

## IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *ICBC v. Phung et al.*,  
2003 BCSC 1281

Date: 20030819  
Docket: S004631  
Registry: Vancouver

Between:

Insurance Corporation of British Columbia

Plaintiff

And

Van Luong Phung, Van Hien Phung, Tong Van Vu, Soi Thi Le,  
Paul Hung Doan, Vinh Van Le, Huong Thi Vu, Hung Manh Nguyen,  
Lien Thi Le, Thanh Son Le, Thanh Phu Trinh, Tuyen Van Do,  
Van Khai Tang, Tuan Duc Bui, Thi Ha Truong, Van Hong Nguyen,  
Quoc Nam Tran, Van Dao Nguyen, Quang Dung Tran, Thi Phuong Pham,  
Van Long Do, Loan Thi Nguyen, and Lin Nguyen and Van Tan Pham

Defendants

Before: The Honourable Mr. Justice Harvey

### Reasons for Judgment

Counsel for the Plaintiff:

F.G. Potts  
B. Martyniuk

Counsel for Defendant, Van Luong Phung:

D.E. Komori

Thanh Son Le:

Appearing in person on March 10-13 and March  
17-18, 2003

Date and Place of Trial:

March 10-13, March 17-18, and March 20-21,  
2003  
Vancouver, B.C.

[1] The plaintiff claims fraud and deceit against twenty-six individuals, who were involved in five motor vehicle accidents, four of which were deliberately staged to fraudulently obtain insurance monies. In the fifth motor vehicle accident, an opportunity arose which was acted upon by the defendants involved therein to fraudulently obtain insurance monies.

[2] The majority of the defendants, in the words of counsel for the plaintiff, were "defaulted" and damages have been assessed against them, including punitive damages, where considered appropriate.

[3] In relation to certain defendants, leave to discontinue without costs was granted.

[4] During the course of the trial, a settlement of the plaintiff's claims against the defendant Thanh Son Le was reached, the result of which was this defendant consented to judgment being entered against him for the inclusive sum of \$20,000 on March 18, 2003.

[5] In this action, the plaintiff seeks:

- (a) Quantification of damages in relation to the defendants Lin Nguyen, Van Tan Pham, and Thanh Phu Trinh. In relation to the defendants Lin Nguyen and Van Tan Pham, no appearances having been entered, they were defaulted. In relation to the defendant Thanh Phu Trinh, while an appearance was entered, he was later defaulted, being in breach of the terms of an order of the court and proceeded against as if no appearance had been entered.
- (b) Judgment and assessment of damages against the defendant Van Luong Phung in relation to four of the five motor vehicle accidents.

[6] The named defendants, save and except Van Luong Phung, by reason of having been defaulted, are deemed to have admitted the allegations made against them based on their failure to file either an appearance or statement of defence, or failure to comply with terms of an order of the court, pursuant to Rule 19(19) of the **Supreme Court Rules**. In this regard, allegations not denied are deemed to be admitted.

[7] Insofar as the pleadings are concerned, and particularly the allegations made by the plaintiff against the defendants, I refer to paragraphs 26-30 inclusive of the further amended writ of summons.

[8] The scheme to defraud as referred to therein is particularized in paragraph 30.

[9] In general terms, the staged motor vehicle accidents involved a collision between two motor vehicles for the purpose of advancing fraudulent material damage and personal injury claims. Those involved in such enterprises (referred to by counsel for the plaintiff as joint enterprises) would stage the motor vehicle accidents in such a manner that:

- (a) Liability was not an issue with the usual form of accident being a rear end collision;
- (b) Injury would be in the form of soft tissue injuries wherein the symptomatology of injury would almost entirely be subjective in nature and depend upon the acceptance of such complaints as being genuine;
- (c) The use of the same medical doctor who while not involved in the enterprise would be compliant and would engage in assessment and diagnosis with a reasonably low threshold of disbelief.

[10] I turn next to the motor vehicle accidents which are the subject of this litigation. As I have stated *supra*, when the action was initiated, some five motor vehicle accidents were the subject of the alleged fraudulent conduct on the part of the defendants. This trial involved consideration of four accidents which occurred on the following dates and have been referred to throughout as accidents 1, 2, 3, and 4:

Accident 1 - May 11, 1993  
 Accident 2 - August 15, 1993  
 Accident 3 - July 24, 1995  
 Accident 4 - September 6, 1995

[11] Accidents 2, 3 and 4 were staged motor vehicle accidents involving two motor vehicles - car A and car B - with passengers therein.

[12] Accident 1 was not a staged motor vehicle accident but rather one which presented itself as a case of opportunistic fraud. It is for this reason that in relation to accident 1 the question of liability for the collision is in issue as well as whether the driver of car A in this accident, the defendant Van Luong Phung, was involved in a joint enterprise with the two passengers in his vehicle, the defendants Van Hien Phung and Tong Van Vu, fraudulently to obtain monies from the plaintiff.

[13] In the course of the trial, the accidents were dealt with sequentially. In this regard, counsel for the plaintiff prepared an aide memoir which was of assistance, not only in relation to indicating which of the defendants were involved in the said accidents, but as well, was of assistance in indicating the disposition of the actions against those defendants save and except the defendant Van Luong Phung.

[14] In relation to the defendant Van Luong Phung, he was an actual participant with direct involvement in accidents 1 and 3. In relation to those accidents, he was the driver of one of the two vehicles involved in the accidents.

[15] In accidents 2 and 4, the defendant Van Puong Phung had indirect involvement in that he was not actually in either of the vehicles involved in the staged motor vehicle accidents. In relation to those accidents, however, a motor vehicle owned by him was involved with his brother, the defendant Van Hien Phung, driving the vehicle. In relation to accidents 2 and 4, the defendant Van Luong Phung assisted the defendants in the vehicles advancing their respective claims for damages against the plaintiff. In relation to these accidents, he acted as the translator for the said defendants and in the totality of his involvement, became part of what counsel for the plaintiff alleges was a joint enterprise to defraud the plaintiff.

