Zhaloba v. Lumbermens Mutual Casualty Co., [2002] O.J. No. 1845

Ontario Judgments

Ontario Superior Court of Justice

Stinson J.

Heard: February 5-7 and March 19-22, 2002.

Judgment: April 30, 2002.

Court File No. 00-CV-196584

[2002] O.J. No. 1845 | *[2002] O.T.C. 326* | *[2002] I.L.R. I-4105* | *114 A.C.W.S. (3d) 135*

Between Mikhail Zhaloba, plaintiff, and Lumbermens Mutual Casualty Company, defendant

(83 paras.)

Case Summary

Insurance — Automobile insurance — Actions, burden of proof — Actions by insured against insurer, defences — Misrepresentation by insured, on claim.

Action by Zhaloba for payment under a car insurance policy. Police found Zhaloba's car abandoned, with the steering column and ignition damaged, damage to the front end, windshield, and undercarriage. There were no signs of forced entry, and the airbags were not deployed. Zhaloba had earlier reported that the car had been stolen from a parking lot where he had left the car the night before. Zhaloba and his daughter testified that the daughter dropped Zhaloba off at his son's home, went out to a club with a friend, drove back and picked Zhaloba up from the son's home, and then returned to Zhaloba's condominium. They stated that the remote control to get into the underground parking lot malfunctioned, so they parked the car across the street in a mall parking lot. Zhaloba took the car keys, and Zhaloba's daughter went to sleep at the friend's home in a neighbouring building. Expert evidence indicated that the car had an electronic anti-theft device that prevented it from being started without the uniquely encoded key, and that after the damage to the steering column, it could not have been started at all. There was further evidence that it was rare for airbags not to deploy during a front-end collision, that the damage was consistent with a front-end collision as well as with being dropped from a tow truck, that the steering column damage was consistent with attempted theft, and that vehicles were sometimes towed by car thieves to remote locations before the thieves attempted to start them. Cellular telephone records confirmed some of the events as described by Zhaloba and his daughter, except for the timing. Significantly, however, several calls were made over a short period of time after the time that they stated Zhaloba had arrived at her friend's home for the night after the car was parked. Most of these calls were made to Zhaloba's friend's cell phone and home phone, and were handled by a cellular phone transmitter tower much closer to the location where the car was found than the friend's home.

HELD: Action dismissed.

Zhaloba had the burden of establishing on a balance of probabilities that when the vehicle was damaged it was not being driving by either him or his daughter. Neither Zhaloba nor his daughter was a credible witness. In particular, their evidence that the daughter gave the car key to Zhaloba after parking the car was inconsistent with their original statements to the insurance investigator, the fact that he already had two sets of keys to the car, and the daughter's subsequent possession of the key. The evidence regarding the cellular telephone calls also called into question their credibility regarding the timing of events. The daughter's friend, a witness to the

events of that evening, was not called to testify. While it was conceivable that the calls from the friend's home could have been transmitted by the cellular phone transmitter tower close to where the vehicle was found, this was unlikely and it was much more consistent with the calls having been made from that location. It was also unusual that Zhaloba's daughter called police to report the car stolen before checking with her father to see if he had moved the car. Zhaloba failed to prove on a balance of probabilities that his daughter was not driving the car when it was damaged.

Counsel

Vadim Kats, for the plaintiff. John P. Desjardins, for the defendant.

STINSON J.

1 This action involves a claim for payment under a policy of car insurance. The plaintiff, the lessee of the car, is suing his own insurer for the cost of repairs to the vehicle.

2 The position of the plaintiff is that the car was stolen from a parking lot in which it had been parked overnight. It was subsequently found by the police, but had been seriously damaged in the interim.

3 The defendant denies that the car was stolen. It asserts that the car was being driven by the plaintiff or a member of his family when it was involved in a collision. The defendant says that the plaintiff made a willfully false statement in respect of the insurance claim and that he committed a fraud with respect to the loss.

FACTS

The Plaintiff's Evidence

4 On June 3, 2000 the plaintiff, Mikhail Zhaloba leased a new Honda Prelude. He insured the car with the defendant. He was covered by the standard Ontario Automobile Policy - O.A.P. 1. The policy contract had a $1,000 deductible for collision and a $300 deductible for comprehensive and specified perils, including loss or damage caused by theft or attempted theft.

5 At the time he leased the Honda, Mr. Zhaloba already had two vehicles, a Chevrolet Cavalier and a Jeep Grand Cherokee. The Chevrolet was ordinarily driven by his 32-year-old son. The only other driver in the family was Mr. Zhaloba's (now) 20 year old daughter, Natalya. According to their testimony, the Honda was not acquired for Ms. Zhaloba to drive, although she did drive it occasionally.

6 According to the evidence of Mr. Zhaloba and Ms. Zhaloba, one such occasion was the night of June 10-11, 2000, just one week after Mr. Zhaloba took delivery of the new Honda. That evening Mr. Zhaloba and his wife had plans to go to a restaurant where they expected to rendezvous with their son, who lived in his own apartment in North York. Ms. Zhaloba, who lived with her parents in their condominium apartment on the eleventh floor at 120 Promenade Circle in Thornhill, had made her own plans, to go to a club in downtown Toronto, to meet some friends there. Since Mr. Zhaloba anticipated that he would be drinking alcohol at the restaurant, it was arranged that Ms. Zhaloba would drive her parents there, and would subsequently pick them up once she came back from the club.

The arrangements for the pickup were left indefinite, on the basis that parents and daughter would be in contact via Ms. Zhaloba's cell phone.

7 According to her and Mr. Zhaloba's evidence, Ms. Zhaloba drove the Honda and dropped her parents off at the restaurant at approximately 9 p.m. She then returned briefly to the condominium in Thornhill, where she rendezvoused with her close friend, Lianne Goldin, whose family lives in the adjacent condominium building at 110 Promenade Circle. Thereafter the two friends drove downtown, Ms. Zhaloba in the Honda and Ms. Goldin in her own car. They took separate cars because they were unsure whether they would leave the club together. They parked their cars in the garage under Roy Thomson Hall and went to the Glass Lounge on Pearl Street. While there, Ms. Zhaloba made several calls on her cell phone.

