

2004 CarswellOnt 827, 7 C.C.L.I. (4th) 167, 183 O.A.C. 294, 44 C.P.C. (5th) 83



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Mader v. Hunter

HELEN-MARIE MADER (Appellant) and WARREN W. HUNTER and MOTORS INSURANCE CORPORATION
(Respondents)

Ontario Court of Appeal

Borins, Feldman, Gillese JJ.A.

Heard: February 25, 2004
Judgment: February 25, 2004
Oral reasons: February 25, 2004
Written reasons: March 1, 2004
Docket: CA C39871

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Proceedings: reversed *Mader v. Hunter* ([January 17, 2003](#)), [Doc. 99-BN-2050](#) (Ont. S.C.J.)

Counsel: David G. Lavkulik, Jennifer Hetherington for Appellant

Susannah M. Travers for Respondent, Warren W. Hunter

J. Claude Blouin, George Kanellakos for Respondent, Motors Insurance Corporation

Subject: Insurance; Civil Practice and Procedure

Insurance --- No-fault automobile insurance — No-fault benefits — Practice and procedure on claim for benefits

Plaintiff was involved in automobile accident — Plaintiff, who at various times during proceedings was not represented by counsel, did not fulfil several undertakings to provide evidence — Defendant insurer's motion to dismiss action was granted — Plaintiff appealed — Appeal allowed — Motion judge did not properly weigh prejudice to

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parties — Insurer not prejudiced by allowing action to continue.

Cases considered:

Byers (Litigation Guardian of) v. Pentex Print Master Industries Inc. (2003), 2003 CarswellOnt 18, (sub nom. *Byers v. Pentex Print Master Industries Inc.*) 167 O.A.C. 159, 62 O.R. (3d) 647, 28 C.P.C. (5th) 258 (Ont. C.A.)

— followed

APPEAL by plaintiff from judgment reported at *Mader v. Hunter* (2003), 2003 CarswellOnt 5719 (Ont. S.C.J.), granting insurer's motion for dismissal of action for failing to fulfill undertakings.

The Court (orally):

1 This is an appeal by Helen-Marie Mader from the order of Wein J. giving effect to an order by Mossip J. dismissing her claim against the respondents Hunter and Motors Insurance Corporation. This claim arises from a motor vehicle accident in which Hunter collided with the rear of the appellant's vehicle. Motors Insurance Corporation is the appellant's insurer and is joined in this action in respect to a claim for statutory accident benefits.

2 When the claim was issued the appellant was represented by counsel. Subsequently, however, she represented herself on several interlocutory motions and when she was examined for discovery. Ultimately, the motion judge dismissed this action on the ground that the appellant had not fulfilled the undertakings which she had given on her examination for discovery. The majority of the undertakings related to evidence concerning her medical condition. Because of the appellant's failure to make reasonable efforts to fulfill the undertakings and given "the long history" of the case, the motion judge dismissed the appellant's motion to set aside an earlier order of Mossip J. dismissing the appellant's claim. The respondents provided no evidence before the motion judge that they would be prejudiced were the appellant to be permitted to proceed to trial.

3 In our view, in the exercise of her discretion the motion judge failed to balance the interests of the appellant in respect to the prejudice that she would sustain if the action were dismissed against any prejudice to the defendants were the action to be permitted to go to trial.

4 The court is always reluctant to dismiss a potentially meritorious claim on grounds that do not address its merits. Unless the defendant can demonstrate prejudice in the sense that to grant the plaintiff the indulgence he or she seeks will prejudice the defendant's ability to defend the claim, the indulgence will usually be granted on appropriate terms. Applying what this court said in *Byers (Litigation Guardian of) v. Pentex Print Master Industries Inc.* (2003), 62 O.R. (3d) 647 (Ont. C.A.), in our view, the justice of the case requires that the order of the motion judge be set aside and that an order be substituted setting aside the order of Mossip J. dismissing the appellant's claim. In the circumstances of this case, denying the appellant a further adjournment in the absence of any prejudice to the respondents and in the absence of a consideration of the potential merits of the plaintiff's claim, in our view, was contrary to the interests of justice.

5 With respect to the plaintiff's motion for the admission of fresh evidence, in our view most of the proposed fresh evidence was available, or with reasonable diligence could have been available, before the motion judge. Therefore,

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on that basis we decline to admit the evidence. However, we have taken into account the proposed evidence that since the dismissal of her claim, appellant's counsel, as the respondents concede, has fulfilled the majority of the undertakings.

6 Therefore, the appeal is allowed and the order of the motion judge is set aside. There will be an order substituted setting aside the order of Mossip J. dismissing the appellant's claim.

7 We award no costs of the motion to introduce fresh evidence, and award costs of the appeal to the appellant on a partial indemnity basis fixed at \$7,5000 and GST.

Appeal allowed.

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