

NOVA SCOTIA COURT OF APPEAL

Citation: *Sparks v. Holland*, 2019 NSCA 3

Date: 20190118

Docket: CA 478929

Registry: Halifax

Between:

Josh Sparks

Appellant

v.

Catherine Holland

Respondent

Judge:

The Honourable Justice David P.S. Farrar

Appeal Heard:

December 10, 2018, in Halifax, Nova Scotia

Subject:

Insurance Law. Deductibility of CPP Disability Payments from Damage Awards. Interpretation of s. 113A of the *Insurance Act*, R.S.N.S. 1989, c. 231, as amended. *Stare Decisis*. Whether a previous decision of this Court was binding on the motions judge.

Summary:

The respondent, Catherine Holland, was involved in a motor vehicle accident with the appellant, Josh Sparks, on May 15, 2013. As a result of injuries suffered in the motor vehicle accident, she received Canada Pension Plan disability benefits.

Ms. Holland commenced an action against Mr. Sparks in 2016 and made a motion before Justice Gerald R.P. Moir to determine a question of law as to whether the CPP disability benefits would be deducted from any future loss of income or loss of earning capacity award pursuant to s. 113A of the *Insurance Act*.

The motions judge found that the CPP disability benefits were

not deductible. He further found that this Court's previous decision in *Tibbetts v. Murphy*, 2017 NSCA 35, did not address the issue and was, therefore, not binding on him. Mr. Sparks sought leave to appeal and, if granted, sought to appeal the decision of the motions judge.

Issues:

- (1) Should leave to appeal be granted?
- (2) Did the motions judge err in concluding that he was not bound by this Court's decision in *Tibbetts*
- (3) Did the motions judge err in his interpretation of s. 113A of the *Act*?
- (4) Should the motions judge's decision be affirmed based on the legislative history of the Ontario *Insurance Act*?

Result:

Leave to appeal granted and appeal allowed. The motions judge erred in finding that he was not bound by *Tibbetts v. Murphy*. This Court's decision in that case determined that CPP disability benefits would be deducted from future loss of earning capacity and future loss of earnings awards.

Further, the motions judge erred in his interpretation of s. 113A of the *Insurance Act*. His decision failed to conduct a purposive contextual analysis of s. 113A.

It is not necessary to address whether the motions judge's conclusion could be affirmed on other grounds as his conclusion was not supported by the legislative text.

No costs were sought by the appellant and none were awarded.

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 18 pages.

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Respondent

Judges: Farrar, Saunders, Hamilton, Fichaud and Derrick, JJ.A.

Appeal Heard: December 10, 2018, in Halifax, Nova Scotia

Held: Appeal allowed per reasons for judgment of Farrar, J.A.;
Saunders, Hamilton, Fichaud and Derrick, JJ.A. concurring.

Counsel: Christopher W. Madill and Tipper McEwan, for the appellant
Colin D. Bryson, Q.C. and Thomas Morehouse, for the
respondent

Reasons for judgment:

Background

[1] The respondent, Catherine Holland, was involved in a motor vehicle accident with the appellant, Josh Sparks, on May 15, 2013. As a result of injuries suffered in the motor vehicle accident, she received Canada Pension Plan disability benefits.

[2] Ms. Holland commenced an action against Mr. Sparks on January 26, 2016.

[3] The parties disagreed on whether the CPP disability benefits received by Ms. Holland after the trial of her action would be deductible from any award for loss of earnings or loss of earning capacity pursuant to s. 113A of the *Insurance Act*, R.S.N.S. 1989, c. 231 (the *Act*), as amended. They also disagreed on whether that issue had previously been addressed by this Court in *Tibbetts v. Murphy*, 2017 NSCA 35.

[4] Ms. Holland made a motion under Rule 12 of the Nova Scotia *Civil Procedure Rules* for a determination of a question of law regarding the deductibility of CPP disability benefits.

[5] The question put to the motion judge was:

Do the deductions from income loss and loss of earning capacity permitted by Section 113A of the *Insurance Act*, R.S.N.S. c. 231, as amended, include *Canada Pension Plan* disability benefits received by or available to a Plaintiff after the trial of the action?

[6] The matter was heard before Justice Gerald R.P. Moir on March 15, 2018. In a decision dated June 18, 2018 (reported as 2018 NSSC 136), he answered “no” to the question.

