

CANADA / JUDGMENT

McGee v. I.C.B.C.

2008 BCCA 508

COURT

British Columbia Court of Appeal

DECIDED

10 December 2008

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2008 BCCA 508 McGee v. I.C.B.C. COURT OF APPEAL FOR BRITISH COLUMBIA Citation: McGee v. I.C.B.C., 2008 BCCA 508 Date: 20081210 Docket: CA033387 Between: Edward McGee and Tyler LaForge, an infant by His Guardian Ad Litem, Karen LaForge Appellants (Plaintiffs) And: Insurance Corporation of British Columbia Respondent (Defendant) Before: The Honourable Madam Justice Huddart The Honourable Mr. Justice Frankel The Honourable Madam Justice Neilson J. E. Murphy, Q.C. Counsel for the Appellants R. J. Berrow Counsel for the Respondent Place and Date of Hearing: Vancouver, British Columbia 20 November 2008 Place and Date of Judgment: Vancouver, British Columbia 10 December 2008 Written Reasons by: The Honourable Madam Justice Huddart Concurred in by: The Honourable Mr. Justice Frankel The Honourable Madam Justice Neilson Reasons for Judgment of the Honourable Madam Justice Huddart:

- [1] In June 1982, Tyler LaForge, through his mother as guardian ad litem, brought an action against Edward McGee for damages he suffered when his mother was injured in a motor vehicle accident with Mr. McGee while she was pregnant with Tyler. Mr. McGee held motor vehicle insurance with the Insurance Corporation of British Columbia ("I.C.B.C."), who accordingly provided his defence in that action. Mr. McGee's policy limits with I.C.B.C. were \$1 million, plus interest and costs. In August 1988 Mr. Justice Wood found Mr. McGee wholly liable for Mr. LaForge's injuries.
- [2] In January 1988, Mr. McGee had retained independent counsel after being advised by I.C.B.C. of a potential personal liability if judgment exceeded the policy limit. In March, a few days into the trial of that tort action, the parties had agreed the quantum of damages was \$1.45 million excluding costs. After judgment against Mr. McGee and some fruitless settlement negotiations whereby I.C.B.C. attempted to obtain a full release of Mr. McGee, I.C.B.C. paid Mr. LaForge's guardian the limits of Mr. McGee's policy. That left Mr. McGee personally liable for \$270,000. Subsequently, Mr. McGee assigned his causes of action against I.C.B.C. to Mr. LaForge in exchange for his agreement not to take execution proceedings. At all material times, Mr. McGee had no significant assets.
- [3] The complaint that caused Mr. McGee and Mr. LaForge's guardian to commence the action that has given rise to this appeal is that I.C.B.C. failed in the duty it owed Mr. McGee to settle the claim within the policy limit. That claim was abandoned late in 1994. When the action

came on for summary trial in September 2005, the claim was for \$80,000 and interest on the basis that I.C.B.C. had refused to enter into a structured settlement after judgment that would have reduced Mr. McGee's liability by that amount. Additionally, the appellants claimed \$2,000 for the costs he had incurred in obtaining independent legal advice about his potential excess liability.

