NOVA SCOTIA COURT OF APPEAL

Citation: *Portage LaPrairie Mutual Insurance Company v. Sabean*, 2015 NSCA 53

Date: 20150604
Docket: CA 428986
Registry: Halifax

Between:

Portage LaPrairie Mutual Insurance Company

Appellant

v.

Andrew Sabean and Cathy Hallett

Respondents

Judges:	Beveridge, Hamilton and Scanlan, JJ.A.
Appeal Heard:	February 4, 2015, in Halifax, Nova Scotia
Held:	Appeal allowed, without costs, per reasons for judgment of Scanlan, J.A.; Beveridge and Hamilton, JJ.A. concurring.
Counsel:	Scott R. Campbell and Jennifer Taylor, for the appellant Derrick J. Kimball, Sharon L. Cochrane and David Faour, Articling Clerk, for the respondent Andrew Sabean

Reasons for judgment:

[1] This appeal raises three issues:

1. Did the trial judge err in interpreting the SEF 44 family protection endorsement ("SEF 44") contained in Mr. Sabean's insurance policy issued by Portage LaPrairie Mutual Insurance Company ("Portage"), saying that future Canada Pension Plan ("CPP") disability benefits are not deductible from the amount payable to Mr. Sabean pursuant to SEF 44?
2. Did the trial judge err by failing to consider the effect of Portage's formal offer to settle when he set the amount of costs and disbursements payable by it?
3. Did the trial judge err in his treatment of costs and disbursements paid by the tortfeasor's insurer on settlement of Mr. Sabean's and Ms. Hallett's claims against the tortfeasor?

Background

[2] On October 23, 2004 the respondents, Andrew Sabean and Cathy Hallett, were involved in a motor vehicle collision giving rise to a claim against a tortfeasor. That claim was settled in 2009 based on the $500,000 policy limit of the tortfeasor's insurance. In addition, the tortfeasor's insurer paid $16,079.27 for costs and disbursements to the respondents' lawyer in trust. A limits agreement was executed as part of the settlement.

[3] Each of the respondents commenced an action under the SEF 44 endorsement in their respective insurance policies for their actual damages to the extent that they exceeded the amount of the payment by the tortfeasor. Following a settlement conference among both respondents and their respective insurers, Ms. Hallett abandoned her SEF 44 action on receipt of $100,000 from the total amount received from the tortfeasor's insurer plus additional amounts from her SEF 44 insurer. There was no evidence of how the $16, 079.27 paid by the tortfeasor's insurer for costs and disbursements was taken into account in the settlement between Ms. Hallett and Mr. Sabean.

[4] Mr. Sabean's action continued against his SEF 44 insurer, Portage.

[5] A jury awarded Mr. Sabean a total of $465,408 in damages as follows:

- $180,000 general damages for pain and suffering;
- $61,749 past lost income;
- $85,116 for future lost income;
- $110,350 for cost of future care;
- $28,133 for past and future loss of valuable services.

[6] Based on this quantification of Mr. Sabean's damages, Portage was required to make a payment to Mr. Sabean. The parties disagreed as to whether the amount should be reduced through the deduction of any future CPP disability benefits Mr. Sabean would receive. Portage's position was that the future CPP disability benefits were to be deducted.

[7] The determination of this dispute required an analysis of SEF 44, in particular, the meaning of the phrase "any policy of insurance" in clause 4(b)(vii). Justice Murray, relying almost exclusively on *Economical Mutual Insurance Co. v. Lapalme,* 2010 NBCA 87, (*Lapalme)* determined that Mr. Sabean's future CPP disability benefits, were not to be deducted (*Sabean v. Portage LaPrairie Mutual Insurance Company*, 2013 NSSC 306). Portage says the trial judge erred in his determination, raising the first issue to be determined in this appeal.

[8] The second issue relates to costs and disbursements. The trial judge awarded costs of $22,200 and disbursements of $38,498.96 to Mr. Sabean at trial. Portage says it made a formal offer to settle which was only $237.24 short of what would have been ordered paid to Mr. Sabean if his future CPP disability benefits are deductible. Portage submits that the amount awarded to Mr. Sabean was so close to the formal offer to settle that the near miss, in terms of the offer to settle, should have been reflected in the costs and disbursements award. It was not. Portage submits the trial judge erred in that regard.

[9] The third issue also has a costs aspect. The trial judge did not reduce the amount to be paid by Portage to Mr. Sabean by attributing some of the $16,079.27 costs and disbursements paid by the tortfeasor's insurer.

