Date: 19980707 Docket: C.A. 143809

NOVA SCOTIA COURT OF APPEAL
Cite as: Sutherland v. Nova Scotia (Victims' Services), 1998 NSCA 113
Chipman, Jones and Cromwell, JJ.A.

BETWEEN:

BARRY SUTHERLAND Appellant	Jean A. McKenna for the Appellant
- and -	
DIRECTOR OF VICTIMS' SERVICES Respondent	Michael T. Pugsley for the Respondent
	Appeal Heard: May 25, 1998
	Judgment Delivered: July 7, 1998

THE COURT: Appeal allowed per reasons for judgment of Cromwell, J.A.; Jones and Chipman, JJ.A. concurring.

CROMWELL, J.A.:

I. **Introduction**:

Persons who are victims of violent crime causing personal injury may apply for compensation under the **Victims Rights & Services Act,**, R.S.N.S. 1989, c. 14. The appellant is such a person. He has applied for and received compensation but thinks that he has not been given his due. The issue on this appeal is whether the various ways in which his compensation has been limited are lawful.

II. **Facts and Proceedings:**

On July 20, 1990, the appellant was at home when one of his employees dropped by with a motorcycle. The appellant asked if he could take it for a ride. He did not wear a helmet or have a licence to drive a motorcycle. While he was driving, a young woman suddenly jumped out in front of him from between parked cars. The appellant tried to avoid her but, in the process, he was thrown off the motorcycle. He broke his back, resulting in paralysis. He is confined to a wheelchair. Although he did not know it at the time he decided to ride, there was no liability insurance on the motorcycle.

In August of 1991, the appellant applied to the Criminal Injuries Compensation Board. The Board refused to entertain his claim, ruling that he was not the victim of a crime scheduled under the **Act**.

The appellant once again applied for compensation to the Director of Victims' Services in August of 1995. The Director extended the time for applying but dismissed the application in May of 1996, ruling that it had not been established that the injury was the result of the commission of a criminal offence for which compensation could be awarded under the **Act**. This decision was set aside by the Utility and Review Board in November of 1996. It received evidence that had not been before the Director and found that the appellant was injured by the act of another person who was committing an offence listed in the Schedule to the **Victims' Rights and Services Act**, namely, mischief causing actual danger to life. The appellant's claim was remitted to the Director for determination of the amount of the award with the comment that:

> The Director may wish to take into account the failure to wear a helmet in determining the amount of compensation to be awarded.

The Acting Director, in January of 1997, once again dismissed the appellant's application, this time on the basis that his behaviour in riding the motorcycle without a valid licence to do so, without vehicle liability insurance and without protective headgear, "directly contributed to the incident occurring." The Acting Director stated:

> [i]f there is evidence that the conduct of the applicant involved flagrant, reckless or foolish disregard for the law or for their own safety, this can make the applicant ineligible for compensation. If the behaviour of the applicant indicates the lack of prudent concern for their own safety, their application

can be denied.

The matter was once again appealed to the Utility and Review Board which, once again, set aside the Acting Director's decision. In reasons dated 2 May, 1997, the Board determined "a lack of prudent concern for [his] own safety should not automatically result in a denial of compensation" and, specifically, that the applicant's alleged violations of the **Motor Vehicle Act**, R.S.N.S. 1989, c. 293, with which he was not charged, should not result in dismissal of the application. The Board found that a 35% reduction of the amounts otherwise recoverable, rather than denial of the claim, would be appropriate to reflect these considerations.

The Board then invited submissions from the Acting Director and the appellant on the issue of the amount of compensation. Having received them, the Board ruled, in November of 1997, that the appellant could be entitled to $6861.64 but taking into account the reduction of 35%, awarded $4460.07. The Board declined to grant compensation with respect to loss of income and future medical needs and disallowed claims for certain other specific costs.

The appellant now appeals to this Court, challenging both the general reduction of the award by 35% and the disallowance of the other claims.