[16] In relation to the accidents that Van Luong Phung had a direct involvement in, namely

accidents 1 and 3, the issue is whether he perpetrated a fraud on ICBC. In relation to the accidents he was indirectly involved in, namely accidents 2 and 4, the issue is whether he was involved in a joint enterprise to defraud ICBC.

[17] In keeping with the nature of the issues remaining for determination, apart from the assessment of damages related to the defendants Lin Nguyen, Van Tan Pham, and Thanh Phu Trinh, the issue of the credibility of the defendant Van Luong Phung looms large and can be said to be of the utmost significance. Because of its importance to the other issues before me, I propose to address the credibility of the defendant first.

[18] At the commencement of his submissions in argument, Mr. Potts put it this way:

"The plaintiff's position is, the major issue is Mr. Phung's credibility... - we say he doesn't have any."

[19] I have reviewed all of the defendant's testimony before me: his cross-examination at discovery conducted in 2002 put in evidence at trial, his testimony at trial in his defence given over the course of three days, and the documentary evidence bearing upon the issues of liability in accident 1 and damages.

[20] In keeping with that review, I have made allowances for a professed difficulty with the English language as a second language, including the relevant times of the accidents under consideration, when he was examined for discovery in 2002 and at trial.

[21] In the result, I find the defendant Van Luong Phung is lacking entirely in credibility in relation to all of the issues requiring determination at this time.

[22] I make this finding for the following reasons, not necessarily in order of importance.

[23] Van Luong Phung exhibited an evasiveness under cross-examination which in the circumstances here was lengthy and penetrating. In many instances, when he did answer the cross-examiner's question, the answer was not responsive.

[24] He was argumentative with counsel in the course of cross-examination which I took in substantial part to be an attempt on his part to divert the cross-examiner from pursuing a given line of questioning. I comment in passing that the cross-examiner, Mr. Potts, would not be so deterred.

[25] He demonstrated in the course of his evidence at trial a most selective memory, using the time factors apparent here as the basis for the "I don't remember" answer given to many questions. When it was in his interest, however, he purported to remember events, sometimes with particularity, otherwise he professed not to be able to remember. When he was confronted with documents bearing his signature, such as, for example, a signed statement given by him to investigators, he would recall the statement or statements, but when not in his interest to confirm the statements, he would say they were not complete in that he only answered questions put to him by the investigators and did not at that time tell them all he knew. This will be illustrated further when I deal with accident 1.

[26] His professed inability at times, particularly during cross-examination, to understand the English language was used by him to require interpretation to be implemented to operate to his advantage.

[27] I comment in passing he did not require translation of the proceedings at trial until the morning of the second day of his cross-examination. Further, in the course of the trial, it became evident that in relation to accidents 2 and 4, in which Van Luong Phung was not directly involved but a motor vehicle owned by him and driven by his brother, the defendant Van Hien Phung, was one of the two vehicles involved, he became directly involved in assisting those defendants who were passengers in the vehicles in advancing their claims for damages for personal injury from the plaintiff. In relation to those accidents, he "represented" these defendants in the sense of acting as interpreter and translator in part in settlement of the claims.

[28] The most dramatic use of his purported difficulty with the English language was when, in the course of cross-examination upon certain of his testimony given at discovery in 2002, Van Luong Phung questioned the quality of the interpretation at discovery and the transcript of his testimony. I note that the quality of the interpretation and the transcript were not the subject of challenge up to this point in time.

[29] This position caused counsel for the plaintiff to make arrangements to call the interpreter and the official court reporter used on that occasion to give evidence at a subsequent date. When it was appreciated by the defendant Van Luong Phung that the interpreter at discovery in 2002 was the same interpreter dealing with his cross-examination from the second day forward at trial, this objection was withdrawn.

[30] I am satisfied that Van Luong Phung's purported difficulties with the English language and his reversion to the use of an interpreter on the second day of his cross-examination at trial was a tactic to interfere with or impair the effect of cross-examination, particularly when he was confronted with obvious differences in his evidence, whether in the form of previous sworn testimony or otherwise.

[31] In my view, the most serious conduct to consider in relation to the issue of credibility is Van Luong Phung's untruthfulness, including that under oath. I will refer to but two examples which came to light during his cross-examination at trial.

[32] At one point in his cross-examination at trial, Mr. Potts was pursuing the subject of the acquisition by the defendant Van Luong Phung and subsequent sale of a certain Nissan Maxima motor vehicle.

[33] The pursuit of the defendant on this subject included reference to two Transfer Tax Forms required by the law of this province to be filed upon such transactions taking place.

[34] At his discovery in 2002, Van Luong Phung stated he purchased the said motor vehicle for \$10,000 cash. In May, 1999 he informed investigators employed by the plaintiff that he had received the said motor vehicle from a woman he did not know as a result of a gambling debt.

[35] The Transfer Tax Forms indicate the following: on November 26, 1996 one Cam Thi Nguyen gifted the said motor vehicle to the defendant Van Luong Phung. Further, the second Transfer Tax Form dated June 14, 1999 indicates the defendant Van Luong Phung gifted the said motor vehicle to Thanh Phu Trinh. At his discovery in 2002, however, the defendant Van Luong Phung stated he sold the said motor vehicle "to a guy" - a person unknown to him - for \$10,000 cash.

[36] I comment in passing that the Cam Thi Nguyen referred to *supra* is the wife of the defendant Thanh Phu Trinh, the driver of car B in accident 3.

[37] The testimony of the defendant Van Luong Phung relevant to this aspect of the matter both at the discovery and at trial is extensive for reasons which will become apparent.

[38] I refer first to the testimony of the defendant Van Luong Phung at his discovery conducted at Kamloops, B.C. on June 18 and 19, 2002.

1330 Q I am producing to you a photocopy of a transfer tax form dated June 24th, 1999, wherein a brown 1991 Nissan Maxima is transferred from you to Thanh Phu Trinh, have a look at that and tell me whether or not that's your signature where it says seller?

A Yes.

1331 Q That is your signature?

A Yes.

MR. POTTS: Mark that as the next exhibit.

