeing criminal or an inexperienced driver-offender presents a grave danger to the public. This year alone, personally, my provincial auto theft unit has experienced the death of a 15-year-old youth who fled the police and died behind the wheel of a stolen car. We have had three instances of when desperate auto thieves have attacked or driven directly at police officers, resulting in the officers discharging their firearms, and there have been countless accidents as a result of fleeing stolen vehicles. The danger of this death and violence spilling out onto the innocent public is a reality.
>
> [Emphasis added.]

[145] Several police officers also testified that there is a connection between thieves fleeing the police and erratic driving, creating risk to other users of the road.

[146] Here, I find that it is reasonably foreseeable that a stolen vehicle would cause serious damage and injuries to the police and bystanders in the vicinity of where the police are attempting to recover the stolen vehicle from the thief.

[147] The Dueck employees called and expected the police to quickly attend to recovering the stolen Truck. Moreover, Dueck authorized OnStar to activate the GPS tracking system in the stolen Truck for the purpose of assisting the police in locating the Truck so that it could be recover

[148] The circumstances in this case differ from those in cases like *Hollett* and *Spagnolo* where the accidents did not occur during the theft.

[149] I am satisfied that, in these circumstances, it was reasonably foreseeable that persons and property may be injured or damaged during the recovery of a vehicle by the police in the immediate aftermath of a theft.

2. Proximity

[150] This depends on the “neighbour principle". The question posed in *Donoghue v. Stevenson,* [1932] A.C. 562 was:

> who then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called into question

[151] The question therefore is whether there is sufficient proximity between Dueck and the injured parties to warrant the imposition of a duty of care.

[152] In *J.J.*, the Ontario Court of Appeal dealt with proximity as follows:

> [54] Although the concept plays an important role in the *Cooper* analysis, proximity has fairly been described as an “elusive concept which provides little principled guidance as to when in novel cases a *prima facie* duty will be recognized”: Philip H. Osborne, *The Law of Torts*, 5th ed. (Toronto: Irwin Law, 2015), at p. 76. That is so because proximity is, in essence, a statement of a conclusion that a duty *ought* to be imposed in particular circumstances because it is fair and just to do so.
>
> [55] This is not to say that proximity is an arbitrary conclusion. Whether it is fair and just to impose a duty of care depends on a number of considerations, including “expectations, representations, reliance, and the property or other interests involved”: *Cooper*, at para. 34. The court elaborated on the nature of proximity in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 (CanLII), [2007] 3 S.C.R. 129, at para. 29:

> The most basic factor upon which the proximity analysis fixes is whether there is a relationship between the alleged wrongdoer and the victim, usually described by the words "close and direct". This factor is not concerned with how intimate the plaintiff and defendant were or with their physical proximity, so much as with whether the *actions* of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed. A sufficiently close and direct connection between the actions of the wrongdoer and the victim may exist where there is a personal relationship between alleged wrongdoer and victim. However, it may also exist where there is no personal relationship between the victim and wrongdoer.
>
> [56] Thus, whether proximity is established in this case does not depend on whether the appellant knew J.J.; clearly, he did not. It depends, instead, on whether the appellant should have had minors like J.J. in mind when he considered security measures at Rankin's Garage.
>
> [57] In my view he should have. The appellant had care and control of many vehicles for commercial purposes, and with that comes the responsibility of securing them against minors, in whose hands they are potentially dangerous. He should have adverted to the risk that minors would be tempted to take a vehicle if it were made easily available to them.
>
> [58] The appellant had his own reasons for securing the vehicles at Rankin's Garage, not least because he either owned them or was responsible for them as bailee. Moreover, securing the vehicles was not an onerous obligation. It was a simple matter of locking the vehicles and storing the keys. Indeed, on the appellant's account, he accepted the need to secure the vehicles and claimed to have done so.
>
> [59] In my view, it is fair and just to impose a duty of care in these circumstances. Proximity is established.

[153] While the case before me does not deal with minors and concerns a duty to unrelated third parties, I find the discussion in *J.J.* apposite. Dueck similarly had care and control of many vehicles for commercial purposes and should have had other users of the road and the police in mind when securing the vehicle against theft.

[154] I therefore find that proximity is made out and that there is therefore a *prima facie* duty of care.