8 According to her evidence, Ms. Zhaloba and her friend Ms. Goldin decided to leave the club at the same time, having agreed that they would spend the night at Ms. Goldin's apartment. Ms. Zhaloba could not recall the exact time that she and Ms. Goldin left the club, but she thought that it was probably around 3 o'clock. Ms. Zhaloba had heard from her parents (either by cell phone call or voice message) that they had left the restaurant and were at her brother's apartment on Goldfinch Avenue near Finch Avenue West and Bathurst Street. According to her, she and Ms. Goldin drove in tandem directly from the club to her brother's apartment, where she picked up her parents. She testified that, in part, she drove up the Allen Road and then up Dufferin Street and that it took between 30 and 40 minutes to drive from the club to her brother's apartment.

9 According to her and Mr. Zhaloba's evidence, Ms. Zhaloba then drove the Honda back to the family's condominium apartment building in Thornhill, with her parents aboard. They normally parked the car in the underground parking garage. To approach the garage entrance, it was necessary to pass by a gatehouse with barrier, that was staffed with a security guard. When they arrived at the garage entrance, however, the Zhalobas were unable to open the garage door. They normally used a remote control garage door opener, but it did not function on this occasion.

10 According to the evidence of Mr. Zhaloba and Ms. Zhaloba, when they discovered that the remote control would not open the garage door, Mr. Zhaloba directed Ms. Zhaloba to park the car across the street from their apartment building, in the parking lot of the Promenade Mall. She proceeded to do so. According to their evidence, they locked the car and left the windows up. Neither could recall for certain if the sunroof was closed. Ms. Zhaloba testified that she gave the car key that she had been using to her father. Her parents then proceeded to their apartment, while Ms. Zhaloba met Ms. Goldin in the lobby of her apartment building and went up to her place. They talked for a while and then went to bed around 5:00 a.m., but Ms. Zhaloba was not sure about the time.

11 Neither Mr. Zhaloba nor Ms. Zhaloba could state with precision the time that she picked her parents up from the brother's apartment nor the time when they parted company in the parking lot of the Promenade Mall. Mr. Zhaloba thought they were picked up sometime around 4:00 o'clock in the morning; he also testified that they got home between 4 and 5 in the morning. He said he was not paying attention to the exact time. Ms. Zhaloba testified that she got to her brother's between 3:00 and 4:15 or 4:30, but she was not sure. She testified that she parked the car at the shopping mall between 4:30 and 5:15 a.m. and that she told the police that it was between 4:30 and 4:45 a.m.

12 According to her testimony, Ms. Zhaloba got up the next morning (Sunday, June 11) around 10:00 a.m. When she left Ms. Goldin's building to walk to her own, she noticed that the Honda was not parked where it had been left the night before. She immediately called 911 on her cell phone to find out if the car had been towed away, and was told to call the security office at the Promenade Mall. She tried to do so, but was unsuccessful because the office was not yet open. She then called 911 again and was asked if she wanted to report the car stolen, which she did. Two police officers attended at the scene, but were called away to another incident. She was interviewed by another police officer later in the day.

13 Following her second call to 911, Ms. Zhaloba went upstairs to her family's apartment and told her father everything she had done. According to Mr. Zhaloba, when he woke up that morning, Ms. Zhaloba told him that the

car had been stolen. He looked out the apartment window and could see that the car was no longer where it had been left the night before. When the police came later in the day both Mr. Zhaloba and Ms. Zhaloba gave statements. They were interviewed by the police again later in the summer at the police station. They were also interviewed by an investigator on behalf of the defendant insurer. Both told the same story about the disappearance of the Honda and both denied any complicity in its theft or the damage that it suffered.

14 Both Mr. Zhaloba and Ms. Zhaloba testified that they were offended by the conduct of the investigator who interviewed them on behalf of the insurance company. Although at the conclusion of each tape recorded interview they stated that they had been treated fairly, they testified that they were unhappy about the investigator's conduct. Mr. Zhaloba said that the investigator "treated me like a criminal." Ms. Zhaloba said that the investigator "made me feel like a criminal." They were both asked by the investigator if they would be prepared to take a lie detector test and both indicated their willingness to do so. Notwithstanding their agreement to submit to a lie detector test, the defendant did not follow through with that request. Mr. Zhaloba conceded on cross-examination that no one from the defendant was rude to him and that he was treated well by the defendant. He said that he was upset because the defendant did not believe him and that it asked the police to investigate the Zhalobas. No criminal charges were laid.

15 Mr. Zhaloba identified the proof of loss form that he submitted to the defendant, arising from the theft of the Honda. Although the car had been recovered, he claimed its full value because, in his view, the car could not be repaired, and, since he had lost a new car, he wanted a new car to replace it. When the insurer denied his claim Mr. Zhaloba proceeded to have the car repaired. The repairs cost $13,000.00, an expense that Mr. Zhaloba paid by way of a cheque drawn on the bank account of his company, 1225132 Ontario Inc., which is also a named insured on the policy of insurance issued by the defendant.

The Damage to the Honda

16 The actual damage to the Honda was described by Jeffrey Fife, a collision damage appraiser with some 27 years' experience, who was called as a defence witness. Mr. Fife inspected the damaged vehicle on June 20, 2000, and took photographs that were marked as exhibits at trial. The photographs show (and Mr. Fife described) damage to the front end of the car, its undercarriage and wheels and its windshield. Mr. Fife described this as "collision" damage, that is, damage that resulted from the Honda having hit another vehicle or some other object, as a result of an accident.

17 The photographs also show (and Mr. Fife described) damage to the interior of the Honda. Specifically, the plastic housing that surrounded the steering column and ignition lock, in the area between the steering wheel and the instrument panel, was broken away, and lying on the floor, ahead of the driver's seat. As well, the key cylinder had been removed from the ignition lock. Mr. Fife described this type of damage as "vandalism", that is, not damage that was caused by the apparent collision in which the vehicle was involved.

Expert Evidence Concerning the Theft

18 Tony Romanic testified as an expert witness on behalf of the defence. Although he is employed as a police officer, a position he has held for some 22 years, he was qualified as an expert in the fields of locksmithing, vehicle anti-theft systems and methods of automobile theft. In addition to his duties as a police officer, Mr. Romanic has, for 5 years, operated a business known as Ace Mobile Locksmith. He has taken courses relating to vehicle locking systems, anti-theft devices and insurance fraud. Part of his business includes inspecting vehicles that have been reported as stolen, and providing reports to insurers concerning his findings and conclusions. He was retained by the defendant to do just that. He inspected the Honda on June 22, 2000. His report dated June 23, 2000, was submitted to the defendant and became an exhibit at trial.

