
CANADA / JUDGMENT

Yeterian v. I.C.B.C.

2004 BCSC 404

COURT

Supreme Court of British Columbia

DECIDED

29 March 2004

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2004 BCSC 404 Yeterian v. ICBC

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yeterian v. I.C.B.C.,

2004 BCSC 404

Date: 20040329

Docket: S031083

Registry: Vancouver

Between:

Vicken Yeterian

Plaintiff

And

Insurance Corporation of British Columbia

Defendant

Before: The Honourable Madam Justice Holmes

Reasons for Judgment

Counsel for the Plaintiff:

B. Poston

Counsel for the Defendant:

K.L. Martin

M.A. Girard

Date and Place of Trial/Hearing:

March 18-19, 2004

Vancouver, B.C.

OVERVIEW

- [1] The Insurance Corporation of British Columbia (I.C.B.C.) resists Mr. Yeterian's insurance claim for the theft of his motorcycle, by contending that he accidentally crashed and damaged the motorcycle and then falsely reported it stolen because he had no insurance coverage for collision damage. Although I.C.B.C. has devoted considerable resources to resisting the claim, no clear or cogent evidence emerges to support the far-reaching allegations I.C.B.C. makes.

BACKGROUND

- [2] The incident occurred during the night of October 14-15, 2002.
- [3] The plaintiff, Vicken Yeterian, was 24 years of age at the time. He lived harmoniously with his parents in the 4100-block of West 14th Avenue in Vancouver. He is a high-school graduate, who had completed one term at Langara College, and left college in order to earn an income. He worked first at Carter Honda, as a used car assistant manager. After September 1997, he joined his brother in a food distribution business. He is now manager of their successful and growing business, from which he earns a moderate income.
- [4] Mr. Yeterian had purchased the 600 CC motorcycle in January 2001, new from Carter Honda. It cost him \$17,424.75, and the extended warranty cost an additional \$1,144. He made a modest downpayment, and financed the remainder through Honda of Canada.
- [5] The motorcycle was Mr. Yeterian's pride and joy. He washed and waxed it each week, and ensured that it was regularly serviced and maintained.
- [6] Mr. Yeterian had taken instruction in motorcycle riding and safe riding habits. He rode his motorcycle primarily for leisure and relaxation. He also had a two-seater car for more functional travel. During the icy winter months, usually November through March, he took the motorcycle off the road, removed its insurance, and stored it in his parents' garage.
- [7] It was agreed that at the time of the incident in October 2002, the motorcycle had a value of \$8,000.

- [8] October 14, 2002 was a Monday, and one of Mr. Yeterian's days off work. He testified that he rode the motorcycle around the city during the day, and then parked it on the street a couple of houses away from his parents' home. In the early evening, two friends joined him at his parents' home for a barbecue. One friend needed to be home early, and Mr. Yeterian and the other friend drove him home to Kitsilano in Mr. Yeterian's parents' car, and returned to the Yeterian residence.
- [9] Mr. Yeterian testified that he saw the motorcycle still parked on the street after the remaining friend had left for his home in Burnaby. This was shortly before Mr. Yeterian went to bed at around midnight.
- [10] Mr. Yeterian was awoken in the morning by a telephone call from the Vancouver Police Department, reporting that they had found the Honda motorcycle lying on its side in the 2100-block of West 11th Avenue.
- [11] When it was found, the motorcycle's alternator cover was cracked, and oil leaked onto the road. Most of the remaining damage was cosmetic, scratches and dents. It seems to be agreed that the motorcycle could not be economically repaired and that if Mr. Yeterian is to be compensated for the loss of the motorcycle, he should receive its full \$8,000 value.
- [12] There was no damage to the ignition or locking mechanisms of the motorcycle when it was found. This indicates that if the motorcycle engine was started, the person doing so had a key. Only Mr. Yeterian had a key to the motorcycle on the night in question.
- [13] Mr. Yeterian testified that when he parked the motorcycle, he secured it as was his habit. The ignition locked similarly to a car's. In addition, the steering could be locked by an extra turn and push of the key. This additional "steering lock" or "fork lock" fixed the handlebars turned to the left, so that the motorcycle could move only in a circle to the left. Mr. Yeterian testified, and told the various I.C.B.C. representatives who questioned him, that he is almost certain that he applied both the ignition and the steering or fork lock, but that it is possible that he neglected to do so.
- [14] Mr. Yeterian testified that he owned and sometimes used an additional lock, similar to a kryptonite bicycle lock that threads through the wheel. However, he did not use it that night, admittedly out of laziness. Nor, for the same reason, did he store the motorcycle in his parents' garage. To do so, he would have had to remove and later return their vehicle, and to do the same thing when he went to work the next day.