3. Residual Policy Concerns

[155] The remaining question under the test is whether there are residual policy concerns which negate the existence of a duty. The Court in Cooper set out the following questions relevant to this inquiry at para. 37:

1. Does the law already provide a remedy?

2. Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class?

3. Are there other reasons of broad policy that suggest that the duty of care should not be recognized?

[156] This issue was also discussed in *J.J.* The court in that case said the law does not already provide a remedy in these types of cases nor would the recognition of the duty raise the spectre of unlimited liability. There is no large class of claimants that would be able to take advantage of this decision, let alone a class that is “potentially unlimited" in size. The court stated:

> 65. Recognition of a duty of care in this case would not create the spectre of unlimited liability to an unlimited class of claimants. The duty in this case arises in the context of circumstances that strictly limit its application. There is no large class of claimants that will be able to take advantage of this decision, let alone a class that is potentially unlimited in size.

[157] The court turned to the question of broad policy concerns. The court stated that this was not a case where the owner of a car left his keys in a car parked at his or her home. Rather it was a commercial garage that had care and control of many vehicles on an ongoing basis. The business was “an inviting target" for theft and joy riding, especially by minors.

[158] I reach the same conclusion here. As in *J.J.* there is no large class of claimants.

[159] Like the defendant in *J.J.*, Dueck has a commercial operation. The duty can be complied with by simply keeping vehicles locked and securing the keys. There is no hardship here. In fact, that is the very policy of Dueck.

[160] I find that there are no residual policy concerns that should negate the *prima facie* duty of care.

4. Summary on Duty of Care

[161] In sum, Dueck had a duty to Constable Provost and Ms. Brundige and the Attorney General to secure the vehicle in its lot and Dueck breached this duty and this breach caused the injuries and damages.

B. Remoteness and *Novus Actus Interveniens*

[162] Dueck argues, that even if there was a duty which they breached and that that breach factually caused the injuries and damages, the injuries and damages were too remote to justify compensation or there was an intervening act that broke the chain of causation.

[163] Remoteness, much like the duty of care analysis, focusses on the foreseeability of the harm. However, the analysis relates to the "type or kind of injury was reasonably foreseeable": *Hussack v. Chilliwack School District No. 33* , 2011 BCCA 258 at para. 71.

[164] Chief Justice McLaughlin, writing for the Court in *Mustapha*, explained remoteness as follows:

> [12] The remoteness inquiry asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (Linden and Feldthusen, at p. 360). Since *The Wagon Mound* (No. 1), the principle has been that "it is the foresight of the reasonable man which alone can determine responsibility" (*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (P.C.), at p. 424).
>
> [13] Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is *probable* or merely *possible*. In my view, these terms are misleading. Any harm which has actually occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in T*he Wagon Mound (No. 2)* as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendan[t] . . . and which he would not brush aside as far-fetched" (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617 (P.C.), at p. 643).
>
> [14] The remoteness inquiry depends not only upon the degree of probability required to meet the reasonable foreseeability requirement, but also upon whether or not the plaintiff is considered objectively or subjectively.

> One of the questions that arose in this case was whether, in judging whether the personal injury was foreseeable, one looks at a person of "ordinary fortitude" or at a particular plaintiff with his or her particular vulnerabilities. This question may be acute in claims for mental injury, since there is a wide variation in how particular people respond to particular stressors. The law has consistently held — albeit within the duty of care analysis — that the question is what a person of ordinary fortitude would suffer: see *White v. Chief Constable of South Yorkshire Police*, [1998] 3 W.L.R. 1509 (H.L.); *Devji v. Burnaby (District)* (1999), 180 D.L.R. (4th) 205, 1999 BCCA 599; *Vanek*. As stated in *White*, at p. 1512: "The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals."

[165] The harm in this case as pleaded consists of standard injuries and damage sustained in motor vehicle accidents. While the plaintiff's may bring claims in the quantum trial which may require a remoteness analysis, I find no issues with remoteness sufficient to void liability on the part of Dueck.

[166] Dueck argues that there is an intervening act. I take that to be the car chase.