[10] The trial judge describes Portage's argument on this issue in his separate reasons dated April 30, 2014 (unreported):

> [6] It is acknowledged by the Defendant Portage that costs and disbursements must be deducted from the amount "deducted" in the sense that they should not be credited to Mr. Sabean, when calculating the amount owed to him by Portage.

> They state in their brief, that under SEF 44, costs should not be considered in calculating amounts obtained by the insured and thus in calculating amounts due.
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> [7] Portage argues, however, that the costs and disbursements paid were for two claims, Mr. Sabean's and Ms. [Hallett's]. In the result, the sum of $16,079.27 should be "split" or apportioned between the two Plaintiffs equally, meaning that $8,039.64 should be subtracted from Mr. Sabean's settlement amount ($398,210.40) leaving him with $390,170.76 instead of $382,131. 13. When this amount, $390,170.76 is deducted from the jury award of $465,408.00, the Defendant Portage claims the amount owed to Mr. Sabean is $75,237.27 instead of $83,276.77.
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> …
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> [20] On the one hand therefore, [Portage] acknowledges that costs should not be subtracted from the amount owed. On the other hand, any amounts actually received under s.4(b)(i) of the SEF 44 policy, suggests it should be deducted, as it is an indemnity policy for which the Plaintiff should recover no more or no less than full indemnity.

[11] The trial judge held:

> [23] Further, I find that the settlement between the two Plaintiffs', is just that. What they agreed upon, in terms of costs is between them. Whatever the amount for costs was, as between them is unknown. It cannot be assumed the Plaintiff, Mr. Sabean, retained the full costs award or even half. What portion of either settlement amount represented costs is pure speculation. There is no cogent evidence of the shared cost amounts as between them. As such, those figures cannot be presumed.

[12] Portage says the trial judge erred by not reducing the amount it has to pay Mr. Sabean by some amount, to take into account the $16,070.27 that was paid to settle the two claims.

Standard of Review

[13] The issue of whether future CPP disability benefits are deductible from SEF 44 payments is a matter of the interpretation of the SEF 44 endorsement. This involves the interpretation of a contract which is to be governed by the application of legal principles to the words of the contract considered in light of the factual matrix (See: *Sattva Captial Corp. v. Creston Moly Corp.*, 2014 SCC 53.). This case involves a discrete and extricable question of law which has broad impact because of its precedential impact. I am satisfied the standard of review is,

according to *Ryan v. Sun Life Assurance Co. of Canada*, 2005 NSCA 12, ¶15 one of correctness. This is the standard upon which the parties agree.

[14] With respect to the two issues relating to costs, costs are awarded at the discretion of the trial judge and appeal courts are normally reluctant to interfere (See: *Metlin v. Kolstee*, 2003 NSCA 95, ¶4). Appellate intervention is not warranted unless there has been an application of incorrect legal principles or the decision is so clearly wrong as to be manifestly unjust.

Analysis

1. Did the trial judge err in interpreting the SEF 44 endorsement to mean that future CPP disability benefits received by Mr. Sabean are not deductible?

[15] The relevant portions of the SEF 44 standard form endorsement provide as follows:

> 4(a) The amount payable under this endorsement to any eligible claimant shall be ascertained by determining the amount of damages the eligible claimant is legally entitled to recover from the inadequately insured motorist and deducting from that amount the aggregate of the amounts referred to in paragraph 4(b), but in no event shall the insurer be obliged to pay any amount in excess of the limit of coverage as determined under paragraph 3 of this endorsement.
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> (b) The amount payable under this endorsement to any eligible claimant **is excess to any amount actually recovered by the eligible claimant from any source (other than money payable on death under a policy of insurance) and is excess to any amounts the eligible claimant is entitled to recover (whether such entitlement is pursued or not) from:**
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> (i) the insurers of the inadequately insured motorist, and from bonds, cash deposits or other financial guarantees given on behalf of the inadequately insured motorist;
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> (ii) the insurers of any person jointly liable with the inadequately insured motorist for the damages sustained by an insured person;
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> …
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> (v) the uninsured motorist coverage of a motor vehicle liability policy;
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> (vi) any automobile accident benefits plan applicable in the jurisdiction in which the accident occurred;
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> (vii) **any policy of insurance providing disability benefits or loss of income benefits or medical expense or rehabilitation benefits;**

(viii) any Worker's Compensation Act or similar law of the jurisdiction applicable to the injury or death sustained;

(ix) any Family Protection Coverage of a motor vehicle liability policy.

