

Citation:



Date:

File No: C6529
Registry: Port Coquitlam

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
(Small Claims Court)

BETWEEN:

JAMES ANTHONY DUNNE

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

DEFENDANT

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE W. A. BLAIR**

Counsel for the Claimant: Paul Janzen
Counsel for the Defendant: F. G. Potts and James Gopaulsingh
Place of Hearing: Port Coquitlam, B.C.
Date of Hearing: September 19, 20 and 21, 2007, January 3, 4 and 10, 2008
Date of Judgment: June 3, 2008

[1] Mr. James Dunne claims that at all material times he was the registered owner of a 1999 Volkswagen Jetta automobile which was stolen on or about January 18, 2005. The Jetta was recovered but suffered substantial damage as a result of a fire. Mr. Dunne seeks recovery for the damage done to the vehicle and incidental costs he is entitled to under the contract of insurance.

[2] It has been established that Mr. Dunne had purchased the Jetta in 1998 and on August 10, 2004 had entered into a contract of insurance which included the following terms. Mr. Dunne was declared to be the principal operator of the vehicle. The vehicle use was for "Business use, pilot car, funeral home limousine, courtesy car or driving school vehicle 5,000 kg GVW or less. Including pleasure use. Vehicle may also be used on not more than 6 days in a calendar month for commercial use".

[3] On January 18, 2005 or thereabouts, the vehicle was stolen and shortly after the theft was found damaged. The vehicle was damaged by having the stereo and wheels removed with an attempt made as well to set the vehicle on fire.

[4] Mr. Dunne reported the loss and made a Claim with The Insurance Corporation of BC (ICBC) for the damages to the vehicle and for rental of a replacement vehicle as he was entitled to do under his contract of insurance.

[5] ICBC in turn denied the Claim on the basis firstly that Mr. Dunne forfeited any coverage as a result of his misrepresentation in the contract of insurance, specifically that Mr. Dunne declared himself to be the principal operator when in fact his son, Andrew Dunne, was.

[6] Alternatively, ICBC states that Mr. Dunne made a wilfully false statement in respect of a claim by stating in writing on January 24, 2005 that at the time of the theft the motor condition was "good".

[7] The Reply of the Defendant is that as a result of the false statements by Mr. Dunne he has forfeited any rights to claim under the policy of insurance relying on Sections 19(1)(b) and 19(1)(e) of the *Insurance (Motor Vehicle) Act*.

[8] Mr. Dunne is a widower with two children, Andrew and Angela, twenty and eighteen years old respectively at the time of commencement of the hearing in September 2007. The children live with Mr. Dunne at his residence on El Camino Dr. in Coquitlam. He is a lawyer with an almost exclusive criminal law practice for the last fifteen years. His office is located near the courthouse in New Westminster.

[9] After Mr. Dunne's wife passed away in March 2002 Mr. Dunne found it difficult to drive both his children to their sports events as well as taking care of all the driving obligations for the family and, as he said, he couldn't wait until Andrew got his licence to take some of the chores off his hands.

[10] Mr. Dunne was declared to be the principal operator during the insurance contract covering August 2003 to August 2004. Andrew Dunne drove the Jetta as well but Angela did not. Andrew Dunne was born November 10, 1986 and therefore was eligible to seek his driver's licence after his sixteenth birthday in 2002.

[11] Andrew Dunne got his "N" level driver's licence in March 2003. He had taken driver's training and was, as well, taught by Mr. Dunne. Within a week of Andrew

Dunne receiving his "N" drivers licence Mr. Dunne purchased a Mitsubishi Lancer Rally 0Z model automobile.

[12] The initial plan was to transfer the Jetta to Andrew Dunne or at least it was expected that he would be the principal operator of the Jetta. The Lancer was insured in the same fashion as the Jetta with Mr. Dunne declared to be the principal operator of both.

[13] In April 2003 after Andrew Dunne obtained his driver's licence he was involved in a motor vehicle accident. He had a second accident on May 20, 2003 while he was delivering Pizza for Sergio's Pizza. These accidents were reported to ICBC. There was a discussion with Mr. Dingman at the time of the second accident about who was the principal operator of the vehicle. Mr. Dunne recalls advising him that Andrew Dunne was the principal driver and he would look after changing the declaration of principal operator upon the renewal of the insurance.

