IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *ICBC v. Nisbet,*
2009 BCSC 1570

Date: 20091117
Docket: S092649
Registry: Vancouver

Between:

Insurance Corporation of British Columbia

Plaintiff

And

Jack Duncan Nisbet

Defendant

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Plaintiff:	F. W. Potts S. W. K. Urquhart
Counsel for Defendant:	H. Rubin, Q.C.
Place and Date of Trial:	Vancouver, B.C. September 21-25, 30 and October 1, 2009
Further written submissions:	October 20 and 22, 2009
Place and Date of Judgment:	Vancouver, B.C. November 17, 2009

INTRODUCTION

[1] It has often been observed that life on this planet is difficult. Be that as it may, Jack Nisbet has encountered more than his share of misfortune.

[2] In 1999, Mr. Nisbet, then a sergeant with the Royal Canadian Mounted Police, saw his daughter suffer a serious and permanent head injury in a motor vehicle accident, his niece lose her life in another motor vehicle accident, and his wife battle with cancer. He took a year's leave from his employment to look after her. On January 6, 2000, Mr. Nisbet's wife lost her battle. He was experiencing health issues of his own that went undiagnosed until 2002. As it turned out, he had multiple sclerosis.

[3] On March 4, 2000, Mr. Nisbet drove down to Fort Leavenworth, Washington, with a friend, Deborah Grisewood. On their way home, Mr. Nisbet lost control of his car when it hit a patch of black ice as they drove through Steven's Pass, resulting in a single-vehicle accident. The car was still drivable, and they returned to the lower mainland. On March 6, 2000, Mr. Nisbet reported the accident to his material damage insurer, Canadian Direct Insurance (CDI), and mentioned that Ms. Grisewood had been a passenger.

[4] Thereafter, Mr. Nisbet embarked upon a course of action that has caused him no end of difficulty, ultimately leading to this lawsuit. When Ms. Grisewood made a claim for personal injury with Mr. Nisbet's liability insurer, the Insurance Corporation of British Columbia, he deliberately lied about the accident, stating that she had never been in his car. The tangled web he wove with this deception led him to commit perjury in Provincial Court, and to suffer censure by the RCMP for disgraceful conduct.

[5] ICBC paid Ms. Grisewood no-fault (Part VII) benefits, and initially forgave what was undoubtedly a breach by Mr. Nisbet of his insurance conditions. When she later commenced action, ICBC defended Mr. Nisbet without reservation. The Corporation's compassion wore thin, however, as its position became ever more compromised by Mr. Nisbet's stubborn and irrational refusal to admit the truth.

[6] Ultimately, ICBC held him in breach and defended the action through trial as a third party. Pursuant to ss. 19 and 21 of the ***Insurance (Motor Vehicle) Act***, R.S.B.C. 1996, s. 231 (***IMVA***, since replaced by the ***Insurance (Vehicle) Act***, in force June 1, 2007), it now sues Mr. Nisbet for reimbursement of the damages it was obliged to pay to Ms. Grisewood, totalling $37,251.42. The Corporation also seeks recovery of adjusting and investigation expenses in the amount of $619.36, half of which it attributes to its statutory claim. The other half it seeks by way of a common law action for civil fraud, to which it appends a claim for punitive damages. These figures are not disputed.

ISSUES

[7] Mr. Nisbet does not deny that he lied. He no longer maintains, as he did on discovery, that he cannot remember what happened. He has resiled from his initial pleading that he suffered from neurological damage or injury to the extent that he could no longer say what occurred at the time of the accident. At trial, a broken man, he agreed that he lied, and that memory was not a problem.

[8] What Mr. Nisbet says is that ICBC, in essence, set him up so that it could take advantage of his false statement although it suffered no loss because of it. In law, he argues, ICBC is estopped by election from holding him in breach of his policy. As to the claim in fraud, Mr. Nisbet says that it is time-barred.

[9] ICBC responds with the submission that there can be no estoppel in fact due to the absence of

detriment, or in law given that its rights are statutory. Even if its rights are not entirely statutory, estoppel is not available because the breach amounts to a violation of the duty of utmost good faith, and involves dishonesty. Its fraud claim, it maintains, is not time-barred because of the repetition of the fraud.

[10] An understanding of the timing and sequence of events is important.

CHRONOLOGY

[11] On April 25, 2000, Ms. Grisewood telephoned ICBC's dial-a-claim line to report an injury claim arising from the March 4 accident. Her initial interview was on April 26, 2000. The ICBC adjuster was quickly in touch with CDI, and left a message for Mr. Nisbet on April 28 to let him know that Ms. Grisewood had reported a claim.

[12] On May 15, 2000, Mr. Nisbet telephoned in response to ICBC's message. He stated that there were no passengers in his car at the time of the accident.

[13] On May 29, 2000, Mr. Nisbet attended at ICBC's Langley Claims Centre and provided a written statement. Once again, he maintained that he did not have any passengers with him at the time, and went on to say this[1]:

> No one by the name of Deborah Griswood was with me at the time. She knows everything that happened as I was over there after the accident. My wife had passed away & I was seeing Deborah for about a month & I did some work for her that she paid me for & some lately that she hadn't paid me for. She is a gold digger & I no longer see her or speak with her. The first I heard of her putting in a claim for injury with when ICBC called me.

[14] At trial, Mr. Nisbet was unable to explain with any clarity why he lied. It was obviously not a rational act, particularly for an officer of the RCMP. He testified that he was having a lot of difficulties with his employer at that time, had experienced a number of personal misfortunes, and was "mad at the world".

