

# Court of Appeal

ORAL REASONS FOR JUDGMENT

Before:

The Honourable Chief Justice Nemetz  
The Honourable Mr. Justice Hinkson  
The Honourable Madam Justice McLachlin

VANCOUVER, B.C.  
DECEMBER 18, 1985.

BETWEEN:

INSURANCE CORPORATION OF BRITISH COLUMBIA

PLAINTIFF  
(APPELLANT)

AND:

DARLENE CLEMMENSON

DEFENDANT  
(RESPONDENT)

R. Bruce Harvey, Esq. Q.C.  
D. Byl, Esq.

appearing for the Appellant  
appearing for the Respondent

(On appeal from the judgment of Low, C.C.J.)

NEMETZ, C.J.B.C.: Madam Justice McLachlin will deliver the  
first judgment.

ORIGINAL

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3 McLACHLIN, J.A.: This case involves a claim by the Insurance  
4 Corporation of British Columbia against the defendant, Darlene  
5 Clemmenson, its insured, for idemnity for settlement monies  
6 which the Insurance Corporation has paid to a Mr. Joseph, who  
7 was struck and injured by the motor vehicle driven by Darlene  
8 Clemmenson.

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10 The facts as found by the trial judge established that  
11 Miss Clemmenson had been drinking prior to the accident; an hour  
12 and forty minutes after the accident occurred, she gave breath-  
13 alizer readings of .18 and .17.

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15 In June 1980, some months after the accident, the  
16 injured person, Mr. Joseph, brought an action against Miss Clemmenson,  
17 with Mr. Stephen Wood acting as his solicitor.

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19 In June of 1981 the Insurance Corporation of British  
20 Columbia filed a Third Party notice under s.20(7) of the Insurance  
21 (Motor Vehicle) Act, alleging that Miss Clemmenson was in breach  
22 of a condition of her insurance contract by driving while under  
23 the influence of alcohol.

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25 Miss Clemmenson's solicitor, Mr. Jenkins, took out an  
26 appointment to examine Mr. Joseph for discovery on April 26, 1982.  
27 Mr. Joseph did not attend. On May 27, 1982, Mr. Jenkins obtained  
28 a Chamber order requiring Mr. Joseph's attendance for examination  
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3 for discovery, failing which Joseph's action would be dismissed.  
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5           Jean Ostanek was the adjuster employed by I.C.B.C.  
6 who dealt with Joseph's claim. She was aware of the existence  
7 of the Chamber order and had been told by Mr. Wood that he could  
8 not locate his client and wished to be removed from the record.  
9

10           On June 25, 1982, Miss Ostanek made a settlement offer  
11 of \$8,000 to Mr. Wood on behalf of I.C.B.C. She left a draft for  
12 \$8,000 with Mr. Wood.  
13

14           Miss Ostanek was aware that Mr. Wood was still having  
15 difficulty tracking down his client. Using the resources of the  
16 Insurance Corporation, she tracked down the whereabouts of  
17 Mr. Joseph on August 18, 1982. Prior to that time Mr. Joseph's  
18 last contact with anyone involved in the accident was on May 12,  
19 1982.  
20

21           Miss Ostanek's file indicates that on October 20th, 1982,  
22 she asked Mr. Wood to return I.C.B.C.'s draft in the amount of  
23 \$8,000.  
24

25           On November 8th, 1982, Mr. Wood telephoned the Insurance  
26 Corporation advising that he had spoken with Mr. Joseph and asking  
27 whether the offer of settlement was still open. He was advised by  
28 another adjuster that it was and the settlement was concluded.  
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3 Ultimately, Mr. Joseph's claim was settled for \$8,000.  
4 In addition, I.C.B.C. paid \$1,288.73 to B.C. Hospital program  
5 pursuant to the Hospital Insurance Act.  
6

7 The trial judge found that the settlement was reasonable  
8 both as to liability and quantum. However, he dismissed I.C.B.C.'s  
9 claim against Miss Clemmenson for indemnity under s.20(6) of the  
10 Insurance (Motor Vehicle) Act. He found that I.C.B.C. had breached  
11 its duty to its insured in taking the steps it did to locate  
12 Mr. Joseph in the circumstances where Mr. Joseph's inactivity would  
13 likely have led to a dismissal of the action. He further found  
14 that it would have been in the best interest of Clemmenson for  
15 I.C.B.C. to have taken the position that the offer was no longer  
16 open on November 8, 1982, when Mr. Wood called, as it was likely,  
17 or possible at the very least, that Mr. Joseph's inconsistent  
18 interest in the claim would lead to dismissal of the action.  
19