III. The Role of this Court on Appeal:

It is important to understand the different roles of the Director of Victims' Services, The Utility and Review Board and this Court in the compensation process established under the **Victims' Rights and Services Act**.

Applications for compensation are made to the Director who, subject to the **Victims' Rights and Services Act** and the **Regulations** made under it, is given wide discretionary authority to deal with the application. The Director's discretion is underlined, for example, by the **Act** stating that the Director, <u>may</u>, (rather than must or shall) award compensation (s. 11A), that the Director is to consider "...such evidence as the director <u>may</u> require", and that in determining whether and how much compensation to award, the Director is to take into account "...all such circumstances as <u>the Director considers relevant</u> to the making of the award...".

A decision of the Director may be appealed to the Utility and Review Board . On the appeal, the Board may receive any information that, in its opinion, may assist it to deal effectively with the matter and make any decision that the Director could have made: s. 11L(1) and (3) ; **Criminal Injuries Compensation Regulations** N.S. Reg 24/94, Schedule A, s. 7(1); **Criminal Injuries Compensation Appeal Rules**, N.S. Reg 25/95. In short, the appeal to the Board provides a broad review of the Director's decision. For the purposes of this appeal, it has been assumed that the Board possesses the same powers on appeal as the

Director had in considering the claim.

This broad review on appeal to the Board is to be contrasted with the narrow scope of the further appeal from the Board to this Court. This appeal, provided for by s.30 of the **Utilities and Review Board Act**, S.N.S. 1992, c. 11. , is limited to questions of law and jurisdiction. Findings of fact by the Board within its jurisdiction are "binding and conclusive": s. 26 . The Board must be correct on questions of law or jurisdiction, but the role of this Court in relation to its factual findings is limited to errors of fact that are "...so egregious as to amount to errors of law": **Nova Scotia v. Research Island AG** (1994), 132 N.S.R. (2d) 156 at 158.

Frequently, questions decided by the Board will involve a mixture of law and fact. Such questions, to use the words of Iacobucci, J. in **Director of Investigation and Research v. Southam Inc.**, [1997] 1 S.C.R. 748 at 767, concern "...whether the facts satisfy the legal tests." The more the question approaches one of pure application of facts to the relevant legal principles, the more nearly the question is rightly characterized as one of mixed law and fact: ibid at 768. This Court on appeal should approach the Board's resolution of these sorts of mixed questions with a measure of deference : see **Southam** at p. 771; see also to much the same effect the judgment of this Court in **Nova Scotia (Attorney General) v. Williams** (1996), 152 N.S.R. (2d) 291 at 296-301.

IV. The 35% Reduction:

The appropriate role of this Court is an important issue with respect to the first ground of appeal . It relates to the Board's reduction of the appellant's award by 35% because of his conduct. In making this reduction, the Board was applying s. 11(D)(1) of the **Victims' Rights and Services Act** . It provides:

> **11D(1)** In determining whether to award compensation and the amount thereof, the Director shall consider and take into account all such circumstances as the Director considers relevant to the making of the award and, without limiting the generality of the foregoing, the Director shall consider and take into account any behaviour of the person injured or killed that directly or indirectly contributed to that person's injury or death.

After noting that there was evidence showing that the appellant's failure to wear a helmet "did not directly contribute to his injuries", the Board stated, at page 6 of its reasons:

> The appellant did take a risk in riding a motorcycle without a helmet. While he had experience with motorcycles, he knew that he was not licensed to operate a motorcycle. He stated he did not intend to ride the motorcycle on the public streets but he clearly did so. In fact, he rode around the block twice. In the board's opinion this is a factor which the Director is entitled to take into account in deciding the amount of the award.