[7] For the reasons that follow, I would grant leave to appeal and allow the appeal. The appellant did not seek costs on the appeal and none will be awarded. The costs awarded to the respondent on the motion below shall be returned to the appellant. I would dismiss the respondent’s Notice of Contention.

Issues

[8] The following issues arise on this appeal:

1. Should leave to appeal be granted?
2. Did the motion judge err in concluding that he was not bound by this Court's decision in *Tibbetts*?
3. Did the motion judge err in his interpretation of section 113A of the *Act*?
4. Should the motion judge's decision be affirmed on the basis that the contextual background supporting the decision includes the legislative history of the Ontario *Insurance Act*, R.S.O. 1990, c. I-8, as amended?

Standard of Review

[9] There is no standard of review with respect to whether leave to appeal should be granted. The question is one of first instance and requires the appellant to raise an "arguable issue" (*Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38, ¶18).

[10] With respect to determining whether he was bound by *Tibbetts* as a matter of *stare decisis*, the motion judge had to be correct. In *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2017 FCA 241, the Court held:

[58] The scope and application of the doctrine of *stare decisis* is a question of law (*Pfizer Canada Inc. v. Apotex Inc.*, 2014 FCA 250 at para. 62, (2014), 465 N.R. 306 (F.C.A.), leave to appeal refused, 2015 CanLII 20821[2015 CarswellNat 1120 (S.C.C.)]). It follows that the prothonotary's determination of this question was, and the Federal Court judge's decision is, subject to review on the correctness standard (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 (F.C.A.) at paras. 66, 69, 72, 79, 83, [2017] 1 F.C.R. 331(F.C.A.)).

(Leave to appeal to SCC dismissed, 2018 CarswellNat 3404)

[11] On the third issue, the motion judge had to be correct in interpreting the statute. This Court confirmed in *Tibbetts* the interpretation of s. 113A is a question of law and the standard of review is correctness:

[22] Statutory interpretation is a question of law. The standard of review on a question of law is correctness: *Housen* at ¶8-9, *Hartling v. Nova Scotia (Attorney General)*, 2009 NSCA 130 at ¶ 31.

[12] With respect to the fourth issue raised by the Notice of Contention, it is not necessary to discuss the standard of review as I am of the view that the motion

judge erred in law when interpreting s. 113A. Therefore, his decision cannot be upheld on the basis that it is supported by the legislative history of the Ontario *Insurance Act* R.S.C. 1990, c. I-8, as amended.

Issue #1 Should leave to appeal be granted?

[13] The respondent conceded leave to appeal should be granted. For reasons that will become obvious, I am also of the view that leave to appeal should be granted.

Issue #2 Did the motion judge err in concluding that he was not bound by this Court's decision in *Tibbetts*?

[14] Section 113A of the *Insurance Act* provides:

Effect of income-continuation benefit plan

113A In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, **the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by all payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity** under the laws of any jurisdiction or under an income-continuation benefit plan if, under the law or the plan, the provider of the benefit retains no right of subrogation.

[Emphasis added]

[15] In *Tibbetts*, after an extensive review, Oland, J.A. concluded:

[58] This analysis of s. 113A following the three questions in *Keizer* which guide statutory interpretation brings me to this conclusion. The Legislature's intention to reduce automobile insurance premiums led to s. 113A which changed the collateral benefits rule and the treatment of CPP disability benefits. Those benefits are for loss of earning capacity and are deducted from awards under that head of damages. The trial judge correctly interpreted s. 113A and deducted CPP disability benefits from the award assessed for the appellant's loss of earning capacity.

[16] The motion judge, here, concluded that the question of deducting future CPP disability benefits from an award of future lost earnings remained to be determined after *Tibbetts* (¶34). With respect, I disagree.

[17] This Court did not specifically address the question of whether CPP disability benefits were deductible from loss of future earnings because it was not asked to do so. However, that does not mean the issue was not addressed by necessary implication.