POSITIONS OF THE PARTIES

- [15] I.C.B.C. was and is not satisfied that a theft occurred, and suggests that Mr. Yeterian must himself have ridden and crashed the motorcycle, perhaps as a result of skidding on fallen wet leaves on the road. I.C.B.C. arrives at this position largely because the ignition and locking mechanisms were undamaged when the vehicle was found, and because when the steering/fork lock is applied, the motorcycle can only move in a circle.

- [16] Mr. Yeterian maintains that he had nothing to do with the removal of the motorcycle. He frankly admits that he has no explanation for how the motorcycle may have been stolen. He acknowledges -- and has always done so -- that nobody other than himself had access to a key. When the I.C.B.C. representatives asked him to speculate as to how the motorcycle might have been taken without damage to the ignition, he suggested that possibly it was lifted by two or more people onto a truck from which it later fell, or that if he had neglected to apply the steering lock someone could have rolled the motorcycle away.

DISCUSSION

- [17] There are difficulties with I.C.B.C.'s position that the motorcycle could not have been stolen. It fails to account for two reasonable possibilities: (1) that the fully locked motorcycle was transported by truck or otherwise to the place where it was recovered, and (2) that Mr. Yeterian failed to follow his usual practice of applying the steering/fork lock, and the motorcycle was coasted or pushed away.
- [18] There was no evidence as to the status of the steering/fork lock until the motorcycle had been in I.C.B.C.'s possession for about six days. The police officer who found the motorcycle gave no evidence as to whether the lock was engaged. There was no evidence as to whether the lock was engaged when the motorcycle first arrived at the I.C.B.C. claim centre. Between the time of its arrival at the claim centre and the time of its examination about six days later, Mr. Yeterian had delivered the ignition keys to the I.C.B.C. adjuster. It is therefore consistent with the evidence that the steering/fork lock was not engaged when the motorcycle was found, and that the key was used to lock the steering and the forks while the motorcycle was in I.C.B.C. custody.
- [19] I.C.B.C.'s position also assumes that it would be extremely difficult or impossible for a thief to push or coast the motorcycle from Mr. Yeterian's home to the place where the motorcycle was recovered. The evidence however was otherwise. Mr. Yeterian testified under cross-examination that although the motorcycle weighs 400 pounds, it can be pushed as easily as a bicycle; only upward hills pose a problem. The distance is about four kilometres through West Point Grey and Kitsilano. Some of the routes involve steep or lengthy uphill grade, but others do not.
- [20] Mr. Yeterian was a credible witness. He gave his evidence in a straightforward and forthright manner, without any apparent effort to shade the facts, including those that did not assist his case. He was unshaken in cross-examination, answering the challenges to his credibility courteously and, I find, with an apparently sincere effort to assist. Witnesses for I.C.B.C. who dealt with him during the claims process described his attitude and demeanour similarly.
- [21] No other witness testified for Mr. Yeterian. I accept his evidence that his parents were away in Europe at the time. He gave adequate explanations for his failure to call either or both of the friends with whom he spent the evening. I note that although I.C.B.C. suggested that Mr.

Yeterian may have driven the Kitsilano friend home, and have abandoned the motorcycle after an accident because he may have been impaired by alcohol, there was no evidence that Mr. Yeterian had been drinking and I.C.B.C. did not call either or both of Mr. Yeterian's friends as witnesses. Mr. Yeterian was cooperative with I.C.B.C. throughout, and there is no indication that he was unwilling to provide the friends' names or contact information.

