NOVA SCOTIA COURT OF APPEAL

Citation: *Kontuk v. Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 2019 NSCA 33

Date: 20190502
Docket: CA 475792
Registry: Halifax

Between:

William Kontuk

Appellant

v.

The Nova Scotia Public Service Long Term Disability Plan Trust Fund

Respondent

Judge:	The Honourable Justice Cindy A. Bourgeois
Appeal Heard:	March 25, 2019, in Halifax, Nova Scotia
Subject:	Effect of extra-provincial legislation on contractual set-off and subrogation rights.
Summary:	In January 2011, William Kontuk, an employee of the Province of Nova Scotia, began receiving long-term disability benefits under the Nova Scotia Public Service Long Term Disability Plan (the "Plan"). In May 2013, Mr. Kontuk settled a personal injury claim arising from a motor vehicle accident that occurred in Ontario in 2005. In September 2016, the Nova Scotia Public Service Long Term Disability Plan Trust Fund (the "respondent") brought an application in chambers seeking a declaration setting out the amount of Mr. Kontuk's settlement which ought to be reimbursed to it in light of past benefits paid and, further, what amount ought to be offset from his ongoing LTD benefits. After considering the arguments advanced by the parties, the application judge concluded that Mr. Kontuk should reimburse the respondent a sum reflective of past wage loss and, further, that his ongoing LTD benefits should be

decreased to reflect his receipt of monies for future wage loss from the tortfeasor.

Mr. Kontuk appealed to this Court. He submitted that the *Insurance Act* of Ontario (R.S.O. 1990, Chapter I.8) precluded the respondent from seeking any portion of his settlement either by subrogation or offset. The respondent cross-appeals and submitted the application judge made an error of fact which resulted in the reimbursement and offset against future benefits being too low.

Issues:

1. Did the application judge err in concluding s. 267.8(17) of the *Insurance Act* did not preclude the respondent's right to seek recovery against Mr. Kontuk pursuant to the Plan?

2. Did the application judge err in his determination that Mr. Kontuk's past and future wage loss claims were the "weakest component" of the claim, resulting in an unduly low quantification of the reimbursement owed to the respondent and the offset against future LTD benefits payable?

Result:

The application judge did not err in concluding that s. 267.8(17) of the *Insurance Act* did not preclude the respondent from seeking recover pursuant to the terms of the Plan.

Further, there was evidence upon which the application judge could base a factual finding that Mr. Kontuk's wage loss claims were the "weakest component" of the claim.

Appeal and Cross-Appeal dismissed.

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Appellant

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The Nova Scotia Public Service Long Term Disability Plan Trust Fund

Respondent

Judges:	Beveridge, Bourgeois and Derrick, JJ.A.
Appeal Heard:	March 25, 2019, in Halifax, Nova Scotia
Held:	Appeal and Cross-Appeal dismissed, per reasons for judgment of Bourgeois, J.A.; Beveridge and Derrick, JJ.A. concurring
Counsel:	Madison Veinotte, for the appellant Colin D. Bryson, Q.C., for the respondent

Reasons for judgment:

[1] In January 2011, William Kontuk, an employee of the Province of Nova Scotia, began receiving long-term disability benefits under the Nova Scotia Public Service Long Term Disability Plan (the "Plan").

[2] In May 2013, Mr. Kontuk settled a personal injury claim arising from a motor vehicle accident that occurred in Ontario in 2005. In September 2016, the Nova Scotia Public Service Long Term Disability Plan Trust Fund (the "respondent") brought an application in chambers seeking a declaration setting out the amount of Mr. Kontuk's settlement which ought to be reimbursed to it in light of past benefits paid and, further, what amount ought to be offset from his ongoing LTD benefits.

[3] The application was heard by the Honourable Justice Timothy Gabriel. After considering the arguments advanced by the parties, the application judge concluded that Mr. Kontuk should reimburse the respondent a sum reflective of past wage loss and, further, that his ongoing LTD benefits should be decreased to reflect his receipt of monies for future wage loss from the tortfeasor.

[4] Mr. Kontuk appeals to this Court. He submits that the Ontario *Insurance Act* precludes the respondent from seeking any portion of his settlement either by subrogation or offset. The respondent cross-appeals and submits the application judge made an error of fact which resulted in the reimbursement and offset against future benefits being too low.

[5] For the reasons that follow, I would dismiss both the appeal and cross-appeal.