[167] In *Hussack*, our Court of Appeal explained this defence as follows:

> [77] The defence of *novus actus interveniens* is successful when the new act is of sufficient magnitude to break the chain of causation: It was stated this way in *Mitchell v. Rahman*, 2002 MBCA 19, 209 D.L.R. (4th) 621:
>
> > [30] A *novus actus interveniens* absolves the original wrongdoer of legal liability (or of further liability) where the later act or event is of such a quality as to cause a break in the chain of causation. Whether or not the intervening conduct amounts to a *novus actus interveniens* is a question that has plagued the courts for centuries.

[168] The question of whether a subsequent act breaks the chain of causation is a question of fact: *Hussack* at para. 88.

[169] Here, I find that there was no act of sufficient magnitude to break the chain in causation from the time Mr. Bolton stole the Truck from the dealership to the time he was apprehended in New Westminster. While there were other factors that may have caused or contributed to the injuries and damage, as will be discussed below, the defendants were not able to point to any act that actually broke the chain.

[170] The principle behind this doctrine is that a defendant should not be held liable for objectively unforeseen consequences. As set out above, I do not find that this concern is an issue here.

V. LIABILITY OF RCMP IN THE BRUNDIGE ACTION

[171] Both Ms. Brundige and Mr. Bolton argue that the RCMP's actions amounted to negligence and that they are contributorily negligent for any damages suffered by Ms. Brundige.

[172] Police pursuits are addressed in the *Emergency Vehicle Driving Regulation*, BC Reg. 133/98 (the "EVDR"). Sections 1, 2, and 3 of the EVDR read as follows:

> **Definitions**
>
> **1** In this regulation:
>
> **"attempting to close the distance"** means attempting to close the distance between a peace officer's vehicle and another vehicle but does not include a pursuit;
>
> **"emergency light"** means a flashing red or blue light;
>
> **"emergency siren"** means an audible siren, signal bell or exhaust whistle;
>
> **"indictable offence"** means an offence under the *Criminal Code* or another statute of Canada which may be prosecuted by indictment and includes dual offences as described in the definition of "indictable offence" in the *Interpretation Act* (Canada);
>
> **"pursuit"** means the driving of an emergency vehicle by a peace officer while exercising the privileges granted by section 122 (1) of the *Motor Vehicle Act* for the purpose of apprehending another person who refuses to stop as directed by a peace officer and attempts to evade apprehension.
>
> **Application**
>
> **2** This regulation establishes the circumstances and conditions that apply to the exercise of the privileges granted by section 122 (1) of the *Motor Vehicle Act*.
>
> **Pursuit by police**
>
> **3**(1) To engage in or continue a pursuit, a peace officer must
>
> (a) have an emergency light and siren activated, and
>
> (b) have reasonable grounds to believe that
>
> (i) the driver or a passenger in the vehicle being or to be pursued has committed, is committing or is about to commit an offence, and

(ii) the seriousness of the offence and the need for immediate apprehension outweigh the risk to the safety of members of the public that may be created by the pursuit.

(2) In considering whether there are reasonable grounds under subsection (1) (b), the driver of the emergency vehicle must consider any pertinent factors, including the following, if relevant:

(a) the nature and circumstances of the suspected offence or incident;

(b) the risk of harm posed by the manner in which the emergency vehicle is being or is likely to be operated;

(c) the risk of harm posed by the distance, speed or length of time required or likely to be required to exercise the privileges;

(d) the nature, condition and use of the highway;

(e) the volume and nature of pedestrian or vehicular traffic that is, or might reasonably be expected to be, in the area.

(3) For the purposes of subsection (1) (b),

(a) the need for immediate apprehension will be low if

(i) the driver or a passenger in the vehicle pursued has not committed an indictable offence, or

(ii) identification or apprehension of the suspected offender may be achieved by other means at that or a later time,

(b) the greater the distance, speed or length of time required or likely to be required for the pursuit, the greater the risk to the safety of members of the public, and

(c) an attempt to evade apprehension is not a factor to be considered in determining the seriousness of the offence or the need for immediate apprehension.

[173] The EVDR refers to s. 122 of the *Motor Vehicle Act,* R.S.B.C. 1996, c. 318. It provides in relevant part:

122(1) Despite anything in this Part, but subject to subsections (2) and (4), a driver of an emergency vehicle may do the following:

(a) exceed the speed limit;

(b) proceed past a red traffic control signal or stop sign without stopping;

(c) disregard rules and traffic control devices governing direction of movement or turning in specified directions;

(d) stop or stand.

