CC 212/83
Prince George Registry

IN THE COUNTY COURT OF CARIBOO

BETWEEN:

INSURANCE CORPORATION OF BRITISH COLUMBIA

PLAINTIFF

AND:

DARLENE MARIE CLEMMENSON

DEFENDANT

REASONS FOR JUDGMENT

OF

THE HONOURABLE JUDGE LOW

Michael J. Hargreaves, Esq., Counsel for the plaintiff
Dick Byl, Esq., Counsel for the defendant

Dates and place of trial: April 5 & 6 1984. Prince George, B.C.

Under the provisions of s.20(6) of the Insurance (Motor Vehicle) Act R.S.B.C. 1979, ch. 204 the Insurance Corporation of British Columbia ("the corporation") seeks to recover from the defendant the sum of $9,288.73 paid by it on a claim of Gary Joseph who was a pedestrian struck by a pick-up truck owned and operated by the defendant on highway 16 in Vanderhoof B.C. on January 19, 1980. The corporation was the liability insurer of the defendant at the time of the accident and alleges that the defendant was in breach of regulation 6.24A made pursuant to the statute. That regulation reads as follows:

> 6.24A(a) A person to whom indemnity is provided by this Part shall be deemed to have committed a breach of this Part where his claim for indemnity

> arises out of (i) his driving or operating a motor vehicle while he is under the influence of intoxicating liquor or drugs to such an extent as to be, for the time being, incapable of the proper control of the vehicle.

By regulation 6.23 the corporation is entitled to refuse to pay any indemnity if there has been breach of a condition. However, by section 20 of the statute a person having a claim against an insured ".....shall be entitled, on recovering judgment against the insured or settlement with the corporation, to have the insurance money payable under a plan or part of a plan applied toward his judgment or the settlement..." By subsection (4) a breach of condition by the insured does not prejudice the right of the claimant to have the insurance money so applied.

The result of the above provisions is that the corporation must pay the judgment or settlement to the claimant in any event. By s. 20(6) the insured is made liable to reimburse the corporation for any amount that it would not be liable to pay other than by reason of s.20 and the corporation is given the power to enforce that right by court action.

The corporation settled Mr. Joseph's claim for $8000 and paid to B.C. Hospital Programs the sum of $1,288.73 pursuant to the provisions of the Hospital Insurance Act, R.S.B.C. 1979, ch. 180, particularly section 27. The defendant concedes that the payment for hospital services was properly made and that if the corporation is entitled to reimbursement it sould be for both emounts paid out by it.

The issues are these:

1. At the time of the motor vehicle accident was the defendant under the influence of alcohol to such an extent as to be, for the time being, incapable of the proper control of her vehicle?

2. Did the corporation act reasonably and in good faith in settling with Mr. Joseph?

About 1:45 A.M. on January 19, 1980 Mr. Joseph and another man were walking east along highway 16 in Vanderhoof. They were walking uphill and backwards. I presume they were either watching traffic or seeking a ride. At that point the highway has two lanes going up the hill and one lane coming down. There was no other traffic going up the hill but it is not clear whether there was any traffic coming down. The defendant was travelling uphill at the 50 km. speed limit. She was in the right hand lane.

The defendant saw the pedestrians from about 100 yards away. She saw Mr. Joseph swaying onto the pavement and back to the shoulder. When the truck was 10 to 15 feet away from him he moved in front of it. The defendant turned the steering wheel to the left but the right front of the truck struck Mr. Joseph. It is quite clear that the point of impact was on the paved portion of the road. Mr. Joseph sustained a severe pelvic injury.

Approximately 40 minutes and 1 hour after the accident the defendant had breathalyzer readings of 180 milligrams of alcohol per 100 milliliters of blood and 170 milligrams of alcohol

per 100 milliliters of blood respectively. I will refer to these and other readings in decimal form. Mr. Norvell, a toxicologist, established that at the time of the accident the blood/alcohol level would have been .185 or .190. The defendant started drinking at 10:00 p.m. and stopped drinking at 1:30 a.m. To reach the levels recorded by the breathalyzer and interpolated by the expert to the time of the accident the defendant would have consumed 12 ounces of hard liquor or 12 draft beer. The level at the time of the accident might have been as low as .17 if the last alcohol the defendant consumed was not yet fully absorbed in her blood. It could have been marginally lower then that if her rate of alcohol elimination was slightly higher then the norm of .015 per hour. If the breathalyzer tests are reliable, the defendant had a blood/alcohol level of at least .17 at the time of the accident. It was Mr. Norvell's opinion, which I accept, that all people are incapable of proper control of a motor vehicle at a level of .10. If she was at a level of .17 or greater the defendant certainly was under the influence of intoxicating liquor to such an extent as to be, at the time of the accident, incapable of the proper control of her vehicle.

