

Case Name:

Tilker v. Canada Life Casualty Insurance Corp.

Between

**David Tilker, plaintiff, and
Canada Life Casualty Insurance Corporation, defendant**

[2002] O.J. No. 2309

[2002] O.T.C. 393

42 C.C.L.I. (3d) 102

116 A.C.W.S. (3d) 938

Court File No. 99-638

Ontario Superior Court of Justice

Fedak J.

June 4, 2002.

(75 paras.)

Insurance -- Insurable interest -- What constitutes -- In personal property -- Payment of insurance proceeds -- Actions, defences -- False statement by insured respecting claim -- Failure to disclose -- Misrepresentation in application -- Burden of proof.

Action by Tilker, the insured, against Canada Life for damages arising from their denial of his claim for the loss of a motorcycle he alleged was stolen. Tilker sought the value of the motorcycle and punitive damages. Tilker claimed that he built the 1997 Harley Davidson Custom Softail motorcycle between 1996 and 1998 by purchasing parts from various sources and using the instructions in a manual. He obtained an appraisal which showed a value of \$22,000 and arranged for insurance with Canada Life. He registered the motorcycle. Three days later, he injured his left foot and was not able to ride the motorcycle for about a month after which he claimed he drove about 2000 kilometres. On June 28, 1998, while parked at a tavern for 15 to 20 minutes, Tilker said the motorcycle was stolen. Tilker reported the theft to the police and to Canada Life. He completed a proof of loss. On July 17, 1998 he notified Canada Life to cancel his insurance coverage. An internal memo prepared by Canada Life's employee indicated that Tilker stated he sold the motorcycle. Canada Life

denied that Tilker had an insurable interest in the motorcycle; claimed that the motorcycle was sold, not stolen; and, that he knowingly misrepresented or failed to disclose material facts in his application for insurance.

HELD: Action dismissed. There were grave concerns about Tilker's credibility. There were numerous inconsistencies in his testimony and the evidence emanating from various documents filed by him and Canada Life. There were several versions of the details surrounding the purchase of the motorcycle frame, its price and the vendor. There were inconsistencies in his evidence regarding the purchase of the various other parts. His financial means did not permit the cash outlays necessary to acquire the parts legitimately. It was likely that he deliberately set out to acquire parts he knew were stolen and deliberately arranged for ownership documentation so that he could insure the motorcycle. He was unable to produce any documentation or other reasonable explanation. As such, Tilker did not have an insurable interest in the motorcycle. There was a lack of corroborating evidence to substantiate Tilker's account that the motorcycle was stolen and he failed to prove his claim in this regard. Tilker made statements in obtaining the insurance that were false and wilfully made and designed to deceive the insurer. There was no basis for punitive damages.

Statutes, Regulations and Rules Cited:

Courts of Justice Act.

Insurance Act, ss. 129, 233(1)(a)(ii), 233(1)(c), 233(3),

[Quicklaw note: Supplementary reasons for judgment were released July 16, 2002. See [2002] O.J. No. 2873.]

Counsel:

Brent Thomas Hurst, for the plaintiff.

Martin Forget, for the defendant.

1 FEDAK J.:-- The plaintiff, David Tilker (Tilker) made a claim for the loss of a motorcycle he alleges was stolen from him, and the defendant, Canada Life Casualty Insurance Corporation (Canada Life) denied this claim.

2 Tilker brings this action for:

- a) The value of his motorcycle, \$22,000.00;
- b) Punitive damages in the amount of \$50,000.00;
- c) Pre-judgment interest and post-judgment interest pursuant to the Courts of Justice Act, R.S.O. 1990, and amendments thereto;
- d) The costs of this action;
- e) Such further and other relief as this Court may deem just.

3 The following issues arise in this action:

1. Did Tilker have an insurable interest in a 1997 Harley Davidson Custom Softail motorcycle he alleges he built from used and new parts?
2. Did Tilker prove on a balance of probabilities that the motorcycle was stolen?
3. Did Tilker knowingly misrepresent or fail to disclose any material facts in his application for insurance?
4. Did Tilker willfully make a false statement in respect of a claim under the contract of insurance?
5. Is Tilker entitled to punitive damages?