Background

[6] In the court below, the parties provided the application judge with an Agreed Statement of Facts that included a number of attached documents. It provided:

> 1. William Kontuk was injured in a motor-vehicle accident on July 14, 2005 in Port Dover, Ontario. His vehicle, while stopped, was struck from behind by a vehicle driven by Hugh Muth. Mr. Muth's liability for Mr. Kontuk's damages was governed by the *Ontario Insurance Act*, RSO 1990, Chapter I.8.
>
> 2. Mr. Kontuk moved to Nova Scotia in December 2005 and, in 2006, began working as a truck/plow operator for the Nova Scotia Department of Highways. As a result of his employment, Mr. Kontuk was an insured under the Nova Scotia Public Service Long Term Disability Plan (the "LTD Plan") (Tab 1).
>
> 3. Mr. Kontuk went off work in January 2010, and commenced receiving disability benefits under the LTD Plan as of January 25, 2011.
>
> 4. Mr. Kontuk commenced legal action in Nova Scotia against Mr. Muth in 2007 (Hfx. No. 276661). Mr. Kontuk and Mr. Muth participated in a judicial Settlement Conference on April 11, 2013. The positions of Mr. Kontuk and Mr. Muth were set out in their respective Settlement Conference Briefs (Tabs 2, 3 and 4). Settlement was not reached at this Settlement Conference.
>
> 5. Counsel for Mr. Kontuk and Mr. Muth engaged in further settlement negotiations, finally arriving at a settlement of $123,750.00 on May 23, 2013 (Tab 5). The LTD Fund consented to this settlement.
>
> 6. Mr. Kontuk's legal fees for this settlement were a contingency fee of 25% of the $123,750.00, plus HST ($30,469.57), plus disbursements of $35,432.41.
>
> 7. Mr. Kontuk received $47,592.48 in long term disability benefits pursuant to the LTD Plan for the period from January 25, 2011 to May 23, 2013. Attached as Tab 6 is a complete record of the LTD payments made to Mr. Kontuk for benefits to June 1, 2016.

[7] I would add the following additional facts found in the attachments:

- In his settlement conference brief, Mr. Kontuk put forward an initial demand totalling $698,786.94, comprised as follows:

Claim Summary

General Damages	
General Damages	$150,000.00
PJI (5% over 8 years)	$60,000.00
TOTAL	$210,000.00
Special Damages	
Future Wage Loss (net of LTD)	**$202,229.00**
Past Wage Loss (net of LTD)	**$34,478.00**
Loss of Valuable Services	$68,671.00
Cost of Future Care	$63,393.00
Subtotal	$368,771.00
PJI	**$68,840.74**
TOTAL	$437,611.74
Costs and Disbursements	
Costs and Contribution (Tariff F)	$15,952.24
Disbursements	$35,222.96
TOTAL	$51,175.20
TOTAL VALUE OF CLAIM	$698,786.94

(Emphasis added)

- Following the unsuccessful settlement conference, counsel for Mr. Muth put forward a global settlement offer of $70,000. Mr. Kontuk countered with an offer of $199,999.00;

- Discussions ultimately resulted in the parties agreeing to a global settlement of $123,750.00, which did not break down what portion, if any, was attributable to past or future earnings loss; and

- After the payment of legal fees and disbursements, Mr. Kontuk received a net sum of approximately $57,850.00 from the settlement.

[8] The application before Justice Gabriel was necessitated by a disagreement between the parties as to whether Mr. Kontuk was obligated to reimburse the Plan that portion of his settlement related to past wage loss and, further, whether his ongoing LTD benefits ought to be offset by that portion attributable to future wage losses. The conflict arose due to divergent views as to the interplay between the offset and subrogation provisions of the Plan, and sections of the Ontario *Insurance Act* (*Note*: All further reference to "*Insurance Act*" will mean the Ontario legislation).

[9] Mr. Kontuk was of the view the *Insurance Act* precluded the respondent from seeking repayment or offset of LTD benefits from his settlement. The respondent held the view the legislation did not alter its contractual rights to recover against those portions of the settlement that compensated Mr. Kontuk for past and future wage losses.

[10] At this point, it is helpful to set out the Plan and legislative provisions at the heart of the dispute. Two provisions of the Plan are relevant. They provide:

> 9. The benefit to which an employee is entitled under this section shall be reduced by:
>
> …
>
> (8) **the amount of earnings** recovered through a legally enforceable cause of action against some other person or corporation.