[15] What is abundantly clear from the evidence is that he was certainly mad at Ms. Grisewood. Even at trial he continued to harp upon an incident (to which he adverted in his statement) when, he said, he delivered a load of gravel to her residence for her use in a project, and she refused to pay him for it. He commenced a small claims action against her in the Provincial Court for recovery of what he claimed he was owed for the gravel. He felt, irrationally, that she was using him; he frequently used the term "gold-digger" in contemporaneous documents and statements. He used the same sort of language before he reported to ICBC, when he told his friends Ken and Elaine Allen that he was going to tell ICBC that his lady friend Debbie had not been in the car when in fact she had been a passenger. He told them that she was a gold-digger out for financial gain.

[16] His lie is not easy to understand, but it was clearly planned and deliberate. It was also extremely unfair to Ms. Grisewood, who quite properly complained to the RCMP.

[17] On May 17, 2000, Brian Reid, the ICBC adjuster then in charge of the file, spoke to the CDI adjuster who had handled the material damage claim. The CDI adjuster confirmed that when Mr. Nisbet reported the

claim to him, he did say that Ms. Grisewood had been a passenger. When Mr. Reid reported this to Mr. Nisbet, Mr. Nisbet suggested that CDI had asked him something different, and continued to insist that there had been no passengers in his car. He went on to discuss his return to work following his wife's illness and death, and his unhappiness at his place of employment.

[18] Because of Mr. Nisbet's position, Mr. Reid took a statement from Ms. Grisewood on June 14, 2000. On June 15, 2000, Ms. Grisewood called to say that her cell phone records confirmed that she had received two calls from her daughter while she was in Washington State with Mr. Nisbet on the day of the accident.

[19] As a result of this information, Mr. Reid concluded that Ms. Grisewood indeed had been a passenger, and agreed to pay her no fault benefits. With respect to these benefits, of course, it was Ms. Grisewood who was the insured.

[20] Mr. Reid was well aware that ICBC was in a position to hold Mr. Nisbet in breach of his policy conditions and his statutory obligations, because of what certainly appeared to have been false statements he gave concerning whether Ms. Grisewood had been a passenger. He discussed the situation with his manager, Casey Riddle. Taking into account what Mr. Nisbet had been through in terms of his wife's illness and death, and his difficulties at work, they decided to ignore his breach. They thought that he had enough to deal with. Ms. Grisewood's injury seemed to be of the minor soft tissue variety, and they anticipated a relatively painless settlement of her claim.

[21] That decision had been reached before July 11, 2000. On that date, Mr. Reid left a message for Mr. Nisbet that they had decided to pay Ms. Grisewood's claim, given that CDI had confirmed that she had been a passenger. On that same day, Mr. Reid met with Sgt. Bissonette of the RCMP. Sgt. Bissonette was investigating Ms. Grisewood's complaint against Sgt. Nisbet, and wanted to know the circumstances of her ICBC claim. Mr. Reid explained about the information from CDI, and the telephone records.

[22] On July 12, 2000, Mr. Nisbet called ICBC, saying that he was very upset that they were paying Ms. Grisewood's claim, and continued to deny that she was a passenger. He also mentioned that Ms. Grisewood had put in a complaint against him at work, which by now was known to ICBC. Mr. Nisbet called again on July 13, stating that Ms. Grisewood was just a "gold digger" out to get money. He asked if Mr. Reid knew about the police investigation, and Mr. Reid said that he had spoken to the officer handling it.

[23] In August of 2000, Mr. Nisbet called to say that he wanted a board review of ICBC's decision to accept Ms. Grisewood's claim. On September 5, 2000, Mr. Riddle noted that such a process would not be appropriate (it is normally designed for disputes over ICBC's assignment of fault for an accident). Mr. Riddle recorded the following note:

> We have accepted the claim, as we feel there is enough information to process under his policy. If he does not like our decision, he would have to proceed with legal action.

[24] On September 20, 2000, the RCMP wrote Ms. Grisewood a letter advising that Sgt. Nisbet had acted inappropriately by supplying a false statement to ICBC. The RCMP apologized for his actions and said that

he had been served with a written reprimand. This letter did not come to ICBC's attention until much later.

[25] In the meantime, the ICBC Special Investigations Unit officer who worked with Mr. Reid suggested that they contact people on the list of persons given by Mr. Nisbet who knew about the accident. Mr. Reid spoke with two of them on September 27, 2000, who had spoken to Mr. Nisbet and Ms. Grisewood after the accident. There was some recollection that Deborah had indicated she had been with Jack at the time.

[26] The prospect of settlement was complicated when Ms. Grisewood was involved in a second accident. Mr. Reid nevertheless remained hopeful of being able to settle the claim over the next few months.

[27] Settlement proved elusive, however, and on February 21, 2002, Ms. Grisewood presented a demand that Mr. Reid considered to be excessive. She also indicated that she had retained a lawyer. In these circumstances, Mr. Reid transferred the file to Carol Moore, a bodily injury claims adjuster who worked with litigation files. Mr. Reid did not handle claims once they went in to litigation.

[28] On March 7, 2002, ICBC received a writ commencing action on Ms. Grisewood's behalf against Mr. Nisbet and others. Ms. Moore appointed Brent Adair Q.C. of the firm of Baker Newby to defend Mr. Nisbet. No steps were taken to reserve ICBC's rights to hold Mr. Nisbet in breach of his insurance.

[29] On March 18, 2002, Mr. Nisbet's claim against Ms. Grisewood in Provincial Court proceeded to trial before the Honourable Judge Cohen. It was dismissed, essentially on the ground that Mr. Nisbet had failed to prove his case on a balance of probabilities. During the course of that trial, Mr. Nisbet was cross examined by counsel for Ms. Grisewood about, among other things, the accident of March 4, 2000. He attempted to object to such questions, but did give evidence under oath that Ms. Grisewood had not been in the car with him at the time of the accident, and that he had not been reprimanded by the RCMP for giving a false statement to that effect. In fact, he had been reprimanded on September 20, 2000.