[18] In the trial decision in *Tibbetts (Tibbetts v. Murphy, 2015 NSSC 280, Tibbetts 1)*, MacAdam, J. concluded that both past and future disability benefits were deductible under s. 113A of the *Act*. He made an award for loss of earning capacity in lieu of a claim for future loss of income sought by the plaintiff. The award was for the loss of the plaintiff's ability to do heavy work over the remainder of her working life. His decision interpreted Section 113A as deducting future CPP disability payments from this future loss – directing that Ms. Tibbetts remit her future CPP disability payments to the defendant:

[86] For the periods when the plaintiff was unable to work, CPP payments, as well as Section B payments, are to be deducted from the damages received for loss of income. In view of the fact that the Section B loss of income payments and the CPP payments exceed the past loss of income there is no sustainable claim for past loss of income. For the period after the plaintiff became able to return to work, future CPP disability payments, to the extent received by the plaintiff, are deductible from damages awarded for lost earning capacity. The plaintiff is required to remit the amount of any future disability benefit when received until the defendant is fully compensated for the amount of loss of earning capacity damages received by the plaintiff. (*Tibbetts 1*)

(Emphasis added)

[19] Justice MacAdam awarded damages of \$40,000 for loss of earning capacity, subject to adjustment for the plaintiff's share of fault, to be paid to the plaintiff. Future CPP disability payments were to be deducted from this award through the remittance of the payments to the defendant. The decision contemplated all this happening after trial and into the future.

[20] The motion judge was of the view that Justice MacAdam did not consider whether past and future CPP benefits were to be treated differently and that no one had interpreted the phrase “before the trial of the action” (¶16). Again, with respect, I disagree.

[21] Justice MacAdam clearly considered whether past and future CPP payments were to be treated in the same way. There is no ambiguity in his decision as reproduced above.

[22] Perhaps, more importantly, this Court dismissed an appeal of the decision and upheld Justice MacAdam’s interpretation of Section 113A as correct. In doing so, the Court fully endorsed the trial judge’s interpretation of s. 113A, including his deduction of CPP disability benefits from the damages for loss of earning capacity. For ease of reference, I again quote from ¶58 of *Tibbetts*:

[58] ... The trial judge correctly interpreted s. 113A and deducted CPP disability benefits from the award assessed for the appellant’s loss of earning capacity.

[23] In the end, the plaintiff in *Tibbetts 1* did not need to remit future CPP disability payments to the defendant beyond the date of the order, because the loss of earning capacity damage award was reduced to zero by the combined effect of the liability apportionment and the CPP disability payments received prior to the order being taken out. However, that does not change Justice MacAdam’s legal analysis and conclusion regarding the interpretation of s. 113A which was endorsed by this Court.

[24] The proper interpretation of this Court’s decision in *Tibbetts* is that both past and future CPP disability benefits are deductible under s. 113A provided the section’s other requirements are met. I will address this Court’s analysis in *Tibbetts* in more detail when considering the second ground of appeal.

[25] In my view, the motion judge erred in concluding that this Court’s decision in *Tibbetts* did not determine future CPP disability benefits were deductible. *Tibbetts* is indistinguishable from this case and the motion judge was bound to follow it.

[26] I would allow this ground of appeal.

Issue #3 Did the motion judge err in his interpretation of s. 113A of the Act?

[27] The Supreme Court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that “[t]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at ¶21).

[28] This Court typically asks three questions when applying the modern principle. These questions derive from Professor Ruth Sullivan’s text, *Sullivan on*

the Construction of Statutes, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.

[29] Ms. Sullivan's questions have been applied in several cases, including *Keizer v. Slauenwhite*, 2012 NSCA 20, and more recently, in *Tibbetts*. In summary, the Sullivan questions are:

1. What is the meaning of the legislative text?
2. What did the Legislature intend?
3. What are the consequences of adopting a proposed interpretation?

(Sullivan, pp. 9-10)

[30] The motion judge correctly identified the three questions and determined that the second and third questions, about the legislative intent and consequences, were answered by *Tibbetts*:

[19] Justice Oland introduced her discussion of s. 113A by referring to the principle of contextual interpretation (para. 31) and the three questions in *Slauenwhite v. Keizer* 2012 NSCA 20 at para. 7. For the present decision the second and third questions, about legislative intent and consequences, are answered by the appeal decision in *Tibbetts* in ways that are binding on me.

[20] The discussion of legislative intent concludes at para. 39:

I agree with the respondents that the Legislature intended to change the collateral benefits rule as part of a wide-reaching statutory scheme to reduce insurance premiums, and that deducting those payments achieves that intent.

