

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *ICBC v. Hoang et al*
2003 BCSC 1139

Date: 20030718

Docket: S004632

Registry: Vancouver

Between:

INSURANCE CORPORATION OF BRITISH COLUMBIA

PLAINTIFF

And:

**THI DINH HOANG, QUANG THUONG NGUYEN, HIEN GIA HOANG, HA THI VU, VAN HONG
NGUYEN, PHI LONG DINH, THI BAC DO, THI HIEN NGUYEN, TRONG DAI TRAN, THUY THI
NGUYEN, CHUNG MINH TRAN, THI LUYEN BUI, VAN QUYET NGUYEN, THEM THI TO, NGUYEN
SON TRAN, VAN QUANG VU, QUOC THAI DIEP, VAN HUY NGUYEN, MINH SON NGUYEN, LAP
THI LE, EM THI BUI, HUONG THI HOANG, XUAN TINH DONG, Y VAN LE, HAI TRONG LE,
THU QUYET DANG, KIN MY CHE, SON NHU NGUYEN, VAN CUONG NGUYEN, VAN THONG NGUYEN,
PHUNG SUNNY WONG, LOAN THI NGUYEN, QUOC THANH TU, MANH CONG TRAN and HUONG THI
NGUYEN**

DEFENDANTS

Before: The Honourable Madam Justice Bennett

Reasons for Judgment

Counsel for the Plaintiff

F.G. Potts

Son Nhu Nguyen

In Person

Van Cuong Nguyen

No appearance

Date and Place of Hearing:

April 11, 2003
Vancouver, B.C.

[1] This is an application for judgment, in accordance with the jury verdict, quantification of special and punitive damages for some of the default judgments, and costs, by the plaintiff, the Insurance Corporation of British Columbia ("ICBC").

[2] ICBC brought suit against 35 defendants alleging fraud, primarily by staging accidents and making false claims.

[3] A number of the defendants settled with ICBC, some default judgments were taken and the matter proceeded to trial with a jury against only Mr. Son Nhu Nguyen and Mr. Van Cuong Nguyen, father and son respectively.

[4] I will deal first with the applications for a judgment based on the jury verdict and special costs.

[5] The evidence suggested that Van Cuong Nguyen and others staged an accident. Van Cuong Nguyen was driving Son Nhu Nguyen's car. Son Nhu Nguyen claimed for the repairs of the car and the car was repaired at a cost of \$1,477.09. A further bill for towing was paid in the amount of \$213.60.

[6] Mr. Van Cuong Nguyen contacted a lawyer regarding filing a law suit, but did not file a writ. ICBC had become suspicious of the claim and after paying for the costs of some medical treatment, declined to pay anything further. The cost paid for medical treatment was \$313.55. The total claim against the two men was \$2,564.39.

[7] In his address to the jury, counsel for ICBC told the jury that ICBC's main concern was the issue of punitive damages in order to deter people from committing fraud in relation to ICBC.

[8] The jury found both Son Nhu Nguyen and Van Cuong Nguyen liable for \$2,564.39. The jury found punitive damages against Van Cuong Nguyen for \$20,000.00 and no punitive damages against Son Nhu Nguyen.

[9] It is clear from the answer to the questions that the jury found that Van Cuong Nguyen did stage an accident. They found that Son Nhu Nguyen was not part of a conspiracy to the staging of the accident, but that he learned afterwards that the accident was staged and fraudulently did not disclose that to ICBC when interviewed by ICBC investigators.

[10] Counsel for ICBC seeks prejudgment interest on punitive damages from the date that the writ was filed. Further, they seek special costs against both of

the defendants based on the conduct of the litigation by the two Nguyens. ICBC is not seeking full indemnity of the legal costs in this case.

[11] Rule 57(3) states as follows:

(3) Where the court orders that costs be assessed as special costs, the registrar shall allow those fees that the registrar considers were proper or reasonably necessary to conduct the proceeding to which the fees relate, and, in exercising that discretion, the registrar shall consider all of the circumstances, including

- (a) the complexity of the proceeding and the difficulty or the novelty of the issues involved,
- (b) the skill, specialized knowledge and responsibility required of the solicitor,
- (c) the amount involved in the proceeding,
- (d) the time reasonably expended in conducting the proceeding,
- (e) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding,
- (f) the importance of the proceeding to the party whose bill is being assessed, and the result obtained, and
- (g) the benefit to the party whose bill is being assessed of the services rendered by the solicitor.

[12] Special costs are awarded where the conduct of the parties during the course of the litigation is "reprehensible", which includes conduct "deserving of reproof or rebuke". See *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 at p. 746-7. In determining whether to order special costs, I must consider all of the circumstances.

