

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: **ICBC v. Patko,**
2009 BCSC 266

Date: 20090302
Docket: M103232
Registry: New Westminster

Between:

Insurance Corporation of British Columbia

Plaintiff

And:

Jonathen James Patko and Frank Patko

Defendants

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Plaintiff:

F.G. Potts
R.N. Hamilton

Counsel for the Defendants:

J.E. Murphy, Q.C.
G.K. Chen

Date and Place of Hearing:

February 18, 2009
Vancouver, B.C.

INTRODUCTION

[1] In this application, the plaintiff Insurance Corporation of British Columbia (ICBC) seeks a declaration of mistrial with respect to the verdict pronounced by the jury on November 6, 2008, following the trial of this action in New Westminster, B.C.

[2] The plaintiff relies on Rules 41(2) and (6) of the **Rules of Court**, and on this Court's inherent jurisdiction, and asks me to substitute my own verdict for that of the jury. Outstanding (and dependent on the outcome of this application) remains the defendant Jonathen Patko's application for an order dismissing the action pursuant to the jury's verdict.

[3] The defendant Frank Patko did not participate in either the trial or this application, default judgment having been taken against him.

[4] Subrules 41(2), (3) and (6) read as follows:

Judgment impossible on jury findings

(2) Where, after any redirection the court thinks appropriate, a jury answers some but not all of the questions directed to it, or where the answers are conflicting, so that judgment cannot be pronounced on the findings, the action shall be retried.

Only partial judgment possible on jury findings

(3) Where the answers of the jury entitle either party to judgment in respect of some but not all of the claims, the court may pronounce judgment on the claims as to which of the answers are sufficient and the remaining claims shall be retried.

Continuing trial without jury

(6) Where, for any reason other than the misconduct of a party or the party's counsel, a trial with a jury would be retried, the court, with the consent of the party who required a jury trial, may continue the trial without a jury.

[5] ICBC was the party who required a jury trial for this action.

THE NATURE OF THE ACTION

[6] This action arose out of a single-vehicle accident that occurred at approximately 2:15 a.m. on January 27, 2005, when a 2004 Ford F150 truck leased to, and being driven by, the defendant Jonathen Patko struck a utility pole in Port Coquitlam. Two young women were passengers in the truck at the time, and both were injured. I shall refer to them as "Passenger A" and "Passenger K".

[7] Jonathen Patko was 20 years old at the time. He had previously been charged with a criminal offence, of which he was subsequently acquitted. At the time of the accident he was out on bail and subject to a court-imposed curfew that prohibited him from being out of his home between 10:00 p.m. and 6:00 a.m. Presumably the allure of a new truck combined with female companionship proved to be irresistible that night, and he breached his curfew.

[8] In the circumstances in which he found himself, Mr. Patko decided to lie to ICBC about who was driving the truck. He managed to persuade his uncle, the defendant Frank Patko, a resident of the downtown eastside, to tell ICBC that it was Frank who was driving the truck, not Jonathen. This deception was supported by Jonathen and, initially, by Passenger A.

[9] ICBC ultimately paid out a total of \$53,843.41 in claims as a result of the accident, made up as follows:

Ford Credit Canada for damage to the truck:	\$39,349.50
Passenger A injury claim:	\$8,282.10
Passenger K injury claim:	\$6,442.00
Property damage (B.C. Hydro):	\$1,797.55
Property damage (Port Coquitlam):	\$4,007.57
Miscellaneous:	\$2,254.68
Less salvage:	<u>- \$8,289.99</u>
Total:	\$53,843.41

[10] As the accident was a single-vehicle collision, the driver was clearly at fault. These claims were therefore

payable regardless of whether the driver was Frank Patko or Jonathen Patko.

[11] Frank Patko did request no-fault benefits, to which he was obviously not entitled, but in the end he submitted no information to support the claim, and nothing was paid to him.

[12] In addition, in the course of investigating who was driving the truck at the time of the accident, ICBC incurred expenses of \$1,800 for DNA testing, and \$175 for the cost of an interpreter whose assistance was required for the interview of a witness.

[13] In these circumstances, ICBC claimed against Jonathen Patko on two bases. The first was that Mr. Patko had given a wilfully false statement with respect to a claim under a motor vehicle insurance plan. It followed, maintained ICBC, that Mr. Patko had forfeited any right to his policy's insurance monies pursuant to s. 19 of the **Insurance (Motor Vehicle) Act** as it then was, R.S.B.C. 1996 c. 231, and was therefore liable to reimburse ICBC for the sum of \$53,843.41 it had paid out on the claims.

[14] The second was that Mr. Patko had committed fraud against ICBC, and had conspired with Frank Patko to injure ICBC, by lying about who was the driver. For this, ICBC claimed reimbursement of its investigation expenses of \$1,975, together with investigation and adjustment costs representing the time of the investigator and the adjuster in the employ of ICBC who had dealt with the file.