And, the discussion of consequences is at para. 57:

Deducting CPP disability benefits under s. 113A would accord with the legislative intention to reduce automobile insurance premiums. It would result in an injured person being fully compensated, but not overcompensated, for her loss of income or earning capacity. Deducting CPP disability benefits would change the collateral benefits rule by reducing tort awards to facilitate the reduction of automobile insurance premiums.

[31] Justice Moir did not consider the first question had been answered insofar as it related to the deductibility of future CPP benefits.

What is the meaning of the legislative text?

[32] In addressing what I consider to be the motion judge's error, some further context is necessary.

[33] Generally, damages in tort are intended to put the plaintiff in the position they would have been in had the tort not been committed.

[34] One exception to this is the collateral benefits rule which allows a plaintiff to recover damages in tort even if the plaintiff will be compensated for the same loss by insurance. Put another way, under the collateral benefits rule, insurance payments are not deducted from a tort award even if the plaintiff recovers twice for the same loss. It is an exception to the rule against double recovery.

[35] Historically, CPP disability payments were exempted by the collateral benefits rule and were not deducted from tort awards. In *Fraser v. Hunter Estate*, 2000 NSCA 63, Glube, C.J. said:

[25] Canada Pension Plan benefits have, for many years, been found to be a form of insurance and therefore non-deductible from an award for loss of income.
[citations omitted]

[36] In 2003, the Legislature enacted s. 113A to help reduce the sky-rocketing automobile insurance premiums being charged in Nova Scotia. This Court has twice held that this was the intent of the *Automobile Insurance Reform Act* (Bill 1) which included Section 113A.

[37] In *Hartling v. Nova Scotia (Attorney General)*, 2009 NSCA 130, Chief Justice MacDonald held:

[74] Following this guidance, I ask what is this legislation's overall purpose and how does it accommodate the appellants' needs, capacities and circumstances? In my view, there can be little dispute that the purpose of this legislation is to control sky-rocketing insurance premiums. ...

[Emphasis added]

[38] In *Tibbetts*, Oland, J.A. adopted the reasoning from *Hartling* and went further, specifically noting that eliminating double recovery was an objective of Bill 1:

[36] In *Hartling*, this Court considered the Legislature’s intention in enacting Bill 1, which included s. 113A. MacDonald C.J.N.S. for the Court wrote:

[74] Following this guidance, I ask what is this legislation’s overall purpose... . In my view, there can be little dispute that the purpose of this legislation is to control sky-rocketing insurance premiums. The legislative debates make this clear... . Further, while the legislation featured the mandatory 20% premium reduction financed by the impugned cap, there were other measures ancillary to this goal. Goodfellow, J. succinctly identified them in his decision ... [*Hartling v. Nova Scotia (Attorney General)*, 2009 NSSC 38]:

¶ 104 There is no doubt that there has been considerable benefit to the citizens of Nova Scotia in the passing of this legislation ... they include the overall purpose of the legislation was to reduce automobile insurance rates ... A number of measures provided benefit including ... (3) eliminating double claims for injuries that are compensated by an accident victim's own insurance;

[37] Those determinations in *Hartling* are substantiated by an examination of Bill 1. It legislated a 20% reduction in automobile insurance premiums, created the Nova Scotia Insurance Review Board, and authorized it to reject unreasonable or unjust risk classification systems. Among other things, it changed the common law by limiting general damages for minor injuries.

[38] Section 9(5) of the *Interpretation Act*, which I set out earlier, states that every enactment shall be deemed remedial and interpreted to ensure the attainment of its objects by considering certain matters. The occasion and necessity for Bill 1 were those sky-rocketing automobile insurance premiums, and the cost of those premiums was the mischief to be remedied. The objective of Bill 1 was to reduce those premiums, and to reduce damage awards. Eliminating double recovery by “all payments in respect of the incident” as set out in s. 113A would reduce the amount of damages, and those amounts are linked to the cost of insurance premiums.

[39] I agree with the respondents that the Legislature intended to change the collateral benefits rule as part of a wide-reaching statutory scheme to reduce insurance premiums, and that deducting those payments achieves that intent.

[Emphasis added]

[39] The motion judge, in citing *Tibbetts*, focuses on Oland, J.A.’s conclusion that the Legislature intended “to change the collateral benefits rule” (¶39). The respondents on the appeal also focus on those words, arguing, as the motion judge found, that although Bill 1 changed the collateral benefits rule it did not eliminate it. However, the motion judge, and the respondent, ignore the paragraphs

preceding ¶39 of *Tibbetts* which find the intention was to reduce insurance premiums by eliminating double recovery, thereby reducing damage awards.