Section 11(D)(1) has two main parts. There is the first, general part which confers broad powers on the Director to decide what matters are relevant to the making of an award. The broad and discretionary nature of this provision is further emphasized when read in light of s. 11(A) which provides that "the Director, in

accordance with the regulations and **on consideration of such evidence as the Director may require, may, as the Director considers proper,** award compensation..." .(emphasis added) The second part of s. 11D(1) contains a more specific direction to consider behaviour of the applicant which directly or indirectly contributed to the claimant's injury. It is not clear on which part of s.11(D)(1) the Board relied in making the reduction.

The appellant's submission on this ground of appeal has two steps. First, it is argued that the broad, general language of the opening part of s. 11(D)(1) is qualified by the more specific language relating to behaviour that "directly or indirectly contributed" to injury. In other words, only such behaviour may be relied on to reduce the award. Second, the appellant argues that the requirement of direct or indirect contribution to the injury means that the accident must constitute contributory negligence as that term is understood in tort law.

The language of the statute confers discretion on the Director with respect to the circumstances which he or she "..considers relevant." : s. 11(D)(1). Specifically with respect to behaviour of the applicant, the Director must consider behaviour that "... directly or indirectly contributed..." to the injury: s. 11(D)(1). In the face of such open-ended discretion and being limited as we are on the appeal to questions of law or jurisdiction, I am inclined to think we may only interfere with the Board's decision if persuaded that the factors relied on under the wide general

language of the first part of the section were "patently" or "wholly" irrelevant to the award of compensation: see **Re Sheehan and Criminal Injuries Compensation Board** (1974), 52 D.L.R. (3d) 728 (Ont. C.A.) at 733 (leave to appeal to S.C.C. denied at 728n.; **Quebec (Attorney General) v. Canada (National Energy Board)**, [1994] 1 S.C.R. 159 at 180.

However, I think that this aspect of the appeal may be resolved on narrower grounds. On the view I take of this case, I do not have to decide whether imprudent conduct which is wholly unrelated to the injury could be taken into account given the breadth of the discretion conferred on the decision-maker under the general provision of the first part of the section: see generally Peter Burns, *Criminal Injuries Compensation* (2d, 1992) at 311 ff. I will assume without deciding that the factors considered must meet the test of the more specific part of the section and be shown to have contributed directly or indirectly to the injury.

I do not think that the statutory language referring to behaviour that contributes to the injury, directly or indirectly, limits consideration by the Director (or the Board on appeal) to behaviour that would constitute contributory negligence in a civil action in the courts. This Court has held that it is within the Board's jurisdiction to take into account imprudent conduct which, while not the direct cause of the injury, nonetheless contributed to it in the sense that " but for " the imprudent conduct, the injury would not have occurred: see **Poholko v. Criminal**

Injuries Compensation Board (1983), 58 N.S.R. (2d) 15 (S.C.A.D.) . In the case before us, the applicant should not have driven the motorcycle, given that he did not have a licence or a helmet. Had he not driven, the injury would not have occurred. His acts were imprudent, they were related to the operation of the motorcycle and had he not so acted, he would not have been injured. I do not think that it was wrong in law for the Board to conclude that they contributed, indirectly, to the injury. There was, in my respectful view, no error of law or jurisdiction in this regard.

V. Limitation of income payments to $12 000:

Appendix A, paragraph 7 of the **Criminal Injuries Compensation Regulations N.S.** Reg 24/94 provides that the maximum amount payable by periodic payment for loss of income shall not exceed $12,000 in total periodic payments. The appellant argues that this limit established by regulation is inconsistent with the Statute and therefore unlawful.

The authority for the **Regulation** is in s.14(1)(cd) of the **Act**. That section provides that the Governor in Council may make regulations "...prescribing the maximum compensation that may be awarded in respect of any item of or class of expense, loss, damages or maintenance." Section 11G of the **Act** also deals with limits on compensation payable:

> **11G(1)** The amount awarded by the Director to be paid in respect of the injury or death of one person shall not exceed
>
> (a) in the case of lump sum payments, thirty

> thousand dollars; and
>
> (b) in the case of periodic payments, one thousand dollars per month,
>
> and, where both lump sum and periodic payments are awarded, one only but not both may exceed half of the maximum therefor prescribed in clause (a) or (b), as the case may be.