[30] On May 2, 2002, Mr. Adair wrote Mr. Nisbet, advising that he had been retained to represent him in the MVA claim brought by Ms. Grisewood. He noted that he would take instructions from and be paid for his services by ICBC, and that his instructions were to deny liability for the causation of the motor vehicle accident. Mr. Adair went on to point out to Mr. Nisbet that he was required to cooperate in the defence of the action, and that if he failed to do so, he may be in breach of his policy.

[31] I should note in this regard that it was Ms. Moore's evidence that it was her practice to deny liability in all cases until the completion of examinations for discovery. At that point, the question of whether the denial of liability should be maintained would be addressed.

[32] On May 10, 2002, Mr. Adair wrote to Carol Moore as follows:

> I have spoken by telephone directly with Mr. Nisbet, at some length, on May 8th, 2002. He is still insistent that the plaintiff was not a passenger in his vehicle at the time of the accident. As my primary client is Mr. Nisbet, I have to work with his instructions on that point, rather than with ICBC's instructions. At this point it does not make much difference as we have denied liability, and one of the aspects of the denial of liability can be considered to be the position that the plaintiff was not in the vehicle at all. However, this is obviously going to create extra issues for us to consider at

examinations for discovery, and potentially at trial.

[33] Mr. Adair clearly appreciated the potential for conflict, but anticipated being able to deal with it. The problem did not, however, go away.

[34] Mr. Nisbet's defence was taken over by Mr. Adair's associate, Christopher Godwin. On October 14, 2003, Mr. Godwin conducted an examination for discovery of Ms. Grisewood. At that time, he was shown a copy of the RCMP's letter to Ms. Grisewood dated September 20, 2000. In his report to Ms. Moore, dated October 31, 2003, Mr. Godwin advised that having heard Ms. Grisewood's evidence about how the accident occurred, it was his view that a potential "no negligence defence" arose. He went on to say this:

> On the basis of the evidence of Ms. Grisewood, and without having the evidence of Mr. Nisbet tested at examination for discovery, I would suggest that the RCMP were correct in their assessment that Mr. Nisbet made a false statement to ICBC by maintaining that Ms. Grisewood was not in the vehicle at the time of the accident. This is unfortunate, as it appears clear that the credibility of Mr. Nisbet could be seriously undermined as a result of his actions relating to Ms. Grisewood. What could have been a good "no negligence" defence as a result of an unexpected slip on black ice is now likely impossible to maintain as the evidence of Mr. Nisbet likely cannot be relied upon.
>
> In my view, we should seriously consider admitting liability on behalf of Mr. Nisbet for the motor vehicle accident of March 4, 2000 and concede that Ms. Grisewood was in the vehicle at the time of the accident. It certainly appears that Mr. Reid, the former adjuster on the file, was convinced in that regard by the evidence provided by Ms. Grisewood. Would you kindly consider this issue and contact me at your earliest convenience to discuss it.

[35] On November 5, 2003, Ms. Moore learned that Sgt. Ellard of the RCMP was carrying out another investigation into Mr. Nisbet's conduct, apparently focusing on perjury in the Provincial Court. She advised the RCMP that as the matter was in litigation, any information pertaining to the claim should be requested under the *Freedom of Information and Protection of Privacy Act*, and should be arranged through defence counsel.

[36] Ms. Moore then turned to consider Mr. Godwin's recommendations of October 31. It was her view that notwithstanding the credibility problems, they should still pursue a no negligence defence. She was therefore unwilling to admit liability.

[37] On January 5, 2004, Mr. Godwin forwarded to Ms. Moore a copy of the RCMP letter to Ms. Grisewood of September 20, 2000. He also spoke to Ms. Moore at some length. Mr. Godwin told Ms. Moore that he had received a call from Sgt. Ellard of the RCMP. Sgt. Ellard advised that the RCMP had just obtained the video from the border crossing that showed that Ms. Grisewood was with Sgt. Nisbet in his car when they crossed the border. Sgt. Ellard thought that Mr. Nisbet had been examined for discovery and asked whether he had testified on discovery that Ms. Grisewood had not been in the car. Mr. Godwin told him that Mr. Nisbet had not yet been examined.

[38] Mr. Godwin then discussed the matter of discovery with Ms. Moore, who instructed him to send a registered letter to Mr. Nisbet advising of the next scheduled examination for discovery. Mr. Nisbet had missed two scheduled discoveries for reasons not his own fault. Mr. Godwin was to tell Mr. Nisbet that

failure to show up would be noncompliance and a breach of his insurance, and that giving a false statement under oath would also be a breach of his insurance. At the same time, she suggested that Mr. Godwin contact ICBC's legal department about whether he could still stay on the case. She was instructed to do this by her manager, Colleen Shaw.

[39] Things got worse. On February 10, 2004, Mr. Godwin wrote to Ms. Moore to say that Ms. Grisewood's counsel had requested him to consent to an order permitting the Ridge Meadows detachment of the RCMP to release its file regarding its internal investigation of Mr. Nisbet. As counsel for Mr. Nisbet, Mr. Godwin was understandably reluctant to consent to the order. He was in a no-win situation. Production of the file would be detrimental to the position of his client, Mr. Nisbet, but Mr. Nisbet's insistence that Ms. Grisewood had not been a passenger made the file relevant.

[40] In his letter, Mr. Godwin recalled that the previous adjuster (Mr. Reid) had been satisfied that Ms. Grisewood was in the vehicle. He suggested that if they were prepared to admit that she was, then the investigation file would not be relevant. He requested instructions. Ms. Moore was away at this time, but another adjuster instructed Mr. Godwin not to consent to the release of the information. It hardly needs saying that when the file was produced by Court order, it did not enhance Mr. Nisbet's credibility.

[41] In these circumstances, the manager, Ms. Shaw, sought advice from within ICBC about whether they were estopped from holding Mr. Nisbet in breach. A meeting among ICBC staff, including Ms. Shaw and Ms. Moore, took place on June 3, 2004. At that meeting, it was agreed that Ms. Shaw would contact Mr. Nisbet and talk to him about the situation. She was to invite him to "come clean" and admit that Ms. Grisewood had in fact been a passenger. In that event, ICBC would continue to defend him, and make appropriate admissions. He was to be told that if he refused, he would be held in breach of his insurance.