[14] It is clear that from the time Andrew Dunne received his driver's licence until the Jetta was to be reinsured in August 2003 Andrew Dunne was the principal operator as he drove the Jetta more than anyone else. The Jetta was to be his vehicle as Mr. James Dunne planned and Mr. Dunne purchased his Lancer vehicle in furtherance of that plan.

[15] On June 9, 2003 the Jetta was stolen from in front of the Dunne residence and recovered some blocks away with broken driver's side windows. The stereo system was stolen.

[16] Andrew Dunne finished the school year in June 2003 and continued to drive the Jetta for work two or three times per week as well as social driving except that he drove the Lancer whenever he was fortunate enough to be able to get it.

[17] In August 2003 when Mr. James Dunne and Andrew Dunne attended to have the insurance renewed they found out the insurance would be in the \$9,000.00 range if Andrew Dunne was declared to be the principal operator.

[18] As a result of the high cost of insurance it was not feasible to have Andrew Dunne declared the principal operator and accordingly James and Andrew Dunne entered into an agreement that guaranteed, in their belief, that James Dunne would be the principal operator of both vehicles. It was decided that Andrew Dunne was not going to get the vehicle until the cost of insurance went down.

[19] The agreement was to be strictly enforced and contained a number of terms including the following. The agreement speaks of James Dunne in the first person:

(1) I will be using either car at my discretion and you will check with me before you take either car to make sure it's okay.

(2) For work you will use either the Jetta or the Lancer but during the course of a month you will make sure that you use the cars about equally for work purposes.

(10) You will reduce the amount of driving drastically. I expect that you will only use the car for work and for a few functions a week and not for "cruising" or just generally taxiing your friends.

You understand the cost of driving and the fact that you have already had two minor accidents makes this Agreement necessary. If you fail to keep this agreement you will be unable to use either car.

[20] Mr. James Dunne was trying to make the point that Andrew Dunne could not do what ever he wanted with the vehicles.

[21] Mr. James Dunne says he took steps to monitor the vehicle use. He made sure he drove the Jetta and the Lancer frequently. Andrew Dunne did not drive daily and Mr. Dunne would decide what vehicle Andrew Dunne would drive at night if Andrew went out.

[22] Mr. Dunne was involved in a criminal practice requiring him to be in court on summary trials throughout the Lower Mainland. As a result of the passing of his wife, Mr. Dunne limited how he practiced law. He also limited where he practiced to insure he was home in the evenings. Mr. Dunne looked after the grocery shopping and all the other day-to-day obligations of the home. His daughter played soccer and had two practices and one game per week. His son played Lacrosse. Mr. Dunne drove every day of the week driving both vehicles frequently in order to make sure Andrew Dunne was not the principal operator.

[23] Mr. Dunne also stated he was an early riser and would leave early every morning. Mr. Dunne would take whichever car he wanted. If the other car was there and Andrew Dunne needed it he would take that car. Mr. Dunne said if he was home in the evenings Andrew would have to ask Mr. Dunne which car to use.

[24] Mr. Dunne stated: "So essentially whatever car was available to him he could use, or he'd have to check with me if both cars were available. And that's how it worked throughout actually, so right up until it was stolen." (see page 43 of the transcript of September 19 2007).

[25] Andrew Dunne said he obeyed the agreement by taking the Jetta and Lancer equally to work. He also followed Item (10) about not cruising and driving friends around.

[26] In September 2003 Andrew Dunne went back to school for his last year of High School. He occasionally drove to school about two to three days per week, driving whichever car was left for him.

[27] When asked how he determined if the vehicle was used by him 50% of the time, Andrew Dunne said that if he drove the Jetta for three days in a row he would not drive the Jetta for the rest of the week. He did not have a schedule of when he would drive which vehicle. He said he couldn't say he drove 50% of the time as he got rides. He estimated he drove each of the vehicles 30% of the time.

[28] On January 30, 2004 Andrew Dunne was involved in another motor vehicle accident while delivering pizza. He says a drunken female driver went through a red light and struck his vehicle. He gave a statement to the police and to ICBC. It was as a result of this accident that Andrew Dunne sustained some injuries that would possibly be dealt with through workers compensation.

