

*Case Name:*

**Cook v. AXA Insurance (Canada) (c.o.b. AXA Insurance)**

**Between  
Bryan Cook, (plaintiff (appellant)), and  
AXA Insurance (Canada), carrying on business as AXA  
Insurance, (defendant (respondent))**

[2006] O.J. No. 413

34 C.C.L.I. (4th) 159

23 C.P.C. (6th) 5

145 A.C.W.S. (3d) 567

2006 CarswellOnt 573

Docket: C43478

Ontario Court of Appeal  
Toronto, Ontario

**S.T. Goudge, S.E. Lang and J.L. MacFarland JJ.A.**

Heard: January 30, 2006.

Oral judgment: January 30, 2006.

Released: February 6, 2006.

(4 paras.)

*Civil procedure -- Appeals -- Extension of time -- Grounds for review -- Reasonable apprehension of bias -- Appeal by Cook from decision refusing his application for extension of time to file statement of claim, reported at [2005] O.J. No. 1348, allowed -- Judge erred in refusing to extend time for service of statement of claim -- Judge's view that Cook had no case coloured his conclusion and assessment of prejudice to AXA -- No prejudice to AXA if extension granted.*

**Appeal From:**

On appeal from the order of Justice Patrick Joseph Flynn of the Superior Court of Justice dated April 6, 2005.

**Counsel:**

Paul R. Sweeny for the appellant

**Linda Matthews** for the respondent

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ENDORSEMENT

The following judgment was delivered by

**1** THE COURT (oral endorsement):-- In our view the motion judge erred in not extending the time for service of the statement of claim. Perhaps understandably, he appeared motivated in some considerable measure by his frustration at the conduct of plaintiff's counsel (not Mr. Sweeny). That cannot be allowed to displace the assessment of prejudice if any to the defendant. Moreover, part of his concern in this regard, namely his view that the letter of January 29, 1998 was not sent, appears to have been ill founded.

**2** Secondly, the motion judge's view that the plaintiff had no case also appears to have improperly coloured his conclusion and his assessment of prejudice to the defendant.

**3** Finally, in our view, there appears to be little if any prejudice to the defendant here. There is no showing that the records sought are in fact unavailable. While the passage of time may affect medical memories, it appears that the clinical notes of the doctors are all available to refresh memories, if necessary.

**4** In the circumstances, we would therefore allow the appeal and order the time for service of the statement of claim extended to February 10, 2006. Given the conduct of plaintiff's counsel below, we would order no costs to the appellant here or below.

S.T. GOUDGE J.A.

S.E. LANG J.A.

J.L. MacFARLAND J.A.

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---- End of Request ----

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