[Emphasis added]

[16] The trial judge accepted the reasoning of the New Brunswick Court of Appeal in *Lapalme* in determining that Mr. Sabean's future CPP disability benefits were not deductible under clause 4(b) of SEF 44. *Lapalme* considered the same issue that is before us under the New Brunswick equivalent to SEF 44, NBEF 44.

[17] The Court in *Lapalme* interpreted this section in a "insured-friendly" way, apparently on the basis that it was ambiguous:

> [28] **As is well known, the Supreme Court of Canada has repeatedly emphasized that, although effect must be given to unequivocal contractual wording, adhesionary contracts of insurance, such as the NBEF 44, stand to be interpreted "contra proferentum, or in favour of the insured" where general rules of contract interpretation fail to resolve the ambiguity at the root of the dispute between the parties:** *Somersall v. Friedman*, at para. 47 and *Progressive Home Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33 (CanLII), [2010] S.C.J. No. 33 (QL) at paras.21 -24. **True ambiguities stand to be resolved against the insurer:** *Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada*, 2008 SCC 66 (CanLII), [2008] 3S.C.R. 453, at paras. 33 and 73 – 75. Correctively, coverage provisions attract a broad construction, while exclusion clauses are to be read narrowly: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 (CanLII), [2000] 1 S.C.R. 551, at para. 70.
>
> [Emphasis added]

[18] The ambiguity was whether the term "any policy of insurance" used in clause 4(b)(vii) includes the provisions of the CPP governing disability payments.

[19] At first glance, it may appear unclear whether the provisions of the CPP governing disability payments qualify as a "policy of insurance" under this section. However, I am satisfied there is no ambiguity once the general principles of contract interpretation are applied, including the plain, ordinary and proper meaning of the words in clause 4, the law in Canada at the time the SEF 44 became available, and its history. It is clear future CPP disability benefits do qualify as "any policy of insurance". Only where there is ambiguity is the *contra proferentem* doctrine applied.

[20] This Court in *Campbell-MacIsaac v. Deveaux*, 2004 NSCA 87, considered how clause 4 should be interpreted. The question in that case was whether future disability benefits paid pursuant to a private insurance policy (not pursuant to CPP as in this case) were deductible from the amount otherwise payable under SEF 44. This Court found that they were deductible after interpreting clause 4. Saunders, J.A. reasoned:

> [52] The primary issue raised on this appeal concerns the interpretation of clauses 4,9 and 10 of the SEF 44 endorsement. Before undertaking an analysis of those provisions, it would be useful to recall some of the leading authorities in contractual interpretation, especially in the context of insurance contracts, and more particularly, special endorsements such as the SEF 44 in this case.
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> [53] In the recent case of **Somersall v. Friedman**, 2002 SCC 59 (CanLII), [2002] 3 S.C.R. 109, the Court had to make certain findings regarding the interpretation of the SEF 44. In its analysis the Court considered the nature of the coverage and its objective. The Court found the SEF 44 was a policy of indemnity thus limiting the insurer's liability to the actual loss proved and denying an insured "profit" or overcompensation under the policy. In my opinion these are important principles to be applied when interpreting the whole of the SEF 44 and those of its provisions engaged in this case.
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> …
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> [55] It has been consistently recognized by the courts that SEF 44 coverage is "last ditch" or "safety net" coverage. It is, as its own provisions make clear, "excess" insurance. The principle that SEF 44 protection is "excess" coverage only and ought not to provide a " windfall" of double recovery was recognized by Glube, C.J.S.C., (as she then was) in **Myers v. Zurich Insurance Co.** [1992], 118 N.S.R. (2d) 379 where at ¶24, she observed:
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> > … The amount payable by Zurich is excess to the amounts actually recovered from any source. The Policy only pays "excess" amounts to any amounts actually recovered. The estate has actually recovered amounts from Omaha and MSI. The only amount unrecovered is the remainder of the funeral expenses. This is an action to indemnify persons as a result of a loss suffered because there was an under insured motorist. The estate is not entitled to receive any amounts for expenses which have been paid in full by others. This is not a case of excusing a tortfeasor from his or her wrongdoing, but rather, payment would result in a windfall to the applicants and would be contrary to the contract between the parties. If Zurich had to pay these amounts, it would be contrary to the clear language of the Policy and in particular the sections in the Endorsement.
> >
> > …

[57] From these and other authorities, I conclude that the SEF 44 endorsement is an indemnity policy which is intended to cover Dr. Campbell-MacIsaac up to the extent of her loss, such that she is to receive no more and no less than full indemnity. She can in no way profit from the insurance. Any analysis and interpretation of the SEF 44 endorsement and its provisions must be consistent with those principles, that is that an insured is not to profit from the insurance and therefore is not entitled to double recovery.