[13] The plaintiff submits that the basis for special costs are the allegations by the defendants that ICBC acted maliciously and that the investigators were racist. As well, ICBC says that a witness, the ex-wife of Son Nhu Nguyen, could not be cross-examined until they had a matrimonial file available with the result that the witness had to wait several days before testifying. Once

she testified there was no cross-examination.

[14] Further, Van Cuong Nguyen was called as an adverse party and during the course of questioning stood up and shouted, "I surrender", and left the courtroom. Essentially he abandoned the case. The jury was instructed that they could draw an adverse inference against him.

[15] The law is very clear that a fraudulent claim may attract an order for special costs.

[16] In *ICBC v. Katinic et al*, 2003 BCCA 147, Southin J.A. speaking for the court said at para. 4:

... In the fraud action she [the trial judge] ordered special costs. No appeal has been taken against that award by the defendants... That is not to say that if the defendants to that action had argued that special costs were not appropriate in the fraud action, that they might not have a point.

[17] Further, Southin J.A. said at para. 5:

In the negligence actions, that is the actions brought by these fraudsters, in my view, special costs ought to have been awarded rather than costs on scale 4 simply because those persons by making fraudulent claims to the Insurance Corporation of British Columbia and then bringing the actions based on those fraudulent claims were engaging in perverting the course of justice. That is the sort of thing which attracts an award of special costs. It is not necessary in such circumstances that there be some other form of reprehensible conduct in the action. The very bringing of the actions themselves with their fraudulent foundation was sufficient to attract an order for special costs. That is the point that I was making in *Sanghera* (1991), 55 B.C.L.R. (2d) 125. I think, with respect, the learned judge put a little too low a value on what was said by me in *Sanghera*.

[18] The court may have drawn a distinction between a successful suit by ICBC against defendants for fraud and a negligence action fraudulently brought in the courts when imposing an order for special costs. The difference between the two is the invocation of the court's process to perpetrate a fraud in the latter instance.

[19] On the other hand, ICBC initially took the position that they were not proceeding against Son Nhu Nguyen. This appears in a letter from the Ombudsman's office to Son Nhu Nguyen. ICBC made errors in its allegations by claiming that one of the defendants was the son of Son Nhu Nguyen, and in spite of Mr. Nguyen's repeatedly pointing this out, the statement of claim was not amended until the eve of trial. Indeed I requested that ICBC look into the matter very early on in the case management proceedings. This was not done.

[20] One of the ICBC investigators, Mr. Elkin was, to be generous, not careful with his evidence. He gave testimony that was simply not true.

[21] ICBC complains about the ex-wife of Mr. Son Nhu Nguyen, Miss Diepe, having to wait to testify because I ordered that the matrimonial file be produced from Nanaimo. Mr. Nguyen requested the matrimonial files to be delivered and I found he was entitled to cross-examine Miss Diepe on matters in the file as relevant to her credibility. However, the main reason for the delay was because counsel for ICBC chose not to identify her as a witness until the eve of trial. That is a decision that ICBC made, however, they cannot lay the fault for the delay in calling her as a witness at the feet of the defendants. Further, once she gave her evidence, the lack of cross-examination by the defendant was appropriate.

[22] Mr. Son Nhu Nguyen filed an affidavit in the proceedings stating that when ICBC served him with the writ of summons, they did so at his place of business, accompanied by a TV news cameraman. I find this conduct unacceptable.

[23] While there were some intemperate allegations made against ICBC, ICBC also did not act in an appropriate manner. I must make it perfectly clear that once Mr. Potts took over conduct of the file, apart from the misstatements in evidence made by Mr. Elkin over which Mr. Potts had no control, Mr. Potts and those assisting him conducted themselves in an exemplary and fair manner.

[24] However, some of the conduct by Son Nhu Nguyen and Van Cuong Nguyen, which ICBC characterizes as at least deserving of rebuke or reproof, no doubt was a response to the manner in which they were treated or at least perceived themselves to have been treated by ICBC.

[25] Further, I take into account that both of these persons were lay litigants and did not have the benefit of counsel during the trial.

[26] I have concluded that this is not a case for special costs. Although the defendants were held liable for the money paid out by ICBC, it is clear from

the jury verdict that the only act that Son Nhu Nguyen was liable for was not advising ICBC of the fraud when he learned of it, and he had been a recipient of repairs to his vehicle.

[27] The thrust of the case against the defendants was a case for punitive damages. Mr. Son Nhu Nguyen was successful on that point. Therefore I find that Mr. Son Nhu Nguyen is not liable for any costs with respect to this matter.