[EXHIBIT NO. 14 FOR IDENTIFICATION: TRANSFER

MR. POTTS:

1332 Q This document, sir, refers to the same brown Nissan that you were telling me that you bought from this unidentified woman for \$10,000.00, we are agreed on that, aren't we?

A Yes, correct.

. . .

1336 Q Is this your signature on Exhibit "14"?

A Yes, that's my signature.

1337 Q Did you see the name Trinh Thanh Phu, the purchaser?

A I am not sure about it, I remember at that time I sold a car to an Asian person.

. . .

1355 Q What did you do with the cash, put it in the bank?

- A I used for gambling.
- 1356 Q So you got \$10,000.00 cash and you gambled it all away?
- A Yes.
- . . .
- 1373 Q Now you were starting to tell me why it says on Exhibit "14", that it's a gift from you to Trinh, why is that?
- A Well because that's the buyer request.
- 1374 Q The buyer told - sorry, go ahead?
- A Because they didn't want to pay tax.
- 1375 Q He didn't want to pay tax?
- A Well I don't know because I was the seller, I didn't have to pay tax.
- 1376 Q But you were helping him by saying it was a gift so he wouldn't have to pay tax?
- A Yes.
- 1377 Q So you say that he was actually buying the car for \$10,000.00?
- A Yes.
- 1378 Q But you put down on Exhibit "14" it was a gift?
- A Yes.
- 1379 Q And that wasn't true, it wasn't a gift?
- A Yes.
- 1380 Q But you put it down so that he could avoid paying the tax he was supposed to pay?
- A Yes.
- 1381 Q And you knew that's why he wanted you to say it was a gift, to avoid paying tax?
- A Yes.
- 1382 Q So you were prepared to lie on the form to help him cheat the government out of its tax?
- A That was his business, not my business.
- 1383 Q But it was your business that you lied on the form, wasn't it?
- A Because I was only the seller, I did need the money, that's all.
- 1384 Q Maybe, sir, tell me if you disagree with this, you lied on the form and the reason you lied on the form is so that he wouldn't have to pay tax, is that right?
- A Yes, correct.

[39] This area was revisited at trial. I refer to the following extracts from the cross-examination of the defendant Van Luong Phung at that time:

- Q At the time did you know that Cam Thi Nguyen was the wife of Mr. Trinh?
- A I didn't even know, how I did know that she was wife or

husband, whatever.

Q Do you know now that she is the wife of Mr. Trinh?

A I still don't.

Q That's new to you, is it?

A Yes.

Q Okay. So you say its just coincidence that Cam Thi Nguyen sold this vehicle to you?

A Yes.

Q Okay, and the sale of that vehicle to Mr. Trinh, was it just a coincidence that he bought the vehicle from you?

Q Question. How much did he pay for the car? Answer I took \$10,000 for the car, the same as before. Question did he pay you cash? Answer yes. Were you asked those questions, did you give those answers?

A Yes.

Q Were they true?

A Yes.

Q Question, what did you do with the cash, put it in the bank? Answer I used for gambling. Question so you got ten thousand cash and you gambled it all away answer yes. Were you asked those questions, did you give those answers?

A Yes.

Q Were they true?

A That answer is not.

Q Is that the answer you gave?

A Yes.

Q But the answer you gave wasn't true?

A Yes.

Q Did you know it wasn't true when you said that?

A Yes, I did.

Q Then why did you say it?

A Because I'm an innocent person and you pushed me to the corner. I got very upset.

Q I see. So you knowingly gave an untrue answer because you were pushed in a corner and you were upset, is that right?

A Yes.

Q Okay. Question so you got \$10,000 cash and you gambled it all away? Answer yes. Question none of it made it into a bank account, there is no paper trail of any sort relating to that \$10,000 that you received? Answer yes. Were you asked those questions, did you give those answers?

A Yes.

Q Were they true?

A I did give that answer, but on my mind, it was not.

Q I'm sorry, I don't understand that. What do you mean?

A I did give that answer to your question, but I only said that when I was upset. It was not the truth.

Q Okay.

. . .

Q Now, this being pushed into a corner, sir, what do you mean by that?

A I didn't say literally pushed to the corner. I said that push me to the dead end, because you push me too much.

Q Okay. Well, what I'm - that's what I'm trying to get at sir, what are you referring to, being asked the questions or something else?

A Because I'm innocent, and when an innocent person is pushed that much, and you are purposely suing me, I got so upset, it's not my fault.

Q Okay. You seem to be saying, sir, that because you are an innocent man, being asked questions, that it's okay to lie after you've been affirmed. Is that what you're saying?

A No, it's not what I'm saying.

Q Well, then I've misunderstood you. You do agree, sir, that you knowingly lied when you answered those two questions. You agreed with that?

A Well, you should understand that when you pushed an innocent person too much, of course that person has to be angry.

Q My question, sir, was do you agree that you knowingly lied when you answered those two questions?

A I was upset.

[40] As is apparent from the thrust of this cross-examination, Mr. Potts pressed the defendant as to why he would lie (state an untruth) on an official document to assist persons he did not know (according to him at the time) to save those persons from a liability for tax. The answer he gave at first was he was not a purchaser and the liability for tax was not his business. When pressed with regard to this form of answer, the defendant had this to say:

Q And the reason you signed an untrue document was so you wouldn't have to pay the tax?

A It's not right. It was not my fault. He did it for me.

Q You're talking about the agent are you?

A Yes.

Q I see. So your explanation for your signature on a document which is untrue is that the agent made you do it?

A Yes, he says no problem, I just have to sign it and because they needed customers.

[41] Finally, I refer again to testimony of the defendant during his cross-examination:

Q That's a transfer of the same vehicle from you to Trinh Thanh Phu?

A Yes.

Q Is that your signature as seller?

A Yes.

Q Okay, and I may have misunderstood you but in your evidence earlier today I thought you said the reason that showed as a gift was because Mr. Trinh wanted to avoid paying tax. Did I

misunderstand you?

A That is his business. I don't know, because as a seller, I didn't have to pay tax.