[174] RCMP officers are also subject to policies that set out their duties during police pursuits and other emergency situations. These include the National RCMP Operational Manual. Section 5.4 is entitled “Emergency Vehicle Operations (Pursuits)” (“EVO Policy”). It contains the following relevant provisions:

> **1. General**
>
> 1.1. Emergency vehicle operations include pursuits, closing the distance and emergency vehicle response.
>
> 1.2 The Incident Management Intervention Model (IMIM) must guide any decision to initiate, continue or terminate an emergency vehicle operation.
>
> 1.2.1 The following IMIM principles will apply:
>
> 1.2.1.1 The primary objective of any intervention is public safety.
>
> 1.2.1.2 Police officer safety is an essential element of public safety.
>
> 1.2.1.3 The IMIM must always be applied in the context of a careful risk assessment.
>
> 1.2.1.4 Risk assessment must take into account the likelihood and extent of fatalities, injury and damage to property
>
> 1.2.1.5 Risk assessment is a continuous process and risk management must evolve as situations change.
>
> 1.2.1.6 The best strategy is to use the least intervention to manage the risk.
>
> 1.2.1.7 Prudent intervention causes the least amount of harm or damage.
>
> …
>
> 2.3. **Pursuit** means the operation of an emergency vehicle for the purpose of apprehending a person who refuses to stop as directed by a peace officer and attempts to evade apprehension.
>
> 3.1 A pursuit may occur when a suspect driver refuses to stop for a peace officer and attempts to evade apprehension.
>
> …
>
> 3.4 Only a fully marked police vehicle equipped with emergency equipment may be used in a pursuit.
>
> > EXCEPTIONS
> >
> > 1. An unmarked police vehicle may be used in a pursuit only if it is absolutely necessary to protect life. Use of an unmarked police vehicle in a pursuit must be relinquished to a fully marked police vehicle as soon as possible.
>
> …
>
> 3.10 A pursuit may only be initiated and continued when other alternatives ae not available.

3.11 In conducting the risk assessment to initiate a pursuit, the seriousness of the situation and the necessity for immediate apprehension must be considered to outweigh the level of danger created by the pursuit.

3.12 The risk will be considered low if:

3.12.1 the driver or passenger in the vehicle has not committed or is not able to commit an indictable offence that poses imminent harm to the public; or

3.12.2 the identification or apprehension of the driver or any passenger may be done by other means at a later time.

> NOTE: A driver's attempt to evade apprehension is not a factor in determining the seriousness of the offence, or the need for immediate apprehension.

4. Non-Pursuable Offences

4.1 A pursuit will not be initiated for the following types of offences:

…

4.1.3 possession of a stolen vehicle as defined at sec. 354, CC;

4.1.4 flight from police as defined at sec. 249.1, CC or dangerous driving as defined at sec. 249, CC, when the only evidence of either offence is gained while conducting a vehicle stop or closing the distance.

…

4.1.6 a violation of a provincial statue or provincial regulation offence;

…

4.1.8 a property-related offence in general.

…

9. Termination of Pursuit

9.1 A pursuit must be terminated when the risk to life becomes too great, the pursuit becomes futile or other means of apprehension are possible.

9.2 The decision to terminate a pursuit may be made by the operator of the pursuit vehicle or the member who has assumed command of the pursuit.

9.3 Ground units will terminate a pursuit once control has been assumed from a police aircraft.

9.4 The decision to terminate a pursuit is final and must be immediately broadcast to all members involved. All members involved will acknowledge the broadcast.

9.5 Upon termination of a pursuit, and when it is safe to do so, all members involved will:

9.5.1 pull over to the roadside, stop their vehicles and deactivate their emergency equipment, and

9.5.2 notify the Operational Communications Centre (OCC) that the pursuit has been terminated and they are stopped at roadside.

[Emphasis added]

[175] The underlined provisions of the EVDR Regulation and the EVO Policy are of particular relevance here. A breach of the Regulation and/or the Policy does not necessarily amount to a breach of the standard of care. It is, however, a consideration.

[176] "E" Division British Columbia and the Yukon has its own application of the EVO Policy for pursuits in E Division.