The appellant concedes that the regulation-making power conferred by s. 14 is broad enough to include a regulation limiting income recovery. The appellant submits, however, that the **Act** as a whole shows that the regulation-making power was not intended to authorize regulations which would cap the total of monthly payments. Specifically, the appellant argues that the regulation is inconsistent with the cap on periodic payments set out in s. 11(G). As noted, that section provides that amounts awarded by the Director shall not exceed $1,000 per month in the case of periodic payments. Having included a monthly maximum for periodic payments in the **Act** itself, it could not have been intended, the appellant submits, that regulations could impose the further cap on the total of periodic payments.

The short answer to this submission is that there is no inconsistency or conflict between the **Act** and the challenged **Regulation**. The **Act** provides that awards are not to exceed the amounts set out in s.11(G). It does not provide that awards must be authorized up to that amount when the circumstances call for it.

Section 14 authorizes, in broad language, imposition of limits on compensation "in respect of any items of or claims of damages." Loss of income is such an item or claim of damages. The Governor-in-Council did not exceed the regulation-making authority conferred by section 14 in making this part of the **Regulation**.

VI. Deduction of Workers' Compensation benefits:

In its assessment of compensation in November of 1997, the Board noted that the applicant had received the following "disability income benefits":

Worker's Compensation	$97,510.00 [July 1990 - October 1994]
Canada Pension Disability	$50,058.08 [Monthly pension of $586.34]
Wawansea Insurance	$32,500.00

The Board declined to make an award for loss of income because the appellant had received more than $12,000 from the Workers' Compensation Board for lost income. The issue is whether this is an error of law or jurisdiction.

The **Act** and Regulations require that certain benefits be deducted from awards. For ease of reference, I will refer to these provisions as the "collateral benefit" provisions. It may be that some types of benefits received are to be taken into account in determining the "expenses actually incurred" or "the pecuniary loss or damages incurred ..." under s. 11(C)(a), (b), (c) and (e). That issue was not raised in this appeal and I make no decision with respect to it. I am dealing here only with the explicit "collateral benefit" provisions in the **Act**. The **Act** and

Regulations, as discussed in the preceding part of these reasons, also provide for overall limits on the amount of compensation payable. I will refer to these as "the cap" provisions. This ground of appeal raises difficult questions about how these two sorts of provisions interact in this case.

The cap provisions set maximum amounts that may be paid under the **Act**. One such provision is in s. 11G which has been set out above. The key words are "the amount **awarded** by the Director **to be paid** ... shall not exceed...". Another cap provision is found in section 7 of Appendix A to the **Criminal Injuries Compensation Regulations**. As noted above, this **Regulation** is made pursuant to the authority conferred by s. 14 of the **Act** to prescribe "... the maximum compensation that may be awarded..." Section 7 provides:

> 7. For the purpose of calculating compensation pursuant to Section 11C(b) of the Act, [provides that compensation may be awarded for "**pecuniary loss ... incurred** by an injured person as a result of total or partial disability affecting the person's capacity to work".] compensation for loss of income, wages or salary up to a maximum loss of $1,000.00 per month less any income or income supplement, salary insurance, sick leave benefits, social assistance or payment of a similar nature received from any source and the maximum amount payable by periodic payments for loss of income shall not exceed $12,000.00 in total periodic payments to any one applicant.

Section 7 of the Appendix to the **Regulation** refers as well to the

collateral benefit question. The $1000 monthly maximum for periodic payments is to be reduced by "... any income or income supplement ... from any source ..." . There is also a collateral benefit provisions in s. 11(E)(b) of the **Act**. The Board is required by that section to deduct from the "...compensation, if any, <u>to be awarded</u> ... any benefit received or to be received by the injured person <u>in respect of the injuries</u>."