[40] The motion judge correctly recognized that this Court's reasons in *Tibbetts* were binding on him with respect to legislative intent (¶19). He said:

[35] I must follow the legislative intent of s. 113A found by *Tibbetts*. The legislature intended "to change the collateral benefits rule as part of a wide-reaching statutory scheme to reduce insurance premiums" (para. 39).

[41] Although he concluded that he was bound by the legislative intent as found by *Tibbetts*, the motion judge failed to take into consideration the very specific finding made in *Tibbetts* that the intent was to eliminate double recovery.

[42] The motion judge failed to examine whether the text of s. 113A could be read harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of the Legislature. He did not conduct a purposive analysis in order to determine if there was an interpretation of s. 113A which would operate in harmony with the Legislature's intention. This, in hindsight, may be explained by his misinterpretation of this Court's findings in *Tibbetts*.

[43] As Professor Sullivan explains:

A purposive analysis of legislative texts is based on the following propositions:

- (1) All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.
- (2) Legislative purpose must be taken into account in every case and at every stage of interpretation, including initial determination of a text's meaning.
- (3) In so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.

(Sullivan, p. 259)

[44] According to Professor Sullivan, "an interpretation that would tend to frustrate or defeat the legislature's purpose should be rejected if there is a plausible alternative" (Sullivan, p. 288).

[45] Limiting the deduction of CPP disability payments to only those amounts that were paid, or could have been paid before trial frustrates the Legislature's purpose as found by this Court.

[46] For convenience, I repeat s. 113A:

Effect of income-continuation benefit plan

113A In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by all payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income-continuation benefit plan if, under the law or the plan, the provider of the benefit retains no right of subrogation.

[47] The motion judge in this case isolated two particular parts of section 113A: (1) the phrase "loss of earning capacity"; and (2) the phrase "payments ... available before the trial of the action."

[48] The Supreme Court of Canada in *R. v. Alex*, 2017 SCC 37, held that plain meaning alone is not determinative and that statutory interpretation must be considered within the context, purpose and relevant legal norms:

31 This Court has repeatedly observed that plain meaning alone is not determinative and a statutory interpretation analysis is incomplete without considering the context, purpose and relevant legal norms: [citations omitted]

[49] Of similar import is *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, which held:

48 This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 34; Sullivan, at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.

[50] Notwithstanding this, the motion judge only considered these phrases in isolation and without regard to the broader context of the legislation. The meaning of the phrases "loss of earning capacity" and "payments ... available before the

trial of the action” — when read in their full context — is different from the narrow technical meaning that the motion judge attributed to them.

[51] “Loss of earning capacity” in Nova Scotia is generally understood to be a future-focused head of damages, awarded where the plaintiff will be capable of working post-trial, but not at her or his pre-injury level.

[52] Justice Oland in *Tibbetts* discusses the distinction when distinguishing between the Ontario statutory scheme and our s. 113A:

[48] In Nova Scotia, loss of income and loss of earning capacity are separate and distinct heads of damages, and have been established as such for a long time. This Court stated in *Newman (Guardian ad litem of) v. LaMarche* (1994), 134 N.S.R. (2d) 127:

22 We must keep in mind this is not an award for loss of earnings but as distinct therefrom it is compensation for loss of earning capacity. It is awarded as part of the general damages and unlike an award for loss of earnings, it is not something that can be measured precisely. It could be compensation for a loss which may never in fact occur. All that need be established is that the earning capacity be diminished so that there is a chance that at some time in the future the victim will actually suffer pecuniary loss.

See also *Exide Electronics Ltd. v. Webb*, 1999 NSCA 102 at ¶44, *Leddicote v. Nova Scotia (Attorney General)*, 2002 NSCA 47 at ¶53-58 and 68, and *Abbott v. Sharpe*, 2007 NSCA 6 at ¶156.