And:

> **Subrogation**
>
> 16(1) Where a long-term disability benefit is payable for an injury or illness for which any third party is, or may be, legally liable, the Trustees will be subrogated to all rights and remedies of the employee against the third party, to recover damages in respect of the injury or death, and may maintain an action in the name of such employee against any person against whom such action lies, and any amount recovered by the Trustees shall be applied to
>
> > (a) payment of the costs actually incurred in respect of the action**, and reimbursement to the Trustees of any disability benefits paid,** and the balance, if any shall be paid to the employee whose rights were subrogated.
> >
> > (b) any settlement or release does not bar the rights of the Trustees under subsection (1) unless the Trustees have concurred therein.

> (c) an employee will fully cooperate with the Trustees in order to allow the Trustees to do what is reasonably necessary to assert the Trustees' rights to subrogation. (Emphasis added)

[11] With respect to the *Insurance Act*, the parties focused their arguments on s. 267.8, the relevant portions of which provide:

> Collateral benefits
>
> Income loss and loss of earning capacity
>
> 267.8 (1) 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 the following amounts:
>
> > 1. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of the income loss and loss of earning capacity.
> >
> > 2. 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.
> >
> > 3. All payments in respect of the incident that the plaintiff has received before the trial of the action under a sick leave plan arising by reason of the plaintiff's occupation or employment. 1996, c. 21, s. 29.
>
> …
>
> Future collateral benefits
>
> (9) A plaintiff who recovers damages for income loss, loss of earning capacity, expenses that have been or will be incurred for health care, or other pecuniary loss in an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile shall hold the following amounts in trust:
>
> …
>
> > 2. All payments in respect of the incident that the plaintiff receives after 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.
>
> …
>
> Limitation on subrogation
>
> (17) A person who has made a payment described in subsection (1), (4) or (6) **is not subrogated to a right of recovery of the insured against another person in respect of that payment.** (Emphasis added)

The Decision under Appeal

[12] In his written reasons, the application judge framed the first question for determination as follows:

> Does the "no subrogation" provision in the Ontario *Insurance Act* prevent the Fund from asserting its rights to the income loss portion of [Mr. Kontuk's] settlement?

[13] In addressing this question, the application judge began with a review of the relevant Plan provisions and the broad principles applicable to them. Both parties had cited the decision of this Court in *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. McNally*, 1999 NSCA 129 as informing the operation of the subrogation provision (then s. 18(1), now s. 16(1)) of the Plan. The application judge agreed.

[14] *McNally* involved a claim made by the Fund against a government employee who had received LTD benefits and subsequently settled a tort claim for a global amount. In the Supreme Court, Justice Stewart determined that a global settlement, which did not specify a particular portion for lost income, did not serve to defeat the Plan's right to subrogation. She ordered McNally to reimburse the Plan a portion of his settlement. That decision was upheld on appeal.

[15] The application judge noted a number of aspects of this Court's decision in *McNally*, particularly:

- In upholding her, the findings of the chambers judge were set out by Chipman, J.A. as follows:

> [19] Stewart, J. reached the following conclusions:
>
> (1) The Plan was one of indemnity. Section 18(1) was unambiguous. It constituted a contractual subrogation. <u>All</u> of the insured employees' rights and remedies against the third party were subrogated to the Trustees. As between the Trustees and the appellant, only the former had the right of recovery. In pursuing the action the appellant acted in effect as the agent of the Trustees. The words "amount recovered by the Trustees" was not of interpretative significance.
>
> (2) There was a nexus between the injuries from the accident and the disability benefits which, on the evidence, "remained alive and well and reflected" in the settlement.

(3) As to the allocation of the recovery, when the settlement was negotiated by the appellant rather than the Trustees the latter needed only to prove that the insured received a settlement from a third party. Then the onus shifted to the appellant to account for the apportionment of the lump sum amount over the various heads of damages and to establish that no portion of the recovered amount fell within the deduction provisions of s. 9(8) and s. 18.

(4) The loss of income aspect was calculable with sufficient certainty that the obligation to account may be effected pursuant to s. 9(8) and/or s. 18. The income portion of the settlement was to be attributed to past loss of income in this case. The Trustees were therefore entitled to recover $40,238.21, plus interest at 4% from July 28, 1995 to December 31, 1997, for a total of $42,183, plus interest, together with costs of $700.00. (Emphasis in original)

- Justice Chipman explained the equitable concept of subrogation as having two distinct elements:

[22] In equity, the right of subrogation accrues to an insurer only in cases where the insurance is a contract of indemnity. Subrogation is the right of the insurer to stand in place of the insured and recover from any party liable for the insured's loss. The right only arises after the insured has been fully indemnified by the insurer. In the event of partial indemnity, the insured retains the right to recover from the third party.