20 It appears from the transcript that Miss Clemmenson's  
21 solicitor was contacted prior to the final settlement and had  
22 knowledge of it. Indeed, on October 19 Mr. Jenkins, the solicitor  
23 for Miss Clemmenson, wrote to Mr. Wood, the solicitor for  
24 Mr. Joseph, asking:  
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26 "Would you please advise whether or  
27 not your client intends to accept  
28 the offer made to him by I.C.B.C."  
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3 Therefore, in my view, there can be no complaint that  
4 the ultimate offer of settlement was made without the concurrence  
5 of Miss Clemmenson.  
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7 Miss Clemmenson's counsel, however, argues before us  
8 that his client suffered prejudice by reason of the earlier  
9 conduct of I.C.B.C. in taking steps to trace Mr. Joseph and by  
10 failing to tell Miss Clemmenson or her counsel, Mr. Jenkins, that  
11 Mr. Joseph had disappeared from the scene and that Mr. Wood,  
12 Joseph's solicitor, was considering ceasing to act for him.  
13

14 The argument, as I understand it, is that had I.C.B.C.  
15 imparted this information to Mr. Jenkins, the solicitor for Miss  
16 Clemmenson, in August of 1982, Mr. Jenkins, instead of, at the  
17 request of Mr. Wood, adjourning a discovery which was then  
18 scheduled of Mr. Joseph, would have insisted on proceeding and,  
19 Mr. Joseph not appearing, Mr. Jenkins would then have moved to  
20 have had the action struck out.  
21

22 It is contended that I.C.B.C. acted unreasonably and  
23 acted in breach of its duty to its insured in failing to advise  
24 Miss Clemmenson of those facts of which it had knowledge at the  
25 time.  
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27 I find that I do not need to go into the issue for  
28 purposes of this case of whether I.C.B.C. acted unreasonably or  
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3 was in breach of any duty in failing to communicate the facts  
4 in question concerning Mr. Joseph's whereabouts and the possibility  
5 of Mr. Wood removing himself from the record. This is because I  
6 am satisfied that there is no evidence establishing that if there  
7 were such unreasonable conduct or breach of duty, the insured,  
8 Miss Clemmenson, was prejudiced thereby. Counsel for Miss  
9 Clemmenson concedes that there is no evidence of what was the state  
10 of Mr. Jenkins knowledge at the critical time when it was suggested  
11 he might have refused to adjourn the examination for discovery of  
12 Mr. Joseph and, upon Mr. Joseph's failure to attend, to strike out  
13 the action.

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15 Mr. Jenkins did not testify. Miss Ostenak, the adjuster  
16 in charge of the case, admitted that she never advised Mr. Jenkins  
17 of the facts, but we do not know whether Mr. Jenkins learned of  
18 them from someone else, such as Mr. Wood, with whom he had a  
19 conversation before adjourning the discovery.

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21 Furthermore, in the absence of Mr. Jenkins' testimony,  
22 there is no evidence of what he would have done had he known that  
23 Mr. Joseph was not in communication with his lawyer and had not  
24 been in communication with his lawyer for some time.

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26 Now, the onus of establishing the state of Mr. Jenkins'  
27 knowledge and consequent prejudice to Miss Clemmenson arising from  
28 I.C.B.C.'s conduct is on Miss Clemmenson, the insured. In the  
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3 absence of any evidence establishing such prejudice, there is  
4 no causal link between the alleged breach of duty of the  
5 Insurance Corporation of British Columbia and the fact that a  
6 settlement was ultimately made as a result of which Miss Clemmenson  
7 finds herself faced with a claim to indemnify the Insurance  
8 Corporation.  
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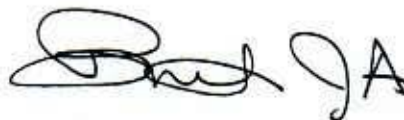
10 In my view this is not a case where it is necessary to  
11 interfere with findings of fact of the trial judge. The matters  
12 I have referred to are inferences which flow from the facts, and  
13 in particular from the absence of certain critical evidence.  
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15 For these reasons I would allow the appeal.  
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17 NEMETZ, C.J.B.C.: I agree.  
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19 HINKSON, J.A.: I agree.  
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21 NEMETZ, C.J.B.C.: The appeal is allowed.  
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25 B.M.M.  
26 J.A.  
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