[15] Finally, ICBC claimed punitive damages against both defendants.

[16] The defendant Frank Patko was deemed to have admitted the allegations against him by reason of his failure to defend the action, and so his liability for fraud and punitive damages was not in issue.

THE TRIAL OF THE ACTION

[17] I presided over the trial of this action, sitting with a jury. Both parties were represented by able and experienced counsel: Mr. Robert Hamilton for the plaintiff, and Mr. Joe Murphy Q.C. and Ms. Grace Chen for Jonathen Patko.

[18] The evidence included an Agreed Statement of Facts filed as exhibit #2, and a Statement of Deemed Admissions of the defendant Frank Patko, filed as exhibit #3. The Agreed Statement of Facts included the following admissions:

1. Jonathen Patko was involved in a single motor vehicle accident on January 27, 2005 at approximately 2:00 a.m.
2. The 2004 Ford F150 pick-up truck Jonathen Patko was driving was leased to him by Ford Credit Canada Leasing company.
3. Ford Credit Canada was a named insured under Jonathen Patko's insurance policy.
4. At the time of the accident, Jonathen Patko was out on bail. One of his bail conditions was a curfew between 10:00 p.m. and 6:00 a.m.
5. [Passenger K] and [Passenger A] were riding as passengers in Jonathen Patko's truck at the time of the accident.
6. After the accident, Jonathen Patko, his uncle, Frank Patko, and [Passenger A] gave ICBC false statements. The false statement they made was that Frank Patko was the driver of the vehicle at the time of the accident.
7. ICBC's Special Investigation Unit investigated the false statements made to ICBC.
8. On April 1, 2005 [Passenger A] admitted to police that Jonathen was driving the truck on the day of the accident.
9. On July 15, 2005, ICBC informed Jonathen Patko by letter that he was being [investigated] for providing a wilfully false statement.
10. On November 8, 2005, Jonathen Patko was found not guilty for the criminal offence he was

out on bail for.

11. On May 11, 2006, Jonathen Patko was charged criminally with providing false information to ICBC contrary to s. 42.1(2)(a) of the *Insurance (Motor Vehicle) Act*.

...

14. On May 29, 2008 Jonathen pled guilty to providing false information to ICBC contrary to s. 42.1(2)(a) of the *Insurance (Motor Vehicle) Act*. The Honourable Judge Pothecary imposed a fine of \$3,000 and a restitution order in the amount of \$3,000.

[19] The plaintiff led evidence from three witnesses: Calvin Bodner, section manager of ICBC's Special Investigation Unit, who was the lead investigator in relation to this accident; Sandra Freeborn, a bodily injury claims adjuster employed by ICBC, who was assigned conduct of the file; and Steven Tripp, a senior manager in ICBC's Special Investigation Unit, whose gave evidence about the serious impact of insurance fraud.

[20] These witnesses were effectively cross-examined. Of relevance to the matters now in issue, the following points emerged.

[21] The purpose of Mr. Bodner's investigation was to determine who had really been the driver. The accident had initially been brought to his attention on February 1, 2005, by the RCMP. Mr. Bodner then reviewed the ICBC database and turned up the ICBC claim that had been filed by Mr. Patko. Information was forthcoming from the police within days of the accident which suggested that Jonathen Patko, not Frank Patko, had likely been at the wheel. Mr. Bodner ultimately determined that there was enough evidence to recommend charges of fraud. He estimated that he spent about 46 hours of investigative time on the file, but kept no record of his time. He was a salaried employee and so was not paid on an hourly basis.

[22] During the course of this investigation, Mr. Bodner learned that Jonathen Patko was under a curfew at the time of the accident, and had two girls as passengers. It was his understanding from his investigation that the primary reason for Mr. Patko's deception was his fear of the consequences of his curfew violation. He was obviously not trying to cheat ICBC out of money. His investigation turned up no other motive.

[23] In his report of his investigation, Mr. Bodner recommended that ICBC should pay Passenger A less than the amount she would otherwise receive as compensation for her injuries because of her brief participation in the deception. Indeed, her claim was settled for \$8,200, which is less than ICBC would normally expect to pay given her injuries. Passenger K was also paid less than she would otherwise have reasonably expected to recover, because of Mr. Patko's lie. Accordingly, ICBC paid out less in claims than it might have expected had the deception not taken place.

[24] Mr. Bodner prepared a report to Crown counsel concerning the Patkos' deception, and recommended criminal charges. In fact, the Patkos were not charged criminally, but were charged under the *Insurance (Motor Vehicle) Act*. Jonathen pleaded guilty. ICBC provided the Court with information as to the costs it had incurred as a result of the claims. In the result, Jonathen was fined \$3,000, and ordered to pay restitution to ICBC in the amount of \$3,000. Frank did not respond to the charge against him and remains the subject of an outstanding warrant.