[23] Subrogation has two aspects: the right to <u>pursue</u> the insured's rights against a third party, and the right to <u>recover</u> any benefits received by the insured with respect to the loss for which he has been indemnified.

[24] Unlike an assignment, the right of subrogation vests by operation of law rather than by an express agreement. The assignee may sue in its own name in pursuing its assigned rights, to the extent provided in the **Judicature Act**, R.S.N.S. 1989, c. 240, s. 43(5). The subrogated insurer must sue in the name of the insured in pursuing the subrogated rights. (Emphasis in original)

- Even where the beneficiary exercises control over an action against a third party, the subrogation provision in s. 16(1)(then s. 18(1)) is still engaged. Justice Chipman wrote:

[40] … Moreover, even if the appellant in fact exercised full control, this does not, in my opinion, diminish the right of the Trustees to do so. In view of the unambiguous language respecting the transfer of the rights of subrogation to the Trustees, and the giving of priority in the recovery to the Trustees, any *de facto* control exercised by the appellant over the recovery proceedings must be regarded as being exercised on behalf of the Trustees. I agree with Stewart, J. when she said:

> Section 18(1) is unambiguous. The wording is clear. Long term disability is payable for an injury for which a third party tortfeasor is liable. All of the insured employee's rights and remedies against a third party are subrogated to the Trustees for damages for the injury. No rights are reserved to the employee. The Trustees may maintain an action in the name of the employee against such third party with any amount recovered being applied to legal costs of the action, reimbursement of paid benefits to the Trustees and the balance, if any, to the employee, in that specific order. The reimbursement provision is not limited to the contractual circumstances of the amount being recovered by the Trustees. The assignment of rights and remedies is not stated to be conditional. The assignment of rights is absolute. One cannot isolate the provisions in s. 18(1). The section must be read as a whole. Since rights are subrogated absolutely to the Trustees obviously only Trustees can recover. Settlement payments to any other party by the third party is in effect a payment in trust for the Trustees. The employee has contracted his rights and absent any re-assignment he has no right between himself and the Trustees to sue. Pursuant to s. 18(2), if an employee attempts to settle or release, this does not bar the rights of the Trustees for the obvious reason that the rights were conclusively assigned to the Trustees, with the only exception being the Trustees' consent or concurrence to its rights being barred. An employee in pursuing an action is in effect the Trustees' agent and pursuant to s. 18(3) must fully cooperate with the Trustees in order to allow the Trustees to do what is reasonably necessary to assert the Trustees' rights to subrogation. (Emphasis added by Chipman, J.A.)

[16] The application judge next turned his consideration to the offset provision contained in s. 9(8) of the Plan. He wrote:

> [19] Future wage loss was not dealt with by the Court of Appeal in *McNally*, *supra*. It has been held to arise pursuant to Section 9(8) of the Plan, the relevant portion of which says:
>
> > 9. The benefit to which an employee is entitled under this section shall be reduced by:
> >
> > …
> >
> > (8) the amount of earnings recovered through a legally enforceable cause of action against some other person or corporation.
>
> [20] This section was interpreted in *Nova Scotia Public Service Long Term Disability Trust Fund v. Warner* 2006 NSSC 160, wherein a component of the Respondent's injury award was for loss of earning capacity. This portion of her total award comprised $125,000.

> [21] In determining the method by which the Fund was to be reimbursed for that recovery, the Court (in *Warner*) approached the matter by reducing the amounts which the Fund would have been otherwise obliged to pay on a monthly basis. It was determined that $77,212.00 (which was considered to represent the award for loss of earning capacity, net of legal fees) should be prorated over the period of time (22 years) from the personal injury recovery to Ms. Warner's 65th birthday, which was the date upon which it was considered likely that she would have retired. This amounted to a reduction in the future payments which she was to receive from the LTD Plan by $209.14 per month. **The court conceded that individual circumstances may dictate an alternative treatment of funds in different factual scenarios.** (Emphasis added)

[17] On this appeal and cross-appeal, neither party has taken issue with the above principles set out and adopted by the application judge. It is the next aspect of his reasoning that is at the heart of Mr. Kontuk's appeal.

