COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Insurance Corp. of British Columbia v. Tran,*** 2004 BCCA 626

Date: 20041130

Docket: CA030089

Between:

Insurance Corporation of British Columbia

Appellant (Plaintiff)

And

Nguyen Son Tran, Van Quang Vu, Quoc Thai Diep and Van Huy Nguyen

Respondents (Defendants)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Mackenzie
The Honourable Madam Justice Saunders

Oral Reasons for Judgment

F.G. Potts and B. Martyniuk — Counsel for the Appellant

No one — Appearing for the Respondents

Place and Date: Vancouver, British Columbia, 30 November 2004

[1] **MACKENZIE J.A.:** The Insurance Corporation of British Columbia ("ICBC") appeals from the quantum of punitive damages awarded against the four respondents who were participants in a motor vehicle accident staged for the purpose of making fraudulent personal injury and property damage insurance claims. ICBC obtained judgments in default of appearance against the respondents for damages to be assessed. None of the respondents were represented at the assessment hearing or on this appeal.

[2] Each of the four respondents made claims to ICBC; they were paid amounts ranging from $733 to $10,399. No issue is taken with the compensatory damages awarded by the trial judge to recover those amounts plus the cost of adjustment of the claims.

[3] The controversy is with the award of punitive damages. The trial judge awarded $1,000 in punitive damages against each of three respondents and $5,000 against the fourth respondent. ICBC contends that these awards were inadequate and that the trial judge erred in law by considering the financial means of the respondents in making the punitive damage awards. ICBC also submits that the trial judge erred in considering irrelevant evidence, misapprehending the evidence with respect to the respondents' financial means, and making awards that were inordinately low. ICBC finally submits that the trial judge erred in law in not awarding special costs. The trial judge awarded costs on scale 3 of the Supreme Court tariff. Section 7(3) of Appendix B of the ***Supreme Court Rules*** terminated the power to award increased costs after 1 July 2002 and as the order under appeal was pronounced 6 August 2002, increased costs were not available as an alternative to special costs.

Punitive Damages

[4] ICBC submits that the financial means of a party may only be considered in the assessment of punitive damages when it is expressly raised as a relevant issue and evidence is adduced to

support the position. ICBC relies on ***Whiten v. Pilot Insurance Co.***, [2002] 1 S.C.R. 595. That was a case where a jury punitive damage award of $1 million was restored by the Supreme Court of Canada for the exceptionally reprehensible conduct of an insurance company in denying a fire loss claim on the plaintiff's residence for alleged arson. There was no evidence whatsoever of arson and the insurance company persisted in its defence in an effort to force the plaintiff to accept an unfair settlement through financial attrition. Mr. Justice Binnie concluded that the jury must have regarded the company's conduct as an outrageous example of willful tunnel vision. At issue was the relevance to the award of the wealth of a powerful corporate defendant. The importance of the context is evident from the following passage from the judgment:

> 118 The theory is that it takes a large whack to wake up a wealthy and powerful defendant to its responsibilities. The appellant's argument is that the punitive damages award of $1 million represents less than one half of one percent of Pilot's net worth. This is a factor, but it is a factor of limited importance.
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> 119 A defendant's financial power may become relevant (1) if the defendant chooses to argue financial hardship, or (2) it is *directly* relevant to the defendant's misconduct (e.g., financial power is what enabled the defendant Church of Scientology to sustain such an outrageous campaign for so long against the plaintiff in *Hill*, [***Hill v. Church of Scientology of Toronto***, [1995] 2 S.C.R. 1130]), or (3) other circumstances where it may *rationally* be concluded that a lesser award against a moneyed defendant would fail to achieve deterrence.
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> [Emphasis in original.]

[5] The present case is the converse of ***Whiten***. The plaintiff is the large institutional insurer and the respondents are individuals without apparent financial wealth or power. The respondents' conduct was certainly outrageous but I do not think that factor alone is sufficient to preclude consideration of their financial circumstances in assessing the quantum of the award. It is not a question of the relevance of financial power as it was in ***Whiten***. The question here is the quantum of the award that is rationally proportionate to the punishment appropriate in the circumstances. In my view, the limited means of an individual defendant is relevant to that determination and the court may consider that factor without requiring that the defendant raise it expressly and adduce evidence in support. In my view, ***Whiten*** was an entirely different case and cannot be interpreted to support such a pre-condition.

[6] I turn then to the evidentiary issues. The trial judge recognized that the evidence with respect to the financial means of the respondents was sketchy. She concluded that two of the four respondents were unemployed and one of those two was unemployable because of a disability. She awarded $1,000 in punitive damages against each of them. She also awarded $1,000 punitive damages against a third respondent alleged to be unemployed in the statement of claim. She did not rely on that allegation but she concluded that because his vehicle was valued at less than $750, he was "probably a person of modest means." There was no other information about his financial circumstances. The trial judge found that the fourth respondent had an income of $2,000 to $5,000 a month from his carpet installation company. She awarded $5,000 punitive damages against him.