[42] After some delays in establishing contact, that conversation took place on July 16, 2004. I have no hesitation in accepting Ms. Shaw's evidence about her contact with Mr. Nisbet in this regard. She testified that she spoke to Mr. Nisbet twice. The first conversation was during the early evening. At that time, Mr. Nisbet's manner was autocratic and authoritarian. He grilled Ms. Shaw instead of listening to her. Basically, his position was that there was nothing to discuss. Ms. Shaw told him that ICBC's information made it clear that Ms. Grisewood was in the vehicle at the time of the accident, and that if he carried on denying it, he would be in breach of his policy conditions. His response was hostile. The conversation ended.

[43] Shortly afterwards, Mr. Nisbet called Ms. Shaw back, although she had not left a number. His manner was now polite and congenial, as though he were a different person. They reviewed all of the issues and evidence concerning Ms. Grisewood. Ms. Shaw told him that if he would only tell the truth, he would continue to be covered. Otherwise, he would not. His response was that he was sticking to his story that Ms. Grisewood had not been a passenger, and nothing was going to change.

[44] As a result of this exchange, Ms. Shaw caused two letters to be sent to Mr. Nisbet. The first was dated July 21, 2004, and was signed by Ms. Moore. In essence, it was a standard form reservation of rights letter that ought to have been sent when ICBC first undertook Mr. Nisbet's defence in March of 2002, and

Ms. Shaw conceded as much. It would have made no sense to Mr. Nisbet in July of 2004.

[45] The second was a letter dated July 28, 2004, also signed Ms. Moore, and misguidedly headed "WITHOUT PREJUDICE". I say misguidedly because it had nothing to do with settlement discussions or tentative positions, and clearly does not qualify as without prejudice correspondence. In that letter, Ms. Moore stated:

> It is our understanding that you are standing by the statement that you gave the Insurance Corporation of British Columbia on May 29, 2000.
>
> Our investigation into this loss indicates that you supplied The Insurance Corporation of British Columbia a false statement as to the facts of this motor vehicle loss.
>
> As such, we are holding you in breach of your insurance under Section 19(1)(e) of the Insurance (Motor Vehicle) Act. This section states "an insured makes a wilfully false statement with respect to a claim under a plan".
>
> Consequently, we will be unable to defend you in any action that may come forth as a direct result of this motor vehicle accident.
> ....

This letter, too, was inapt since an action had obviously "come forth" some considerable time before, and the explanation of s. 19(1)(e) in the third paragraph made little sense.

[46] Mr. Nisbet responded by a somewhat incoherent letter dated August 4, 2004, and sent by registered mail. He wrote, in part, as follows:

> In Reference to paragraph one you state that my Statement that I submitted to the Insurance Corporation of British Columbia Dated May 29, 2000 still stands as written and remains unchanged in meaning as voluntarily given by myself according to Record.
>
> In Reference to paragraph two whereas you further say that your Investigation into this loss indicates that I supplied the Insurance Corporation of British Columbia a false Statement as to the facts of this Motor Vehicle Loss.
>
> In Answer to the whole of the Statement in paragraph two the Defendant denies each and every allegation as insinuated by the Insurance Corporation of British Columbia that the Defendant made a false Statement as alleged or as to the facts of this Motor Loss and the Defendant puts the Insurance Corporation of British Columbia to strict proof thereof.

[47] In his evidence at trial, Mr. Nisbet suggested that he did not always know what was being written in his name as he had others prepare his correspondence for him. I am satisfied, however, that he approved the contents of any letter that went out over his signature.

[48] In the meantime, the RCMP investigation was continuing. On March 22, 2005, Mr. Nisbet was suspended for disgraceful conduct, the particulars of which included making false and misleading statements to a Provincial Court Judge during a small claims court hearing (his claim against Ms. Grisewood). Mr. Nisbet took the position that this suspension was in retaliation for complaints he had made to the Canadian Human Rights Commission, alleging discrimination on the basis of his disability. In a letter to the CHRC dated May 31, 2004, he continued to assert that Ms. Grisewood "was never a passenger in my vehicle at the time of the accident in early 2000."

[49] Mr. Nisbet was subsequently charged criminally with two counts of committing perjury in relation to Ms. Grisewood, which charges were ultimately stayed (due, I believe, to his medical condition and the advocacy of Mr. Rubin). The next step was the commencement of this action.

DISCUSSION

1. Forfeiture

[50] ICBC's claim against Mr. Nisbet for recovery of the amount it paid out to Ms. Grisewood pursuant to her judgment is based on ss. 19 and 21 of the ***IMVA***. The relevant portions of s. 19 read as follows:

> 19(1) If
>
> ...
>
> (c) an insured violates a term or condition of a plan,
>
> (d) an insured commits a fraud in respect of this Act, or
>
> (e) an insured makes a willfully false statement with respect to a claim under a plan,
>
> all claims by or in respect of 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 ... insured to benefits and insurance money is forfeited.
>
> (2) If a forfeiture would appear inequitable, the corporation may relieve a person affected by it from the forfeiture of all or any benefits or insurance money.

[51] Section 21 of the ***IMVA*** obliges ICBC to satisfy any judgment obtained by a claimant against an insured. Subsection 21(6) provides as follows:

> (6) Without limiting section 30.1, if the corporation has paid an amount to a person under this section, by way of settlement or otherwise, that it would not otherwise be liable to pay, and has personally delivered or forwarded by registered mail to the last known address of the insured a demand for reimbursement of that amount, the insured is liable to reimburse the corporation that amount, and the corporation may enforce the right by action in court.