19 According to his testimony and his report, Mr. Romanic found no evidence on the Honda of forced entry, such as broken or tampered door locks, scratches around the perimeters of the doors or ripped or broken weather-

stripping. He saw no signs of tool marks such as those that are sometimes left by tools that are used by tow truck drivers and others to open locked cars.

20 The main focus of Mr. Romanic's testimony concerned the electronic anti-theft device that is part of the Honda's ignition lock and key system. The key that is used to start this particular vehicle contains a computer chip in the plastic key handle. That chip functions as a form of transponder, giving off a particular radio signal when the key is placed in the ignition lock on the car's steering column and turned. The radio antenna that emits and receives the signals transmitted to and from the chip in the key is contained in the plastic moulding that surrounds the lock into which the key is placed when it is used to start the car. The anti-theft feature of this system is that the chip in the key is programmed to emit a particular and distinct code that coincides with the code that is programmed into the vehicle's ignition system. Only when the vehicle's ignition system computer recognizes the key as one that emits the correct code will the computer enable the car's ignition system, thus permitting the engine to be started. If a key is cut in the correct pattern to fit the tumblers in the locking mechanism, so that it can turn the car's ignition lock and switch, that key will not be able to start the car if it is not programmed with the correct code. Thus, even if the locking mechanism is forced or by-passed, absent the correct electronic interaction between the encoded key and the on-board computer system, the car cannot be started.

21 Mr. Romanic also testified about his inspection of the steering column and ignition lock of the plaintiff's Honda. He identified photographs that showed that the plastic casing surrounding the steering column between the steering wheel and the dashboard had been broken away, revealing the mechanism beneath. He testified that the actual lock cylinder had been removed from the locking mechanism, so that it was possible to insert a screwdriver into the lock mechanism and to turn that mechanism to the point where the electrical system of the car was activated. Using the screwdriver, he was able to turn the lock mechanism to the point where the starter would normally be engaged. Due to the electronic anti-theft system described above, however, nothing happened. The car could not be started.

22 Mr. Romanic also testified that the anti-theft antenna mechanism on the steering column surrounding the ignition key slot had been broken away. Given that damage, even using a properly programmed key, it would not have been possible to start the car because the necessary electronic interaction between the chip in the key and the ignition system computer could not take place. In effect, the damage done to the steering column disabled the vehicle by damaging an integral element of the electronic anti-theft system.

23 In the report that he prepared and submitted to the defendant in June 2000, Mr. Romanic recited the foregoing information. He also expressed the opinion that "this vehicle was not taken by any other means than that of using the exact key that was designed for this car."

24 By way of reply evidence, the plaintiff called Alasdair Sutherland, a retired police officer who was qualified as an expert in the areas of automobile theft and insurance fraud relating to automobile theft. Mr. Sutherland testified that cars are stolen in various ways, not all of which entail being driven away from the location from which they are stolen. One method involves using a truck to tow the car away to a more secluded location, where the thieves can try to start it. He also testified that, in his experience, cars that are being towed can be damaged if they are dropped by the tow truck. Depending on the method of towing used, the result of such an incident may be damage to the undercarriage of the car or to the bodywork.

25 Mr. Sutherland did not inspect the Honda personally. It had been repaired long before he was retained. With respect to the absence of signs of forced entry reported by Mr. Romanic, Mr. Sutherland noted that not all tools that are used to break into cars necessarily leave marks or scrapes on all occasions; sometimes they do and sometimes they do not. With respect to the interior damage that was visible in the photographs taken by Mr. Romanic, Mr. Sutherland observed that the air bags in the car were not deployed. He noted that the propensity for air bags to be deployed in front-end collisions is very high.

26 Mr. Sutherland also noted the damage in the vicinity of the ignition lock, where the plastic housing had been broken away. He testified that this appeared to him to be more than cosmetic damage, a term that he used to describe damage sometimes inflicted by a car owner on his or her own vehicle where the owner seeks to create a

scenario that will persuade the police or an insurer that the car was stolen. He described the damage to the steering column as extensive, noting that people do not usually want to cause extensive damage to their own cars. He testified that, in his opinion, the damage to the ignition housing was consistent with an attempt to steal the car, apparently by a thief who seemed unaware of the transponder anti-theft system.

27 Mr. Sutherland also testified in chief and in cross-examination about the circumstances under which car owners sometimes fraudulently report thefts of their vehicles. In his experience this is sometimes done for financial reasons, where the owner may be in a collision but has only comprehensive coverage which would respond only if the car was stolen. To collect from the insurer the owner may orchestrate the circumstances to make it appear that the car was stolen. Other reasons for falsely reported thefts include hiding the fact that the car was being driven by someone who was intoxicated or whose driver's licence was suspended or who was not authorized to be driving it at the time.

Evidence Concerning Cellular Telephone Use

28 Both sides called expert witnesses in the field of cell phone technology, the defence as part of its case, and the plaintiff in reply. They did so in light of the fact that Ms. Zhaloba carried and made extensive use of a cell phone on the night in question. Although the plaintiff produced Ms. Zhaloba's cell phone bill prior to trial, plaintiff's counsel resisted requests from defence counsel for permission to obtain the underlying records of the cellular company, Bell Mobility, relating to the phone's use that night. Shortly before trial the defendant moved, unsuccessfully, to get production of these reports. Only at trial, in response to a summons to Bell Mobility from the defence, did those records become available.

29 The underlying records of Bell Mobility showed the date, time and duration of the calls from and to Ms. Zhaloba's cell phone that night. The records also listed the telephone numbers of the originating and receiving telephones (whether cellular or land based) for all calls. In addition, the Bell Mobility records indicated which cellular telephone antenna tower received and transmitted the radio signals for the wireless calls from and to Ms. Zhaloba's mobile phone, from time to time. The underlying Bell Mobility records thus contained more information than the telephone bill alone, which merely recited the basic call and billing information and the name of the municipality in which the call was apparently placed or received.

30 The Bell Mobility representative who produced and identified these records, Michael Rickerd, testified that a cellular telephone is a radio transmitter and receiver that ordinarily interacts with the closest cellular antenna tower, or in the alternative, with the next closest tower if the first one is unavailable because it is too busy. If the second tower is also too busy, the signal will go back to the first tower. If that tower remains too busy to handle the signal the user will get a "fast busy" tone on the phone, reflecting the fact that the system is busy.