[29] Mr. James Dunne spoke to an adjuster about this accident and provided a copy of the agreement to show that Andrew Dunne was not now the principal operator. Mr. Dunne testified he told the adjuster they would review the issue of the principal operator at the time of the renewal of insurance in August 2004. It was decided as the agreement was working well with Andrew Dunne making only \$10.00 per hour at

Sergio's Pizza that the insurance would not be changed and Mr. James Dunne would continue to be declared as the principal operator.

[30] Although there was a clause in their agreement about Andrew Dunne putting after market equipment on the Jetta, as the tires needed to be replaced after the January 2004 accident, Andrew Dunne bought tires and rims over the internet and Mr. James Dunne was agreeable to have those items installed on the Jetta instead of buying new tires himself.

[31] In June 2004 Andrew Dunne graduated from school and continued to work three days per week thirteen hours per day at Sergio's Pizza. He would do preparation during the day and do cash in the evening until 11:00 pm.

[32] In January 2005 the Jetta was stolen from in front of Mr. Dunne's home. He found out about the theft when a police officer telephoned him in the morning of January 19, 2005 while Mr. Dunne was getting ready for work. He gave a statement to the officer over the telephone and did not speak to the officer again.

[33] At the time of the call Mr. Dunne believed the Jetta was parked in the front of his home. He drove it last on the Sunday before to fill a prescription and when he returned to his home, as his niece had parked her vehicle in the driveway, Mr. Dunne parked the Jetta on the road. The report of theft indicates that Mr. Dunne last saw the vehicle on Tuesday not Sunday although nothing turns on that.

[34] Mr. Dunne did not recall at the time of the trial whether he went to work on the Monday but if he did he would have driven the Lancer then and on the Tuesday following, not the Jetta.

[35] Cst. Ellis testified about his conversation with Mr. Dunne when the officer spoke to him about the stolen Jetta. Mr. Dunne was not aware the vehicle was missing. The Constable testified he was told by Mr. Dunne "that he does not drive the car, that it was his son's vehicle".

[36] Cst. Ellis described the vehicle he saw at the Bramblewood School on Westwood Plateau as a dark coloured Volkswagen Jetta missing its wheels, sitting on blocks. It appeared someone had attempted to set fire to the vehicle. All the windows were rolled up and in tact with no sign of forced entry. The stereo was missing from the vehicle. Cst. Ellis said the vehicle did not appear to be an "up kept vehicle by any means." Clearly tastes are personal to each of us but when the officer said he felt the vehicle belonged to a younger person, his opinion does not leave room for individual tastes but it was the opinion of Cst. Ellis that Mr. Dunne was not the regular driver of this vehicle. The officer's belief was confirmed when Mr. Dunne stated it was his son's vehicle and that Mr. Dunne rarely drove the vehicle.

[37] The officer's notes deal with the question of who else drives the vehicle and Mr. Dunne responded that his son did or at least the note indicates that his son drives the vehicle. There is no mention in the notes indicating that Mr. Dunne said he rarely drives the vehicle. There is no mention that his son was the exclusive driver.

[38] When challenged that the comments were not in his notes because Mr. Dunne did not say those things, the Constable responded that that was absurd, he did not lie.

[39] After learning of the theft of his vehicle, Mr. Dunne reported it stolen to ICBC on January 20, 2005 by telephone.

[40] Mr. Hall was qualified to give opinion evidence as to the operation and functioning of automobiles and as to the effect of mechanical problems and wear on the operation of motor vehicles. He did a mechanical inspection of the vehicle and made these comments.

- (a) It is apparent from the evidence gathered during the mechanical inspection that this vehicle was not maintained properly. It was in an unsafe condition prior to the accident and should not have been on the road.
- (b) The engine oil was very black, highly oxidized and carbonizing on the valve cover.
- (c) The engine oil was overfilled.
- (d) The transmission oil was in very poor condition. The oil showed signs of drive clutch debris and severe oxidization. The condition of the oil would most certainly have affected the functioning of the transmission. The transmission would have been slipping badly when the vehicle was driven.
- (e) The dip stick plastic cover was melted which ...indicated there was severe overheating at one point.
- (f) The front brake pads were completely worn out and in a dangerous condition.
- (g) The rear brake shoes were worn out and severely cracked and in dangerous condition" ..."I suspect(sic) the brakes were also very noisy in operation.