The Board decided that the appellant could not recover for loss of income because he had received more than the cap amount of $12,000.00 in Workers' Compensation benefits. While the parties on the appeal focused on s. 11E(b), the Board, in fact, relied on s. 7 of Appendix A to the **Regulations** in reaching this conclusion. In its November 14, 1997, ruling, the Board referred to and adopted its May, 1997, decision on this point. The relevant passage from the May ruling is as follows:

> ...According to the original application filed with the Criminal Injuries Compensation Board the Applicant has received benefits from C.P.P. and from his automobile insurance. The Board assumes these were both as a result of the injury. The Workers' Compensation benefits relate to an earlier injury at work.
>
> The maximum claim under the Table of Prescribed Compensation in the Regulations is $12,000.00 for loss of income, wages or salary "less any income or income supplement, salary insurance, sick leave benefits, social assistance or payment of a similar nature received from any source." The Board interprets this wording as including Workers' Compensation payments. The original application shows a payment of $19,200.00 from Workers' Compensation for the 12 month period following the injury. This figure is

greater than $12,000 so there can be no award for loss of wages.

The Board's interpretation of s. 7 of Appendix A of the **Regulation**, in my respectful view, constitutes a clear error of law.

Section 7 of Appendix A of the **Regulations** sets three limits on compensation. It is useful to review them with appropriate commentary:

i. Periodic payments under s. 11C (b) (i.e., for pecuniary loss or damages incurred by an injured person as a result of total or partial disability affecting the person's capacity for work) must not exceed $1000.00 per month.

There must be a pecuniary loss as a result of a disability affecting capacity for work. Payments for loss of capacity for work may take into account not only present but future income loss: see: **Re Manarey and Commissioner of the Northwest Territories** (1988), 150 D.L.R. (3d) 358 (N.W.T. S. Ct.) at 361-365.

ii. If it is determined periodic payments are to be awarded, the **Regulations** require that they are to be reduced by the other income replacements as specified in the section being received by the claimant.

The text of the **Regulation** makes it clear that these “collateral benefits” are to be deducted from the $1,000.00 limit. The words used stipulate that the “maximum loss” is $1,000.00 per month minus the stated deductions. The result is that if the claimant is in receipt of more than $1,000.00 per month in benefits as described in the section, no periodic payment is to be awarded for the period during which those other benefits are being received.

iii. The total of periodic payments is not to exceed $12,000.00

The section uses the words “... the maximum amount payable by periodic payments ... shall not exceed $12,000.00.” This refers to amounts actually paid by way of periodic payments.

The Board deducted the workers’ compensation benefits from the $12,000.00 periodic payment limit and concluded that no amount was payable. It should have first decided whether there was a pecuniary loss incurred as a result of a total or partial disability affecting the capacity for work. In considering this question, it ought to have taken into account past, present and future losses. If persuaded that there were such losses and if it decided to award a periodic payment, the monthly award should have been quantified. In doing so, the monthly loss should have been set at the actual loss up to $1,000.00, minus the income replacement benefits referred to in the section. Benefits received for past income loss should not be off-set against the claimant’s entitlement to compensation for

present or future income loss. For example, if a claimant earning $1,000.00 per month had been injured and totally disabled 2 years ago and received complete income replacement benefits for one year totaling $12,000.00, no compensation would be payable under the **Act** for that year. But if for the second year, no such benefits were received and the disability due to the injury persisted, the claimant is eligible for up to $1,000.00 per month until such payments reach the cap of $12,000.00.

When the appellant's case was considered by the Board in November of 1997, he unquestionably was suffering a pecuniary loss as a result of a total or partial disability affecting his capacity to work as required by s. 11C(b). The Workers' Compensation benefits he had received related to the period of July, 1990 to October, 1994. They were irrelevant to the recovery of loss of income incurred after those benefits ceased. The Board ought to have considered what the pecuniary loss was and, if it wished to award a periodic payment, reduce that compensation payable by any benefits as described in s. 7 being received at the time. The periodic payments, if any, awarded would cease when they reached the $12,000.00 limit for such payments.