[42] On another occasion, May 12, 1997 the defendant Thanh Phu Trinh, while operating the said motor vehicle owned by the defendant Van Luong Phung received a traffic offence notice - a ticket - for a driving offence.

[43] When the use of his vehicle at that time was put to the defendant Van Luong Phung in cross-examination, he denied ever loaning the vehicle either at that time or at any other time to the defendant Thanh Phu Trinh, stating to that effect that someone must have taken his keys and returned them to him while he was at "the gambling place".

[44] I find Van Luong Phung's testimony taken as a whole in relation to the acquisition and sale of the said motor vehicle in the circumstances described, does not have any reality to it and seems to me to be a desperate attempt on his part to disassociate himself from the defendant Thanh Phu Trinh and, of course, his involvement with this defendant in accident 3.

[45] Further, the contradictory explanations he gave when pressed on the facts and circumstances of his involvement in these transactions and with whom they were conducted only serve to exemplify the tangled web woven "when first we practice to deceive". The lack of any sense of reality in his explanations is some indication of the contempt he has had and continues to have for the plaintiff and those of us required to receive and consider such testimony.

[46] At one point in his cross-examination, not particularly associated with the point in issue, he volunteered the following:

"If you asked me ten questions only six answers were correct and the other four weren't."

[47] I turn to the accidents. I will first consider whether Van Luong Phung committed fraud in relation to the accidents he was directly involved in, namely accidents 1 and 3.

[48] Accident 1 occurred on May 11, 1993. The accident involved a collision between car A owned and driven by the defendant Van Luong Phung in which the defendants Van Hien Phung and Tong Van Vu were riding as passengers, and car B owned and driven by Scott Meyer.

[49] This was not a staged motor vehicle accident. Rather, it was an accident which occurred fortuitously and provided an opportunity for the driver and passengers in car A to engage in a joint enterprise to defraud the plaintiff. In this perspective, it was described during the course of the trial as an opportunistic fraud.

[50] At trial, there was a direct conflict between the testimony of the defendant Van Luong Phung and Scott Meyer as to not only how the accident occurred, but where it happened and what took place thereafter.

[51] In a statement given to the plaintiff at that time, with the assistance of the defendant Lin Nguyen as interpreter, the defendant Van Luong Phung maintained that while driving his vehicle he was cut off by the Meyer vehicle on Highway 1 in Burnaby. He stated that following the collision between the two vehicles, he followed the Meyer vehicle, attempting to get him to pull over and stop, which efforts were unsuccessful. In this statement, he made no mention of being followed by the Meyer vehicle nor of any activity on the part of the passengers in this vehicle, including the throwing of an object or objects at the windshield of the Meyer vehicle.

[52] Insofar as the issues of liability for the accident, the two passengers gave statements to the plaintiff at the time that they were sleeping at the time the collision occurred and during the events which occurred shortly thereafter.

[53] Mr. Meyer's testimony at trial was given in a straightforward manner. Essentially, what he stated was the direct opposite of the evidence given by the defendant Van Luong Phung insofar as where and how the accident occurred. In this regard, Mr. Meyer states that he observed a vehicle closing in on his vehicle at a relatively high rate of speed on the Grandview Highway onramp, approaching Highway 1. Mr. Meyer states his vehicle was cut off by the Phung vehicle, resulting in a relatively minor collision occurring. Mr. Meyer states that from that point on, with both vehicles having entered Highway 1, he attempted to get the driver of the other vehicle's attention and to get him to pull over.

[54] It is in this manner that the two vehicles proceeded along the highway until Mr. Meyer concluded by reason of the activity that occurred on the highway and the incident itself, that he

had better report it to the police. Mr. Meyer proceeded to drive his vehicle to the Port Coquitlam detachment office of the police. His vehicle was followed by the Phung vehicle and there was an exchange between the two drivers and a police officer who did not take statements from them or for that matter do much more than direct them to report to the highway patrol detachment office.

[55] Mr. Meyer states that during what may be described as a form of chase along the highway, persons (passengers) in the Phung vehicle threw objects towards his vehicle, one of which struck the windshield of the vehicle. He described the objects being thrown by persons in a standing position within the vehicle, projecting above the roof of the vehicle through its sunroof.

[56] I comment in passing there was no reference by the occupants of car A to the throwing of objects at the Meyer vehicle during the chase portion of this incident. At a later date, during his discovery, the defendant Van Luong Phung acknowledged that objects were thrown by the passengers in his vehicle at the Meyer vehicle using the opening of the sunroof to provide an opportunity for standing and throwing the objects. When questioned as to why he did not inform the plaintiff of these facts at the time of giving his initial statement, his answer was to the effect that he only answered questions which were put to him. It was in this way he attempted to explain what I will describe as the non-disclosure aspect of his statement.

[57] In due course, the plaintiff received notice of accident 1 and shortly thereafter received claims for injury arising from the accident on the part of the defendants in car A. The plaintiff proceeded to process the claims.

[58] In keeping with an internal system used to process such claims, including particularly assessment of the question of liability, the plaintiff should have communicated with Mr. Meyer, by providing him with a form confirming the reporting of an accident involving his motor vehicle (he was also insured under the plan) and inviting his response. In keeping with such procedure, Mr. Meyer's response, when received, would be considered together with the statements of the other driver and any witnesses to the accident (the defendant passengers in car A) and a determination of the issue of liability would be made. By way of another form sent to Mr. Meyer, ICBC would invite him to accept or reject as the case may be, such determination. Following such a procedure, particularly for example in the case of rear end collisions, where liability would usually be "accepted" as indicated on the form, settlement of the claimants' claims would be negotiated.

[59] In the circumstances of this case, however, the plaintiff's internal system was not followed. The plaintiff has no record of communication with Mr. Meyer in the first instance, nor for that matter at any time thereafter until the fraud investigation giving rise to the advancement of this action was conducted years later, and Mr. Meyer's version of the accident and the surrounding circumstances was obtained.