[41] Mr. Hall testified about a severe oil leak he detected, so severe that when he started the car and looked underneath he saw some oil dripping down the back of the

engine. He testified it is not common to see oil pouring out and dripping on to the ground. He showed in the photos where the oil was being discharged on to the bottom of the exhaust manifold. He pointed out some old oil deposits which led to the conclusion the leak had been there for some time.

[42] With regard to the leak, Mr. Hall described how a leak progresses from a weep, to one drip a day to the point, as it was in this vehicle, of pouring out. He described this leaking as pretty bad and that it would take time for the leak to progress to the point it did, at least a month in Mr. Hall's opinion.

[43] With regard to the transmission oil Mr. Hall concluded it was burned out and therefore finished. The transmission was completely unserviceable and the slippage associated with the condition of the transmission would be apparent to anyone operating the vehicle.

[44] It was Mr. Hall's opinion there would be noise associated with the operation of the vehicle which would be apparent to someone driving the vehicle. Because of the condition of the brakes and the heat created as a result of the metal parts of the brake rubbing against the disc after driving for twenty kilometres or so, the vehicle would in effect have no brakes.

[45] The cracking in the rear brake shoes is, in the opinion of Mr. Hall, caused by high temperature which could have been caused by an improper adjustment of the brake or driving with the parking brake left on for a period of time. When Mr. Hall observed the car the brake shoes were against the drum continually.

[46] He said as well that the oil leaking onto the exhaust manifold would produce a lot of smoke which would get drawn into the driver's cabin.

[47] Mr. James Dunne said he never had any problems with the Jetta. It needed brakes but otherwise it was good. It was in good condition and it ran well. He had no concerns about the brakes before the vehicle was stolen. They needed to be done but otherwise they were fine. There were no problems with the transmission and there were no problems with the engine or oil leaks. Mr. Dunne said the car needed a tune up but it otherwise ran well.

[48] Mr. Dunne signed an ICBC document headed "Report of Automobile", a document related to the vehicle and the condition of it. In the area where the MOTOR CONDITION, EG. OIL LEAK, BURNING OIL ETC. is to be described the description "GOOD" is inserted. The Stereo/wheels/grille are described as after market equipment. The form discloses the service on the vehicle was last done by Fountain Tire in July 2004. As well there is a disclosure of dents on the driver's side fender.

[49] In the Automobile Proof of Loss by Statutory Declaration, Mr. Dunne declared the vehicle to be worth \$13,500.00.

[50] With regard to the statement of Mr. Dunne in the document entitled "Report of Automobile" he is clearly in error when he noted the motor condition to be good. It was not. The evidence of Mr. Hill is accepted completely on this issue. Mr. Dunne, I accept, is not a person with a mechanical aptitude. At most, his knowledge of the operation of vehicles other than how to drive them is negligible. But the question went further and pointed to oil leaks and burning oil when considering the motor condition. If Mr. Dunne

drove the vehicle as much as he said he did he must have known there was at least an oil leak and the odour of burning oil must have been evident as well.

[51] If one was, as well, to consider the condition of the brakes and transmission, the overall condition of the vehicle was appalling and must have been something the most casual operator of the vehicle would realize. That would include both Mr. James Dunne and Andrew Dunne.

[52] After the theft of the Jetta in January 2005 Mr. Dunne rented a vehicle as permitted by his insurance policy. Andrew Dunne, because of his age, was unable to drive the rental vehicle, and accordingly, he drove the Lancer whenever he drove during the time Mr. James Dunne had the rental vehicle.

[53] During this time period while Andrew Dunne was driving the Lancer he was involved in a hit and run motor vehicle accident. While he was parking the Lancer, outside a party, a person drove away after driving into the door of the Lancer as Andrew Dunne was opening it to get out. Neither Andrew Dunne nor anyone he spoke to knew the identity of the driver of the other vehicle. Andrew Dunne told his father and he gave a statement to ICBC as well. He said on January 29, 2005 he was driving the Lancer motor vehicle at the time of the accident. He stated contrary to what was happening at that time "I don't drive this vehicle very often". Clearly Andrew Dunne was not telling the truth. His explanation under oath of why he made such a statement along with much of his testimony left the court with the opinion that Andrew Dunne's testimony and the truth had only a passing acquaintance and only when it suited his purpose. Andrew Dunne appeared to be willing to say whatever was needed to affect his purpose.