[177] There is no dispute that Ms. Brundige is owed a duty of care by police officers engaged in a pursuit. While our Court of Appeal in *Bergen v. Guliker*, 2015 BCCA 283 held that there is no recognized duty of care before the commencement of the police pursuit, it noted at para. 49 that it "is common ground that police owe a private law duty of care to other motorists when they engage in a vehicle pursuit".

[178] The RCMP argue, however, that the pursuit had ended approximately 45 seconds before the collision with Ms. Brundige, referencing Corporal Peters broadcast over the radio to "shut [the pursuit] down". At that time, Constable Whitney de-activated his lights and siren.

[179] I do not accept this submission. Although the lights and siren came to an end, the pursuit continued. Both Constable Hartigan and Mr. Laughlin describe the police vehicles as driving at high speeds. They passed Mr. Laughlin near the intersection with No. 5 Road. If there had not been a pursuit going on, there was no reason to pass.

[180] I conclude that the actions of Constable Whitney and Constable Lee constituted a pursuit. I further find that Corporal Waldron was also engaged in the pursuit. He also did not pull over when the command to stop came down.

[181] The issue therefore is whether the police officers met the standard of care. The standard is that of "a reasonable police officer, acting reasonably and within the statutory powers imposed upon him or her, according to the circumstances of the case": *Doern v. Phillips Estate* (1994), 2 B.C.L.R. (3d) 349 (S.C.) at para. 68, aff'd (1997), 43 B.C.L.R (3d) 53 (C.A.).

[182] The standard of care was described by McLaughlin C.J. in *Hill v. Hamilton-Wentworth Regional Police Services Board,* 2007 SCC 41 at para. 73:

> I conclude that the appropriate standard of care is the overarching standard of a reasonable police officer in similar circumstances. This standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. …

[183] The RCMP concedes that Constable Whitney's and the other officer's termination of the pursuit did not entirely accord with internal guidelines. Constable Whitney, for example, did not pull over, stop, and acknowledge the broadcast to shut the pursuit down. However, the RCMP argues that the decision to keep going was within a reasonable range of possible decisions.

[184] Corporal Peters (acting as sergeant at the time of the accident) gave certain answers in his examination for discovery:

71 Q. Anyway, before the day of the accident had you experienced in your career that auto thieves drive more erratically than the average user of the road?

A. Absolutely

72 Q. You have witnessed that yourself?

A. Absolutely. I have been involved in the pursuit myself so…

73 Q. And in your observation is it fair to say that the erratic dangerous driving of a thief would increase if they are being pursued by the police?

A. Yes. Yeah.

74 Q. So there is a connection, in your view at least, between erratic driving increasing with pursuit?

A. There's some connections yeah for sure yeah, for sure.

75 Q. And that is a common sense connection really.

A. Yes. Yeah.

[185] Corporal Peters also said this in his examination for discovery:

> 397 Q. So certainly Constable Whitney at least did not comply with the policy insofar as pulling over and stopping; correct?
>
> A. According to what he wrote, no.
>
> 398 Q. And you know whether Constable Lee pulled over and stopped?
>
> A. I read his police statement. He – the same thing, he turned off his lights and sirens and he slowed down.
>
> 399 Q. So Lee did not comply with 9.51 either insofar stopping his vehicle; correct?
>
> A. That is right, yeah
>
> 406 Q. And so Lee and Whitney did not follow your direction, did they?
>
> A. No, they did, but they did not – they shut it down but they did not pull over. So they listen to the direction of shutting down but they did not comply with policies that you have to shut it down and pull over. They are missing the pullover part.

[186] And further:

> 439 Q. Yes. And if I can characterize it this way, you let me know whether you agree: the thief was pursued by constables Lee and Whitney in fully marked RCMP vehicles; is that correct?
>
> A. That is correct.
>
> 440 Q. And shortly after the lights of the police vehicles were turned off a collision occurred.
>
> A. That is correct.
>
> 441 Q. And at this point both Constable Lee and Constable Whitney, in fully marked police vehicles, were still following, i.e. they had not pulled over; correct?
>
> A. that is correct, yeah

[187] Corporal Peters said that the watch commander is the person who decided to shut down the pursuit and that that decision was made by Staff Sergeant Stark. He said that he did not necessarily agree.