BACKGROUND

4 Tilker claims that he had a life-long desire to build a motorcycle. He decided to build a 1997 Harley Davidson Custom Softail motorcycle in 1996.

5 He alleges that he started to purchase parts in 1996 and 1997 in various parts of Ontario, and completed the motorcycle in mid-May of 1998. He claims he built the motorcycle in the sunroom of the house in which he resided and that it took him about 6 months to complete. Other than advice from others, Tilker relied mostly on his ability to read the manual (Exhibit #1, Tab 39) and the use of some four or five basic tools.

6 After building the motorcycle, Tilker decided to obtain insurance. Tilker was advised by someone at Canada Life to obtain an appraisal and he obtained one from Shelby Motor Car Co., in Hamilton on May 13, 1998. An appraisal report was prepared by Mr. Ken Edmonds, the then owner of Shelby Motor Car Co., showing a value of \$22,000 (See Exhibit 1, Tab 5).

7 On May 14, 1998, Tilker arranged for insurance coverage on his motorcycle with Canada Life under policy #A0382533. He agreed to pay an annual premium of \$3,351.00. (See Exhibit #1, Tab 7)

8 In order to obtain registration of his motorcycle on May 15, 1998, Tilker was required to execute an affidavit setting out a serial number for the frame and an I.D. number for the crank case. (See Exhibit #1, Tab 1 and Tab 10)

9 On or about May 18 Tilker injured his left foot, which required him to eventually be fitted with a hard cast from just below his knee to his toes. He claims he was not able to ride his motorcycle till mid-June after which he claims he drove to various parts of Ontario for about 2000 kilometers.

10 On June 28, 1998 Tilker testified that he travelled by motorcycle to Mississauga where he spent several hours with his sister.

11 He left his sisters' house at about 5:00 p.m. and travelled to Hamilton via Lakeshore Road, and arrived at Parkdale Avenue and Burlington Street in Hamilton at about 6:00 p.m. At this point, Tilker needed to use washroom facilities. He decided to stop at George and Mary's Tavern at the corner of Parkdale and Melvin Avenue which was approximately 1.5 kilometers away from his home.

12 Tilker claims that he parked his motorcycle in the George and Mary's Tavern parking lot in the third parking spot from the sidewalk. He testified that he locked the front steering column with a padlock and locked the ignition before he went into the tavern. He used the washroom facilities, ordered a coke, and estimates he spent 15 to 20 minutes inside.

13 Tilker then went to the parking lot and found that his motorcycle was missing. The motorcycle was never recovered. He claims that he inquired from a person parked in front of a confectionary store, very close to the parking lot whether he saw anyone take the motorcycle. That person was unable to help him. Tilker then returned to the bar where he called the Hamilton Police to report the theft, and he then called Canada Life to report the theft of his motorcycle. After about 45 minutes, Constable Zadvorny of the Hamilton Police arrived at George and Mary's where he made a note of the theft in his notebook (See Exhibit #1, Tab 18).

14 Tilker called Canada Life on June 29, 1998 when he spoke to Kim Mathews who was known as operator 468. Mathews noted in an internal memo that Tilker called to confirm that his "bike" was stolen from a bar in Hamilton, and that there were no witnesses, but that police officer Zadvorny made a report of this claim. (See Exhibit #1, Tab 20)

15 On July 3, 1998 Tilker met with Gordon Faber, insurance adjuster from Canada Life, at Tilker's then home at 110 Reid Street South, Hamilton. Tilker signed a three page report providing details required by Canada Life. (See Exhibit #1, Tab 21)

16 On July 17, 1998 Tilker signed an Automobile Proof of Loss form seeking \$22,000.00 less \$2,000.00 deductible for a total claim of \$20,000.00. (See Exhibit #1, Tab 24) For some unknown reason, Faber did not receive this original form until July 29, 1998 but he did receive a faxed copy on July 17, 1998.