[54] After the Jetta was stolen in January 2005 Mr. Dunne purchased a Nissan motor vehicle. It was to be Andrew Dunne's vehicle but Mr. Dunne was declared to be the principal operator when the vehicle was insured by Mr. Dunne at the time it was purchased. After about three months the vehicle was put in Andrew Dunne's name. Mr. Dunne said it needed an engine.

[55] Mr. Dunne was cross examined about each adjuster he spoke to and the discussions around who was the principal operator from the time of the accident in May 2003.

[56] When the accident occurred with the intoxicated driver in January 2004 Mr. Dunne was told by the adjuster there could be an insurance problem because Andrew Dunne was delivering Pizza when the vehicle was not insured for delivery. He was also advised that if Andrew Dunne was found at fault for the accident there could be a problem as Mr. James Dunne was listed as the principal operator. This accident was one that may have resulted in a workers compensation claim as Andrew Dunne was working at the time of the accident.

[57] Mr. Dunne denies saying he would place his son Andrew as the principal operator.

[58] When the insurance was to be renewed in August 2004 Mr. Dunne did not recall at the time he testified whether he determined how much it would cost to change the declaration of principal operator. But Mr. Dunne said as the agreement was working fine he did not have to change the designation of principal operator.

[59] Evidence was lead through Mr. Kristjanson who is with ICBC about the accident claims on the Jetta. With regard to the first accident of April 2003 that Mr. Andrew Dunne was involved in, ICBC made payment on the single vehicle accident and therefore there was a liability claim against Mr. Andrew Dunne. With regard to the accident of May 2003 there was a claim originally processed through ICBC that was later paid back and therefore would have disappeared from the claims rated scale. Accordingly when the payment was processed after it was paid in September 2003 the accident would have been cleared off Andrew Dunne's slate. From September 2003 through to August 2004 Andrew Dunne would have had one claim charged against him.

[60] If Andrew Dunne was declared the principal driver in August 2003 he would have had to pay more for insurance than Mr. James Dunne for the same coverage on the same vehicle. With two accidents Andrew Dunne would have to pay \$8,889.00 for insurance plus a licensing fee of about \$60.00 while Mr. James Dunne would have to pay a total of \$1,483.00 including payment for a Roadstar package.

[61] For August 2004 Andrew Dunne, as the principal operator having one accident, the costs of the second one having been paid back to ICBC, would have to pay for business insurance at \$4,486.00 while Mr. James Dunne would have to pay \$1,471.00. Mr. Andrew Dunne would have to pay \$688.00 more for comprehensive premiums in the insurance calculation for 2004. Without the intervention of at least a supervisor once insurance is renewed, the right to pay back the claim is forfeited.

[62] Mr. Brian Dingman, an accident adjuster with ICBC in May 2003, dealt with Mr. James Dunne with regard to a motor vehicle accident where Andrew Dunne was driving

at the time of the loss. When dealing with Mr. James Dunne, Mr. Dingman advised him that the principal operator designation should be changed at the time of renewal if Andrew Dunne is the principal operator. Mr. Dunne said he would be changing the designation of who was the principal operator at the time of renewal as Andrew Dunne was going to be using the vehicle more than Mr. James Dunne.

[63] Andrew Dunne was held fully responsible by ICBC for the accident. A letter was sent out to Mr. James Dunne advising that Andrew Dunne was being held responsible for the accident and if Mr. Dunne wished to dispute the findings, the manner in which Mr. Dunne could follow forward with his dispute was set out in the letter. Mr. Dunne apparently did not receive the letter and Mr. Dunne was quite shocked about the cost of the insurance when he went to renew the insurance on the vehicle.

[64] It was after Mr. Dunne found out about the insurance costs at the time of the renewal of the policy in August 2003 that he repaid an amount to ICBC. By letter dated August 14, 2003 Mr. Dunne was made aware a repayment in the amount of \$1,026.40 was required to avoid a change in the Claim-Rated scale. Mr. Dunne forwarded a cheque in that amount with a letter to the attention of Mr. Dingman on August 2003.