31 Mr. Rickerd also explained the coded information on the Bell Mobility records and identified the locations of the cellular towers that were involved in handling Ms. Zhaloba's calls over the relevant period. He also identified a map that showed the location of Bell Mobility's towers in the City of Vaughan. One such tower is located close to Bathurst and Centre Streets, a few blocks away from the Zhalobas' apartment building.

32 The Bell Mobility records indicated that Ms. Zhaloba received two calls in the early evening of June 10, 2000, the radio signals for which were transmitted via the Bathurst and Centre tower The records further indicated that Ms. Zhaloba placed several calls between approximately 10:15 p.m. and 2:30 a.m., via the Spadina and Adelaide tower in the City of Toronto. That tower is not far from the club where Ms. Zhaloba was that night, during that period of time. At 2:33 a.m. she placed a call via the College and University tower. At 2:46 a.m. she placed a call via the Yorkdale Mall tower, which is located near Allen Road and Highway 401. The latter call would be consistent with Ms. Zhaloba being enroute to her brother's apartment at that time, going up Allen Road, close to Yorkdale Mall.

33 Of particular significance are a total of 12 calls placed or received by Ms. Zhaloba between 3:43 and 5:09 a.m. on the morning of June 11, 2000. According to her evidence and that of her father, that is roughly the time range that she picked up her parents at her brother's apartment, drove them home and then went to Ms. Goldin's

apartment to stay over. To be fair, neither father nor daughter could be precise about the times, although Ms. Zhaloba told the police that she parked the car at the shopping plaza between 4:30 and 4:45 a.m. Ms. Zhaloba testified that she and Ms. Goldin talked for a while and then went to bed around 5:00 a.m., although she was not sure about that time.

34 The radio signals for the 12 cell phone calls between 3:43 and 5:09 a.m. were all transmitted via the Bell Mobility cellular tower located at 3901 Highway 7 West, in Woodbridge, Ontario. The Woodbridge tower is approximately 8.3 kilometres west of the apartment buildings on Promenade Circle. According to the Bell Mobility tower map, leaving aside the Bathurst and Centre tower, there are two other cellular towers located to the west of the apartment buildings on Promenade Circle, that are closer to apartment buildings on Promenade Circle than is the Woodbridge tower, being the Oster Lane tower and the Jane and 7 tower. The Oster Lane tower is approximately 3.5 kilometres west of the apartment buildings, while the Jane and 7 tower is approximately 5.6 kilometres west of the apartment buildings.

35 In relation to the calls on Ms. Zhaloba's cell phone between 3:43 and 3:44 a.m. on June 11, Mr. Rickerd testified that the cellular tower nearest to Ms. Zhaloba's phone at that time was the Woodbridge tower. He further testified that, had those calls been placed near Bathurst and Centre Streets, they would have been handled by the Bathurst and Centre tower.

36 In reply, the plaintiff called Ronald Murphy, an engineer who works for Rogers/AT&T Wireless, a competitor of Bell Mobility in the cellular telephone field. Mr. Murphy has extensive experience in the design, installation and operation of cellular telephone systems and cellular towers. He has studied and is familiar with the underlying technology and the physics behind the transmission of wireless telephone signals in cellular systems.

37 Mr. Murphy disputed Mr. Rickerd's evidence that Ms. Zhaloba's cellular telephone was nearest to the Woodbridge tower when the calls in question were made. It was his evidence that the current state of technology does not permit the location of a cell phone to be determined with reliability in the fashion described by Mr. Rickerd. He described various factors that can affect the manner in which the propagation of the radio signals passing from and to cell phones, such that those signals may well be processed via a cellular tower that is not the one closest to the telephone at the relevant time. He cited as a specific example the experience of Rogers/AT&T employees who used their cell phones while located on the 9th floor of the company's headquarters office tower, who found that their calls were handled via a tower a number of kilometres away, in effect skipping two towers that were geographically closer.

38 Mr. Murphy also testified about an investigation and analysis conducted by him concerning the possibility that the calls made using Ms. Zhaloba's cell phone that were processed via the Woodbridge tower, were nonetheless made while the cell phone was in Ms Goldin's apartment. He testified that because the Goldin suite is on the west side of the building and the Bathurst and Centre tower is to the east, the concrete mass of the apartment building would impede the signal from Ms. Zhaloba's phone from reaching the Bathurst and Centre tower, notwithstanding that tower is closest to the building. He described a personal attendance at a point roughly equidistant between the apartment building and the Woodbridge tower, from which he observed that there was a clear line of sight in each direction. In view of that fact, and his underlying understanding of cellular technology, Mr. Murphy was of the opinion that it was possible that a call placed through Ms. Zhaloba's cell phone while she was at Ms. Goldin's apartment could be processed via the Woodbridge tower site, notwithstanding there are other cellular towers closer to the apartment.

39 On cross-examination, Mr. Murphy conceded that the system will try to favour the tower that is closest to the telephone. He also conceded that he did not check the two towers to the west of Promenade Circle that are closer to Promenade Circle than the Woodbridge tower (Oster Lane and Jane and 7) for line of sight reception from Ms. Goldin's apartment.

Other Fact Witnesses

40 Other fact witnesses who testified included Constable McAllister, the police officer who investigated the theft, Gary Maidens, the investigator who was assigned by the defendant to investigate the claim, and Nita Hill, the adjuster who handled and ultimately denied the claim on behalf of the defendant. Constable McAllister testified that Mr. Maidens provided her with a copy of the report of Mr. Romanic, the locksmith expert, which contained the conclusion that the Honda could not be driven without a correctly encoded key. Having received that information, she decided to re-interview the Zhalobas. She ultimately concluded that there was no basis for conducting any further criminal investigation of them because there was no reasonable prospect of a conviction. Constable McAllister also testified (as did Mr. Maidens and Ms. Hill) that no-one on behalf of the insurer sought to have the police lay criminal charges against the Zhalobas in relation to the reported theft of the Honda.

41 Constable McAllister also testified about the locations from which the Honda was reported stolen and at which it was located when it was recovered. She marked these locations on the map that showed the location of the Bell Mobility cellular towers in the City of Vaughan. According to that map, the Honda was recovered at a location that is approximately one kilometre south of the Woodbridge cellular tower.