The breathalyzer readings are challenged on three grounds. Firstly, that the defendant's evidence as to the amount she had to drink should be accepted and it would yield a much lower reading. Secondly, that the defendant and her passenger gave evidence that she in fact had proper control of her vehicle before and at the time of the accident. Thirdly, that the symptoms of impairment observed by the investigating police officer immediately following

the accident were not as severe as would be expected at a level of .17 or higher.

The defendant insisted that, between 10:00 p.m. and 1:30 a.m. at a pub in Vanderhoof, she had no more then two 1 ounce drinks of vodka and 5 or 6 draft beer. On Mr. Norvell's evidence this would result in levels at the time of the accident of approximately .06 to .08. The defendant did not testify that she had some way of keeping count. She was at a table with other people. Beer was brought in pitchers from which each person's glass was filled. The defendant was away from the table dancing from time to time. She could not have known how often her glass was filled or topped up over the long period of time she was in the pub. People who have been drinking to any extent are unlikely to be able to later give an accurate account of the quantity of alcohol they consumed. I do not accept the defendant's evidence as to the amount she had to drink.

The defendant testified that she was able to drive without difficulty and had no mechanical problems in driving the several blocks from the pub to the accident scene. Her passenger, Mr. McClelland, who also had a considerable amount to drink, testified that there was nothing out of the ordinary in her driving. Of course, since they both had a significant amount to drink their judgment about such matters would not be reliable. Also, there is no evidence that the defendant was faced with any unusual driving problems before she came upon the two pedestrians. Even at a level of .17 she would have been capable of mechanically

operating the vehicle and driving from one point to another, including negotiating turns. But at that level one's judgment is impaired as well as one's ability to react to driving situations created by others. Some proof of that is to be found in the fact that the defendant did not reduce her speed or change lanes, or both, when she saw from an appreciable distance the risk being created by Mr. Joseph in staggering on and off the pavement. The poor quality of the defendant's driving is evidenced by that lack of reaction and judgment.

Mr. Norvell testified that at .17 or .18 a person would show the usual symptoms of impairment such as slurred speech, staggering, and lack of co-ordination although not everybody would exhibit those symptoms. However, it would be unusual for the subject not to show some lack of physical co-ordination. The investigating police officer, Cst. Reid, observed that the defendant had an odour of alcohol about her, had blood shot and watery eyes, and had slurred speech. He had her sit in the police vehicle while he attended to other matters at the scene of the accident. Because the temperature was about 30° below zero he did not have the defendant do any physical tests at that location. Later at the police station the defendant was upset and he felt that it was best not to require her to attempt any physical tests. He merely made the demand for a breath sample and the two samples were taken. It is apparent that Cst. Reid was very kind to the defendant because of her emotional state. As a result he passed up the opportunity to test her co-ordination in ideal circumstances

at the police office. The absence of evidence one way or the other about the defendant's co-ordination or impairment thereof does not negative the blood/alcohol evidence. The plaintiff proved that the breathalyzer machine was working properly and that the breath samples were properly taken. I find that they were accurate tests of the defendant's blood/alcohol level.

The onus is on the plaintiff to prove on a balance of probabilities that the defendant was incapable of proper control of her vehicle: see Kulbaba v. I.C.B.C. (1982) 32 B.C.L.R. 189. The unsuccessfully challenged evidence of the defendant's blood/alcohol level, confirmed as it is by her symptoms and her lack of reaction and judgment at the time of the accident, establishes that she was incapable of proper control of her vehicle at the time of the accident. There was a breach of the condition in regulation 6. 24A (a).

I turn now to the second issue - whether the settlement the corporation reached with Mr. Joseph was reasonable and made in good faith. S. 20(2) of the Insurance (Motor Vehicle) Act provides that ".....the corporation may at any stage compromise or settle the claim." There are no restrictions on the power and no explanation of it in the statute. I am told by counsel that there are no reported cases interpreting the subsection.