[60] To the extent that it has relevancy, Mr. Meyer did not proceed with a formal reporting of the accident at the time for a number of reasons:

- (a) The damage to his motor vehicle described by him as a "project vehicle" was minimal;
- (b) He shortly thereafter took the vehicle off the road, abandoning the so called project he had earlier had in mind;
- (c) Shortly after involvement in this accident, he was diagnosed with cancer and as a result thereof spent the next nine to ten months in hospital.

[61] It seems from the point of view of the plaintiff at that time, Mr. Meyer dropped out of sight and its system of determining and allocating fault was not pursued. Essentially, what the plaintiff did was to allocate liability for the motor vehicle accident to Mr. Meyer.

[62] In this regard, the occupants of car A in accident 1 were fortunate. What was initially only an opportunity to advance fraudulent claims for compensation from the plaintiff turned into the equivalent of a "sure thing" when Mr. Meyer's version of the accident and related events was not obtained at the relevant time.

[63] In the course of his submissions, Mr. Potts referred to what occurred in certain instances as "bad adjusting", in particular, what occurred in relation to investigation of accidents 1 and 4.

[64] I have tried to avoid engaging in hindsight in relation to the adjusting which did occur and particularly the circumstances and claims arising from accident 1 and accident 4 which I will refer to in greater detail later in these reasons. However, it is not unfair to say the "adjusting" in relation to those accident was incomplete and inaccurate. If for example the plaintiff's internal system had been followed, even minimally, the claims for damages of the passenger claimants in car B in accident 4 would have been rejected out of hand, and there would

at the very least have been a serious issue as to liability for the accident in relation to accident 1. In this regard, it comes as no surprise that two of the passenger claimants in car B in accident 4 consented to judgment against them.

[65] I turn next to the facts of accident 3. This was a staged accident in the true sense, where there is no issue as to liability, the at fault driver having "accepted" liability within the plaintiff's internal system. Here, there were no witnesses to derogate away from what appeared to be a conventional rear end collision, leaving the only issue to be the quantification of the damage claims arising therefrom.

[66] In relation to this accident, the defendant Van Luong Phung was the owner and driver of car A in which the defendants Thanh Son Le and Van Tan Pham were passengers. The owner and driver of car B was the defendant Thanh Phu Trinh.

[67] All defendants who advanced claims for damages for this accident were defaulted except Van Luong Phung. The defendant Thanh Phu Trinh was also defaulted.

[68] In addition to the other circumstances related to this accident, it is of note that two days before the motor vehicle accident occurred, the defendant Thanh Phu Trinh obtained collision coverage for his vehicle - a coverage he had never previously obtained for the vehicle.

[69] I turn now to the issue of fraud with respect to these two accidents. The plaintiff ICBC bears the burden of proving that the defendant Van Luong Phung committed a fraud in advancing his claims. The plaintiff's burden of proof is on a balance of probabilities, but where there are allegations of a quasi-criminal act, as here, the degree of proof required is higher than what would be required in proving negligence: *Continental Ins. Co. v. Dalton Cartage Co. Ltd.* (1982), 131 D.L.R. (3d) 559 (S.C.C.).

[70] The accepted test for actual fraud in a civil case is outlined by Lord Herschell in *Derry v. Peek* [1886-90] All E.R. Rep. 1 (H.L.) at 22:

...fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such belief..

[71] Fraud may also be committed by incomplete disclosure. As was said by Chambre J. in his now famous dictum in *Tapp v. Lee* (1803), 127 All E.R. 200 at 203: "fraud may consist as well in the suppression of what is true as in the representation of what is false."

[72] I return to the issue of liability in accident 1.

[73] I accept without reservation the testimony of Mr. Meyer as to where the accident occurred and the manner in which it occurred - his vehicle being cut off by the defendant Phung's vehicle and a very minor collision occurring between the vehicles.

[74] In this regard, I find that the defendant Van Luong Phung was entirely responsible for the accident.

[75] The subsequent conduct of the defendant Van Luong Phung and the passengers in the vehicle, while perhaps in the perspective of road rage as suggested by Mr. Potts, is conduct on their part which may have been conducted to support the defendant Phung's position related to liability.

[76] In relation to this accident, Van Luong Phung, the driver of the car, made a statement to the ICBC adjuster indicating that he was cut off by the Meyer vehicle. He made no mention of chasing or being chased by the Meyer vehicle, nor did he mention that the occupants of his vehicle were throwing a bottle or jar at the windshield of the Meyer vehicle. He made a claim of injury to the adjuster, but made no such claim when reporting the motor vehicle accident to the police. At discovery, Van Luong Phung said that following the motor vehicle accident he could not attend work. He advised Dr. Chow that he was in a motor vehicle accident where he was rear-ended. He subsequently retained a lawyer to advance a claim against ICBC.

[77] I have no hesitation in finding that Van Luong Phung knowingly made a false representation about the cause of the accident in relation to accident 1 in that he misrepresented to the adjuster that he was cut off, when in fact he cut off the Meyer vehicle. He also made an incomplete disclosure to ICBC; his failure to tell ICBC about the chase and the bottle throwing incident was also fraudulent.

[78] I add that whether there was bad adjusting or incomplete and inaccurate adjustment, as in the case of accidents 1 and 4, is of no moment when allegations of fraud are made against defendants. In this regard, it is no answer for those accused of such fraud, opportunistic or otherwise, to say the plaintiff here might have learned the truth by proper inquiry. The concept of due diligence in the perspective of fraud was rejected many years ago: *United Services Funds v. Richardson Greenshields of Canada Ltd.*, [1988] B.C.J. No. 123.

[79] In relation to accident 3, I also have no hesitation in finding that Van Luong Phung knowingly misrepresented the cause of the accident and the extent of his injuries in order to defraud ICBC and obtain money not properly owing to him. This was clearly a staged accident and Van Luong Phung again made false claims to the adjuster on behalf of himself and the others in his car, including that the passengers were asleep at the time of the accident.

[80] I turn next to the two accidents in which the plaintiff alleges Van Luong Phung was indirectly involved in, in the sense that he participated in a joint enterprise.