42 Ms. Hill testified that she made the decision to deny the plaintiff's claim in consultation with her supervisor. She said that in doing so she relied on the report of the appraiser, Mr. Fife, about the collision damage, and that of the locksmith expert, Mr. Romanic, who had concluded that the vehicle could not have been taken without using the exact key that was designed for the car.

ISSUES AND ANALYSIS

43 Based upon the submissions of counsel, there are four principal issues that I am called upon to decide in this case, as follows:

1. What burden of proof must a plaintiff satisfy in order to succeed on a claim under the theft coverage in a standard automobile insurance policy?
2. Has the plaintiff satisfied the burden of proof in the present case?
3. What are the plaintiff's damages?
4. Is the plaintiff entitled to an award of punitive damages?

44 I will consider each of these issues in turn.

Issue 1 — What burden of proof must a plaintiff satisfy in order to succeed on a claim under the theft coverage in a standard automobile insurance policy?

45 By its terms, the insurance policy issued by the defendant covered losses caused by theft or attempted theft. The policy did not cover loss or damage caused when a person who lives in the same household as the insured steals the vehicle. Accordingly, if the Honda was damaged when it was being driven by the insured, Mr. Zhaloba, or by Ms. Zhaloba with her father's permission, it was plainly not stolen and the loss would not fall within the policy coverage. If the Honda was damaged when it was being driven by Ms. Zhaloba without her father's permission, the loss would not fall within the policy coverage due to the fact that it would have been stolen by a person who lived in the insured's household.

46 As noted at the outset of these reasons, in response to the plaintiff's claim, the defendant took the position that the car was not stolen but was being driven by the plaintiff or a member of his family when it was involved in a

collision. The defendant asserted that the plaintiff made a willfully false statement in respect of the insurance claim and that he committed a fraud with respect to the loss.

47 Having regard to the foregoing allegations, an issue arose before me concerning the burden of proof borne by each side. Counsel for the plaintiff argued that the insured must establish theft on a balance of probabilities, but that once the insured does that, the burden shifts to the insurer to prove fraud. Among other cases, he relied upon the decision of the British Columbia Court of Appeal in Bevacqua v. Insurance Corp. of British Columbia, *[1999] B.C.J. No. 2178*. He also argued, relying on the decisions of the Supreme Court of Canada in Continental Insurance Co. v. Dalton Cartage Company, *[1982] 1 S.C.R. 164* and Hanes v. Wawanesa Mutual Insurance Company, *[1963] S.C.R. 154*, that allegations of fraud against an insured are quasi-criminal in nature. Such serious allegations called for heightened scrutiny of the evidence by a trial judge, before being satisfied that an allegation of fraud has been proven on a balance of probabilities.

48 Counsel for the defendant argued that the plaintiff had the burden of proof to establish a right to recover under the terms of the policy. This meant that the plaintiff had to prove that a theft covered by the policy actually occurred. The thrust of the submissions of defence counsel on this point may be summarized as follows. The mere denial of the claim by the insurer based on the assertion that the car was damaged while it was being driven by the insured or (with his permission) by his daughter - while it may impliedly amount to an assertion that the claim was fraudulent - does not alter the basic burden of proof on the plaintiff. Likewise, the assertion that the car was damaged while it was being driven by the insured's daughter without his permission - while it may impliedly amount to an allegation of theft against the daughter - does not alter the basic burden of proof. In either case, the plaintiff had to satisfy the trier of fact, on a balance of probabilities, of the existence of facts that entitle him to coverage under the policy. In the present case this meant that the plaintiff had the burden of proving that neither he nor his daughter (with or without his permission) was driving the Honda when it was damaged.

49 In my view, this issue has been authoritatively decided in Ontario by the Ontario Court of Appeal in Shakur v. Pilot Insurance Company *(1990), 74 O.R. (2d) 673*. That decision was summarized and followed by Molloy J. in Coates v. Allstate Insurance Company of Canada,[2002] O.J. No. 80, (Court File No. 00-CV-190723SR, released January 14, 2002). In Coates, Molloy J. said the following about Shakur (at para. 51):

> In that case, the plaintiff alleged that she had removed a number of pieces of jewellery from her bank safety deposit box and that on her way home from the bank she was mugged and the jewellery was stolen. The insurer denied that there had been any such theft. The trial judge found that this amounted to an accusation of fraud by the insurer and that a "higher degree of probability" would be required to establish fraud, applying Continental Insurance Co. v. Dalton Cartage Co. The Court of Appeal held that the trial judge thereby erred in placing the burden of proof on the insurer ....

50 In Shakur, the Court of Appeal said the following: (at p. 681)

> 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 [insured] and remained on the [insured] to prove on the balance of probabilities that a theft of her jewellery had occurred. That the [insurer] in denying the allegation of theft, impliedly alleged that the [insured] was fraudulent in putting forward the claim in no way shifted the basic burden of proof resting on the [insured].

51 The Court of Appeal went on to quote the decision of the English Court of Appeal in Regina Fur Co. Ltd. v. Bossom, [1958] 2 Lloyd's Reports 425 in which that court held the onus of proof remained on the plaintiff to establish a loss covered by the policy and that onus remained on the plaintiff throughout. In Regina Fur, Sellers L.J. said (at p. 434):

> In order to succeed, the plaintiffs have to prove a loss of goods covered by the policy due to a risk insured against, and this obligation remains nonetheless where the evidence advanced to prove the loss, if rejected, and/or evidence called by the defendant underwriter, might establish or tend seriously to show

> that a crime had been committed by the claimants. If the evidence of all the witnesses and the effect of all the documents leave the court in doubt on the question whether or not there was a fortuitous loss - that is by breaking and entering and stealing - the plaintiffs would not be entitled to judgment as they would not have established the material fact that the loss of the goods was due to a risk insured by the policy.

52 In Shakur, the Ontario Court of Appeal concluded as follows: (at p. 682)

> ... The trial judge started off on the wrong foot by describing the issue in this case as "a matter of fraud" and then applying the decision of the Supreme Court of Canada in Continental Insurance Co. v. Dalton Cartage Co. to hold that where "a charge of fraud" was being made by the [insurer], a higher degree of proof was required. The issue was not whether the [insurer] had proven a fraud on the part of the [insured]. The simple issue was whether the [insured] had established a theft within the meaning of the policy.
>
> The trial judge was clearly in error in stating that he was not required to decide "whether it is more likely than not that the robbery ever happened". Whether the [insured] had proven on the balance of probabilities that a robbery or theft had occurred within the meaning of the policy was precisely the issue before him.