[52] ICBC argues that Mr. Nisbet is caught by subparagraphs 19(1)(c), (d) and (e) via the same act of denying that Ms. Grisewood had been a passenger. As ICBC would therefore not have been liable to pay Ms. Grisewood's judgment but for s. 21(1), and forwarded a demand for reimbursement to Mr. Nisbet pursuant to s. 21(6), he is now liable to reimburse the corporation.

[53] I note that ICBC's letter to Mr. Nisbet of July 28, 2004, advising that he was being held in breach referred only to subparagraph 19(1)(e) (willfully false statement). I do not think that ICBC is thereby limited to relying on that subparagraph, given its wider pleading in this action, and the reality that no new underlying act is raised. The actual act complained of remains the same.

[54] ICBC sought to rely on subparagraph 19(1)(c) by referring to s. 73(1)(c) and s. 73(2) of the ***Revised Regulation (1984) Under the Insurance (Motor Vehicle) Act***. Section 73(1)(c) obliges an insured to "cooperate with the corporation in the investigation, settlement or defence of a claim or action", while s. 73(2) provides that the corporation is not liable to an insured who, to the prejudice of the corporation, fails to

comply with that section. ICBC argued that lying about Ms. Grisewood was a breach of this duty, thereby constituting a violation of a term or condition of the plan within the meaning of subparagraph 19(1)(c) of the ***IMVA***.

[55] I note that the cooperation provisions of the ***Regulation*** stand alone, and import different legal requirements from those employed by s. 19(1) of the ***IMVA***. I do not need to decide, however, whether Mr. Nisbet's false statements are caught by them, and thereby lead to forfeiture pursuant to s. 19(1)(c), or whether s. 19(1)(d) applies in the unusual circumstances of this case. I am satisfied that subparagraph 19(1)(e), on which ICBC originally relied, will suffice.

[56] To qualify as a "willfully false statement" giving rise to forfeiture pursuant to s. 19(1)(e), the false statement in question must, of course, have been made *willfully*. That Mr. Nisbet's lies about Ms. Grisewood were willful is conceded. But the false statement under s. 19(1)(e) (or fraud under s. 19(1)(d)) must also have been *material* in the sense of being capable of affecting the mind of the insurer either in the management of the claim or in deciding to pay it: ***Inland Kenilworth Ltd. v. Commonwealth Insurance Co.*** (1990), 48 B.C.L.R. (2d) 305, 72 D.L.R. (4th) 594 (C.A.); ***Gilchuck v. Insurance Corp. of British Columbia*** (1993), 82 B.C.L.R. (2d) 145, 17 C.C.L.I. (2d) 315 (C.A.). Unlike a breach of the duty to cooperate set out in s. 73 of the ***Regulation***, actual prejudice to the corporation is not required.

[57] Although it was not formally conceded, counsel for the defendant did not, and could not, seriously contest the materiality of Mr. Nisbet's lie. It is obvious that the whole point of the lie was to affect the mind of the corporation in deciding whether to pay Ms. Grisewood's claim.

[58] It follows, then, that Mr. Nisbet's "right ... to ... insurance money [in this case, liability coverage] is forfeited", unless he is able to establish an estoppel.

2. Estoppel by election

[59] Counsel for the defendant argued that his client's breach in fact occurred in May of 2000, when he provided a false statement to ICBC. Thereafter, it was simply a matter of repetition. By July of 2000, ICBC in effect waived that breach, on the ground that Mr. Nisbet had enough to deal with. This, he submitted, was appropriate. He does not, however, rely on that waiver as binding ICBC, conceding that it was not in writing signed by an officer of the corporation, as required by s. 12(2) of the ***IMVA***.

[60] In accordance with that decision, however, ICBC proceeded to defend Mr. Nisbet when action was commenced. Mr. Rubin argued that ICBC should have formally breached Mr. Nisbet at that time, or at least it should have reserved its rights. It should have done so again, he asserted, when Mr. Adair talked to Mr. Nisbet, and Mr. Nisbet maintained his lie. In each case, it did neither. Instead it continued to defend Mr. Nisbet. ICBC was not obliged to do so, but elected to do so. It is therefore estopped by that election from now relying on the breach to claim forfeiture, and cannot try to resurrect the breach by triggering another false statement as, he submitted, Ms. Shaw did in her telephone conversations with Mr. Nisbet on July 16, 2004.

[61] In law, Mr. Rubin argued, estoppel by election does not require actual detriment to the person relying on its shield. Detriment is presumed.

[62] Much was made in argument of whether ICBC made up its mind in 2000 that Mr. Nisbet was lying about Ms. Grisewood, and decided not to bother about it as submitted by Mr. Rubin, or whether ICBC was in fact continuing its investigation until the matter was put beyond doubt in early 2004, as argued by Mr. Potts.

[63] Mr. Potts submitted that it was only when defence counsel advised of the existence of the border video evidence on January 5, 2004, that Ms. Moore, and through her ICBC, knew for certain that Ms. Grisewood had indeed been a passenger, and that Mr. Nisbet had been lying. Before then, he argued, ICBC was obliged by its duty of good faith to give Mr. Nisbet's evidence considerable weight, particularly as he was an RCMP officer. Ms. Moore kept saying that it was her job to investigate the issue, and that while she knew there was a "strong possibility" that Ms. Grisewood had been in the car, she did not know for sure that that was so until January 5, 2004. Ms. Shaw described the video information as "the icing on the cake".

[64] I found Ms. Moore to be rather evasive and, in my view, there was a good deal of hair-splitting in her testimony. It is clear to me from all of the evidence that she and the others at ICBC responsible for this matter in their turn were satisfied since at least July of 2000 that Ms. Grisewood had in fact been a passenger. They may not have known for certain in the sense of having seen it with their own eyes, but they were not left in any doubt notwithstanding the protestations of Mr. Nisbet, and no one testified that his status as an RCMP officer caused them to change their views in this regard.