The corporation concedes that any settlement reached must be reasonable. Otherwise the corporation could pay an artificially high amount to satisfy the claim to the unfair detriment of the insured person. However, the corporation contends

that, beyond that qualification, the subsection has a clear meaning. It can settle a claim to which s.20 applies on the same basis as it would be able to settle if it had not alleged a breach of condition by the insured person.

Counsel for the defendant argues that the corporation, in settling under its s.20(2) powers, must also act in good faith and in the interests of the insured person. He cites five decisions from the State of California - Comunale v. Traders & General Insurance Company (1958) 328 P. (2d) 198; Davy v. Public National Insurance Company (1960) 5 Cal. Reptr. 492; Hodges v. Standard Accident Insurance Company (1962) 18 Cal. Reptr. 17; Kinder v. Western Pioneer Insurance Company (1965) 42 Cal. Reptr. 394; and Crisci v. Security Insurance Company of New Haven (1967) 426 P.(2d) 173. Generally, they stand for the proposition that an insurer must act in good faith and in the common interest of itself and the insured in considering settlement of third party claims within policy limits when there is some risk that the insured may have to pay that portion of the third party claim in excess of the policy limits if settlement is not effected. If an insurer acts unreasonably or unfairly in rejecting a settlement proposal it will have to pay the entire third party judgment which follows, including that portion which exceeds the policy limits. That principle was applied and the Crisci case was cited in the judgment of Fitzpatrick, J. in Dillon v. Guardian Insurance Company Limited (1983) I.L.R. 6586 (Ontario S.C.). There the insurer passed up a settlement offer at $46,000 believing that the claim was worth $2,000 to $3,000 less. Subsequently the third

party claimant obtained judgment for almost $28,000 above the $50,000 policy limits. The court held the insurer liable for the full amount of that judgment on the basis that, in refusing to settle at $46,000, it did not use reasonable care for the protection of the insured and was therefore guilty of bad faith.

There is no reason why the same principle should not be applied when the corporation settles a claim under s.20(2) of the Insurance (Motor Vehicle) Act. The corporation must act in the interests of the insured as well as its own interests or be guilty of bad faith. To hold otherwise would be to permit the corporation to unilaterally effect a settlement which may serve its own ends but would result in financial loss to the insured which he or she might not otherwise have to bear.

The defendant contends in the present case that the corporation acted contrary to her interests in the amount and in the manner it effected settlement with Mr. Joseph. The defendant complains that the corporation unrealistically compromised the liability issue; that it agreed to general damages which were excessive; that it proposed and actively pursued the settlement when Mr. Joseph was at great risk of having his action dismissed for failure to comply with the rules of court; and that it did not advise the defendant or her solicitor of the settlement proposal or, at least, did not do so in a timely manner. A review of the history of the action brought by Mr. Joseph and the conduct of the corporation's file by its staff adjusters, particularly Miss Ostanek, is necessary. In evidence are the pleadings in the Joseph

action and the whole of the adjuster's file.

On February 21, 1980 a corporation adjuster (not Miss Ostanek) interviewed Mr. Joseph and recorded that he was "rude, abusive and ignorant" and that he wanted $6,000 every month for his injuries. This and other information in the file make it clear that Mr. Joseph was a very irresponsible young man.

Mr. Joseph's action was commenced on June 26, 1980 with Mr. Stephen Wood of Prince George acting as his solicitor. The statement of claim was not filed until December 3, 1981. In June, 1981 Mr. David Jenkins of Prince George entered an appearance for Miss Clemmenson. In the same month Mr. Roy Logie of Vancouver filed a third party notice on the part of the corporation pursuant to s.20(7) of the Insurance (Motor Vehicle) Act. Statements of defence were later filed on behalf of the defendant and third party.

Mr. Jenkins took out and served Mr. Wood with an appointment to examine Mr. Joseph for discovery on April 26, 1982. Mr. Joseph did not attend. On May 27, 1982 Mr. Jenkins obtained a chambers order requiring Mr. Joseph to attend an examination for discovery or have his action dismissed. The precise terms of the order are not clear as it was never entered. However, it is clear from the evidence that Mr. Joseph was in jeopardy of having his action dismissed (and his claim statute barred) if he did not take more interest in the action.