[49] Although the wording of our s. 113A and Ontario’s s. 267.8(1) both refer to “income loss and loss of earning capacity,” this distinction is critical. Indeed, the Ontario Court of Appeal in *Demers* suggested that, if the two had been differentiated in that Province as they are in Nova Scotia, then CPP disability payments should be deductible for damages for lost earning capacity:

34 An example of a case where the two phrases have been distinguished is the decision of the Nova Scotia Court of Appeal in *M.(L.M.) v. Nova Scotia (A.G.)*, 2011 NSCA 48, 303 N.S.R. (2D) 243, at para. 63. There, the court endorsed the following excerpt from the trial judge's reasons, [2010] N.S.J. No. 42:

There is, it should be noted, a distinction between "loss of earning capacity" and "lost future income." This point was discussed in *Exide Electronics Ltd. v. Webb* (1999), 177 N.S.R. (2d) 147, where Freeman J.A., for the court, wrote, at para. 44, that "Loss of earning capacity is loss of a capital asset; it can be compensated for even when it is not accompanied by a reduction in income," as in a situation where a plaintiff can return to work, but with "a disability

that restricts the scope of other employment that might become available in the future." By contrast, "The simplest illustration for an award to replace future income is total permanent disability, which requires an assessment based on earning expectations over the plaintiff's working lifetime." Similarly, in *Abbott v. Sharpe*, 2007 NSCA 6, Saunders J.A. said, at para. 156: "... this award was intended to compensate for diminished earning capacity which is seen as a loss to a capital asset, as opposed to a mathematical calculation of projected future lost income." In my view "loss of earning capacity" is the relevant approach in the present case.

35 On this view, damages for loss of earning capacity compensate for the loss of a capital asset. They do not depend on proving a pecuniary loss. Instead, they are triggered by a particular disability, which impairs the ability to work. In this sense, CPP disability benefits tend to duplicate damages for loss of earning capacity. Neither requires proving a pecuniary loss; both depend on proving a disability. As the one tends to duplicate the other, the one should be deductible from the other.

[Emphasis added]

[53] It is a principle of statutory interpretation that "when used in legislation, common law terms and concepts are presumed to retain their common law meaning." (Sullivan, p. 543).

[54] The thrust of this Court's decisions is that "loss of earning capacity" is a future-oriented loss. Loss of earning capacity is a form of general damages, as it cannot be precisely calculated. In this sense, it is distinct from past income loss, which is a form of special damages that must be pleaded and specifically proven as fully as possible in the circumstances of a given case.

[55] Cases in which damages for past loss of earning capacity are awarded are very much the exception, such as when an injury occurs to someone who is too young to have started to work. (See *L.M.M. v Nova Scotia (Attorney General)*, 2011 NSCA 48 and *Nova Scotia (Attorney General) v. B.M.G.*, 2007 NSCA 120). Generally, however, loss of earning capacity looks forward to determine what loss a person will likely sustain in the future. It is almost exclusively treated as a prospective award.

[56] Although loss of earning capacity can, in exceptional circumstances, refer to past losses, by focusing on this point, the motion judge failed to consider the words in context. He concluded:

[55] As I see it, the references to income loss and loss of earning capacity in s. 113A are [two] different ways of compensating for loss of earnings and do not distinguish between past losses and future losses.

[57] With respect, the motion judge effectively concluded that s. 113A would not be robbed of meaning by limiting it to past amounts. In doing so, he ignored the analysis from *Tibbetts* which I have set out above and failed to consider whether there was an alternative interpretation that was more consistent with the intention of the Legislature and the meaning most commonly attributed to loss of earning capacity in Nova Scotia.

[58] After reaching that conclusion, the motion judge turned his mind to the meaning of “payments received or were available before the trial” of the action, concluding that “the correct interpretation of the text in context is that it does not apply to future payments” (¶75).

[59] With respect, the motion judge did not correctly interpret the text in context. He did the exact opposite, taking an overly technical approach to syntax and tense.

[60] He found that “available is an adjective. It has no tense.” and he therefore rejected the argument that the word “available” in section 113A applied to future payments (¶56-58).

[61] However, the word “available” has a broad meaning, and refers to payments that a person is entitled to, but has not yet received.