- [4] The facts relevant to these claims are few.
- [5] Following judgment in the tort action, the parties communicated frequently, each making settlement offers. On 2 September 1988, I.C.B.C. offered to pay the policy limits and to structure any portion of the funds in exchange for a full release of Mr. McGee's liability. On 8 September, Mr. LaForge offered to settle for the right to structure \$800,000 of the funds to be paid by I.C.B.C., and in return to reduce Mr. McGee's liability by \$80,000. Both parties repeated these offers on more than one occasion. When it became apparent Mr. LaForge's guardian would not provide a full release of Mr. McGee's liability on the judgment, Mr. McGee's independent counsel wrote twice, on 19 and 22 September, to I.C.B.C. requesting that it accept Mr. LaForge's offer. I.C.B.C. refused and on 29 September paid out the policy limits. Its policy was to agree to a structured settlement only in return for a full release of its insured from any further liability from the judgment.
- [6] Mr. Justice Stewart concluded that I.C.B.C. had no obligation to incur liability beyond the limits of its insurance policy. He explained that I.C.B.C. was within its rights to reject Mr. LaForge's offer because agreeing to a structured settlement would have the effect of imposing a contingent liability on I.C.B.C. it was not obliged to incur. He also rejected the claim for legal expenses on the authority of *Fredrikson v. I.C.B.C.* (1990), 44 B.C.L.R. (2d) 303, 69 D.L.R. (4th) 399 (S.C.). In that case, as in the case at bar, the insured was advised to consult independent counsel as his liability could exceed his policy coverage, but the insurer was not obligated to pay for such services.
- [7] The appellants' first point is that I.C.B.C., as a statutory exclusive insurer with the exclusive right to settle a claim against its insured, is subject to duties of good faith and fair dealing, to consider the insured's interest at least equally with its own and to disclose all material information to the insured reasonably promptly: *Shea v. Manitoba Public Insurance Corp.* (1991), 55 B.C.L.R. (2d) 15 at para. 191, 1 C.C.L.I. (2d) 61 (S.C.). In the circumstances of this case, the appellants submit, those duties obliged I.C.B.C. to accept the best post-judgment settlement it could obtain. Its refusal to accept Mr. LaForge's final offer was based on his refusal to release Mr. McGee from all liability. The effect on Mr. McGee was to lose the benefit of an \$80,000 reduction in his outstanding liability.
- [8] The first difficulty with this submission is that it depends on the court finding a breach of what might be called a "Shea duty". The appellants submit that I.C.B.C.'s failure to disclose to Mr. McGee the contents of an opinion written by a claims adjuster six weeks before trial as to the "huge exposure" he faced, combined with its failure to take advantage of numerous pre-trial opportunities to settle within policy limits, required I.C.B.C. to accept the best offer

it could get after judgment. They see the contingent liability as an excuse to say no to that best offer: I.C.B.C. commonly entered into structured settlements, even when paying out the full amount of its policies, and in this case, offered to pay out the policy limits in a structured settlement. And, the appellants submit, the trial judge erred when he disregarded this submission and the evidence on which it was based.

- [9] This is a difficult point for an insured to make after he has abandoned his claim that the insurer breached its duty to settle the claim within the policy limit, particularly when the appellants also abandoned Mr. McGee's claim that I.C.B.C. did not properly investigate or defend the action. Typically, Shea duties arise before judgment. And, while the "insurer's duty to defend includes the obligation to attempt to minimize by all lawful means the amount of any judgment awarded against the insured" (Shea, *supra*, at para. 191), the appellants provided no authority for the proposition that an insurer's duty to defend or any other Shea duty obliges it to accept a settlement offer exposing it to a contingent liability in addition to the policy limit.
- [10] In my view, in refusing to accept Mr. LaForge's final offer, I.C.B.C. was doing no more than insisting on its contractual right in furtherance of its policy to accept structured settlements (and the accompanying contingent liability) only where it could obtain for its insured a full release from liability. It follows that I agree with the trial judge's finding that I.C.B.C. did not breach any obligation it owed to Mr. McGee.
- [11] I also agree with his conclusion that Mr. McGee was not entitled to indemnity for the costs of independent legal advice he sought on the recommendation of I.C.B.C. As in *Fredrikson*, *supra*, the only element of potential conflict between I.C.B.C. and Mr. McGee arose from the size of the claim potentially exceeding the limit of coverage. *Esson C.J.S.C.* could see "no possible basis for finding the insurer obligated to provide independent advice in respect of that uninsured exposure of its insured" in that case (*Fredrickson*, *supra* at 328). Nor could the trial judge in this. Nor can I.
- [12] It follows I would dismiss the appeal. "The Honourable Madam Justice Huddart" I agree: "The Honourable Mr. Justice Frankel" I agree: "The Honourable Madam Justice Neilson"

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