17 Faber required a VIN number for the motorcycle and Tilker sent him a note indicating that he built this bike from a "compilation" of parts which he received from all over Ontario and that the bike was never purchased as a vehicle therefore there was no VIN number. (See Exhibit #1, Tab 28)

18 On July 17, 1998 Tilker notified Rita Cassaletti of Canada Life to cancel his insurance coverage. An internal memo prepared by Rita Cassaletti indicates that Tilker stated he sold the bike (See Exhibit #1, Tab 25). Tilker confirmed the cancellation in writing (See Exhibit #1, Tab 29), and Canada Life confirmed the cancellation by issuing a cancellation notice on July 24, 1998. (See Exhibit #1, Tab 30)

19 On September 4, 1998, Faber, on behalf of Canada Life confirmed by letter that based on investigations, his claim was denied. (See Exhibit #1, Tab 33)

20 I will refer to other factual details when I discuss the issues.

CREDIBILITY OF WITNESSES

21 There is no issue with respect to the credibility of Kim Edmonds for the plaintiff and Gordon Faber and Rita Cassaletti for the defendant. Each of these witnesses gave evidence in a direct and forthright manner, and cross-examination of these witnesses did not result in destruction or damage to their evidence. I have no hesitation in accepting their evidence.

22 With respect to the credibility of Tilker, I have grave concerns. These concerns arise when I consider the numerous inconsistencies that arise out of his testimony in court and the evidence emanating from various documents filed either by him or by Canada Life at trial.

23 I mention just several such inconsistencies which graphically demonstrate his difficulty with the concept of truthfulness.

24 At trial and in examination for discovery, Tilker indicated that the injury to his foot arose out of an accident at a baseball game. He told the doctor at St. Joseph's Clinic that his foot was injured

by a refrigerator. At trial, he tried to explain the inconsistency on the basis that he was embarrassed to give the true reason.

25 With respect to the purchase of a motorcycle frame, Tilker has several versions. At the trial he testified that he purchased the frame from his friend Carl Haggard. At the examination for discovery, he swore that he purchased the frame from Carl Haggard who ordered it by "E-mail". In response to a letter from Tilker's lawyer Haggard indicated that he did not purchase the frame by "E-mail", but at a swap meet in Fort Erie. (See Exhibit #1, Tab 37) In his affidavit for the Ministry of Transportation, Tilker said he purchased the frame from Mid U.S.A. Cycle.

26 With respect to the price of the frame, Tilker swore in his affidavit for the Ministry of Transportation that he paid \$1,600.00. At the examination for discovery, Tilker swore that he paid \$3,500.00 cash. At his interview with the polygraphers he indicated he paid \$2,500.00. On cross-examination he indicated he was confused.

27 Tilker at his examination for discovery swore that he purchased the motor for the motorcycle from an unknown person in Georgetown as part of the purchase of a number of parts for which he paid \$6,000.00 cash. He swore in his affidavit for the Ministry of Transportation that he purchased the motor from Mid U.S.A. Cycle.

28 At his examination for discovery, Tilker swore he purchased the rear wheel for \$250.00 and the front wheel for \$150.00 at Pooles' Cycle. At the trial, he swore that the front wheel was attached to the fork for which he paid \$1,200.00.

29 With respect to the motorcycle seat, he swore at his examination for discovery that he purchased same at A.L.Choppers. At trial, he swore he purchased the seat at Pooles' Cycle.

30 Tilker has difficulties with memory as to minor details such as to what he drank at George and Mary's Tavern on the day the alleged motorcycle was stolen. At his examination for discovery and at trial he swore he drank a coke. When he spoke to Faber and to the polygrapher, he indicated he drank a gingerale. These incidents reflect adversely on both Tilker's credibility, and on his reliability as a witness.

THE ISSUES, ANALYSIS AND CONCLUSION

31 The first issue deals with the question as to whether Tilker had an insurable interest in a 1997 Harley Davidson Custom Softail motorcycle.

32 There was no doubt that a 1997 Harley Davidson custom Softail motorcycle was registered and that an ownership certificate was issued by the Ministry of Transportation to David J. Tilker on May 15, 1998. (See Exhibit #1, Tab 10)

33 An appraisal of such a motorcycle was prepared by Ken Edmonds, setting out a value of \$22,000.00 (See Exhibit #1, Tab 5). Mr. Edmonds took two photographs of a motorcycle purported to be the motorcycle in question (See Exhibit #1, Tab 3).