[25] At the request of Mr. Hamilton, and after reviewing a transcript of Mr. Patko's sentencing hearing before the Provincial Court Judge, I instructed the jury at this point that (1) the Provincial Court Judge had found ICBC's readily assessable losses to be \$3,000, (2) the Judge did not have the benefit of the evidence before the jury, and (3) it was open to the jury to find ICBC's losses to be less or more than \$3,000.

[26] Ms. Freeborn described how Mr. Patko and his uncle came in and gave statements to the effect that Frank Patko had been the driver. Frank Patko also suggested that he had suffered a soft tissue type of injury and filled out a medical benefits application form. No further information was forthcoming from him, and nothing was paid to him.

[27] Ms. Freeborn subsequently asked Jonathen Patko to fill out an automobile proof of loss form which he had to swear before a lawyer. By this time, she was already suspicious that Jonathen had been the driver, and wanted him to give a sworn statement on the issue.

[28] As far as Ms. Freeborn was concerned, the claim of Passenger K was not compromised as a result of any lie or her own conduct. She had not participated in the deception. The claim of Passenger A, however, which was settled for just over \$8,000, was indeed discounted because of her initial participation in the deception. Ms. Freeborn would ordinarily have expected to pay between \$12,000 and \$15,000 for the injuries sustained by Passenger A. She did not agree that the claim was worth considerably more than that.

[29] The claims of Ford Credit Canada, B.C. Hydro and Port Coquitlam would all have been paid in the same amount regardless of who was driving. An independent adjuster was hired to interview the two passengers, which step would also have been taken in the ordinary course. The interpreter cost and the DNA testing cost, however, would not have been incurred had it not been necessary to investigate the issue of who was driving.

[30] Ms. Freeborn gave no evidence about how much time she spent on the file. Like Mr. Bodner, she was a salaried employee and therefore was not paid on an hourly basis.

[31] Mr. Tripp gave evidence about the cost of automobile insurance fraud, indicating that according to Canada-wide industry-accepted parameters calculated by the Canadian Coalition of Insurance Companies, fraud cost approximately \$100-\$150 per policy. In British Columbia, this would amount to some \$300,000,000 per year.

[32] Mr. Murphy's cross-examination of Mr. Tripp appeared to me to have some impact on the jury. Mr. Tripp was unable to back up his figures (they were not developed for British Columbia and ICBC had none of its own), or explain why ICBC was not doing more to combat this appalling plague. He was obliged to concede that the case of Jonathen Patko did not fit into the various types of fraud covered in ICBC's manual, although Mr. Tripp thought it arguable that it was covered by property damage claim fraud even though the property damage claims would have been paid regardless of who was driving. He could not explain why ICBC had not told Mr. Patko of its suspicions that he was lying, and conceded that if Mr. Patko had told the truth, it is unlikely that ICBC would have withheld that information from the police.

[33] An affidavit from an ICBC employee was admitted into evidence which gave hourly rates which ICBC would expect to pay for investigation and adjusting.

[34] Evidence was read in from Jonathen Patko's examination for discovery, including the following questions and answers:

81 Q All right. So on these two occasions when he reported the accident, when you came in and gave a statement to ICBC and you told them that Frank was driving, you knew what you were telling ICBC was not true; correct?

A I did.

82 Q Okay. And also at the time you knew that ICBC needed to know who the driver of the vehicle was so that ICBC could get an accurate account of the accident. Do you agree with that?

A I did.

83 Q Yeah. And I gather that you also knew that by lying to ICBC about who the driver was you were preventing ICBC from getting an accurate account as to how the accident occurred. Do you agree with that?

A It wasn't my intentions, but, yes, I was.

84 Q Okay. And you understand that by delaying until now to come forward with the truth as to who the driver was, ICBC's been unable to obtain an accurate account as to how this accident occurred. Would you agree with that?

A I would.

85 Q And I'll ask you if you agree with this: you understand that by delaying until now to come forward and tell the truth as to who was driving your truck ICBC has incurred expenses in the form of investigating and adjusting expenses and commencing this lawsuit. Do you agree with that?

A Yes, I do.

[35] Following the close of ICBC's case, Jonathen Patko elected to call no evidence and applied for an order dismissing the action on the ground of insufficient evidence. I dismissed that application, essentially on the basis submitted by Mr. Hamilton, that the weighing of evidence, for which this application called, was for the jury and not for me. That was the end of the evidence portion of the trial.

THE CASE THAT WENT TO THE JURY

[36] I held a pre-charge conference with counsel in order to obtain their submissions as to the points of law on which the jury should be charged, and to discuss in a preliminary way the questions that would go to the jury. One of the issues we discussed was that of the wilfully false statement Jonathen Patko was alleged to have made, and the requirement in law that it be material to the claims. I suggested that the question of whether the statement had been made wilfully should not, on the evidence, be left with the jury, but Mr. Murphy was adamant that it should be, and the appropriate definition of "wilfully" was discussed. Mr. Hamilton did not oppose Mr. Murphy on this point.