[81] Accident 2 was also a true staged accident with no issue as to liability. Car A was rear-ended by car B. In this accident, the defendant Van Luong Phung was the owner of car A in which once again his brother Van Hien Phung was one of the two adult passengers. The defendant Van Hien Phung and the defendant Soi Thi Le, the other passenger, were both defaulted and have had damages assessed against them. The driver of car B, the defendant Vinh Van Le, consented to judgment against him in the sum of \$30,000.

[82] Accident 4 was a staged motor vehicle accident in the form of a rear end collision but involving an innocent victim, Mrs. Larine McLean. Mrs. McLean was operating her vehicle, which at the time was lawfully stopped for a stop sign at an intersection when the vehicle was struck from the rear by a motor vehicle. Mrs. McLean had observed this motor vehicle pull out from the side of the road to travel directly behind her.

[83] The staging of this accident involved some ingenuity. Its planning included what was referred to in the course of the testimony at trial as a "driver switch" and "jump-ins".

[84] As the vehicle driven by Mrs. McLean approached the controlled intersection, car B, allegedly driven by the defendant Van Hien Phung, pulled in behind her vehicle from the side of the highway and closed the distance between the vehicles and then struck the McLean vehicle, which by this time had stopped, heavily from the rear. Mrs. McLean observed the movement of this vehicle and noting that the driver was not decreasing the vehicle's speed, appreciated a collision was going to take place.

[85] Immediately following the collision, Mrs. McLean got out of her vehicle and went back to speak to the other driver. She observed at that time, as had been her impression earlier, that there were no passengers in the vehicle. When her attempts to speak to the person seated in the driver's position were of no avail, she proceeded to check the damage to the rear of her own vehicle. When she looked back to the other vehicle, to her surprise it was filled with passengers - the so-called jump-ins. Additionally, she noted there was a change in the drivers - the driver switch.

[86] These events were witnessed by Kathleen Fleming, the proprietor of a nearby corner store at the intersection. Mrs. Fleming not only confirmed what Mrs. McLean stated in her testimony, but, during the police investigation conducted by one police officer, made a point of directing that officer's attention to the driver switch.

[87] It seems apparent, in spite of the ingenuity of the scheme or staging of the motor vehicle accident, that it should have been thwarted at that time by the combined observations of Mrs. McLean and Mrs. Fleming. Unfortunately, such was not the case. Again, internally within the plaintiff's organization, the personal injury adjuster assigned to deal with the claims arising from this accident "missed" the meaning of the coding indicating on a certain report that there were no passengers in car B.

[88] The effect of this mistake, whether as a result of bad adjusting or otherwise, was to allow these claims to be advanced and accepted and monies to be paid to the claimants.

[89] In relation to this motor vehicle accident, the defendant Van Luong Phung attended one of the plaintiff's claims centres to advance first his claim for the damage to car B (his vehicle) and to translate for the other claimants in his vehicle, the passenger jump-ins.

[90] In relation to this motor vehicle accident, I accept without reservation the testimony of Mrs. McLean and Mrs. Fleming and particularly that related to the driver switch and the jump-ins. The accident was clearly and unequivocally a fraud perpetrated upon the plaintiff for monetary gain.

[91] The remaining issue in relation to these two accidents is whether the defendant Van Luong Phung was involved in a joint enterprise to defraud the plaintiff for monetary gain or to assist others in their fraudulent claims for monetary gain.

[92] The plaintiff submits that I should look at all of the accidents together, and find a pattern of behaviour, and that they were joint enterprises.

[93] The leading case on joint liability is *The "Koursk"*, [1924] P. 140 (C.A.) where Bankes L.J. held at p. 151:

... in order to constitute a joint tort there must be some connection between the act of the one alleged tortfeasor and that of the other. It would be unwise to attempt to define the necessary amount of connection. Each case must depend on its own circumstances. The learned authors of Clerk and Lindsell on Torts (7th ed.) say this:

"Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design "...

[94] Where two or more persons agree on common action, and in the course of or to further that action, one of them commits a tort, that tort will be attributed to the others: *ICBC v. The Corp. of the City of Vancouver* (1997), 38 B.C.L.R. (3d) 213 (S.C.), aff'd (2000) 73 B.C.L.R. (3d) 1, 2000 BCCA 12.

[95] In *R. v. Mota* (1979), 46 C.C.C. (2d) 273 (C.A.) Martin J.A. for the Court held that a series of events must be viewed in their entirety when considering whether there is evidence to show a joint enterprise.

[96] In relation to accidents 2 and 4, Van Luong Phung's co-defendants are guilty of perpetrating a fraud against ICBC pursuant to Rule 19 whereby allegations not denied are deemed to be proved. For the following reasons, I am satisfied that the defendant Van Luong Phung was engaged in a joint enterprise with the others to commit these frauds.

[97] Looking at the total circumstances in this case, accidents 2, 3 and 4 were essentially all staged accidents that occurred in the same way. These rear-end collisions were all staged in such a way so that the injuries of the defendants involve soft tissue injuries. As part of the scheme, the defendants dealt with a doctor who did not speak their language and was not aggressive in his examinations. Claims were then presented to ICBC by someone with a grasp of the English language.

[98] While Van Luong Phung was only the driver in accident 3, he was the registered owner of the cars involved in all three accidents. Further, his brother was the driver of the vehicle in both accidents 2 and 4. The passengers in all three vehicles were known to Van Luong Phung.

[99] Notably, Van Luong Phung also attended the claims centre after all of the accidents to translate and assist the claims being advanced. There he spoke English and also advanced his own claims for vehicle repairs.

[100] The staging of these accidents and the subsequent trips to the doctor and ICBC claims centre required preparation and careful planning. The defendants named in this trial, including Van Luong Phung, were part of a well rehearsed group of individuals attempting to deceive ICBC in order to obtain benefits that were not properly owing to them.

[101] Looking at the total circumstances here, it is clear that there was a joint enterprise being conducted. All of the individuals involved had some part to play in the scheme. Although he was not actually in the vehicle when accident 2 or 4 occurred, I am satisfied that Van Luong Phung, with the others, fraudulently and deceitfully conspired and agreed together to cheat and defraud ICBC.