34 Canada Life issued a certificate of policy #A0382533 to David Tilker based on information that this was a Kraftec frame with all other parts being from a Harley Davidson (Exhibit #1, Tab 7). All of the above indicates that there was such a motorcycle in existence.

35 The problem arises with respect to whether Tilker knew or should have known that the motorcycle's substantive parts, or the motorcycle itself were stolen, or whether he had already sold the motorcycle when he completed a proof of loss form. (Exhibit #1, Tab 24)

36 In any event, it is the position of Canada Life that Tilker's claim must fail.

37 Canada Life highlights some of the following factors which assists in its contention:

- a) That Tilker will not name or provide an address of the person who allegedly sold a good portion of parts to him in Georgetown;
- b) That Tilker is not able to provide any receipts or trace any monies that he paid for any of these parts he claims he paid in cash;
- c) That Tilker cannot indicate with any degree of certainty where he bought many of the parts in question;
- d) That the only evidence showing his finances is a bank account at the Hamilton Municipal Employees' Credit Union which shows approximately \$1,000.00 per month is deposited from the employer (See Exhibit #1, Tab 35). Out of this \$1,000.00 Tilker is required to pay a loan of \$100.00 per month, his rent, his utilities, his gas, his clothing, his food, and an insurance premium of \$350.00 per month for the motorcycle. That he could afford all these expenses on his income seems incredible;
- e) That Tilker has \$6,000.00 in his shoebox in his closet from which he paid the un-named person in Georgetown. This only Tilker's evidence which is totally uncorroborated. Carl Haggard who was not called as a witness might have been able to provide corroboration.
- f) That while Tilker is on accidents benefits due to an injury to his foot he makes an offer to purchase property known as 208 Kensington Avenue North, Hamilton with the transaction to close on August 27, 1998 (See Exhibit 1, Tab 15) He require approximately \$8,000.00 to close this transaction;
- g) A deposit of \$8,000.00 into his account is made on June 16, 1998. Tilker is unable or unwilling to tell the court where he received the money. He states simply that he cannot recall where the money came from. (Exhibit 1, Tab 35)
- h) Tilker testified that he received a buy out amount of approximately \$18,000.00 (\$16,570.00 net) from his employer Maple Leaf Pork when he returned to work after an employees strike. He produced a slip of paper showing a severance amount of \$8,418.84 and a buy out amount of \$16,570.00. His name is not on this slip of paper, the name of Maple Leaf Pork is absent and there is no date. Maple Leaf Pork did not respond to any questions about this matter.
- i) When the unexplained money in this deposit is considered with the fact Tilker called Rita Cassaletti on July 17, 1998 to cancel the policy because he sold the bike, and the fact that Tilker's expenses were substantially higher than his monthly income, the probability that the motorcycle was sold is extremely high.
- j) Likewise, in light of Tilker's apparent financial difficulties, in the period in which he alleges that he purchased parts from all over Ontario, the probability that the motorcycle or at least many of its parts were stolen looms very high. Indeed he himself swore at the examination for discovery that he suspected the parts were stolen. At trial he indicated that he trusted the

un-named person in Georgetown. This in itself is not an indication that he was duped into purchasing these parts.

38 Hutchinson J. in *Hrycan Enterprises Ltd. or Insurance Corporation of British Columbia* [1989] B.C.J. No. 971 dealt with the issue of stolen goods at page two:

"The general principle of law was settled in this country in *Peoples Bank of Halifax v. Estey* (1907) 34 S.C.R. 429 in which it was held that a person in possession of stolen goods has no title, nor has he a legal or equitable interest in the goods. As those are the necessary requirements to obtain an insurable interest, it follows that a person in possession of stolen property does not have an insurable interest in those goods."

39 In Ontario this rule has been modified. Superior Court Justice Juriansz in *Newcourt Financial Limited v. Bruno* [1999] O.J. No. 2363, found there was no evidence that the defendant Bruno or Municipal Leasing had notice the vehicle was previously stolen. Accordingly, he was found to have an insurable interest in the vehicle.