[37] I also queried whether the issue of punitive damages should be left with the jury given that the law, as I understood it, was such that an award of punitive damages against Jonathen Patko would be difficult to justify on the facts of this case. Mr. Hamilton argued strenuously that this was a question of fact that had to be left to the jury, and that in any event, the jury would have to assess punitive damages against Frank Patko. I accepted his submissions in this regard.

[38] I then completed a draft of my proposed charge to the jury, and had it distributed to counsel by e-mail. The following morning, some amendments were made to the charge at the request of counsel, but not many. In the meantime, counsel had by agreement formulated the questions to be put to the jury, following the outline of my charge. Those questions were divided into three issues. The first issue was dealt with as follows:

ISSUE 1

1. Did Jonathen Patko make a false statement to ICBC that was wilful concerning who was driving the Patko Truck at the time of the Accident?

Yes_____ No_____

2. If your answer to question 1 is "NO", you do not have to answer any further questions under the section and proceed to Issue 2.

3. Was Jonathen Patko's false statement material to the claims advanced?

Yes_____ No_____

4. If your answer to question 3 is "NO", you do not have to answer any further sections under this section and proceed to Issue 2.

5. What accident payment costs do you award ICBC as against Jonathen Patko?

Amount_____

[39] With respect to this issue, the jury was instructed that the making of a false statement was admitted by Jonathen Patko, but that ICBC had to prove that the false statement was made wilfully, and was material to the claims. They were then charged as follows:

In law, "wilfully" means that it was done intentionally, knowingly and purposely, without justifiable excuse. It is to be distinguished from a statement given carelessly, thoughtlessly, heedlessly or inadvertently. The onus is on the plaintiff to satisfy you that the false statement Jonathen Patko admittedly gave was given wilfully.

If you are so satisfied, then the onus is on the plaintiff to prove to you that the wilfully false statement was material to the claim. In law, a statement is material to the claim if it is capable of affecting the mind of the insurer (the plaintiff) either in the management of the claim or in deciding to pay it. In this

case the claims to which the statement must have been material consist of the claims that ICBC paid out and now seeks to recover from Jonathen Patko. That is the property damage claims paid to Ford Credit Canada, BC Hydro and Port Coquitlam, and the bodily injury claims paid to the two passengers. So it must be material to those claims.

[I]f you are satisfied that on a balance of probabilities Jonathen Patko's false statement was not only wilfully made but was also material to those claims, then it follows as a matter of law that Jonathen Patko has forfeited his right to insurance coverage for those claims and you must find him liable to ICBC for the funds it has paid out to satisfy those claims. I call these accident payment costs. They total \$53,843.41.

[40] Under the heading of Issue 2, the following questions were posed:

- 6. Did Jonathen Patko commit fraud?
Yes_____ No_____
- 7. Did Jonathen Patko conspire with Frank Patko to injure ICBC?
Yes_____ No_____
- 8. If your answer to either question 6 or question 7 is "YES", what administrative costs do you award ICBC jointly and severally as against Jonathen Patko and Frank Patko?
Amount_____

[41] On that issue, I charged the jury as follows:

Under this basis the plaintiff must prove on a balance of probabilities that Jonathen Patko committed fraud on ICBC or entered into a conspiracy to injure ICBC.

In this context, fraud (more properly called deceit) exists where you find that:

- a) an individual makes a false representation of fact;
- b) knowing it to be false;
- c) with the intention that it should be acted on by the plaintiff; and
- d) the plaintiff has acted upon the false statement and has sustained damage by so doing.

Based on the admissions in this case we know that Jonathen Patko made a false statement to ICBC about who was driving the Ford truck at the time of the accident. On the evidence there really is no other conclusion you can come to other than that Jonathen Patko knew the statement was false. Therefore, requirements (a) and (b) outlined above have been satisfied on the evidence.

You must consider whether the other two requirements, (c) and (d), have also been satisfied: That Jonathen Patko intended ICBC to act upon his statement, and that ICBC in fact did so and sustained damage by so doing. In this regard you are entitled to conclude that Mr. Patko intended the natural and probable consequences of his act.

If you conclude that the test is satisfied, then Jonathen Patko is liable to ICBC at common law for what ICBC has lost as a result of the false statement. It is important to understand, by the way, that the fact of the lie does not become the cause of action of deceit until there has been reliance on it and loss suffered. You can tell a lie that causes no loss. Nobody can sue you for that.

If you conclude that the test is not met so that there was no fraud or deceit, you must then consider whether Jonathen Patko is liable to ICBC for the tort of conspiracy.

In a conspiracy action the plaintiff must prove the following:

- (aa) that there was an agreement between two or more persons;
- (bb) that those persons took action pursuant to that agreement;

(cc) that the conspirators intended by their action to cause damage to the plaintiff -- and that is both of them; and

(dd) that as a result of the conspiracy the plaintiff suffered an actual loss.