53 Based upon the foregoing authority, I agree with the submissions of defence counsel in relation to the onus issue. I have therefore concluded that in the present case the plaintiff has the burden of establishing on a balance of probabilities that when the vehicle was damaged, it was not being driven by either the plaintiff or his daughter.

Issue 2 Has the plaintiff satisfied the burden of proof in the present case?

54 The plaintiff's theory of the case is that, after Ms. Zhaloba parked the Honda in the parking lot at the Promenade Mall in the early morning of June 11, it was removed by a person or persons unknown. In the face of the evidence from the defence's locksmith expert that the vehicle could not have been driven without the use of a key that had been properly programmed to interact with the electronic anti-theft device, the plaintiff's auto theft expert witness advanced the theory that the Honda could have been towed away from the Promenade Mall parking lot by a tow truck to a secluded spot, where the thieves could have attempted to start it by breaking away the steering column cover and trying to jimmy the ignition lock. The external damage that was suffered by the vehicle (to the front end and the undercarriage) was consistent with that which could occur if it were dropped by a tow truck while being towed. In further support of this theory, the plaintiff's expert pointed out that the airbags on the car had not been deployed, something that very often occurs in a front-end collision. Additionally, the damage that was inflicted on the interior of the vehicle to the steering column and the ignition switch was more than the ordinary cosmetic damage that might be inflicted by an owner who wished to fake a theft.

55 The theory of the defence was that the car was being driven by Ms. Zhaloba earlier in the evening. Subsequently, she drove it to the Woodbridge area, where an accident occurred. With a view to disguising that fact, she abandoned the Honda and the next morning she reported it as stolen. By way of support for the defence's theory and with a view to discrediting the plaintiff's theory, defence counsel relied upon the evidence of the locksmith expert to the effect that the Honda could not be driven without the correct key. Further, it could not be started at all once the damage was inflicted to the steering column. This evidence is consistent with the vehicle having been driven up to the point when the so-called collision damage occurred and then having been vandalized in the steering column area with a view to faking a theft, or having been abandoned after an accident and subsequently vandalized by others.

56 There is, of course, no direct evidence before me concerning how the Honda was taken from the parking lot and damaged, merely competing theories. It is not possible and, indeed, not necessary for me to make a finding of fact as to how the car was damaged, or by whom. For the plaintiff to succeed I must find on a balance of probabilities that it is more likely than not that neither Mr. Zhaloba nor his daughter was driving the car when it was damaged.

Both of them testified that they were not. I therefore now turn to an examination of the credibility of Mr. Zhaloba and Ms. Zhaloba.

57 I start from the premise that, as the trier of fact, it is open to me to accept all, some, or none of the evidence of any particular witness. In many respects, I have no reason to doubt or question much of the testimony of either Mr. Zhaloba or Ms. Zhaloba. For example, it is perfectly consistent with the theory of the plaintiff and the theory of the defence that Ms. Zhaloba did take her parents to a restaurant, that she went to a club and that she later picked her parents up from her brother's apartment and drove them home. The critical point of departure between the two theories concerns what occurred after Ms. Zhaloba and her parents parted company in the parking lot at the Promenade Mall. The plaintiff would have me accept that Ms. Zhaloba then went up to Ms. Goldin's apartment where she remained overnight and that she discovered the car missing when she left there to walk home the next morning. It would be consistent with the defence's theory that, at some time after she parted company with her parents, Ms. Zhaloba returned to the Honda and drove it to Woodbridge. This latter approach does not require me to disbelieve most of what Mr. Zhaloba said, but calls into question significant portions of the testimony of Ms. Zhaloba.

58 Dealing first with the evidence of Mr. Zhaloba, the central feature of his testimony that would defeat the theory of the defence is that when he returned to his apartment after parting company with Ms. Zhaloba in the parking lot, he carried with him the key that Ms. Zhaloba had used that evening to drive the car. He testified in chief that after the car was locked at the Promenade Mall parking lot, he had the keys.

59 During the course of his interview with the insurance investigator on July 5, 2002, Mr. Zhaloba was asked several questions about the keys for the Honda. He indicated that there were two sets of regular keys and one special or master key that he kept at home in a box. With respect to the regular keys, he told the investigator that he had one of these and that the second key was at home or with his daughter when she drove the car. At one stage he explained that the Honda dealership had required a set of keys for the car, after it had been recovered and towed there to be repaired. He stated that "my daughter gave them the [sic], her key."

60 In relation to the sequence of events leading up to and following the parking of the car at the Promenade Mall parking lot, Mr. Zhaloba had the following exchange with the investigator:

Investigator: I am just trying to follow this story. So, Natalie came and picked you up.

Mr. Zhaloba: Yeah, she pick us.

Investigator: At your son's house.

Mr. Zhaloba: Yeah.

Investigator: Drove you and your wife home, so you got home 4:30, 5.

Mr. Zhaloba: Yeah, something like that.

Investigator: Like that, OK, and the remote wouldn't work.

Mr. Zhaloba: Yeah.

Investigator: So then you.

Mr. Zhaloba: We left the car on a parking lot at Promenade.

Investigator: And Natalie drove the car to the parking lot.

Mr. Zhaloba: Yeah, we, she drove.

Investigator: Yeah.

Mr. Zhaloba: We left car there.

Investigator: Locked it up.

Mr. Zhaloba: Yeah, locked it up.

Investigator: OK.

Mr. Zhaloba: (unintelligible) because I check everything.

Investigator: Right.

Mr. Zhaloba: I always check.

Investigator: OK.

Mr. Zhaloba: I check (unintelligible).

Investigator: OK, so, she had her keys.

Mr. Zhaloba: She had her keys, yeah.

Investigator: You had your keys?

Mr. Zhaloba: Yeah, I had my keys.

Investigator: And -

Mr. Zhaloba: My keys were actually at home.

Investigator: Yeah.

Mr. Zhaloba: Because I didn't drive it.

Investigator: And the other key that's put away.

Mr. Zhaloba: Always is, it was always at home.

Investigator: And you keep that in a box or something you said, at home.

Mr. Zhaloba: Yeah, yeah.

Investigator: OK. So, nobody else had a key.

Mr. Zhaloba: No.