[102] I further find that Van Luong Phung committed fraud in relation to accidents 2 and 4 because he was at least recklessly indifferent as to whether the individuals he was advancing claims on behalf of were making false representations.

#### **DAMAGES:**

[103] The plaintiff seeks an order for quantification of damages against Van Luong Phung, Lin Nguyen, Van Tan Pham and Thanh Phu Trinh. In particular, special and punitive damages are claimed against the named defendants.

[104] As indicated above, the defendants Nguyen, Pham and Trinh are deemed to have admitted the allegations based on their failure to file either an Appearance or a Statement of Defence pursuant to Rule 19(19) of the Rules of Court.

[105] The named defendants therefore have either admitted, or have been found liable in the case of Van Luong Phung, of wrongfully and maliciously conspiring to cheat and defraud ICBC in order to obtain payments and benefits from ICBC which were not properly owing to the defendants.

[106] I will turn first to the issue of special damages. ICBC seeks all amounts paid to the individual defendants, or to third parties on their behalf, as well as the costs of investigating and adjusting these claims. The plaintiff provided a summary of the damages sought against each defendant.

[107] Against Van Tan Pham, ICBC seeks \$14,540.21 paid to Mr. Pham in relation to accident 3. The amount breaks down as follows: medical payments of \$531.92; wage loss payments of \$7,561.00; final settlement payments of \$6,319.00; and adjusting costs of \$128.28. As there was no evidence of bad adjusting in relation to accident 3, I award the full amount of \$14,540.21 in special damages against the defendant Pham.

[108] Against Thanh Phu Trinh, ICBC seeks \$5,986.06 paid to him in relation to accident 3. The payments made to Mr. Trinh are as follows: towing/storage costs of \$125.30; autobody services of \$239.30; appraisal payment of \$43.47; loss of use payment of \$498.20; total loss on vehicle payment of \$2,680.37; and payment to third party of \$2,399.42. Again, as there was no evidence of bad adjusting in relation to this accident, I award the full amount of \$5,986.06 against the defendant Trinh.

[109] ICBC seeks special damages in the amount of \$59,357.13 against Lin Nguyen, being the total amount claimed and paid out by ICBC for accidents 1 and 2. I decline to award these special costs against the defendant Lin Nguyen as it would amount to double recovery.

[110] ICBC seeks special damages in respect of accidents 1, 2, 3 and 4 against the defendant Phung. The payments Mr. Phung received in relation to accident 1 break down as follows: payments for repairs to 1988 Nissan Maxima of \$480.29; settlement of personal injury claim payment of \$4,500; reimbursement of deductible payment of \$100.00; and adjusting costs of \$138.97. The plaintiff has admitted that there was "some bad adjusting" done in relation to accident 1. The adjusters did not follow correct procedure and in particular, a statement was never taken from Mr. Meyer. I therefore decline to make an award for the adjusting costs for accident 1. The plaintiff will receive special damages in respect of the other payments, totalling \$5,080.29.

[111] ICBC claims \$5,092.21 in relation to accident 2, broken down as follows: payments for repairs to 1986 Honda Accord of \$4,971.69; towing costs of \$35.00; and adjusting costs of \$85.52. I award the total amount of \$5,092.21 as there was no evidence of bad adjusting in relation to accident 2.

[112] ICBC claims \$27,075.49 in relation to accident 3, broken down as follows: payments for repairs to 1988 Nissan Maxima of \$8,320.34; towing costs of \$53.35; car rental payment of \$535.52; medical payments of \$300; wage loss payments of \$10,800.00; final settlement payments of \$6,938.00; and adjusting costs of \$128.28. Again, as there was no evidence of bad adjusting, the full amount of \$27,075.49 is awarded.

[113] ICBC claims \$6,688.51 against Mr. Phung in relation to accident 4, broken down as follows: towing costs of \$313.40; repairs to Nissan Maxima of \$6,310.97; and adjusting costs of \$64.14. There was clearly poor adjusting in relation to this accident, and therefore I decline to make an award for those costs. I award \$6,624.37 in special damages against Phung for accident 4.

[114] I turn next to the more substantial issue of whether punitive damages should be awarded against these defendants, and if so, the amount of the award.

[115] The plaintiff referred to the judgment of Arkell J. in *ICBC v. Le* (1997), 40 M.V.R. (3d) 235 (S.C.). At ¶18, Arkell J. held that:

...punitive damages will be appropriately awarded where fraud is alleged and no statement has been filed. As Madam Justice Southin stated in *ICBC v. Sanghera* at page 139, and I quote:

"The Corporation is by statute the insurer of all British Columbian motorists. Fraud on the Corporation is, in reality, fraud on all the motorists of British Columbia and deserves such punishment as the civil courts can properly administer."

[116] The issue was more recently addressed by Madam Justice Sinclair Prowse in *ICBC v. Hoang et al.* (2002), 29 M.V.R. (4th) 204, 2002 BCSC 1162 (S.C.). This case involved facts very similar to the facts in this case. At ¶50-57 Sinclair Prowse J. succinctly reviewed the law in this area. She set out the purpose of punitive damages and the applicable factors in determining whether such an award is appropriate:

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

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

Applying these principles to the facts in this case, all of the 14 Defendants have committed an actionable wrong (namely, they committed fraud) and that wrong injured the Plaintiff as was set out in the preceding section.

This conduct of these Defendants in deliberately participating in a scheme to defraud their insurer is the type of reprehensible conduct that calls for an award of punitive damages. (Although each case must be addressed separately, this conclusion is in keeping with the conclusions reached in *Sanghera*, *supra*, *Sam*, *supra*, and *Le*, *supra*, which were cases with similar facts to the present case).

An award for punitive damages in the circumstances of this case is not a duplication of the damage awards made in the preceding section. Rather those awards compensate the Plaintiff for the losses and the expenses that it has incurred as a result of these frauds. They do not address the reprehensible aspect of this conduct and or the need for specific and general deterrence and denunciation of the conduct of the Defendants. For all of these reasons, the Plaintiff is granted an award of punitive damages against all of these 14 Defendants.