[65] Mr. Robert Starcevich testified about contact he had with Andrew Dunne in January 2004 while Mr. Starcevich was acting in his capacity as a bodily injury adjuster for ICBC. (In the transcript and my notes I have it as Starcevich although a chronology provided by counsel spelled his name as Starcevic). A query of whether there was a RO/PO breach was part of the Claim File Report. Mr. Starcevich did some research to see if the driver was the principal operator of the vehicle. He met with Andrew Dunne

probably on February 3rd 2004. Andrew was delivering Pizzas at the time of the accident which is a different insurance coverage than business use and costs more.

[66] As Andrew was underage it was difficult for Mr. Starcevich to obtain a statement from him. Accordingly, Mr. Starcevich spoke to Mr. James Dunne advising him that he would need a statement from Andrew Dunne. He discussed with Mr. James Dunne his concern about Andrew driving and having an accident. Mr. Starcevich was concerned that there may be a principal operator insurance problem. Mr. Dunne told Mr. Starcevich that he and Andrew had an agreement and he would send a copy of it to ICBC.

[67] During their ongoing discussions Mr. James Dunne advised Mr. Starcevich that Andrew was now a cook and was not delivering pizza anymore. They spoke about the issue of who was the principal operator of the vehicle and Mr. Starcevich told Mr. James Dunne it would be a good idea to get the principal operator designation put in Andrew's name to avoid any future problems. Mr. Starcevich says Mr. James Dunne said he would look after it. He was left with the assurance Mr. Dunne would change the principal operator to Andrew and Mr. Starcevich made note to that effect.

[68] As strenuously as Mr. Starcevich was cross examined about his lack of recollection of the exact words spoken by Mr. James Dunne, Mr. Starcevich stood by his evidence, that Mr. Dunne was going to change who was declared as the principal operator. Mr. Starcevich did not at any time accept that Mr. Dunne said he was going to look at the issue when he was renewing the insurance.

[69] A Nissan 240SX was registered in Mr. Dunne's name upon purchase in March 2005 and in June 2005 gifted to Andrew Dunne. Mr. Dunne drove the vehicle at most a few times. He was not the principal operator and was not expected to be although Mr. Dunne was declared to be. Again Andrew Dunne told an untruth about how often his father drove the vehicle. Mr. James Dunne in turn was prepared to declare anything without considering the veracity of the statement. He had no intention of being the principal operator of the vehicle and never intended to be. Why he would declare himself as such has not been explained to the court's satisfaction.

[70] After purchasing the Nissan Mr. Dunne said "we" took it home and ordered a new engine. The first new engine did not work so a second engine was put in the vehicle. The installation of the two engines took a long time. After the second engine was installed the vehicle was insured in Andrew Dunne's name.

[71] Mr. Dunne paid for the vehicle although it was to be Andrew Dunne's vehicle. Mr. Dunne does not know why the Nissan was registered and insured in his name. He does say that it was insured in his name so he (Andrew) could get it fixed and when that was done it was transferred to Andrew.

[72] The Defendant relies or at least refers to Section 19 Subsection 1(b) and 1(e) of the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996 in its Reply. The subsections read:

19(1) If

(b) an applicant for an owner's certificate or a driver's certificate knowingly misrepresents or fails to disclose in the application a fact required to be stated in it,

(e) an insured makes a wilfully false statement with respect to a claim under a plan,

All claims by or in respect of the applicant or the insured are rendered invalid, and his or her right and the right of a person claiming through or on behalf of or as a dependant of the applicant or the insured to benefits and insurance money is forfeited.

[73] The law is stated in *Kolesnykov v. ICBC* [2004] B.C.J. 202 that “the standard of proof is on a balance of probabilities:

“Is the allegation of fraud more likely than not?” “Fraud is a quasi-criminal allegation (as is the misrepresentation alleged in the case at bar) and a finding of fraud could affect the claimant’s life well beyond the outcome of the insurance claim. The trial judge, when scrutinizing the evidence, must keep in mind that substantially more than a mere tilting of the evidentiary scales is required. The quality of the evidence must be assessed taking into account the degree of proof required. The scrutiny is heightened in the sense that the judge must determine whether the evidence is clear and cogent enough to more than just tilt the scales. The more serious the allegation and its consequences, the greater the degree of proof required.”