The cap provision in s. 7 of Appendix A of the **Regulations** applies only to periodic payments for loss of income, salary or wages. It does not apply to lump sum payments for the same sort of loss. It would be open to the Director, for

example, to award a lump sum for future loss of earning capacity up to the lump sum maximum established by the **Act**. In that event, the issue of the interaction between the deductions required by s. 11(E) and the cap set out in s. 11(G) would arise.

The **Act** makes it clear, in my opinion, that the deductions required by s. 11(E) are to be made from the compensable loss incurred and that the cap is to be applied to that amount. In other words, the caps in s. 11G apply to compensation actually paid. Section 11E, which deals with deductions, uses the words "the amount of compensation to be awarded" when it describes the amount from which deductions are to be made. Section 11G refers to "the amount awarded ... <u>to be paid</u>" when it sets out the caps. This approach is consistent with the intention of the cap provisions which is to set a maximum cost to the provincial treasury of each claim: see **Burns**, above, at pp. 288-89. It is also consistent with the approach taken in **Re Garet and Criminal Injuries Compensation Ordinance**, [1975] 5 W.W.R. 36 (N.W.T. S. Ct.), the only reported Canadian case that I have located dealing with the point. In summary, the matter is to be approached in three steps: 1. what is the eligible loss; 2. what deductions are to be made from that eligible loss; and 3. what limits on compensation otherwise payable apply.

The deductions required by s. 11E relate to benefits "received or to be received ... <u>in respect of the injury</u>". Workers compensation benefits are payable as

a result of work related injuries. As the Board pointed out in its May decision, the Workers' Compensation benefits received by the appellant related to an earlier injury at work. To the extent that the Board relied on s. 11E in deducting the workers' compensation benefits, it also erred in law in my opinion, because such benefits were not received "in respect of the injury" as contemplated by s. 11E.

In summary, I conclude that the Board erred in law when it decided that recovery of more than $12,000.00 from an income replacement source described in s. 7 of Appendix A to the **Regulations** precluded recovery for periodic payments up to the $12,000.00 limit for income loss for a period when such benefits were no longer being paid.

VI. Disallowance of Future Medical Costs:

The Board disallowed certain future medical costs. It stated:

> The medical and pharmaceutical award includes an amount for certain medical costs [suppositories, dulcolax and cranberry pills] for a period when they were not covered. The Applicant is seeking an award to cover these costs in the future. The Acting Director's position is that they are costs which may be recoverable from the Department of Community Affairs. (sic)

As noted, s. 11E(b) of the **Act** requires deductions for any benefit "received or to be received ... in respect of the injury." The Board did not address this question further in its reasons, but did not make an award for these items. Although not stated very clearly, the Board must have concluded from the material before it

that these costs were recoverable from another source. This is a question of fact on which the Board's determination is protected by the privative clause in s. 26 of the **Utility & Review Board Act**. I am not persuaded that the Board's conclusion on this factual determination was so egregious as to amount to an error of law. If in fact these amounts are no longer recoverable, the applicant may apply to the Director to vary the award pursuant to s. 11(J) of the **Act**.

VII. Disposition:

For these reasons, I would allow the appeal, and remit the matter to the Board for determination of the applicant's claim for loss of income in accordance with the applicable law. No costs were requested and I would order none.

Cromwell, J.A.

Concurred in:

Jones, J.A.

Chipman, J.A.

C.A. No.143809

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

BARRY SUTHERLAND	)	
Appellant	)	
- and -	)	REASONS FOR
	)	JUDGMENT BY:
DIRECTOR OF VICTIMS' SERVICES	)	
	)	CROMWELL, J.A.
	)	
Respondent	)	
	)	
	)	
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	)	