[62] The Supreme Court of Canada discussed the breadth of the word “available” in *Alberta Giftwares Ltd. v. The Queen*, [1974] S.C.R. 584. Although not a statutory interpretation case, the Court’s comments aptly anticipate the contextual exercise required by the modern principle:

“Available”, like many other words in the English language, is capable of different shades of meaning, and in my opinion in construing a will, deed, contract, prospectus or other commercial document, the legal effect to be given to the language employed, is a question of law and in the construction of such a document, it is an error in law to attribute a fixed meaning to a word of variable connotation by selecting one of alternative dictionary definitions without regard to the context of the paragraph or sentence in which the word is used. (page 588)

[63] The words “available before the trial of the action” simply require that the Court be able to determine entitlement to any proposed source of deductions at the time of trial.

[64] This interpretation of “available” is consistent with the meaning of the word “available” in relation to the deduction of “Section B” no-fault benefits under the *Act* as found by this Court.

[65] Every standard automobile insurance policy provides no-fault benefits for loss of income in Section B of the policy. Section 146(2) states:

Where a claimant is entitled to the benefit of insurance within the scope of Section 140, this, to the extent of payments made or available to the claimant thereunder, constitutes a release by the claimant of any claim against the person liable to the claimant or the insurer of the person liable to the claimant.

[66] In *Kirk v. Singh*, [1994] N.S.J. No. 486 (C.A.), Freeman J.A. interpreted “available” as including future benefits in order to advance the legislative purpose of “avoiding double recovery”:

[26] The s. 146(2) release is required only for Section B payments “made or available”. This creates no difficulty with respect to past payments. The problem relates to future payments, which must be held to be embraced by the word “available” if the provision is to be given the meaning apparently intended by the legislature in the interest of avoiding double recovery by a claimant. But availability cannot be projected; it can only mean payments which at some future time are to be actually made, and that cannot be determined in advance because of the contingencies of death and recovery. [...]

[27] The language of s. 146(2) does not support a release of the claim for loss of future income unless the Section B benefits are actually made or available. Therefore the approach most at harmony with the intention of s. 146(2) appears to be that adopted by the trial judge, payment of the damage award for lost future income upon assignment to the defendant or its insurer, in this case Judgment Recovery on behalf of the defendant, of the Section B benefits. An assignment measures the release to be given under s. 146(2) more precisely than an attempt at capitalization.

[Emphasis added]

[67] Both past and future Section B benefits were deducted from tort awards for many years prior to the introduction of s. 113A.

[68] The law on the deduction of Section B benefits gives context to the proper interpretation of s. 113A. Both provisions are in the *Act*. Both provisions were intended to reduce tort awards. Both provisions were intended to reduce double recovery. Both provisions must capture future payments to give effect to the

Legislature's intended purposes. Both provisions refer to payments "made/received" on the one hand, and "available" on the other.

[69] The motion judge erred by focusing on a textual analysis to the detriment of a broader and purposive contextual analysis. Reading s. 113A in its proper context leads to the conclusion that s. 113A requires the deduction of future CPP payments.

[70] When faced with two plausible interpretations, the motion judge should have rejected the interpretation which tended to frustrate or defeat the intention of the Legislature and the purposes of the legislation. Instead, the motion judge adopted that interpretation.

[71] For these reasons, the motion judge erred in his approach to the first Sullivan question – What is the meaning of the legislative text?

What are the consequences of the proposed interpretation?

[72] The final Sullivan question to be answered is, what are the consequences of the proposed interpretation?

[73] Sullivan points out why the consequences of an interpretation are important:

[t]he courts are interested in knowing what the consequences will be and judging whether they are acceptable. Consequences judged to be good are presumed to be intended and generally are regarded as part of the legislative purpose. Consequences judged to be contrary to accepted norms of justice or reasonableness are labelled absurd and are presumed to have been unintended. (Sullivan, p. 307)

[74] In *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, the Supreme Court of Canada has emphasized that, as among two or more available interpretations, the courts should adopt the interpretation that best advances the legislative purpose and reject the interpretation that would lead to negative or unintended consequences:

... Since it may be presumed that the legislature does not intend unjust or inequitable results to flow from its enactments, judicial interpretations should be adopted which avoid such results. [...] Where a provision is open to two or more interpretations, the absurdity principle may be employed to reject interpretations

which lead to negative consequences, as such consequences are presumed to have been unintended by the legislature. (p. 1082)

[75] With respect to consequences, the motion judge said:

[36] I must recognize consequences as part of context in the same way as did *Tibbetts*. If s. 113A applies to future CPP disability payments the collateral benefits rule is further changed in a way that would reduce the amount of claims for losses from motor vehicle collisions, so as to allow insurance companies to reduce premiums if they wished.