[188] Here, I conclude that the breach of the standard of care by RCMP officers is on the part of Constable Whitney, Constable Lee and Corporal Waldron. All three officers engaged in a high speed pursuit of the truck in an urban area in the middle of the day. Moreover, they did not appropriately comply with an order to terminate

the pursuit when it was made by Staff Sergeant Stark and repeated by Corporal Peters.

[189] Constable Whitney heard the order to discontinue the pursuit. His duty was to deactivate his lights and sirens (which he did) and to stop the vehicle at the side of the road and state his location. He did not stop and do that. Instead, he continued following the Truck on River Road.

[190] Corporal Peters confirmed that members do not have discretion to ignore an order to terminate a pursuit. The decision not to obey the order was contrary to the EVO Policy. Had he pulled over and stopped when he heard the order, I find that the sense of danger in the mind of Mr. Bolton would have been significantly reduced. Instead, Constable Whitney's continual visual contact and close proximity to the Truck maintained the atmosphere of a pursuit and influenced Mr. Bolton's driving.

[191] Of course, the Court does not have the benefit of Mr. Bolton's evidence. However, Constable Lee testified that "the thief would have been aware that he was being pursued".

[192] Constable Lee also failed to comply with this policy by stopping his vehicle.

[193] Corporal Waldron breached the policy when he failed to stop, participated in a pursuit in an unmarked vehicle, and participated in a pursuit where there was already a primary and secondary vehicle engaged.

[194] Although Constables Lee and Whitney stated that they slowed down to the speed limit, this is not consistent with the observation of Mr. Laughlin.

[195] Arguably, there may have been a breach of standard of care in initiating and continuing the pursuit in the first place. However, that decision was made in the stressful circumstances involving the "10-33" call.

[196] The plaintiffs argue that there was little reason to commence the pursuit: Mr. Bolton had been obeying traffic laws. He did not present any risk to the public except when he was evading the police. Constable Whitney gave no consideration to the

need for immediate apprehension and appeared to be unfamiliar with the decision making process under the EVO Policy. There were lessor means available that were in fact ultimately successful in apprehending Mr. Bolton. This included continuing unmarked surveillance, the intervention of Air One, and the resumption of OnStar monitoring.

[197] An important principle is stated in *Radke v. M.S.,* 2005 BCSC 1355 at para. 76:

> It is important not to lose sight of the fact that police officers are exercising judgement often quickly and in highly stressful circumstances. One must not to analyze the circumstances, from the relative calm of a courtroom, without keeping this in mind.

[198] The difficulty in this case faced by the RCMP is that a judgment was made to bring the pursuit to an end. However, Constable Lee, Constable Whitney, and Corporal Waldron chose to continue the pursuit. To expect the officers to immediately end a pursuit when their senior officers direct them to is not holding officers to a standard of perfection. This was a clear order and there are clear guidelines for officers on how to respond when such an orders is issued. There were no circumstances present that could justify the officers continuing their pursuit.

[199] Finally, the RCMP argues that it did not cause the collision. The RCMP submits it was the action of Mr. Bolton and Dueck who caused the collision and not the pursing policer officers.

[200] I respectfully disagree. I am satisfied there is a causal link between the breach by the officers of the EVO and the collision. There was little reason for Mr. Bolton to enter the turn at No. 5 Road at such a high speed other than the fact that he was being pursued.

[201] Constables Lee and Whitney and Corporal Waldron proceeded to follow the vehicle. I find that they were, as Mr. Laughlin and Constable Hartigan testified, proceeding quickly. Their actions, on a balance of probabilities, caused Mr. Bolton to continue to drive at a high rate of speed. On the evidence, but for their pursuit, the accident with Ms. Brundige would not have occurred.

[202] I find the defendant, the Minister of Justice for the Province of British Columbia, liable for the negligence of the officers.

VI. LIABILITY OF THE RCMP IN THE PROVOST AND ATTORNEY GENERAL ACTIONS

[203] Mr. Bolton argues that in the action brought by the Attorney General, the police are "effectively agents of the plaintiff". He argues that because of police actions leading to the accident with Constable Provost, the Attorney General ought to be held contributorily negligent for its own loss.