Now, again, based on the admissions in this case we know that Jonathen Patko and Frank Patko agreed to make and did make a false statement to ICBC about who was driving the Ford truck at the time of the accident. Therefore, again, elements (aa) and (bb) outlined above have been satisfied. Accordingly, you must consider elements (cc) and (dd), whether the conspirators intended by their action to cause damage to ICBC and, if so, whether as a result ICBC suffered an actual loss. If you answer both questions in the affirmative, then Jonathen Patko is liable to ICBC for the tort of conspiracy.

On the issue of whether ICBC suffered an actual loss there is evidence that ICBC incurred certain expenses that it would not have incurred but for the false statement. These are the DNA testing expense of \$1,800 and the interpreter cost of \$175. Whether these constitute an actual loss is discussed below.

Damages for the second basis of liability: the damages which ICBC claims as a result of the alleged fraud and conspiracy consist of what I will call administrative expense costs. These are made up of the value of the time expended by ICBC staff, principally the two witnesses from whom you heard, Mr. Calvin Bodner, the investigator, and Ms. Sandra Freeborn, the adjuster, in investigating the issue of who was driving and in adjust the claims, together with the two expense items discussed above.

There is no doubt these damages are claimable against Frank Patko and once you are satisfied as to the properly claimable amount of these damages, you must find Frank Patko liable to pay them. If you also find liability against Jonathen Patko on the second basis for fraud or conspiracy, then he will be jointly and severally liable to ICBC to pay these damages. That means that ICBC would be in a position to recover the administrative expense cost as assessed by you from either or both of the defendants.

Now, these kinds of damages are recoverable to the extent that they constitute an actual loss suffered by ICBC as a result of the fraud or the conspiracy and are reasonable and identifiable. The first step of course is to look at the evidence. You have heard evidence concerning the amount of time that Mr. Bodner, the special investigation officer, estimates that he spent in investigating the matter: 46 hours. He did not, however, keep any record of his time. You will have to consider whether this claim is reasonable, given what he accomplished, and how complicated the matter was.

You also have evidence in Exhibit 4, paragraph 3, that the hourly rate for investigators over the time in question ranged from \$28.38 to \$33.28 per hour. Mr. Hamilton has indicated to you he is accepting the lower of those figures. Mr. Bodner testified, however, that he was paid a salary rather than an hourly wage. In these circumstances you must consider whether ICBC's claim for this time is reasonable and identifiable.

With respect to the adjusting expense you have hourly rates but there is no evidence of how many hours Ms. Freeborn spent, although Ms. Freeborn told you about some of the steps you took. She too was paid by salary.

The administrative expense costs, then, flowing from the false statement consist of the DNA testing expense of \$1,800, the interpreter fee of \$175, and such amount if any that you consider has been identified and is reasonable in relation to the time of Mr. Bodner and Ms. Freeborn.

Now, these are the expenses that ICBC incurred as a result of the false statement but do they constitute a loss? You must look at the total result or effect of the defendant's false statement and consider whether there is anything that should be taken into account in offsetting those expenses.

If, after taking the total result into account, you find that ICBC remains out of pocket as a result of the false statement, then that net amount must be awarded as damages against Jonathen Patko and Frank Patko jointly and severally. That is of course assuming that you have made the finding of liability. If you find that nothing remains owing, then Jonathen Patko is not liable on the second basis

even if you conclude that he was guilty of fraud or conspiracy. Liability on either of those bases requires the plaintiff to have suffered a loss. Frank Patko is deemed to have admitted that ICBC suffered loss and damage as a result of his conspiracy, but if you find that in fact no loss was incurred, then there are no damages to award against him either under this basis of liability.

[emphasis original]

[42] Issue 3 concerned the plaintiff's claim for punitive damages. The jury was asked these questions:

9. Do you award ICBC any punitive damages payable by Jonathen Patko?

Yes _____ No _____

10. If your answer to question 9 is "YES", what amount of punitive damages do you award ICBC payable by Jonathen Patko?

Amount _____

11. What amount of punitive damages do you award ICBC payable by Frank Patko?

Amount _____

[43] I instructed the jury that with respect to Frank Patko, their only task was to decide how much should be awarded. With respect to Jonathen Patko, there would be no need to consider the claim for punitive damages unless they first found him liable to ICBC on either or both of the bases covered in Issues 1 and 2.

[44] In terms of the factors to be considered in assessing any punitive damage award, I had this to say with respect to the motive for the conduct in question:

Mr. Bodner's investigation suggested that the lie at issue was intended to cover up Jonathen Patko's breach of his bail conditions, which had been imposed in relation to a charge of which he was subsequently acquitted. ICBC's investigation turned up no other motive. You heard no evidence from Mr. Patko, and it will be up to you to decide whether you can come to any conclusion about what his motive was. But whatever your conclusion, there is no evidence that Jonathen Patko lied in order to obtain any personal financial gain at the expense of ICBC. That is not the case with respect to Frank Patko

[45] Each member of the jury had a printed copy of my charge.