[65] Why, then, did they undertake his defence and continue defending him? Because, I find, Ms. Moore and her manager felt hamstrung by the decision made by Mr. Reid and his manager not to breach Mr. Nisbet for making a false statement, a decision with which Ms. Moore clearly disagreed. That is the only explanation consistent with all of the evidence. The significance of the new and incontrovertible evidence of January 5, 2004, is that it finally motivated ICBC to review its options instead of assuming that it had none.

[66] Did ICBC then entrap Mr. Nisbet into repeating his false statement so that it could breach him anew? After considering all of the evidence, I conclude that it did not.

[67] ICBC found itself in an increasingly awkward and untenable position as a result of Mr. Nisbet's determination to maintain his lie. The case was not one that proved capable of settlement on modest terms. Contrary to what had initially been expected, an arguable defence based on no negligence presented itself, but was impaired by Mr. Nisbet's position. Trial by jury could not be considered for such a defendant. Moreover, it would have been irresponsible of ICBC to produce Mr. Nisbet for examination for discovery knowing that he would lie under oath.

[68] Although Mr. Rubin argued that ICBC could easily have admitted liability or made other appropriate admissions in order to resolve its dilemma, I reject the suggestion that ICBC ought to tailor its litigation strategy in order to protect its insured from the consequences of his lies, thereby relieving him from his duty to act in good faith.

[69] The reality is that the litigation landscape had changed considerably since Mr. Reid and Mr. Riddle had made their initial decision to ignore Mr. Nisbet's breach. The truth now mattered very much.

[70] In these circumstances, ICBC decided to give Mr. Nisbet another chance. Far from attempting to entrap him, it offered to let bygones be bygones. Ms. Shaw did not simply ask him what his evidence was in the hope that he would repeat his earlier false statement. On the contrary, she laid out the circumstances in full. She described to him all of the evidence they had in hand that established beyond doubt that Ms. Grisewood had in fact been a passenger. She explained to him what the consequences would be if he maintained his lie. She confirmed that if he would tell what they both knew to be the truth, all would be forgiven. She then gave him his chance. Fully informed, he declined to take it. This was not entrapment.

[71] In these circumstances, was ICBC nevertheless estopped from changing its position? Both counsel submitted able and learned arguments on the applicable law.

[72] Mr. Rubin began by noting that ICBC had a duty to investigate the lie, which it did, and to take its position, as quickly as possible, citing *dicta* in the concurring reasons of Thackray J.A. in ***Insurance Corp. of British Columbia v. Hosseini*** (2006), 49 B.C.L.R. (4th) 250 (C.A.). He then argued that by undertaking Mr. Nisbet's defence notwithstanding what it knew, and carrying on with that defence for more than two years, an estoppel by election arose that in equity prevents ICBC from relying on something it knew about all along to hold Mr. Nisbet in breach.

[73] In this regard, Mr. Rubin relied on a line of cases beginning with ***Parrott v. Western Canada Accident and Guarantee Insurance Company***, [1921] 2 W.W.R. 569 (S.C.C.), and proceeding through ***Cadeddu v. Mount Royal Assurance Company***, [1929] 2 W.W.R. 161 (B.C.C.A.), ***Federal Insurance Company v. Mathews*** (1956), 18 W.W.R. 193 (B.C.S.C.), ***Gilles v. Couty*** (1994), 100 B.C.L.R. (2d) 115 (S.C.) and ***Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Co.*** (2008), 67 C.C.L.I. (4th) 61 (Ont. S.C.J.), aff'd 70 C.C.L.I. (4th) 188 (Ont. C.A.).

[74] These authorities, he argued, establish that where an insurer abandons its rights to rely on a policy breach for a period of time, it is estopped by its election to do so from later attempting to resurrect those rights, and no detriment to the insured is necessary.

[75] I am not convinced that the words of Mignault J. in the ***Parrott*** case, relied on in the other authorities, go so far as to establish that detriment is unnecessary. The learned Supreme Court Justice said this, at p. 575:

> [The insured] took no steps to protect himself because lulled into security by the belief, induced by the company's action, that it would indemnify him against whatever judgment Oxenham might recover. Prejudice sufficient to support an estoppel would seem to be implied in the circumstances.

[76] It seems to me that reliance and detriment form the equitable backbone of the concept of estoppel, and the authorities, properly examined, go no further than to confirm that detriment becomes a rebuttable presumption in certain circumstances.

[77] Mr. Potts argued that, regardless of these issues, the forfeiture under s. 19 of the ***IMVA*** is a statutory remedy, to which estoppel cannot apply. For this proposition, he relied on a line of cases including ***Harris v. The Law Society of Alberta***, [1936] S.C.R. 88, ***Brown Mobile Homes Ltd. v. Royal Insurance Company Ltd.***, [1965] 54 W.W.R. 490 (Sask. C.A.), ***Langley (Township) v. Wood***, 1999 BCCA 260, 67 B.C.L.R. (3d) 97, and ***Pitt Meadows (District) v. Ron Jones Ltd.***, 2004 BCCA 277, 28 B.C.L.R. (4th) 324.

[78] Mr. Potts also referred me to another line of cases that apply different tests, including that estoppel can only lie against the Crown when an exercise of non-statutory discretion is involved; will not apply against the Crown or its agents where the statute has an obvious public-policy character; and will not apply where the Crown is exercising statutory powers in the proper exercise of its duty to act for the public: see, for instance, ***Canada Post Corp. v. G3 Worldwide (Canada) Inc.***, 2007 ONCA 348, 85 O.R. (3d) 241, ***Bella Vita Restaurant (Re)*** (1982), 41 B.C.L.R. 283 (C.A.), and ***Saskatchewan (Minister of the Environment) v. Redberry Development Corp.***, [1992] 2 W.W.R. 544 (Sask. C.A.).

[79] Finally, Mr. Potts referred me to yet another line of cases where a potential for public law estoppel is recognized, but no test is given, exemplified by ***Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services)***, [2001] 2 S.C.R. 281.