[...]

[72] ...The consequence of the text is that the collateral benefits rule was not changed as much by our legislature as that for Newfoundland and Labrador. There would be less money available to insurers to reduce premiums. However, an intent to change the collateral benefits rule is not an intent to abolish it.”

[76] The motion judge misdirected himself as to the consequences of the alternative interpretation of s.113A. He incorrectly apprehended that this would amount to a wholesale abolition of the collateral benefits rule. But that is not the case. At most the broader application of s. 113A would represent a limited modification of the collateral benefits rule only to prohibit double recovery in the motor vehicle context – not an abolition.

[77] It also runs contrary to this Court’s decision in *Tibbetts* when it discussed the consequences of the interpretation:

[57] Deducting CPP disability benefits under s. 113A would accord with the legislative intention to reduce automobile insurance premiums. It would result in an injured person being fully compensated, but not overcompensated, for her loss of income or earning capacity. Deducting CPP disability benefits would change the collateral benefits rule by reducing tort awards to facilitate the reduction of automobile insurance premiums.

[58] This analysis of s. 113A following the three questions in *Keizer* which guide statutory interpretation brings me to this conclusion. The Legislature’s intention to reduce automobile insurance premiums led to s. 113A which changed the collateral benefits rule and the treatment of CPP disability benefits. Those benefits are for loss of earning capacity and are deducted from awards under that head of damages. The trial judge correctly interpreted s. 113A and deducted CPP disability benefits from the award assessed for the appellant’s loss of earning capacity.

[Emphasis added]

[78] The consequences of the interpretation in *Tibbetts* is that a person would not be overcompensated but would be fully compensated for their injury.

What are the consequences of the motion judge's interpretation?

[79] First, the motion judge stated that “[t]here will be less money available to insurers to reduce premiums” (¶72). The purpose of the legislation was to reduce damage awards paid by insurers, which would in turn reduce the cost of automobile insurance for Nova Scotians. The consequences of the interpretation adopted by the motion judge frustrates the intention of the Legislature.

[80] Second, the motion judge's interpretation would permit double recovery. This is contrary to the intent of the Legislature in enacting Bill 1. At the risk of being repetitious, this Court has found that eliminating double recovery was one of the primary goals of Bill 1 (*Tibbetts*, ¶38; *Hartling*, ¶74). Section 113A is the only provision in Bill 1 designed to accomplish the goal of eliminating double recovery.

[81] Third, on the motion judge's interpretation, CPP disability benefits would be deductible before the trial of the action, and would not be deductible after the trial of the action. It would be little more than a token gesture for the Legislature to eliminate double recovery to the date of trial, and to permit double recovery thereafter. Nor would a distinction based on the happenstance of the trial date reflect any discernible principle or legislative policy.

[82] Finally, the motion judge's interpretation is contrary to the objective of the *Civil Procedure Rules* – the just, speedy and inexpensive determination of every proceeding (Rule 1.01). Defendants would have little or no incentive to settle claims or move quickly to trial, knowing that a plaintiff's CPP disability benefits would be deductible before trial whereas those received after trial would not be deductible.

[83] With respect, the motion judge's reasons do not contain any meaningful or sufficient analysis of the consequences of his interpretation of s. 113A.

[84] For the reasons stated above, the motion judge's interpretation frustrates the purpose of the statute, and produces consequences which thwart the intention of the Legislature.

Conclusion

[85] On a proper and purposive analysis of section 113A, all CPP disability benefits (past and future) that are available in respect of the incident must be deducted from the plaintiff's damages for income loss or loss of earning capacity. This is the only way to give full effect to and to comprehensively promote the intention of the Legislature.

[86] In limiting the deductibility to CPP benefits received before the trial of the matter the motion judge erred.

[87] I would allow this ground of appeal.

Notice of Contention

[88] In light of my conclusions on the first two grounds of appeal, it is not necessary to address the respondent's Notice of Contention.

Disposition

[89] I would allow the appeal and dismiss the Notice of Contention. The appellant did not seek costs here or in the proceeding below and, therefore, none will be awarded. The costs awarded to the respondent at trial will be repaid to the appellant.

Farrar, J.A.

Concurred in:

Saunders, J.A.

Hamilton, J.A.

Fichaud, J.A.

Derrick, J.A.