[58] In addition, I hold the view that the specific terms of the SEF 44 endorsement should be read in the context of the wording of the entire endorsement and not in isolation. As well, the terms of the endorsement must be interpreted in light of its overall purpose, that is "last ditch," "safety net" and "excess insurance."

[59] In **Consolidated Bathurst Export Limited v. Mutual Bolier and Machinery Insurance Company,** 1979 CanLII (SCC), [1980] 1 S.C.R. 888, Estey, J., explained the rules of interpretation that apply to insurance contracts at pages 901-902:

> Even apart from the doctrine of contra proferentem as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intentions of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought not anticipated at the time of the contract. (underling in the original)

[60] A similar expression is found in **Liability Insurance Law in Canada,** 3rd ed. (Toronto: Butterworths, 2001) where the author Gordon Hilliker states at pages 27-28:

> The requirement that words are to be construed in accordance with their plain, ordinary and popular sense does not mean that one ignores the context in which the words are found. Rather, it is a cardinal rule that a contract of insurance should be considered in its entirety and be

> constructed liberally so as to give effect to the purpose in which it was written, (underling in the original case)
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> [61] In the text, **Insurance Law in Canada,** Craig Brown, 2002, Thompson Canada Limited, Volume 1, pp. 8-15, the author states the following with respect to the interpretation of insurance contracts:
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> > Note that the reference is to the reasonable expectations of the parties, not just the insured. In this there are echoes of Estey, J. in *Consolidated Bathurst* and Sopinka, J. in *Brissettte*, both of whom made it clear that an interpretation should avoid windfalls for insureds as much as insurers. (underlining in the case)
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> [62] In the result, particular words and phrases should not be lifted form the contract and considered in isolation. They must be interpreted within the context, scheme and objectives of the entire endorsement which is to provide "last ditch" "safety net" and "excess" protection to Dr. Campbell-MacIsaac that is "no more and no less than full indemnity" and without profit or windfall or double recovery, all in keeping with "the mutual obligations created by the SEF 44" endorsement (**Somersall,** supra, at ¶33.)

[21] Thus, the context that SEF 44 is an excess coverage provision, is important to interpreting the meaning of the phrase "any policy of insurance" in clause 4(b)(vii).

[22] At the time the SEF 44 endorsement became available in Canada, the Supreme Court of Canada had established in *Canadian Pacific Railway v. Gill,* [1973] S.C.R. 654, that benefits payable pursuant to the CPP, to the widow and children for the wrongful death of Mr. Gill, were paid pursuant to "any contract of insurance" for the purpose of s.4(4) of the *Families Compensation Act* of British Columbia, which provided:

> In assessing damages there shall not be taken into account any sum paid or payable on the death of the deceased **under any contract of** assurance or **insurance.** (*Gill,* p. 669) (emphasis added)

[23] Spence, J., in writing for the Court, made the following comparison between the CPP and a contract of insurance (at 669-670):

> … persons in the class of pensionable persons are required by statute to make a contribution to the pension plan; the employer makes a contribution, and then a pension is payable on retirement or upon becoming disabled, or a pension is payable to the widow and dependent children upon the death of the contributor The plan, therefore, is an exact substitute for a privately arranged insurance policy made between the deceased person and an insurance company with the benefits payable upon the death or disablement of the insured. There is an element of risk

> to both the contributor under the Canada Pension Plan and to the Government which pays the benefits under the Plan. It may well be that a person who is a contributor may make but a few payments and then becomes disabled and be paid pension amounts over a long period, on the other hand, the contributor may contribute for a very long number of years and then upon retirement die within a few months so that very little pension benefit is obtained.
>
> There are, of course, many forms of insurance and surely one of them may be considered to be the social insurance now exemplified by the Canada Pension Plan. In so far as the word "contract" is concerned, there is, in result, a contract between the contributor to the Canada Pension Plan and the Government which, by virtue of the statute, exacts from such contributor weekly deductions from his wages. …

[24] The Court concluded that pensions payable under the CPP "…are so much of the same nature as contracts of insurance that they also should be excluded from consideration when assessing damages under the provisions of that statute".

