

<b><u>CASE NO.</u></b>	<b><u>VOL. NO.</u></b>	<b><u>PAGE</u></b>
<b>STEPHEN CLARKE</b> (Appellant) <b>C.A. 175644</b>	- and -	<b>RAHEEM ISMAILY</b> (Respondent)
<b>STEPHEN CLARKE</b> (Appellant)	- and -	<b>KAREEN ISMAILY, LILLIAN ISMAILY and SAFAR ALI ISMAILY</b> (Respondents)
<b>C.A. 175708</b>	Halifax, N.S.	<b>SAUNDERS, J.A.</b>

[Cite as:*Clarke v. Ismaily*, 2002 NSCA 64]

**APPEAL HEARD:** March 28, 2002

**JUDGMENT DELIVERED:** May 17, 2002

**SUBJECT:** **Proper Test for Dismissal of a Claim for Want of Prosecution. CPR 28.13. Motor Vehicle Accident. Inordinate and Inexcusable Delay. Serious Prejudice. Blameworthiness. Causal Connection. Exercise of Discretion. Striking a Balance.**

**SUMMARY:** The appellant was injured in a motor vehicle accident in 1989. A law suit was commenced in 1991, following which his lawyer was suspended and later resigned from the practice of law. His new lawyers in Ontario discovered that certain named parties were misidentified and other defendants were added to the action. Judgment Recovery (N.S.) Ltd. became involved. Throughout the intervening years various steps were taken and contact maintained among counsel or insurance representatives for the various parties. A substantial settlement offer was made in 2000. Case management conferences were attended by all parties, including one in 2001, to establish a schedule for discoveries of parties and witnesses in Ontario that summer.

In August, 2001, the respondents applied successfully in Chambers to strike the appellant's claims. He appealed.

**HELD:** Appeal allowed. Chambers judge erred in his application of the test for dismissal for want of prosecution. Orders striking appellant's claims set aside. The Chambers judge failed to consider the extent of the appellant's own blameworthiness, or whether there was any causal connection between the appellant's conduct and the serious prejudice

alleged by the respondents. Many of the respondents' claims of serious prejudice were exaggerated or not attributable to any delay on the part of the appellant personally. In the exercise of his discretion the Chambers judge failed to strike a fair and just balance between the appellant's position and that of the respondents, amounting to error in law requiring appellate intervention.

After conducting the necessary and detailed analysis found that the balance clearly favoured the appellant's position in carrying on with his litigation.

**This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 14 pages.**