[28] I find that Van Cuong Nguyen is liable for costs on Scale 3.

[29] Given the findings of the jury, the two defendants are jointly and severally liable for \$2,564.39. Van Cuong Nguyen is also liable for the \$20,000.00 in punitive damages the jury assessed against him. The motion for judgment is granted in those terms.

[30] ICBC also seeks prejudgment interest from the date the writ was filed.

[31] Prejudgment interest will be awarded on the award of \$2,564.39 from the date the writ was filed. I do not order any prejudgment interest on the punitive damages.

[32] I am also asked to fix punitive and special damages against the defaulted defendants for the remainder of the accidents which have not been dealt with by settlement or in another proceeding.

[33] I will deal first with special damages. From accident number three, ICBC seeks joint and several liability of a total claim of \$707.41 from Thuy Thi Nguyen, Chung Minh Tran and Them Thi To. There is nothing in the claim that substantiates a claim of fraud against Thuy Thi Nguyen. Therefore, no damages or costs are awarded. However, there will be an award of \$46.00 against Tran and \$69.00 against To. From accident number five, ICBC seeks an award of special damages of \$4,633.56 against Lap Thi Le. ICBC is not seeking an order of joint and several liability with respect to the others. That order is granted. In accident number six they seek an award of \$375.90 from Loan Thi Nguyen and are not seeking joint and several liability with respect to that accident. This is in relation to investigative costs and will be dealt with later in these Reasons.

[34] The real issue is whether punitive damages should be awarded against those defendants and, if so, the amount of the award.

[35] ICBC claims punitive damages from all of the above named save and except

Loan Thi Nguyen. They only seek an order with respect to investigative costs against Loan Thi Nguyen.

[36] ICBC takes the position that because these actions were not defended then the allegations in the statement of claim are deemed to be admissions pursuant to Rule 19(19):

An allegation of fact in a pleading, if not denied or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant or mentally incompetent person.

[37] The issue of punitive damages with respect to the litigants who have not defended the claim presents an interesting legal problem. Some of the default judgments in this case were dealt with previously by Madam Justice Sinclair Prowse: see *ICBC v. Hoang et al.* (2002), 42 C.C.L.I. (3d) 235, 2002 BCSC 1162. ICBC submits that I should not follow her decision because full submissions were not made before her. Further, Justice Sinclair Prowse was told that there was a cap of \$10,000.00 on punitive damages as a result of another judge's decision. ICBC sought before her a range of punitive damages between \$3,000.00 to \$10,000.00. Further, Justice Sinclair Prowse asked whether there was a correlation between the special damage award and the punitive damage award and was told that there was such a correlation. The plaintiff is not taking that position before me. The plaintiff says there is no correlation between the special damage award and the punitive damage award. Further, Justice Sinclair Prowse was not provided with any of the jury awards made in other cases. Finally, the jury award in this case had not been determined.

[38] ICBC submits that the decision in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 at para. 94 stands for the proposition that the jury verdict keeps the judge in touch with the community, including financial realities:

(1) Punitive damages are very much the exception rather than the rule, (2) imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for

the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded *only where compensatory damages*, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[39] ICBC submits that I should give more substance to the punitive awards granted by juries as opposed to those granted by judges.

[40] In the proceedings before Sinclair Prowse J., she raised the concern of inconsistent verdicts as between her decision and mine, given we are both dealing with parties in the same cause of action.

[41] Now, ICBC takes the position that I should not follow Sinclair Prowse J., in the same litigation, because she was misinformed by ICBC. I note that Sinclair Prowse J. relied on the **Whiten** case in coming to her conclusion.

[42] In her Reasons for Judgment, Sinclair Prowse J. succinctly sets out the purpose of punitive damages and the applicable factors. I can do no better than to reproduce those Reasons here. See paras. 50-57:

Punitive damages are a separate head of damages. Their purpose is to punish the defendant through specific and general deterrence and denunciation. See **Vorvis v. Insurance Corp. of British Columbia**, [1989] 1 S.C.R. 1085; and **Huff v. Price** (1990), 51 B.C.L.R. (2d) 282 at 298 (C.A.).

Punitive damages may be granted in situations in which the defendant has committed an actionable wrong; that wrong has injured the plaintiff; and the conduct of the defendant in committing that wrong is deserving of the condemnation of the court. See *Vorvis*, *supra*. Conduct that is deserving of the condemnation of the court includes conduct that is extreme in the sense that it is harsh, malicious, high-handed, oppressive, vindictive, and/or reprehensible. See *Vorvis*, *supra*; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Whiten v. Pilot Insurance Co.*, [2002] S.C.J. No. 19, 2002 SCC 18; *Huff*, *supra*.