89. In *Petersen v. Bannon* [1993] B.C.J. 2357 the court of Appeal said at paragraph 46 “A wilful act is one done intentionally, knowingly and purposely, without justifiable excuse. A wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. A wilful act differs essentially from one done negligently.”

And at paragraph 47: “ The onus is on the insurer to prove on a balance of probabilities that the statements in question were wilfully false. Because the allegations are serious, the judge is justified in scrutinizing the evidence carefully, and cogent evidence will be required to support the allegation of dishonesty.”

[74] I accept the law to be with regard to allegations similar to fraud that clear and cogent evidence is required. In *Bevacqua v. I.C.B.C.*(1999), 68 B.C.L.R. (3d) 262 Finch J.A. stated “ It must be remembered that allegations of fraud against an insured are quasi-criminal in nature, and if proven could affect the insured’s life well beyond the

outcome of his insurance claim. Such serious allegations call for heightened scrutiny of the evidence by a trial judge, before being satisfied that an allegation of fraud has been proven on a balance of probabilities.”

[75] At best Mr. James Dunne's is playing fast and loose about the class of insurance coverage on the Jetta. Business coverage may allow for delivery a certain number of days per month and delivery coverage was certainly not an issue at the time of the theft in January 2005 but it certainly may have been earlier on in Andrew Dunne's short driving/insurance coverage history.

[76] I am satisfied that the principal operator of the Jetta automobile in January 2005 was Andrew Dunne. I accept the evidence of Cst. Ellis and his recollection of his conversation with Mr. James Dunne by telephone shortly after the vehicle was located. I accept that Mr. Dunne said the vehicle was his son's car and I accept Mr. James Dunne said he hardly drove the vehicle.

[77] I note what was in the vehicle when photos were taken after the vehicle was retrieved including a CD case on the seat and one on the floor. I would hardly think Mr. James Dunne was listening to the music on the CD on the front seat of the Jetta. Everything on January 19, 2005 points to the vehicle being driven by Andrew Dunne not Mr. James Dunne. That includes the mechanical condition of the vehicle, which condition had to be known by the driver.

[78] The issue though is not whether Mr. James Dunne or Andrew Dunne was the principal operator of the vehicle but rather was James Dunne the principal operator of the vehicle at the time insurance was placed on the vehicle in August 2004.

[79] I am satisfied that Andrew Dunne was the principal operator at that time as well. He had been since he obtained his driver's licence. There may have been some effort at first to insure that Andrew Dunne was not the principal operator of the Jetta or the Lancer but that effort did not continue.

[80] The issue becomes - is the court satisfied to the degree of "knowingly misrepresents" as set out in the *Insurance (Motor Vehicle) Act* and the burden of proof to establish such a misrepresentation?

[81] I am satisfied Mr. Dunne did knowingly misrepresent that he was the principal operator of the Jetta automobile and he was aware of it. It had been brought to his attention repeatedly - the concern about Mr. Dunne being declared the principal operator when in fact Andrew Dunne was. He made comment as the witnesses said that he was going to change the designation of who was the principal operator as he told Mr. Dingman and Mr. Starceovich but he did not. Not because Andrew Dunne was using the vehicle less but rather for other reasons likely having to do with the cost of insurance. He therefore breached Section 19(1)(b) of the *Insurance (Motor Vehicle) Act*

[82] With regard to the material misrepresentation of the condition of the vehicle at the time of the theft in January 2005, I am satisfied Mr. Dunne did misrepresent the condition of the vehicle when he declared it's mechanical condition to be good. Mr. Dunne, if he was driving the vehicle, must have known the condition of the vehicle was poor. If he was not driving the vehicle, and it must be remembered that the driver of the Jetta would know very quickly its mechanical condition, Mr. Dunne made a false representation as he would not be aware of the condition of the vehicle and thereby

made a wilfully false statement. One can not make a statement without any knowledge of the truth or lack of truth of the statement and not be found to make a wilfully false statement. There is no basis for Mr. Dunne to be able to make the statement if he is not driving the vehicle. If he was, as he stated then, his statement was a wilfully false statement in contravention of Section 19(1)(e) of the *Insurance (Motor Vehicle) Act*.

[83] Mr. Dunne's Claim is dismissed with costs to the Defendant.



W. A. Blair
Provincial Court Judge