[80] I do not find it necessary to decide this issue, although I would have thought that where the statute in question is part of an overall plan of insurance that incorporates contractual as well as statutory provisions, and where, as here, ICBC appears to have exercised a non-statutory discretion to ignore Mr. Nisbet's breach, then estoppel could lie in the right circumstances. This case does not raise the right circumstances.

[81] Unlike every one of the cases relied on by Mr. Rubin to support his argument of estoppel by election, the breach in this case was not a single static act that had no further impact after it occurred, but rather was a continuing course of attempted deception, the impact of which evolved and increased over time. Mr. Nisbet did not just make one false statement at the beginning that ICBC ignored while he thereafter lived up to his obligations. Rather, Mr. Nisbet continued to lie so that he could use ICBC as a weapon against Ms. Grisewood.

[82] That ICBC went along with this for longer than, perhaps, it should have done does not, in my view, result in detriment to Mr. Nisbet when ICBC declined to be used further in that capacity after giving him a chance to change course. Mr. Nisbet was still in a position to defend the claim and protect himself if necessary, particularly with the benefit of ICBC continuing to defend as a third party. Thus, on the evidence, there was simply no reliance on the part of Mr. Nisbet, or corresponding detriment, that would engage the principles of equity to prevent ICBC from acting as it did.

[83] Moreover, the great shield of equity is not intended to protect an insured like Mr. Nisbet from the consequences of his deliberate course of deceit. I echo the words of Wetmore Co. Ct. J. (as he then was) in ***Greyell v. Insurance Corp. of British Columbia*** (1979), 16 B.C.L.R. 289, [1979] B.C.J. No. 1815 at para. 26:

> What the [insured] got was exactly what he purchased by his own fraud, a policy which was at any time voidable by the victim of that fraud.

[84] Accordingly, I conclude that the defence of estoppel is not available to prevent the operation of the forfeiture imposed by s. 19 of the ***IMVA*** in this case. Mr. Nisbet is therefore liable to repay ICBC the amount of $37,251.42 plus adjusting and investigation costs in the amount of $309.68.

3. Fraud

[85] In addition to statutory forfeiture, ICBC relies upon the common law cause of action of deceit (civil fraud). To succeed, it must establish the following four elements (see, for instance, ***Hoole v. Advani***, [1996] B.C.J. No. 731 (S.C.)):

a) Mr. Nisbet made a false representation of fact;

b) knowing it to be false;

c) with the intention that it should be acted on by the ICBC; and

d) ICBC has acted upon the false statement and has sustained damage by so doing.

[86] The defendant conceded that these elements are present in this case. He maintained, however, that ICBC's cause of action arose no later than May 29, 2000, when he gave the statement to ICBC that included the false representation of fact. The defendant argued further that the running of the limitation period could not have been postponed further than July 11, 2000, by which time ICBC concedes that Mr. Reid and Mr. Riddle had considered that Mr. Nisbet was in breach by reason of his false statement, and had decided to ignore it. As the limitation period is six years, the defendant argued, it had accordingly expired by the time this action was commenced on May 24, 2007.

[87] The plaintiff argued that the running of time was further postponed by reason of Mr. Nisbet's continued false statements right up to July 16, 2004. According to ICBC, there was just one act of fraud that started in 2000 and was not complete until January of 2004.

[88] I disagree. The essence of the tort is the making of a false representation of fact. From that false statement, all other elements must flow. Once they are established, the cause of action is complete.

[89] Section 6(4) of the ***Limitation Act***, R.S.B.C. 1996, c. 266 reads as follows:

> (4) Time does not begin to run against the plaintiff with respect to an action referred to in subsection (3) [which includes an action based on fraud or deceit] unless the identity of the defendant is known to the plaintiffs and those facts within the plaintiff's means of knowledge are such that a reasonable person knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
>
> (a) an action on the cause of action would, apart from the defect of the expiration of a limitation period, have a reasonable prospect of success, and
>
> (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the persons circumstances into account, to be able to bring an action.

[90] In my view, it is clear from the evidence that all four requirements of the tort of civil fraud were established by July of 2000. By then, ICBC had acted upon Mr. Nisbet's representations that Ms. Grisewood had not been in his car, and had concluded that they were false. It had a right of action as a result. It chose not to pursue it. In my view, nothing in s. 6(4) of the ***Limitation Act*** would delay the commencement of the running of time beyond that point. Subsequent repetitions of the false misrepresentation of fact might give rise to a new cause of action but would not start the clock running again on the original one. It follows that any claim ICBC might have arising out of false representations of fact made by Mr. Nisbet more than six years before the commencement of the action (May 24, 2001) would be time-barred.

[91] The question, then, is whether Mr. Nisbet's false representations occurring after May 24, 2001, gave rise to new causes of action. There were two such representations made to ICBC or its agents (as opposed to the RCMP or other parties): the statement made by Mr. Nisbet to Mr. Adair on May 8, 2002, and the statements made to Ms. Shaw on July 16, 2004.

[92] While it is clear that on both these occasions, Mr. Nisbet made false representations of fact that he knew to be false with the intention that they be acted upon by ICBC, the question is whether ICBC in fact suffered loss as a result of reliance on these two representations. Obviously it did not suffer loss in reliance on the statement made to Ms. Shaw, as ICBC held him in breach because of it.

[93] The evidence concerning Mr. Nisbet's statement to Mr. Adair was contained in a letter from Mr. Adair to ICBC reporting on the interview. Initially, the defendant did not admit the truth of the contents of the letter, so that it was admissible only as evidence of what was reported by Mr. Adair. Mr. Rubin subsequently changed his position to the extent that he relied upon the truth of the fact of his client's statement on that occasion in order to support his argument of estoppel by election.