61 It may thus be seen that Mr. Zhaloba's assertion at trial that he had the keys after the car was locked up at the Promenade Mall was not entirely consistent with what he told the investigator in July 2000. Indeed, during that interview, he told the investigator that after the car was locked up Ms. Zhaloba had her keys and that his keys were actually at home. The plaintiff provided this information to the investigator before the defendant disclosed to the plaintiff that its expert locksmith had determined that the Honda could not have been driven without using the specific key coded to the vehicle.

62 During the course of her interview with the insurance investigator on July 5, 2000, Ms. Zhaloba had the following exchange in relation to keys for the Honda:

Investigator: OK. How many sets of keys are there for the car, Natalie?

Ms. Zhaloba: I am not too sure. My father would know better, but I think there is three.

Investigator: OK. So, you have a set of keys.

Ms. Zhaloba: Yeah, it is at the dealership now.

Investigator: All right.

Ms. Zhaloba: But I, I had a set of keys.

Investigator: OK, so you have one set.

Ms. Zhaloba: And there was like two spares I think.

Investigator: And there is two, two other sets?

Ms. Zhaloba: Yeah. That's what I think.

Investigator: And who keeps control of the other keys?

Ms. Zhaloba: My father.

63 The foregoing exchange is also consistent with Ms. Zhaloba having had and kept her own key for the car on the night in question.

64 I note that Mr. Zhaloba referred to Ms. Zhaloba as having "her keys" and that Ms. Zhaloba stated that she "had a set of keys". They both testified at trial, however, that Ms. Zhaloba gave the key to the Honda to her father when they parted company in the parking lot. In light of the fact that, the next morning, the Honda was gone, there would have been no need or reason for Ms. Zhaloba to get her key back from her father. Yet, both of them confirmed that Ms. Zhaloba gave the dealership her key. This, too, is consistent with Ms. Zhaloba having had and kept her own key to the Honda on the night in question.

65 Quite apart from the foregoing evidence, there remains the question of why Ms. Zhaloba would turn over "her" key to the Honda to her father after it was parked. By his own evidence, Mr. Zhaloba had his own key back at his apartment, so he did not need the one that Ms. Zhaloba had used that night. On the evidence before me, there was no apparent reason for Mr. Zhaloba to take the key away from his daughter as he allegedly did that night.

66 In light of the foregoing evidence and analysis, I am left in doubt concerning the reliability of the evidence of Mr. Zhaloba regarding the whereabouts of the key that Ms. Zhaloba used when she drove the Honda on the night of June 10/11. It may be that he was in error or that his recollection of this detail was faulty, or that he was relying on something that he was subsequently told by his daughter. As well, in light of the foregoing evidence and analysis and the analysis that follows in relation to the subject of Ms. Zhaloba's cellular telephone usage, I am unable to rely on Ms. Zhaloba's evidence regarding the whereabouts of the key.

67 Based upon the evidence before me and my assessment of the credibility of the witnesses, I am not persuaded that Ms. Zhaloba turned over the key to the Honda to her father after the car was parked at the Promenade Mall.

68 Of considerably more significance, however, and crucial to my decision in this case, is the evidence relating to the use of Ms. Zhaloba's cellular phone that night. Both the plaintiff's and the defendant's cellular telephone experts testified that, ordinarily, cellular phones operate in such a fashion that a mobile phone will try to transmit and receive via the closest cellular antenna tower. This is reflected by the fact that Ms. Zhaloba's telephone calls in the early evening of June 10 (before she went out) were transmitted via the Bathurst and Centre tower. The calls placed by her when she was at the club downtown were transmitted via the nearby Adelaide and Spadina tower.

69 The fact that Ms. Zhaloba's call at 2:46 a.m. was transmitted via the Yorkdale Mall tower is consistent with her having been enroute to pick up her parents at her brother's apartment near Bathurst and Finch at that time. The distance from the Yorkdale Mall to the brother's apartment is approximately 6 or 7 kilometres This would mean that she likely picked up her parents at approximately 3:00 a.m. Given that her parents' apartment is approximately 5 or 6 kilometres away from that of her brother, it seems likely that Ms. Zhaloba and her parents could have arrived there by 3:15 a.m.

70 This takes me to the 12 cellular telephone calls on Ms. Zhaloba's cell phone between 3:43 and 5:09 a.m. on June 11. As previously mentioned, all of these calls were processed via the Bell Mobility cellular tower in Woodbridge. According to the plaintiff's cell phone expert, given that there is a direct line of sight between Ms. Goldin's apartment on the west side of 110 Promenade Circle and the Woodbridge tower, it is possible that signals from Ms. Zhaloba's telephone when it was used in that apartment could be processed via the Woodbridge tower. Thus the plaintiff's explanation for the fact that these calls were processed via that tower is that Ms. Zhaloba was at Ms. Goldin's apartment over this period of time.

71 There are a number of problems with this explanation, all of which raise doubts concerning the reliability and veracity of Ms. Zhaloba's testimony, as follows:

1. The cell phone call at 2:46 a.m. that was transmitted via the Yorkdale Mall tower suggests that Ms. Zhaloba was in that vicinity at that time. This call raises doubts about the reliability of Ms. Zhaloba's timeline as it relates to the events in question. If, indeed, she was passing in the vicinity of Yorkdale Mall at 2:46 a.m. she would have arrived at her brother's apartment, which is only 6 or 7 kilometres away, by 3:00 a.m. The drive home from her brother's apartment to the family condominium on Promenade Circle would have taken another 15 minutes or so, placing her there at between 3:15 and 3:30 a.m. She told the police, however, that she parked the car between 4:30 and 4:45 a.m., over an hour later.
2. Notwithstanding the fact that her 2:46 a.m. call was transmitted via the Yorkdale Mall tower, Ms. Zhaloba testified that she placed three calls almost an hour later (at 3:43 and 3:44 a.m.) while she was driving along in tandem with Ms. Goldin en route home from the club. Even more curiously, although she claimed to have been driving home up the Allen Road (and not in Ms. Goldin's apartment) all three of these calls were transmitted via the Woodbridge tower, and not via any other Bell Mobility cellular towers.
3. If Ms. Zhaloba was in Ms. Goldin's apartment when her calls were transmitted via the Woodbridge tower, this means that she was there before 3:43 a.m. Ms. Zhaloba told the police, however, that she parked the car at the Promenade Mall between 4:30 and 4:45 a.m., that is, more than 45 minutes after the first of the calls.
4. If, indeed, Ms. Zhaloba was at Ms. Goldin's apartment when all 12 calls were placed, it is difficult to understand why 8 of the 12 calls in question were between Ms. Zhaloba's cell phone and Ms. Goldin's home or cell phone. According to Ms. Zhaloba's evidence they were both in the apartment together. Although he was given the opportunity to do so, plaintiff's counsel did not call Ms. Zhaloba in reply to explain these calls.
5. Quite apart from the unexplained telephone calls between Ms. Zhaloba and Ms. Goldin, there remains the question as to why all 12 calls between 3:43 a.m. and 5:09 a.m. were transmitted via the Woodbridge tower. The cell phone experts both agreed that the system favours the closest tower, such that a cellular telephone call is most likely to be transmitted via the tower that is closest to the telephone. The plaintiff's expert explained that the tower closest to the Goldin apartment (Bathurst and Centre) would not have processed these calls because it was located to the east of the concrete mass of the apartment building and the Goldin apartment was on the west side of the building. It remains the case, however, that there were two other Bell Mobility cell phone towers (Oster Lane and Jane and 7) located to the west of the Promenade Circle apartment buildings that were closer than the Woodbridge tower. Based upon the maps that were identified in evidence, the signals from Ms. Zhaloba's telephone would more or less have to "leap frog" over the two intervening towers to be transmitted via the Woodbridge tower. While this is theoretically and technically possible (according to the evidence of the plaintiff's expert) it seems somewhat unusual that 12 consecutive calls between 3:43 a.m. and 5:09 a.m. would all be handled in this fashion.