40 In the Ontario Superior Court of Justice, Mr. Justice Campbell had earlier dealt with a similar problem in *Assaad v. Economical Insurance Group*, [1999] O.J. No. 1653. He found at page 7 that a person in innocent possession of a stolen vehicle had an insurable interest in it.

"He reasoned that though the person in possession of a stolen vehicle does not have legal title to it, he or she does have dominion and control over it, does have the expectation of a benefit in purchasing insurance on it, and does suffer prejudice as a result of its loss."

41 In the case at bar, Tilker was not duped into purchasing what he reasoned were stolen parts of a new Harley Davidson motorcycle. On the balance of probabilities, it is evident that he deliberately set out to acquire parts he knew were stolen. He deliberately arranged for ownership documentation so that he could insure the motorcycle. It was obvious from his financial circumstances he was unable to purchase and obtain title to a legitimate motorcycle or parts. Given that Tilker has been unable to produce any documentation or reasonable explanation that would lead me to believe that the parts were legitimately acquired, I conclude that the motorcycle parts were stolen, and that he knew or should have known that they were stolen. Accordingly, Tilker did not have an insurable interest and therefore fails in his claim on this ground.

42 The second issue is whether Tilker proved on a balance of probabilities that the motorcycle was stolen.

43 Mr. Justice Griffiths writing for the Ontario Court of Appeal in *Shakur v. Pilot Insurance Co.* 73 D.L.R. (4th) 337 stated the following on page 6:

"It is fundamental insurance law that the burden of proof rests on the insured to establish a right to recover under the terms of the policy. In this case, the burden rested on the respondent and remained on the respondent to prove on the balance of probabilities that a theft of her jewelry had occurred. That the appellant in denying the allegation of theft, implied allegedly that the respondent was fraudulent

in putting forward the claim in no way shifted the basic burden of proof resting on the respondent."

44 It is Canada Life's position that besides the issue of credibility there are other factors which make it improbable that the motorcycle was stolen as alleged by Tilker.

45 The matter of credibility was recently dealt with by Madam Justice Malloy in *Coates v. Allstate Insurance Company of Canada* [2002] O.J. No. 80, in a case similar to the case at bar. At paragraph 49 on page 11 she states:

"Conversely, if the onus of proof is on Mr. Coates to prove that the motorcycle was stolen, the plaintiff fails. The only evidence of the theft is the testimony of Mr. Coates Himself. The police officer and Mr. Grogan can only corroborate that the report of the theft was made on November 5, 1999 at the described location. There are such significant problems with Mr. Coates' credibility that I am not prepared to make any findings of fact based solely on his word. His evidence as to the source of funds used to purchase the motorcycle is ?? Illustration of this point."

46 Madam Justice Malloy continues at paragraph 54, on page 13:

"It may be the case that Mr. Coates is telling the truth. There is no evidence to the contrary. However, given Mr. Coates' track record, the many discrepancies in his evidence and his demonstrated willingness to lie when it suits his purposes, I am not in the position to say that something is more likely than not to have happened solely because Mr. Coates says it is so ..."

47 And further down in the same paragraph:

"... Mr. Coates has been dishonest about things in the past and therefore his word alone is not necessarily proof of anything ..."

48 She concludes in paragraph 54:

"... I do not know if Mr. Coates is telling the truth and I am not able to say that it is likely his motorcycle was stolen based solely on his testimony. Therefore, according to the law binding on me, I must conclude that he has not proven his claim."

49 Canada Life raises other factors which create doubt on whether the theft occurred as Tilker alleges:

- a) That given the injury to his foot it would be most difficult for Tilker to drive his motorcycle to Mississauga as he claims he did on the day of the alleged theft;
- b) That he stopped at George and Mary's Tavern located in a questionable area when he was only 1.5 km away from his own residence;

- c) That he locked his motorcycle by a padlock to the steering column and by locking the ignition. Yet there was no evidence of the lock or disturbance of gravel to indicate that the motorcycle was moved or how it was moved.