[204] Constable Provost did not name the RCMP as a defendant. Mr. Bolton argues that because the RCMP are partly at fault, Constable Provost is not entitled to a finding that Mr. Bolton (or a combination of Mr. Bolton and Dueck) is 100% liable.

[205] Both these assertions require a consideration of the RCMP's conduct leading up to the collision with Constable Provost.

[206] Mr. Bolton argues that a decision had been made to attempt to arrest Mr. Bolton when he had exited the Truck and was away from it on Douglas Street.

[207] When Constables Baird and Tutt made their final approach to Mr. Bolton, they discovered that Mr. Bolton was back in the driver's seat of the Truck with the door shut. Mr. Bolton argues that Constables Baird and Tutt were driving a covert Toyota Sienna minivan, with no identifiable police markings, and that there was no indication that Mr. Bolton had identified them (or anyone else) as police officers.

[208] Mr. Bolton argues that the arrest attempt should have been aborted at that time. Instead, Constable Tutt exited the police vehicle and shouted at Mr. Bolton to exit the Truck. He drew his pistol and pointed it at Mr. Bolton.

[209] It was entirely predictable, it is argued, that Mr. Bolton fled; first backing into Sergeant Anderson at high speed and then speeding away and upon rounding the first corner, running into the covert Hyundai Sonata driven by Constable Provost.

[210] There is no indication that Mr. Bolton had any idea that the Chevy Tahoe he hit was driven by Sergeant Anderson, a police officer, or that the Hyundai Sonata was driven by another police officer, Constable Provost.

[211] Mr. Bolton's position is that these two accidents were the direct result of Mr. Bolton's driving in a dangerous manner in an excited attempt to flee the arrest attempt.

[212] I respectfully disagree. Mr. Bolton had left the Truck. He posed a potential danger to the public. There were comments on the radio about his driving like an "idiot" and driving 80 kph. In my view, it was the right time to attempt the arrest. They only missed by a few seconds.

[213] Decisions are made in conditions of stress. It is not the place of the Court to second guess such decisions and to consider these matters with the benefit of 20/20 hindsight.

[214] I conclude that there is no contributory negligence on the part of the Attorney General in respect of the attempted arrest and subsequent collision with Constable Provost.

VII. CONTRIBUTORY NEGLIGENCE OF CONSTABLE PROVOST

[215] Constable Provost was not wearing his seatbelt at the time of the collision with Mr. Bolton. Dueck's position is that Constable Provost was contributorily negligent for having unlatched his seatbelt shortly before his car was struck by the Truck. Section 220(4) of the *Motor Vehicle Act* provides:

> (4) A person in a motor vehicle being driven or operated on a highway must, if the motor vehicle has properly attached to it a seat belt assembly for the seating position occupied by that person, wear the complete seat belt assembly in a properly adjusted and securely fastened manner.

[216] Section 32.04(4) of the *Motor Vehicle Act Regulations*, B.C. Reg. 26/58 exempts a police officer in certain circumstances:

> (4) When a peace officer has reasonable and probable grounds to believe the use of a seat belt assembly would obstruct the performance of his

> duties, the peace officer and any passenger is exempt from section 220 (3), (4) and (6) of the Act.

[217] Constable Provost testified that he removed his seatbelt because he believed he was about to get out of his vehicle to arrest Mr. Bolton. He needed to be able to exit his vehicle quickly to increase his chances of apprehending Mr. Bolton if he were to flee on foot.

[218] Constable Provost testified that he heard over the radio that the Truck was stopped and that the suspect was on foot. His plan was to locate the suspect visually, then quickly stop his car and exit it to either attempt an arrest or assist the dog handler. (The dog handler controls the dog while another officer affects the arrest on the suspect.)

[219] Constable Provost did not know whether the suspect had a weapon and, therefore, assumed he had one.

[220] He was traveling at idle speed with his foot resting or hovering over the break and his right hand on the gear shift. He removed the seatbelt to be able to get out of the vehicle quickly, to be able to make an arrest, pursue the thief, or protect himself. He was ready to exit as fast as possible.

[221] He heard a radio call that the K9 unit had the vehicle. He next heard the radio call of “PCMVI” meaning that a police officer has been involved in a motor vehicle accident. Before he had time to process this new information, the Truck came into view as it cut the corner at Douglas and Smith and plowed into the front of Constable Provost’s vehicle. Constable Provost did not have enough time to carry out an evasive maneuver, or for that matter to fasten his seatbelt.