72 Before leaving the subject of the cell phone records, one additional and significant fact needs to be mentioned.

As noted above, all 12 telephone calls between 3:43 a.m. and 5:09 a.m. were handled by the Woodbridge tower, which is located some 8.5 kilometres to the west of the Promenade Mall location from which the vehicle was reported stolen. The location at which the Honda was found when it was recovered is approximately one kilometre away from the Woodbridge tower. According to the map that was placed in evidence, the recovery location was closer to the Woodbridge tower than it was to any other Bell Mobility tower.

73 While it is conceivable that it is a mere coincidence that the Honda was recovered in the same general vicinity as the Woodbridge tower, it is a rather remarkable coincidence, given the plaintiff's theory that thieves towed the Honda away from the Promenade Mall and went looking for a surreptitious place to try and start it. Of all locations in York Region they chose one that was within a kilometre or so of the cell phone tower that handled all of Ms. Zhaloba's cell phone calls between 3:43 and 5:03 a.m. that morning. An alternative explanation, consistent with the theory of the defence, is that Ms. Zhaloba was driving the car in the Woodbridge area when it was damaged, and that is why the 12 calls were handled via the Woodbridge tower.

74 There is one final aspect of Ms. Zhaloba's testimony that does not ring true. According to her, when she left Ms. Goldin's apartment on the morning of June 11, 2000, she noticed that the Honda was no longer in the location where it had been parked the night before. She immediately called the police to find out if the car had been towed away, and she ended up reporting it as stolen. She did all this before she went up to her parents' apartment to confer with them about the whereabouts of the car. She could easily have used her cell phone to call the apartment in order to ask her father whether he had moved the car. Given that, according to her, her father had all the sets of keys for the car, it strikes me as unusual that Ms. Zhaloba would report to the police that the car had been stolen before speaking to her father.

75 Finally, I am compelled to observe that although Ms. Zhaloba described Ms. Goldin as a very close friend, Ms. Goldin did not testify. According to Ms. Zhaloba, she spent the night at Ms. Goldin's apartment after she brought her parents home and left the car in the Promenade Mall parking lot. Ms. Goldin would therefore have been able to corroborate Ms. Zhaloba's story concerning her whereabouts that night. I draw the inference from the failure to call Ms. Goldin that her evidence would not have been helpful to the plaintiff's case: see Clairborne Industries Ltd. v. National Bank of Canada *(1989), 69 O.R. (2d) 65* at 77 (C.A.)

Conclusion As To Credibility

76 Based on the foregoing analysis, I have come to the conclusion that I can place only limited reliance on the evidence of Ms. Zhaloba. As previously mentioned, I also have my doubts about the reliability of the evidence of Mr. Zhaloba in relation to the critical issue of whether, after the car was left in the parking lot, he took Ms. Zhaloba's keys home with him. As I have previously indicated, the burden of proof is on the plaintiff to satisfy me on the balance of probabilities that neither Mr. Zhaloba nor Ms. Zhaloba was driving the car when it was damaged. Having regard to the evidence of the defendant's locksmith expert regarding the key-coded anti-theft system, and having regard to my concerns about the credibility of Ms. Zhaloba in particular, I have concluded that the plaintiff has not discharged the burden placed upon him. In other words, the plaintiff has failed to satisfy me on a balance of probabilities that Ms. Zhaloba was not driving the car when it was damaged.

77 It follows that the plaintiff has failed to prove that the loss he suffered was due to a risk insured by the defendant's insurance policy. In the result, the plaintiff's claim on the insurance policy must fail.

Issue 3 What are the plaintiff's damages?

78 The evidence satisfies me that the cost of the repairs to the Honda was $13,000. Accordingly, I assess the plaintiff's general damages at $13,000.

Issue 4 Is the plaintiff entitled to an award of punitive damages?

79 Based upon the evidence before me, I am satisfied that the defendant acted in good faith in deciding to deny the plaintiff's claim. It relied upon the report of the expert locksmith which indicated that the Honda could not be driven without using the "exact key that was designed" for the car. In my view, the defendant acted reasonably in doing so.

80 As well, the conduct of the investigator retained by the insurer to investigate the claim, was relatively innocuous. He treated the Zhalobas politely and, in effect, apologized in advance for any offence they might take at being asked if they were involved in the theft. His only impropriety (if it can be classified as such) was in asking the Zhalobas if they would be willing to submit to a polygraph test. While that approach is not commendable, in my view it falls short of establishing bad faith on the part of the insurer.

81 I have therefore concluded that the evidence in the case fails to establish the type of misconduct on the part of the defendant insurer that would warrant an award of punitive damages. I would award nothing on this account.

CONCLUSION

82 For these reasons I conclude that the plaintiff has failed to satisfy me that he is entitled to payment under the policy. The action is therefore dismissed.

83 If the parties are unable to agree on the disposition of the costs of the action, they should arrange a conference call with me to address the appropriate procedure for submissions on that issue.

STINSON J.