Miss Ostanek was aware of the chambers order. Nevertheless, after considering an earlier opinion letter from Mr. Logie on liability and quantum of damages, she approached Mr. Wood on June 25,

1982 with a settlement offer of $8,000. She had been told by Mr. Wood ten days earlier that he could still not locate Mr. Joseph and wanted to get himself removed from the record in the action. On the 25th she noted that Mr. Wood "doesn't know where his client is, doesn't seem to care" and "has no instructions from his client and is not pushing." She made the offer and left a draft for $8,000 together with a release with Mr. Wood on that date even though she knew that he had lost contact with his client. She did not inform Mr. Jenkins or the defendant that the offer was being made although Mr. Logie has recommended that Mr. Jenkins be advised of any offer to settle. It would appear that neither Mr. Jenkins nor the defendant became aware of the offer until the latter part of August.

On May 12, 1982 Mr. Joseph telephoned Mr. Logie's office and later attended there. He wanted the examination for discovery to be conducted in Vancouver where he was residing for a few weeks. Mr. Logie sought Mr. Wood's confirmation of such an arrangement. It is apparent that after that date Mr. Joseph got in touch with nobody. There was no further contact with him in connection with his action by anybody until Miss Ostanek had him tracked down in Vancouver in August. If she had not taken this step there is no telling when, if ever, Mr. Joseph would have pursued this matter on his own. On August 18, 1982 Miss Ostanek wrote to Mr. Wood to give him Mr. Joseph's Vancouver address. Mr. Wood continued to have difficutly getting instructions despite extensive efforts.

Mr. Jenkins took out an appointment to examine Mr. Joseph

for discovery on November 15, 1982. It is likely that if he did not appear on that date his action would be dismissed. Miss Ostanek made notes on her file in October in which she anticipated such a result. On October 20th she noted that she had "asked Wood for our money back." However, on November 8, 1982 Mr. Wood telephoned the corporation to advise that Mr. Joseph had showed up. Mr. Wood wanted to know if the offer was still open. Another adjuster reviewed the file and later advised Mr. Wood by telephone that the offer was still open. The settlement was subsequently concluded.

On November 8th somebody on behalf of the corporation contacted Mr. Byl (Mr. Jenkin's associate and defendant's counsel at trial) to advise him of Mr. Wood's inquiry. The fact of that advice, but not its substance, is noted on the corporation's file. However, it is common ground that neither the defendant nor anybody on her behalf ever consented to or acquiesced in the settlement.

I am satisfied that the quantum of general damages agreed to and the equal division of liability were reasonable in all the circumstances. The medical reports indicate that Mr. Joseph suffered a severe pelvic injury with total disability for several months and a strong possibility of future degenerative arthritis. It is unlikely that Mr. Joseph could have proved any wage loss because of a very poor work record and attitude but there was an element of possible future wage loss. I think that the full general damage assessment of $16,000 to $20,000 by the corporation's representatives was realistic and settlement at 50% of the lower end of that range was reasonable.

I have already dealt with the circumstances of the accident. I find that an equal division of liability would have been a likely result of a trial of that issue.

I find that in effecting settlement in the way it did the corporation acted without regard to the interests of the defendant. That amounts to bad faith on the part of the corporation and disentitles it to successfully claim against the defendant under s.20(6) of the Insurance (Motor Vehicle) Act notwithstanding the breach of the regulation and the reasonableness of the settlement as to quantum.

I have reached that conclusion by looking at the progress of the Joseph action from the defendant's point of view. It was in her best interests to take full advantage of Mr. Joseph's inactivity and let it lead to dismissal of the action. If the corporation's representatives had not pushed for settlement and had not gone to some lengths to locate Mr. Joseph, dismissal of the action would have been the likely result. It was not in the defendant's best interests for the corporation to keep the settlement offer open on November 8, 1982. If the defendant had any control over the matter at that point, it would have been wise for her to take the position that the offer was no longer outstanding and take advantage of the likelihood that Mr. Joseph's inconsistent interest in his claim would soon lead to dismissal of his action.

Miss Ostanek agreed under cross examination that one reason she proposed the settlement was to avoid unrecoverable fees of counsel at trial. She also agreed that she gave primary consideration

to the interests of the corporation. From the corporation's point of view the way the settlement was brought about was perhaps economically sound and consistent with good policy for disposition of claims. But since the corporation intended to seek indemnity from its insured it was bound in law to not act inconsistently with the interests of its insured.

The action is dismissed with costs.

R. 2.Tag, cc9

Prince George, B.C.
June 5, 1984