And further at paras. 56-57:

As far as the determination of the quantum of these punitive damage awards is concerned, the proper approach is to focus on the defendant's misconduct and not the plaintiff's loss. A formulaic approach, such as imposing a fixed ratio between compensatory and punitive damages, does not permit a consideration of the many variables necessary to reach a fair award. The facts of each case should be related to the underlying purposes of punitive damages. The quantum of the damages should be the lowest award that will serve those purposes. Proportionality is the governing rule for quantum. See *Whiten v. Pilot Insurance Co.*, *supra* at paras. 71-74.

As suggested in cases such as *Sanghera*, *supra*, *Sam*, *supra* and *Le*, *supra*, when reviewing the defendants' conduct and the underlying principles of punitive damages, consideration should be given to such factors as:

- 1) Whether the claims pertain to a fraud on the public and, if so, the public interest, and, in particular, to the multiplied effect of those fraudulent claims on that public body and the public taxpayers;
- 2) Whether the defendant's conduct includes criminal conduct. If it does, the criminal penalty for that conduct and the amount of the punitive damage award should be consistent with it. If the defendant has been charged criminally, that fact should be taken into account;

3) All of the circumstances of the conduct. If, for example, the conduct is based on the commission of fraudulent acts, consideration should be given to such facts as whether: the acts were planned, organized, and/or deliberate; specialized knowledge was used; persons were recruited for profit; families and children were used; and/or the defendants participated in multiple claims;

4) Whether the defendant has abused the court process by such conduct as commencing actions in pursuit of his or her fraudulent claims; and

5) The financial means of the defendant.

[43] Needless to say, each claim must be considered on an individual basis. I add, parenthetically, that no evidence of the financial means of the defendants, is before me, other than what appears in the statement of claim. It would be speculation to make any inference regarding financial circumstances of the parties.

[44] ICBC acknowledges that the fact the litigant did not require ICBC to prove its claim is a factor to take into account in assessing punitive damages.

[45] In my view, I am bound by the parameters of other judge- decided cases when I assess the appropriate amount of punitive damages. These include the Reasons of Sinclair Prowse J. in *Hoang, ICBC v. Sanghera* (1991), 55 B.C.L.R. (2d) 125 (C.A.), *ICBC v. Sam*, [1997] B.C.J. No. 571 (S.C.) and *ICBC v. Le*, [1997] B.C.J. No. 3135 (S.C.).

[46] I will deal first with Chung Minh Tran. Chung Minh Tran was involved in a staged accident. Although not claimed in the statement of claim, ICBC submits that it paid for physiotherapy on behalf of the defendant Tran.

[47] In this staged accident, children were in one of the cars. This is an aggravating feature of this accident.

[48] Taking into account the nature and circumstances of the fraud, and the other factors noted above, I assess punitive damages at \$7,500.00.

[49] Next, Them Thi To was involved in the same accident as Minh. She claimed for injuries. The children in the car were her own children.

[50] In my view, her conduct all around was considerably more serious than Minh's. Taking into account all of the factors, especially the fact that she put her own children at risk for fraudulent financial gain, I assess punitive damages at \$15,000.00.

[51] Next, is Lap Thi Le. Lap Thi Le was involved in a staged accident, made a claim for injuries and was paid \$4,000.00 for general damages. Taking into account the nature of the fraud and the factors noted above, I fix punitive damages at \$10,000.00.

[52] Next, is the issue of costs of the investigation. The amount claimed for Chung Minh Tran for investigative costs is \$16.68 for the adjuster's work and \$220.75 for the investigator's work for a total of \$237.43. That award is granted.

[53] The amount claimed for Them Thi To is \$31.51 for adjuster's costs and \$225.07 for investigative costs for a total of \$256.58. That award is granted.

[54] The special damages, adjuster and investigative costs against Tran and To are awarded on a joint and several liability basis. This award is granted.

[55] The amount claimed from Lap Thi Le is \$44.48 for adjuster's costs and \$225.01 for investigative costs for a total of \$269.49 and that award is granted.

[56] Finally, the amount claim against Loan Thi Nguyen is \$55.60 for adjuster costs and \$320.30 for investigative costs for a total of \$375.90. That award is granted.

[57] The plaintiff will have its costs on Scale 3.

[58] Finally, court ordered interest will apply to the special damages and the award for adjusters' and investigative costs from the date of the writ.

"E.A. Bennett, J."

The Honourable Madam Justice E.A. Bennett