[46] After deliberating for a period of time, the jury returned with a question relating to Issue 2. They wanted to know whether they had to find that all four elements of the torts of fraud and conspiracy had been established, or whether it was sufficient to find that only the first two had been established. They were instructed (again) that they must find all four elements to have been proven in order to find Jonathen Patko liable in fraud or conspiracy. They retired once more.

THE VERDICT

[47] On Issue 1, the jury answered "No" to question #1, whether Jonathen Patko's false statement was wilful. Although it was unnecessary for them to do so, they also answered "No" to question #3, whether the false statement was material to the claims advanced.

[48] On Issue 2, the jury answered "No" to question #6, whether Jonathen Patko committed fraud, and "No" to question #7, whether Jonathen Patko conspired with Frank Patko to injure ICBC.

[49] On Issue 3, the jury answered "Yes" to question #9, whether they awarded ICBC any punitive damages payable by Jonathen Patko, and in question #10 awarded \$4,000. No punitive damages were awarded against Frank Patko.

[50] The jury's handling of Issue 3 was clearly inappropriate, and this was discussed with counsel in the jury's

absence. The jury then returned to the courtroom, and I redirected them that having found Jonathen Patko not liable under Issues 1 and 2, they could not award punitive damages against him under Issue 3. We then adjourned to await the jury's further verdict.

[51] Court was reconvened at the request of Mr. Hamilton who advised that he had an application for a mistrial based on Rule 41(2), on the ground that the jury's answers were conflicting. I noted, however, that Rule 41(2) permitted a redirection, which we had just undertaken. In those circumstances, I considered it preferable to await the return of the jury, which occurred at that very moment. The jury's response was to find that no punitive damages were payable by Jonathen Patko, but that ICBC was entitled to \$4,000 in punitive damages from Frank Patko.

[52] At that point, Mr. Murphy moved for judgment dismissing the claim against Jonathen Patko, but Mr. Hamilton advised that he intended to proceed with an application for a mistrial and for the matter to be retried. That brings us to the present proceeding.

THE PLAINTIFF'S POSITION

[53] For ICBC, Mr. Potts submitted that I should set aside the jury's verdict on either of two bases. First, the second verdict, just like the first, was not sustainable at law due to inconsistent answers, and accordingly Rule 41(2) applied. Second, there was simply no evidence to support the jury's answers to questions #1, 3, 6 and 7, so that those questions in fact never should have gone to the jury.

A. Inconsistent answers

[54] As noted, in their first verdict, the jury found that Jonathen Patko was not liable to ICBC under either Issue 1 or Issue 2, but nevertheless purported to award ICBC punitive damages against Jonathen Patko in the amount of \$4,000. This was not a result that was possible in law, and so I redirected the jury.

[55] Mr. Potts now points out that the second verdict was equally unsustainable because there was no compensatory damage award against Frank Patko to which an award of punitive damages could be attached. This is because the questions as drafted by counsel under Issue 2 did not ask the jury to award damages in fraud against Frank Patko alone in the event that no liability was found on Jonathen's part. Mr. Potts helpfully directed me to a case in which a similar problem arose: *I.C.B.C. v. Sun et al.*, 2003 BCSC 1175.

[56] In that case, Groberman J., as he then was, had presided over a jury trial in which the plaintiff, ICBC, alleged that the defendants had staged five motor vehicle accidents and fraudulently claimed damages with respect to them. The jury had to deal with claims against 15 defendants, against 10 of whom default judgment had been taken, as it had against Frank Patko in our case. With respect to those defaulted defendants, the jury was asked to quantify its award of special damages in respect of each of them, and to decide what, if any, award of punitive damages it would make against each of them.

[57] In its verdict, the jury awarded special damages against each of the defendants except one, Mr. Baryaktarovic, who was one of the defaulted defendants, and awarded punitive damages in the amount of \$20,000 against each of the defendants, including Mr. Baryaktarovic.

[58] Groberman J. noted that the jury should not have awarded punitive damages against Mr. Baryaktarovic without finding him liable for some amount of special damages. He concluded that in this situation, Rule 41(2) applied. The jury had given conflicting answers to the two questions posed to them with respect to Mr. Baryaktarovic, and judgment could not be pronounced on those findings against him. He therefore declared a mistrial with respect only to the claim against Mr. Baryaktarovic, and accepted ICBC's invitation to proceed as judge alone – the same invitation as has been extended to me in the present case in very similar circumstances.

[59] On the evidence before him, Groberman J. found that ICBC was entitled to special damages against Mr. Baryaktarovic in the amount of \$93, and further awarded the sum of \$20,000 in punitive damages against that defendant, which sum the jury had obviously considered appropriate. He was satisfied that the jury had simply overlooked the special damages in Mr. Baryaktarovic's case.