50 Taking into consideration all the evidence with respect to the theft, I find that there is a lack of corroborating evidence to substantiate Tilker's account. I likewise find, just as Justice Malloy found in the Coates decision that I do not know if Tilker is telling the truth. I am not convinced on a balance of probabilities that a theft occurred. Accordingly, I find that he has failed to prove his claim.

51 In fact, it seems more likely than not that Tilker sold the motorcycle in order to raise funds. I draw this conclusion from the fact that Tilker's income could not have supported his basic expenses, and from the fact that Tilker did not provide an explanation for the \$8000 which mysteriously appeared in his bank account. His claim that he simply cannot remember where the \$8000 came from is absurd.

52 The third issue before me is whether Tilker knowingly misrepresented or failed to disclose material facts in his application for insurance.

53 Section 233(1)(a)ii of the Insurance Act R.S.O. 1990, Chapter I.8 provides:

where,

- (a) an applicant for a contract,
 - (ii) Knowingly misrepresents or fails to disclose in the application any fact required to be stated therein;

a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited.

54 It is the position of Canada Life that when Tilker called Rita Cassaletti on May 14, 1998, he disclosed that he had one ticket two years before this date in which he was charged with failing to have insurance. (See Exhibit #1, Tab 9)

55 Ms. Cassaletti confirmed at trial that it was her practice to routinely ask questions listed on the customer information sheet. (See Exhibit #1, Tab 4) and that at no time did Tilker disclose that he had three accidents and two convictions.

56 Tilker on the other hand testified that he only answered questions put to him, and in any event, he claimed the questions referred to his experience and driving record dealing with motorcycles and not with respect to automobiles. This seems odd because he did disclose that he drove when he had no insurance. The charge dealt with the driving of a motor vehicle and not a motorcycle.

57 Tilker also relies on the provisions of s. 233(3):

"No statement of the applicant shall be used in defence of a claim under the contract unless it is contained in the signed written application or, where no signed written application is made in the purported application, or part thereof, that is embodied in, endorsed upon or attached to the policy."

58 Canada Life readily admits that the application for insurance was not signed. But, it takes the position that despite the discrepancies between the application (Exhibit #1, Tab 4) and the certifi-

cate of insurance (Exhibit #1, Tab 7), the information in the application is incorporated in the policy certificate. As well, Canada Life takes the position that the section relied upon by Tilker is not designed to protect the insured from a clerical error in the face of the misrepresentation.

59 When it comes to the issue of credibility I do not hesitate in accepting the evidence of Ms. Cassaletti over that of Tilker. However, Ms. Cassaletti does not have an independent recollection of the application for insurance by Tilker. She cannot therefore explain discrepancies.

60 Because of the discrepancies between the application and the certificate, I find it difficult to find that Tilker's statement is embodied in, endorsed upon or attached to the policy.

61 I conclude therefore that s. 233(3) does provide a good defence for Tilker.

62 The fourth issue before the court is whether Tilker made a false statement in respect of his claim under the contract of insurance.

63 Section 233(1)(c) of the Insurance Act, R.S.O. 1990, Chapter I.8 provides as follows:

"S. 233(1) where,

(c) the insured willfully makes a false statement in respect of a claim under the contract,

a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited."

64 Chief Justice McEachern of the British Columbia Court of Appeal in *Inland Kenworth Ltd. v. Commonwealth Insurance Co.*, 72 D.L.R. (4th) 594, [1990] B.C.J. No. 1858, dealt with "willful statement" as follows on page 4:

"I believe a fraud or willfully false statement about the quality or condition of the insured property the subject of the claim which is capable of affecting the mind of the insurer regarding the claim must be material. In this case, the fraud was discovered before the insurer paid the claim but I do not think it is necessary for the insurer to show actual prejudice. If that were so then only successful frauds would avoid coverage."

He continues:

"It is sufficient, in my view if the fraud or willfully false statement is capable of affecting the mind of the insurer either in the management of the claim or in deciding to pay it?"

He further stated at page 5:

"A contract of insurance is one of utmost good faith and one cannot commit frauds or make willfully false statements about the subject matter of the claim for any purpose without risking the loss of the right to indemnity if it turns out to be material on any issue."