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

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

- 1) Whether the claims pertain to a fraud on the public and, if so, the public interest, and, in particular, to the multiplied effect of those fraudulent claims on that public body and the public taxpayers;
- 2) Whether the defendant's conduct includes criminal conduct. If it does, the criminal penalty for that conduct and the amount of the punitive damage award should be consistent with it. If the defendant has been charged criminally, that fact should be taken into account;
- 3) All of the circumstances of the conduct. If, for example, the conduct is based on the commission of fraudulent acts, consideration should be given to such facts as whether: the acts were planned, organized, and/or deliberate; specialized knowledge was used; persons were recruited for profit; families and children were used; and/or the defendants participated in multiple claims;
- 4) Whether the defendant has abused the court process by such conduct as commencing actions in pursuit of his or her fraudulent claims; and
- 5) The financial means of the defendant.

[117] As in *Hoang*, the conduct of these defendants in deliberately participating in a scheme to defraud their insurer is the type of reprehensible conduct that calls for an award of punitive damages. It is conduct that requires specific deterrence and denunciation. I must therefore determine the appropriate amount of punitive damages to be assessed against each of the four defendants.

[118] Before turning to the defendants individually, I note that, as per factor number 1 above, each claim in this case pertains to a fraud on the public. Mr. Wittenshaw, an assistant vice-president of ICBC, gave evidence about the effect of such frauds. He reported that ICBC spends \$10 million per year fighting fraud and estimated losses in excess of \$150 million a year on account of it. The corporation estimates that fraud costs every rate payer something in the order of \$150 per year. In other words, fraud is a significant problem for the corporation, and one that has a direct and serious effect on the public.

[119] I would add that I know little of the financial means of all of the named defendants, other than the amounts of special damages I have awarded against each of them above. Further, Mr. Potts submits that since no plea was taken by the defendant that his financial circumstances ought to be taken into account, that factor is neutral.

[120] As well, in determining the appropriate amounts of punitive damages, I am mindful of the parameters of awards made in judge-decided cases including *ICBC v. Hoang*, *supra*, *ICBC v. Le*, *supra*, *ICBC v. Sam* (1997), 41 C.C.L.I. (2d) 308 (B.C.S.C.) and more recently *ICBC v. Hoang*, 2003 BCSC 1139.

[121] I turn now to a consideration of each claim on an individual basis.

[122] Turning first to Van Tan Pham, he was involved in a deliberate staged accident and a

planned fraud of a public body. Mr. Pham fraudulently told ICBC that there was no relationship between the persons in his vehicle, and the driver of the other vehicle. He made false claims for wage loss and medical payment. However, there was no evidence that Mr. Pham was one of the so-called "masterminds" of the scheme to defraud ICBC. No special knowledge was used; no children were used. He was not involved in a great number of the accidents. I assess punitive damages at \$5,000.

[123] Turning next to Thanh Phu Trinh, again he was involved in a staged accident. The act was planned and deliberate and criminal in nature. Mr. Trinh was involved in the transfer of the Nissan Maxima with Mr. Phung. Like Mr. Pham, he misrepresented to ICBC that there was no relationship between himself and the occupants of the other vehicle. However, like Mr. Pham, Mr. Trinh was not one of the "masterminds" of the scheme, and was not involved in a great number of the accidents. I again assess punitive damages at \$5,000.

[124] The circumstances of Lin Nguyen are different. His involvement in a scheme to defraud ICBC was addressed by Arkell J. in *ICBC v. Le*, *supra* at ¶25:

The defendant Lin Nguyen was the mastermind and the person that used his knowledge, training and experience as a paralegal in the law firm of Michael Golden and also as a court interpreter to recruit the other defendants and to plan the majority of these fraudulent actions.

[125] Arkell J. assessed punitive damages against Mr. Nguyen in the sum of \$100,000.

[126] Mr. Potts submits that this is a judicial determination of what type of character Mr. Nguyen is and a judicial determination of what involvement he had in the scheme to defraud ICBC. He submits that by virtue of Mr. Nguyen defaulting, he has admitted the allegations in the statement of claim that he developed substantial expertise in the policies and procedures of ICBC, and developed and refined the scheme to defraud and injure the plaintiff. In other words, as in *Le*, *supra*, Mr. Nguyen was one of the key masterminds of the operation.

[127] Mr. Nguyen had special knowledge. He was utilized as a translator to assist those involved in accidents 1 and 2 in making statements to ICBC. Those persons then retained Mr. Nguyen's employer, Mr. Golden, to assist them with their claims. As a paralegal, Mr. Nguyen himself had some knowledge of the legal system. It is clear he was involved in developing and executing the scheme to defraud ICBC.

[128] However, while there was evidence of Mr. Nguyen's involvement in 12 incidents in the *Le* case, there are only 4 accidents before me. Further, Mr. Potts admitted that Mr. Justice Arkell's award of \$100,00 in punitive damages was high compared to the relatively low amounts that other judges have seen fit to award as punitive damages.

[129] For the above reasons, I find an award of punitive damages against Mr. Nguyen in the sum of \$15,000 is appropriate.

[130] Finally, I turn to the defendant Van Luong Phung. He was involved in multiple claims; I have found that he deliberately planned to defraud ICBC in relation to accidents 1, 2, 3 and 4. He was directly involved in two of the accidents and indirectly involved in the other two. His actions for all four accidents resulted in a total loss to ICBC of \$44,075.47.

[131] Like Mr. Nguyen, Mr. Phung was clearly a kingpin or mastermind of the operation. He organized, encouraged and assisted various of the defendants. He used his knowledge of English to translate and speak English to ICBC adjustors. His conduct in this whole scheme was very serious.

[132] Taking into account the nature and circumstances of the fraud, and the factors noted above, I assess punitive damages against Mr. Phung in the sum of \$25,000.

[133] The question of costs was not addressed in keeping with the circumstances of the other issues requiring determination.

"R.B. Harvey, J."  
The Honourable Mr. Justice R.B. Harvey