B. No Evidence

[60] Mr. Potts argued forcefully that, as a matter of its inherent jurisdiction, the Court can and should overturn the jury verdict where there was simply no evidence to support it. He maintained that there was no evidence upon which the jury could conclude that Mr. Patko had not made his false statement wilfully, and no evidence on which the jury could conclude that the false statement was not material to the claims. Similarly, he argued that there was no evidence upon which the jury could find that Mr. Patko had not committed fraud. According to Mr. Potts, those questions should never have been left to the jury. Only the assessment of punitive damages should have gone to the jury.

[61] In Mr. Potts' further submission, the position taken on behalf of Jonathen Patko was based on sympathy only, and Mr. Murphy's argument to the jury should have been the subject of an objection. That position was that Jonathen Patko did not make the false statement wilfully because he had no choice but to lie. If he had not lied, the adjuster would have advised the police of his breach of curfew. Mr. Potts argued that this was not a "justifiable excuse" so as to render the false statement not wilful. If Mr. Patko did not want the police to learn about his breach of curfew, his solution was to keep quiet and make no claim for the damage to his truck, instead of getting ICBC to pay the money to fix it.

[62] Similarly, once he elected to make an insurance claim, it could not be said that his lie was not material to that claim. Moreover, Mr. Potts pointed out, Jonathen Patko pleaded guilty to an offence under s. 42.1(2)(a) of the **Insurance (Motor Vehicle) Act**, thereby raising a rebuttable presumption that the false information was material to the claim.

[63] On the issue of fraud, Mr. Potts argued that the defendant had given no evidence about his intention, which is one of the elements of fraud, and had admitted on discovery that ICBC relied on what he said and suffered loss as a result.

[64] Mr. Potts then took me to a line of cases supporting his contention that in addition to Rule 41, I have the jurisdiction and discretion to refuse to accept the jury verdict where I consider that there was no evidence to support the findings of the jury. These cases included **McCannell v. McLean**, [1937] S.C.R. 341, **Haynes v. Canadian Pacific Railway Co.** (1972), 31 D.L.R. (3d) 62, [1972] B.C.J. No. 751 (C.A.), **LeBlanc v. Corporation of the City of Penticton** (1981), 28 B.C.L.R. 179 (C.A.) and **Johnson v. Laing**, 2004 BCCA 364, 30 B.C.L.R. (4th) 103.

[65] I accept that I have the jurisdiction for which Mr. Potts contends. Whether or not I agree with the jury's verdict is of no consequence. Apart from the jurisdiction conferred by Rule 41, I may refuse to accept the verdict only where I am satisfied that there was no evidence to support the jury's findings.

DISCUSSION

[66] As discussed above, there is no question that the jury's second verdict was flawed. Because the jury was not asked under Issue 2 to assess what "administrative costs" it would award against Frank Patko alone, we ended up with an award of punitive damages against Frank Patko in the amount of \$4,000, unsupported by any award of compensatory damages. This flaw clearly brings Rule 41(2) into play.

[67] But, as was the case in **I.C.B.C. v. Sun**, *supra*, the flaw arises only with respect to one defendant, against whom default judgment had been taken. There is nothing about the jury's answers which renders it impossible to pronounce judgment dismissing the claims against Jonathen Patko as requested by Mr. Murphy. This brings Rule 41(3) into play.

[68] Consequently, unless I am prepared to refuse to accept the jury verdict on the ground that there was no evidence to support the jury's findings, I am satisfied that the proper course would be to follow the example set by Groberman J. in the **Sun** case. The result would be to declare a mistrial only with respect to the claim against Frank Patko, and to substitute my own verdict on that claim at the invitation of Mr. Potts. The claim against Jonathen Patko would then be dismissed in accordance with the balance of the jury's findings.

[69] I therefore turn to consider the jury's findings with respect to the claim against Jonathen Patko.

[70] My first observation is that the jury did exactly what was requested of it. It answered the questions put to it by the agreement of counsel. It is only after the jury answered the questions that, in retrospect, plaintiff's counsel complained that the questions ought not to have gone to the jury at all. In these circumstances, it seems to me that I must be very cautious indeed before refusing to accept the jury's answers to the questions that the parties agreed it should be asked, especially at the behest of the party who required the jury in the first place.

[71] This is particularly so in relation to question #1, whether Jonathen Patko's false statement had been made wilfully. I specifically raised with counsel the question of whether it should properly be left to the jury. Counsel were content that it should be – that is, until it was answered in a manner unexpected by the plaintiff and its counsel.

[72] It is noteworthy that the relevant forfeiture provision in the *Insurance (Motor Vehicle) Act* refers to an insured who "makes a wilfully false statement". Other parts of that section use different language such as "falsely describes" or "knowingly misrepresents", while the offence section, s. 42.1(2)(a), which led to Mr. Patko's guilty plea, refers to information "that the person knew or ought to have known is false or misleading". This suggests that the forfeiture section requires more than that the insured intended the statement to be false, or knew that it was false. In law, the term "wilfully" imports not only the concepts of intention and knowledge, but also whether there was a justifiable excuse.