[25] Subsequent to *Gill*, Ontario's *Insurance Act* was amended making private insurers responsible to provide coverage with respect to underinsured drivers. A standard endorsement form, SEF 42, was drafted by the insurance industry and became available October 1, 1981: Morse, J., *"SEF No. 44 Underinsured Motorist Coverage: The Aftermath of SEF 42 and the Borland, Wigle and White Cases"* (1986-87 Advocates' Q. 185 at 187).

[26] SEF 42 contained no limitation analogous to s.4(b)(vii) of the SEF 44 endorsement and so made no attempt to prevent double recovery from any form of disability insurance. SEF 42 was withdrawn by the insurance industry as a direct result of judicial interpretations which expanded coverage in a way it had not anticipated and was unwilling to accept, such as the "stacking" of policy limits. If left undisturbed, the industry felt the decisions would result in insurers having to pay for losses far in excess of what was originally intended, necessitating an astronomical increase in premiums; John Newcombe, *The Standard Automobile Policy, Annotated* (Toronto: Butterworths), 1986, page 188. As a result, the insurance industry made the more restrictive SEF 44 endorsement available as of February 1, 1985. Among the changes designed to limit coverage was clause 4(b)(vii), which "effectively precludes the double recovery permitted at common law" (at 220).

[27] I am satisfied the difference between the phrase considered in *Gill*, "any *contract* of insurance", and the phrase "any *policy* of insurance" in clause

4(b)(vii), is of no import. A similar conclusion was reached by the Ontario Court of Appeal in *Gignac v, Neufeld*, [1999] OJ No 1295, where the court relied on *Gill* to conclude that CPP disability benefits received by an injured person was money paid under "a valid policy of insurance" within the meaning of the section of the regulation under consideration in that case, s.2(1)(b) of Regulation 676, RRO 1990, a regulation to the *Ontario Insurance Act,* RSO 1990, c. 18.

[28] In addition, the definitions of "contract" and "policy" in the Nova Scotia *Insurance Act* R.S.N.S. 1989, c. 231,s.1 suggest a distinction without a difference in the use of these words in the context of clause 4(b)(vii):

> (h) "contract" means a contract of insurance and includes a policy, certificate, interim receipt or writing evidencing the contract, whether sealed or not, and a binding oral agreement;
>
> (q) "policy" means the instrument evidencing a contract;

[29] Given: (1) the law established in G*ill,* before the SEF 44 endorsement was made available, that pensions payable under the CPP "of the same nature as contracts of insurance"; (2) the clear wording to the effect that SEF 44 is excess insurance - that no one is entitled to double recovery; and (3) the unimportance in the context of clause 4(b)(vii) of the use of the word "policy" as opposed to "contract", I am satisfied there is no ambiguity. It is clear that the term "any policy of insurance" in clause 4(b)(vii) includes the provisions of the CPP governing disability benefits. Future CPP disability benefits are deductible from amounts payable by SEF 44 insurers. Thus I am satisfied the trial judge erred in adopting the reasoning in *Lapalme* and ordering that Mr. Sabean's future CPP disability benefits were not deductible from the amount Portage is required to pay to him under SEF 44.

[30] I would allow this ground of appeal and remit the matter to the trial judge to determine the value of Mr. Sabean's future CPP disability benefits that are to be deducted from the amount otherwise payable to him by Portage.

2. Did the trial judge err by improperly considering the effect of Portage's formal offer to settle when he set the amount of costs and disbursements payable by it?

[31] In light of my decision with respect to the first issue, I would rescind the provisions of the trial judge's order dealing with costs and disbursements at trial and direct him to determine the amount of costs and disbursements to be paid once

he determines the amount payable by Portage, after deducting the value of Mr. Sabean's future CPP disability benefits.

3. Did the trial judge err in his treatment of costs and disbursements paid by the tortfeasor's insurer on settlement of Mr. Sabean's and Ms. Hallett's claims against the tortfeasor?

[32] The trial judge is entitled to deference. There was no evidence before him on how these costs and disbursements were dealt with between Mr. Sabean and Ms. Hallett. Without any evidence, the appellant has not satisfied me the trial judge made a reversible error.

Costs on appeal

[33] The main issue in the present case is one of importance to the appellant and other insurers. The issue is one that, no doubt, has impacted insurance cases and settlements since the implementation of SEF 44 provisions. It is important to insureds and insurers that it be resolved. I am not satisfied that it should be resolved on the back of this insured. I am satisfied it would be just and appropriate for the parties to each bear their own costs on this appeal.

Scanlan, J.A.

Concurred in:

Hamilton, J.A.
Beveridge, J.A.