65 In Ontario, Madam Justice MacFarland in *Royal Insurance Company of Canada v. Daniels* [1996] O.J. No. 3880, dealt with this type of issue at page 6 as follows:

Paragraph 36 "In addition, in the Proof of Loss document which he completed on January 25, 1990, Mr. Daniels stated that during the term of the policy no one other than he had an interest in that vehicle and that statements upon which the insurer relied in making payment to him was false and he knew it."

Paragraph 37 "I am satisfied that Mr. Daniels was in breach of both s. 233(1)(a)(ii) and s. 233(1)(c) of the Insurance Act and all other matters being equal, his claim is invalid and his right to recovery forfeited."

66 Canada Life takes the position that Tilker made the following willfully false statements:

1. That he purchased parts of a motorcycle from a friend of a friend, unnamed, for \$6,000.00, money which he cannot trace and purchased the rest of the parts from various parts of Ontario, likewise without proof as to how and where they were purchased;
2. That in his statement to Faber, the insurance adjuster for Canada Life, Tilker stated that he bought the "bike" about a year ago. (See Exhibit #1, Tab 21) When questioned about the VIN number by Mr. Faber, Tilker sent him a note indicating that he built the bike from a compilation of part which he received from all over Ontario and that the bike was never purchased as a vehicle and therefore had no VIN number (See Exhibit #1, Tab 28);
3. That he stated the motorcycle had 2000 kilometers showing on the odometer. In fact, the odometer showed over 11,000 kilometers. It is unbelievable that Tilker could have driven 2000 kilometers with his injured foot;
4. That he stated he got a new frame from a company called Kraft Tech. This certainly was not his evidence at trial;
5. That he made many false statements in his statement to Ballantyne Insurance Adjusters prior to a polygraph examination on June 28, 1998. He stated for example that he paid \$6,500.00 for the motor. In fact the motor was part of the parts he allegedly purchased in Georgetown for \$6,000.00.
6. He further indicated that he purchased the frame for \$2,500.00. In his affidavits to the Ministry of Transportation he swore he paid \$1,600.00. At his examination for discovery he stated that he paid \$3,500.00.

These are just some of the many false statements given to the polygrapher and intended to be acted upon by the insurer.

67 Applying the definition of a willful false statement as defined in both the *Inland* and *Royal Insurance* cases, I am satisfied that the statements made by Tilker offended s. 233(1)(c) of the Insurance Act.

68 Does s. 129 of the Insurance Act assist Tilker? Section 129 provides the following:

"Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just. R.S.O. 1980, c. 218, s. 106."

69 In *The Canadian Surety Co. v. Siciliano* 3 C.C.L.I. 181 Mr. Justice Maloney dealt with s. 106 of the Insurance Act (same as present s. 129) at p. 184;

"Though I doubt that s. 106 of the Insurance Act, which provides for relief from forfeiture, was intended to cover a case where there is dishonesty in the advancing of the claim, a fraud, a falsehood, it may perhaps be resorted to in this case. It might very well be characterized as "imperfect compliance" in terms of s. 106. I find that, under all of the circumstances, for the reasons I have referred to, the plaintiff insurer has not established its claim. But, if need be, I think I might properly resort to s. 106 and grant relief from forfeiture on the basis that the insured's proof of loss really amounted to imperfect compliance."

70 I am satisfied that the statements made by Tilker cannot be characterized as "imperfect compliance", but in fact are false statements willfully made and designed to deceive the insurer to act upon.

71 The fifth and last issue is whether Tilker is entitled to punitive damages.

72 At the conclusion of the submissions Mr. Hurst, counsel for Tilker, acknowledged that the claim for punitive damages is unfounded.

73 I agree that on the evidence before me it has not been demonstrated that the conduct of Canada Life was high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from standards of decent behaviour. (See *Whiten v. Pilot Insurance Co.* [2002] S.C.J. No. 19)

74 In view of my findings above, there will be an order:

1. Dismissing the plaintiff's claim for the value of the motorcycle in the amount of \$22,000.00.
2. Dismissing the plaintiff's claim for punitive damages.

75 In the event the parties cannot settle the matter of costs, written submissions should be submitted within 30 days.

FEDAK J.

cp/e/nc/qlala/qlkjg