[73] It would appear that the jury concluded that Mr. Patko had a justifiable excuse for making a statement he knew to be false. What was justifiable in the circumstances was for the jury to decide. Even though Mr. Patko did not testify, there was at least some evidence from which the jury could conclude that his false statement was intended in no way to cause harm to ICBC, but rather was intended to avoid the personal consequences of his breach of curfew. I refer to the evidence of Mr. Bodner about his investigation into motive, and Mr. Patko's answer to question #83 on his examination for discovery. In addition, there was evidence from which the jury could reasonably conclude that if Mr. Patko had not lied, ICBC would have disclosed his breach of curfew to the police notwithstanding that it was irrelevant to his insurance coverage, and despite the reciprocal obligation between insurer and insured to deal with each other in good faith.

[74] Mr. Potts argued vigorously that this could not constitute a justifiable excuse. If Mr. Patko wished to avoid the consequences of his breach of curfew, he had another choice: to swallow the loss and present no insurance claim at all. That, however, was for the jury to decide, and decide it they did. It also ignores the personal injury claims of the two passengers, which had to be dealt with in any event, the legal obligation to report an accident, and the substantial premium Mr. Patko paid for his insurance coverage.

[75] In these circumstances, I am not persuaded that it would be appropriate for me to refuse to accept the answer of the jury to question #1. That disposes of Issue 1.

[76] Turning to Issue 2, it is evident to me from the questions asked by the jury that although they accepted that Mr. Patko had knowingly made a false representation of fact, they were not satisfied that he intended that it should be acted on by ICBC, and/or that ICBC had acted upon the false statement and sustained damage by so doing.

[77] Once again, I am unable to say that there was no evidence capable of supporting these findings. I have already reviewed the evidence relating to Jonathen Patko's intention. In addition, there was evidence from which the jury could reasonably conclude that ICBC became aware almost immediately that Mr. Patko's statement was likely false. Indeed, this was brought to Mr. Bodner's attention before he was even aware of the claim. The jury might well have concluded that ICBC did not in any way rely upon the false statement, but acted as it did precisely because it did not believe it. Indeed, Mr. Bodner's time appeared to have been devoted principally to building a case for criminal or quasi-criminal charges against the Patkos. This may have represented a cost to ICBC, but arguably was not done in reliance upon the truth of the false representation.

[78] With respect to damages, there was no doubt (and the jury was so instructed) that in the course of investigating the question of who was driving, ICBC incurred expenses totaling \$1,975. Nevertheless, the jury evidently formed the view that ICBC had not suffered a loss as a result of the false statement. There was, of course, undisputed evidence that Jonathen Patko had already paid ICBC \$3,000 by way of restitution. The jury, it would appear, concluded that this more than set off the expenses incurred by ICBC. In light of the jury's answers under this issue, I can only assume that the jury concluded that the administrative costs in the form of the hours

spent by the adjuster and the investigator were not sufficiently identifiable or reasonable, given that these were not hourly wage employees, and in view of the absence of any record of their hours. These were findings of fact that it was open to the jury to make.

CONCLUSION

[79] For these reasons, I conclude that it would not be appropriate for me to refuse to accept the jury's findings relating to the claim against Jonathen Patko. The plaintiff's claim against Jonathen Patko is accordingly dismissed on the basis of those findings.

[80] As far as the claim against Frank Patko is concerned, it is clear, as I have said, that judgment cannot be pronounced on the basis of the jury's answers. In the circumstances, given Frank Patko's deemed admissions and the evidence at trial, ICBC is entitled to an award of compensatory damages for his admitted fraud. I find that this would consist of the costs incurred by ICBC of \$1,975, together with some amount for the time spent by Mr. Bodner in his investigation. I am not prepared to include any amount for time spent by Ms. Freeborn, as there was no evidence of what that time was, and she would clearly have had to adjust the claim in any event. I also note that Mr. Bodner kept no record of his hours, and I am not persuaded that compensation for 46 hours is justified, particularly given that it was fairly clear from the beginning that Jonathen had been the actual driver. I will allow 34 hours at \$28.38 per hour, for a total of \$964.92.

[81] As far as punitive damages are concerned, I see no reason to differ from the amount assessed by the jury.

[82] I therefore award ICBC damages for fraud in the amount of \$2,939.92 together with applicable pre-judgment interest, and punitive damages of \$4,000, as against Frank Patko.

[83] There remains the question of costs; ICBC's against Frank Patko, and Jonathen Patko's against ICBC. I understand that Mr. Murphy has some submissions to make in this regard, and I would appreciate the further assistance of counsel. Counsel may arrange a further date with the registry for this purpose.

"Grauer J."

The Honourable Mr. Justice Grauer