[222] I am satisfied that Constable Provost had a reasonable basis for making the decision to remove his seatbelt. There were sound reasons for removing the seatbelt. Constable Provost anticipated that he would be dealing with a desperate suspect, potentially with a weapon.

[223] Expert evidence was called to the effect that Constable Provost's injuries would have been reduced if he had been wearing a seatbelt. In light of my conclusion regarding the lack of a seatbelt, it is unnecessary to address this evidence.

VIII. APPORTIONMENT OF LIABILITY

[224] Ms. Brundige seeks a finding of liability against Mr. Bolton, Dueck, and the Minister of Justice for the Province of British Columbia on behalf of the RCMP officers involved in the pursuit. Constable Provost seeks a finding of liability against Mr. Bolton and Dueck. The Attorney General seeks a finding of liability against Mr. Bolton and Dueck. I have found all of these defendants liable and the remaining question is how should liability be apportioned?

[225] In *Aberdeen v. Township of Langley*, *Zanatta, Cassels,* 2007 BCSC 993, Mr. Justice Groves summarized the principles governing apportionment:

> [59] The relative blameworthiness approach is therefore quite clearly established as the appropriate approach to apportionment of damages in British Columbia.
>
> [60] Although assessing the relative blameworthiness of the parties is the correct approach, there is some difficulty in quantifying that concept. In this regard, the words of Lambert J.A. in *Cempel*, *supra*, at ¶ 24 are instructive:
>
> > In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties.
>
> [61] Finch J.A. (as he then was) expanded upon the concept of relative fault in *Alberta Wheat Pool v. Northwest Pile Driving Ltd.* (2000), 80 B.C.L.R. (3d) 153, 2000 BCCA 505 at ¶ 46 as follows:
>
> > Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

> [62] Thus, fault is to be determined by assessing the nature and extent of the departure from the standard of care of each of the parties. Relevant factors that courts have considered in assessing relative degrees of fault were summarized by the Alberta Court of Appeal in *Heller v. Martens*, *supra*, at ¶ 34 as follows:
>
> 1. The nature of the duty owed by the tortfeasor to the injured person…
> 2. The number of acts of fault or negligence committed by a person at fault…
> 3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault…
> 4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy… Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis…
> 5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy…
>
> [Authorities omitted.]

[226] There is no dispute that the most blameworthy tortfeasor in this case was Mr. Bolton. He stole the Truck and engaged in a flight from the police that involved numerous breaches of traffic laws. He concedes that he was driving dangerously. He had attempted an illegal pass of Mr. Laughlin's stationary vehicle. He encroached upon Ms. Brundige's lane as he turned right onto No. 5 Road. I assess his blameworthiness at 70% in the action brought by Ms. Brundige and 85% in the actions brought by the Attorney General and Constable Provost.

[227] Dueck's negligence created the situation that was highly tempting to any opportunistic would be thief. Given the character of the dealership location, the size of the Truck, and the complete lack of care exercised by Dueck staff, I assess Dueck's blameworthiness at 15% in all three actions.

[228] As for the RCMP, certain members failed to comply with a direct order. They continued a pursuit when it was unsafe to do so. They did not avail themselves of an opportunity to de-escalate the situation. They created conditions that spurred Mr.

Bolton to drive in a highly erratic and dangerous fashion at the location of the Brundige collision. I conclude that their blameworthiness is difficult to distinguish from that of Dueck. Both equally contributed to the dangerous situation that resulted in the collision. I conclude that the Minister of Justice's blameworthiness should be assessed at 15% in Ms. Brundige's action.

IX. CONCLUSION

[229] In sum, I apportion liability as follows:

1. In the action brought by Ms. Brundige, liability is to be apportioned 70% to Mr. Bolton, 15% to Dueck, and 15% to the Minister of Justice;

2. In the action brought by Constable Provost, liability is to be apportioned 85% to Mr. Bolton and 15% to Dueck; and

3. In the action brought by the Attorney General of Canada, liability is to be apportioned 85% to Mr. Bolton and 15% to Dueck.

_____

The Honourable Mr. Justice Kelleher