[7] With the exception of the vehicle owner, the information came from accident benefit forms completed by the respondents. The claims for accident benefits were integral to the fraud, and all statements by the respondents on the forms were tainted accordingly. Nonetheless, there was no other evidence before the judge and there was nothing in the circumstances of the fraud to suggest that the respondents were employed, other than as represented for the fourth respondent, or that they otherwise had significant assets or income. In my view, the trial judge was entitled to consider the representations as to occupational status made on the accident benefit forms and give them some weight and in these circumstances the weight could be minimal because there was no other evidence of financial means. The representations of unemployment would be against interest in terms of any wage benefit entitlement. The inference that the vehicle owner was of modest means was also a fair inference from the minimal value of the vehicle although as Mr. Potts observed these frauds frequently use vehicles of minimal value to minimize the cost to the fraudsters of staging these accidents. The trial judge had to do the best she could on the limited material before her and I am not persuaded that she misapprehended the evidence or made any error that would permit this Court to disturb her conclusions. I would reject this ground of appeal.

[8] ICBC contends that the awards are inordinately low compared to awards of punitive damages in similar cases, particularly ***ICBC v. Sanghera*** (1991), 55 B.C.L.R. (2d) 125 (C.A.); ***ICBC v. Le***, [1997] B.C.J. No. 3135 (S.C.); and ***ICBC v. Sam*** (7 March 1997), Van. Reg. C963847 (S.C.), as well as some judgments that are subsequent to the award made by the trial judge in this case. In ***Sanghera*** this Court varied an award of punitive damages for a single fraud to $15,000 against five defendants jointly. That award compares to $8,000 severally against the four respondents here. In ***Sam***, punitive damages of $3,000 were awarded against individuals involved in single similar incidents, although awards of up to $11,000 were made against defendants involved in multiple incidents. In ***Le*** awards of $10,000 each were made against defendants involved in single incidents with substantially higher awards against those involved in multiple incidents as well as $100,000 against the defendant identified as the mastermind of the entire fraudulent scheme.

The trial judge made reference to all three of these cases and she considered the applicable law discussed in ***Whiten*** and other leading cases. In my view, she made no error in law or principle. While the $1,000 awards against three of the respondents are low in comparison with other ICBC fraud cases and subsequent cases referred to, I do not think they are so inordinately low that we can vary them. I would therefore dismiss the appeal against the punitive damages award.

Costs

[9] ICBC submits on the issue of costs that the trial judge erred in not allowing costs higher than scale 3 of the party and party tariff. Before the trial judge ICBC relied on ***Sanghera*** and the trial judgment in ***Katinic v. Bruno*** (2000), 77 B.C.L.R. (3d) 297 (S.C.). In ***Katinic***, involving proceedings following another staged motor vehicle accident, the trial judge awarded special costs in the ICBC fraud action and costs on scale 4 in the unsuccessful negligence actions by the plaintiffs found to be fraudsters. This Court allowed an appeal from the scale 4 award in the negligence actions and substituted special costs. Madam Justice Southin said ((2003), 49 C.C.L.I. (3d) 84, 2003 BCCA 147, 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*.

[10] The trial judge did not have the benefit of these reasons which were given after the judgment under appeal. She distinguished ***Sanghera*** on the ground that there the fraudsters pursued the fraudulent claims in a negligence action and defended the ICBC fraud action and had abused the court process. The fraudsters in ***Katinic*** also pursued their claims and defended ICBC's fraud action through trial. Here none of the respondents commenced actions and they did not defend ICBC's fraud action. In the passage from ***Sanghera*** quoted above, Madam Justice Southin indicated that it is the commencement of the proceedings (and presumably the defence of the fraud action) that is the abuse that attracts an award of special costs rather than conduct which precedes the litigation. This point has not been fully argued before us as only one side is represented on this appeal. In these circumstances I am not prepared to conclude that special costs cannot be awarded for fraudulent or otherwise reprehensible conduct that does not extend into the litigation process itself. I think it is sufficient to conclude that there is at least a discretion not to award special costs when the conduct does not extend into the litigation process and the refusal to award special costs here was within that discretion. I would therefore not vary the costs awarded by the trial judge.

[11] Accordingly, I would dismiss the appeal.

[12] **FINCH C.J.B.C.:** I agree.

[13] **SAUNDERS J.A.:** I agree.

[14] **FINCH C.J.B.C.:** The appeal is dismissed.

"The Honourable Mr. Justice Mackenzie"