- [22] I did not find helpful the defendant's collision reconstruction report and its conclusions as to the cause of damage to the motorcycle. The author of the report examined the motorcycle in December 2003, long after the incident in question, and after the motorcycle had been involved in a second accident. After I.C.B.C. denied Mr. Yeterian's claim in respect of the October 2002 incident, he spent the necessary funds to make the motorcycle roadworthy, but did not repair the extensive cosmetic damage. It cannot reliably be determined from the expert report which damage was caused by the October 2002 incident and which by the later accident, and it is not clear to which incident the report's conclusions apply.
- [23] When the motorcycle was found, its license plate had been removed. I.C.B.C. suggested that Mr. Yeterian may have removed the license plate to delay any investigation of the crash and his identification as the driver. No evidence was led as to how the license plate was attached and therefore removed. Nor was Mr. Yeterian asked whether he customarily carried tools with him on the motorcycle. This area of the evidence was therefore intriguing but ultimately unhelpful.
- [24] Counsel devoted considerable attention in their submissions to the applicable burden of proof. They agree that this is described in general terms in *Bevacqua v. Insurance Corp. of British Columbia* (1999), 68 B.C.L.R. (3d) 262, 179 D.L.R. (4th) 219 (C.A.) at ¶47-49. Once the insured proves a loss falling within the scope of the insurance, it is for the insurer to prove by clear and cogent evidence that the insured participated in or procured the loss.
- [25] Mr. Justice Brenner, as he then was, described the burdens more specifically in *Golden (1995) International Trading Ltd. v. Insurance Corp. of British Columbia*, [1998] B.C.J. No. 1643 (Q.L.)(S.C.) at ¶29:

As both counsel submitted these cases tend to be fact specific. In my view the following principles arising in part from the foregoing cases are to be applied when dealing with an insurance claim where the plaintiff contends that a motor vehicle was stolen:

1. The plaintiff bears the legal burden of proving on a balance of probabilities that a loss arising from the insured peril has occurred (i.e. the theft of the motor vehicle).
2. This burden remains on the plaintiff and never shifts. If the plaintiff adduces some evidence in support of a theft it may be necessary for the defence to lead evidence to rebut it. If by the end of the trial the plaintiff fails to convince the trier of fact that it is more probable than not that a theft occurred, the plaintiff's claim will be dismissed.

3. On the other hand if the trier of fact concludes it is more likely than not that a theft occurred, then the burden of proof shifts to the defence to prove that a term of the insurance contract has been breached (i.e. the participation by the plaintiff in the theft of the motor vehicle or in the making of a claim false in some other manner).
 4. In some cases the defence's evidence called to rebut the plaintiff's contention of a theft may also be the evidence relied on by the defence to prove that the insured breached the policy by making a fraudulent claim. In other cases the defence's evidence of fraud may relate to the condition and value of the motor vehicle rather than to the circumstances of its alleged theft.
 5. If the trier of fact is convinced on a balance of probabilities that a theft occurred, then the court will scrutinize the defence's evidence in support of a finding that the plaintiff was involved in the theft or is in some other manner involved in a fraudulent claim with a level of care commensurate with the gravity of the serious nature of that type of allegation.
- [26] Mr. Yeterian's account of the events, including his acknowledgement that he cannot explain the theft, is convincing. The possibilities that the motorcycle was removed in a fully-locked state, perhaps by truck, or that Mr. Yeterian neglected to fully lock it and the motorcycle was rolled or coasted away are reasonable possibilities that are consistent with the evidence.
- [27] Mr. Yeterian has proven a loss. The evidence discloses little but speculation to support I.C.B.C.'s position that he falsely reported a theft.

CONCLUSION

- [28] Mr. Yeterian has proven his claim, and is entitled to damages. There will be damages in the amount of \$8,000, plus interest from the date of loss to the present.
- [29] I am not convinced that Mr. Yeterian is entitled to those portions of his financing loan and extended warranty payments attributable to the period of the loss.

COSTS

- [30] Although Mr. Yeterian's damages may fall within the monetary jurisdiction of the Provincial Court, I am satisfied that it was reasonable for him to bring his claim in this court, and that he should have his Scale 3 costs.

"H.J. Holmes, J."

The Honourable Madam Justice H.J. Holmes

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