[94] While the letter discussed steps to be taken by Mr. Adair as a result of the statement by Mr. Nisbet that would likely satisfy the fourth requirement of the tort of civil fraud (actual reliance), that evidence remained hearsay notwithstanding Mr. Rubin's change of position. Mr. Adair did not testify. The letter was therefore not admissible to establish the truth of the reliance described in it.

[95] On the admissible evidence, then, ICBC did not rely on the two later misrepresentations of fact, which it knew to be false. The damages that were agreed to have flowed from Mr. Nisbet's civil fraud, consisting of half the adjusting and investigation expenses in the amount of $619.36, relate, as far as I am able to tell, to the earlier time-barred period. There was no evidence to the contrary. The fourth element of the cause of action is therefore missing.

[96] It follows that ICBC's claim against Mr. Nisbet for damages for civil fraud or deceit is dismissed due to the expiry of the applicable limitation period. ICBC does, of course, have a remedy for the false statement under s. 19(1) d) of the ***IMVA*** as discussed above.

4. Punitive damages

[97] ICBC initially appended its claim for punitive damages to its claim for civil fraud. After argument was

completed, however, ICBC sought and was granted leave to submit a further argument that even if its claim in fraud could not be maintained, punitive damages could still be supported by an award based on statutory forfeiture, citing ***Haiduc v. Alberta Motor Assn. Insurance Co***., 2003 ABPC 61, [2003] A.J. No. 392, or on the basis of a breach by Mr. Nisbet of his duty of good faith, citing cases such as ***Andrusiw v. Aetna Life Insurance Co. of Canada***, [2001] A.J. No. 789 (Q.B.) and ***Vorvis v. Insurance Corp. of British Columbia***, [1989] 1 S.C.R. 1085.

[98] While ICBC's argument is persuasive in this regard, I conclude that I do not need to determine whether it is open to me as a matter of law to award punitive damages on top of the remedy of statutory forfeiture. On the assumption that it is, I find that the particular circumstances before me do not warrant such an award.

[99] As the name suggests, punitive damages are intended to punish the defendant, not to compensate the plaintiff. In that sense, they constitute a windfall for the plaintiff. As a result, they can be awarded only under certain rare and exceptional circumstances: ***Whiten v. Pilot Insurance Co***., [2002] 1 S.C.R. 595.

[100] As a matter of law, punitive damages may be awarded only where there has been conduct on the part of a defendant that is so outrageous as to deserve condemnation beyond his liability for compensatory damages, in order to achieve the objectives of retribution, deterrence and denunciation – objectives normally the preserve of the criminal law. The usual description of the kind of conduct in question is "harsh, vindictive, reprehensible and malicious": see, for instance, ***Vorvis***, *supra*, at para. 27.

[101] The Supreme Court of Canada has made it clear that even with respect to fraudulent conduct, it is only in exceptional cases that punitive damages will be justified: ***Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd***., [2002] 1 S.C.R. 678 at para. 87.

[102] Moreover, the law dictates that any award of punitive damages must serve a rational purpose. The question is whether Mr. Nisbet's misconduct was so outrageous that punitive damages are rationally required to achieve the purposes of retribution, deterrence and denunciation. This is because in law, an award of punitive damages is rational if, but only if, compensatory damages and any criminal or quasi-criminal proceedings taken *do not* adequately achieve the objectives of retribution, deterrence and denunciation. Otherwise, there is no rational basis for giving the plaintiff such a windfall: ***Performance Industries Ltd.***, *supra*.

[103] As the Supreme Court of Canada pointed out in ***Whiten***, *supra*, a court should first relate the facts of the particular case to the underlying purposes of punitive damages and examine specifically how an award would further one or more of those objectives (para 71). The "rationality" test applies both to the question of whether an award of punitive damages should be made at all, as well as to the question of quantum (para. 101).

[104] Turning to Mr. Nisbet's situation, then, I note the following factors:

- Mr. Nisbet's misconduct was indeed outrageous, particularly from the point of view of its intended victim, Ms. Grisewood;

- although Mr. Nisbet's misconduct was outrageous and deliberate, and he persisted in it, it was not in fact aimed at or intended to harm ICBC;
- unlike the situation in cases such as ***Insurance Corp. of British Columbia v. Suska***, 2009 BCSC 1051, and ***Insurance Corp. of British Columbia v. Phung***, 2003 BCSC 1281, 3 C.C.L.I. (4th) 83, Mr. Nisbet did not in any way intend to defraud ICBC (or anyone else) with a view to making personal gain;
- as a result of this case, and as a result of proceedings within the RCMP, Mr. Nisbet's conduct has already been thoroughly denounced;
- with respect to the RCMP, Mr. Nisbet has been reprimanded and found guilty of disgraceful conduct;
- with respect to this case, Mr. Nisbet has been found liable to pay to ICBC a substantial amount of money, based not on loss suffered by ICBC (it would likely have had to pay damages to Ms. Grisewood even if Mr. Nisbet had been truthful throughout), but on statutory forfeiture. To some extent, then, a penal element is already included in the award;
- Mr. Nisbet's misconduct was *sui generis*. The unique circumstances of emotional dysfunction combined with the absence of any profit motive render general deterrence superfluous, while the goal of specific deterrence has already, I find, been satisfactorily met through this trial.

[105] In these circumstances, I consider that the objectives of retribution, deterrence and denunciation have been adequately achieved, and that an award of punitive damages would serve no rational purpose. Mr. Nisbet has been punished enough for his lies.

[106] The claim for punitive damages is accordingly dismissed.

CONCLUSION

[107] ICBC is entitled to judgment against Mr. Nisbet in the amount of $37,561.10. ICBC's claims against Mr. Nisbet for damages for civil fraud and for punitive damages are dismissed.

[108] The parties are at liberty to speak to costs. They should contact the registry within the next 14 days to arrange for a hearing date.

"GRAUER, J."

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[1] All quotes preserve the original content without use of the intrusive "[*sic*]".