[18] The application judge considered whether, as argued by Mr. Kontuk, s. 267.8 of the *Insurance Act* precluded the respondent from seeking recovery under ss. 9(8) or 16(1) of the Plan. In concluding the legislation did not have that purported effect, he wrote:

> [25] The Respondent argues that these provisions preclude the Applicant from seeking recovery with respect to any payments made to him by way of wage loss or wage replacement. In particular, the Respondent contends:
>
> > An issue very similar to the matter at hand was dealt with in the Ontario case of *Landry v. Roy*, [2001] O.J. No. 3366 (ONSCJ). In *Landry*, the plaintiff , a New Brunswick resident, was involved in an accident in Welland, Ontario. Justice Pitt of the Ontario Superior Court of Justice was called on to determine the following question of law:
> >
> > > whether the New Brunswick Ministry of Health and Community Services has a subrogated claim against the alleged tortfeasor for any medical services provided to the plaintiff as a result of injuries sustained in the subject motor vehicle accident, pursuant to the *Medical Services Payments Act*, R.S.N.B. 1973, c. M-7.
> >
> > (Respondent's brief, p. 5)
>
> [26] He continues thus:
>
> > … Both cases involve the applicability of Ontario law to parties located outside Ontario. Both of the benefits in these cases were issued in a province that was different from the province where the tort occurred. Despite this, Ontario law was still held to be applicable and the insurer's subrogated claims were disallowed under s. 267.8(17) of the *Insurance Act*.

(Respondent's brief, p. 6)

> [27] With respect, I disagree. In my view, this argument fails to give proper effect to the Court's determination in *McNally, supra.* Subrogation has two components: first, the right to pursue the insured's claim against the third party in the name of the insured and second, the right to the benefit of any other amounts available to the insured for the particular loss to which the paid benefits apply.
>
> [28] These two aspects are not contingent or co-dependant. The Fund's right to recovery is not obviated by its failure (or its inability, in this case) to assert its right to pursue Mr. Kontuk's action in Ontario and obtain recovery in his name.
>
> [29] The Plan and, in particular, Sections 9(8) and 16(1) thereof, govern the rights of Mr. Kontuk and the Fund *inter se*. As we have already seen, the Plan does not require full indemnification of Mr. Kontuk before the Fund's contractual right to recover "any benefits received by the insured" is triggered.
>
> [30] What the Ontario legislation can and does do is prevent the Fund from pursuing compensation with respect to the MVA in Mr. Kontuk's name. It does not, nor can it, purport to alter the contractual relationship between the Respondent and the Fund.
>
> [31] Put differently, there is no need to give the Ontario *Insurance Act* extra provincial effect in order to fulfill its intended purpose in this case. The purpose of the Ontario legislation is to protect automobile insurance consumers by allowing insurers to deduct (from their obligation to reimburse for wage loss) amounts recoverable by the victim arising out of the accident from other sources, and thereby keep premiums as low as possible. There is no need, nor does the legislation purport, to override the clear provisions of the contract between Mr. Kontuk and the Applicant.
>
> [32] Therefore, I conclude that nothing in the Ontario legislation prevents the Applicant from relying upon its rights as contained in ss. 9(8) and 16(1) of the Plan.

[19] Having determined that the respondent was not precluded from exercising its contractual rights in the Plan, the application judge then turned to consider what portion, if any, of Mr. Kontuk's settlement was attributable to past or future earning loss. He undertook an extensive analysis, starting with the premise the onus was on Mr. Kontuk to establish what portion of the settlement was something other than income loss. He wrote:

> [75] This reasoning was adopted by our Court of Appeal in *McNally, supra,* at para. 53 where it was indicated:
>
> > ... With a settlement award negotiated by the insured as opposed to a settlement award negotiated by the Trustees or a court award, the Trustees need only prove that the insured received a settlement from a third party and the onus shifts to the insured to account for the proportioning of the

> lump sum amount over the various heads of damages and to establish no portion of the recovered amount falls within the deduction provisions of s. 9(8) and/or s. 18(1).

[20] And further:

> [79] I conclude that mere difficulty in breaking down the settlement does not and cannot relieve the Respondent of his obligation to account for wage loss to the Fund in accordance with his contractual obligations. However, the burden of proof as expressed in *McNally* only becomes a determinative factor in the event that a just basis upon which to calculate the wage loss cannot be determined on the basis of the proven facts themselves.
>
> [80] I also conclude that there is no "one size fits all" when calculating the wage loss component and (afterward) the manner by which the Fund is to be reimbursed upon the basis of such calculation. The approach must be one which appears to be best able to do justice between the parties, and it must be ascertainable upon the basis of the established facts.
>
> [81] If there is "no evidence which would permit the trial judge to make that determination" (per para. 73, *Pereira* [2011 BCCA 361]) then the full amount of the settlement is to be treated as wage loss.

[21] Neither party has taken issue with the above aspect of the application judge's reasons.

[22] In the court below, the respondent did not assert that the total settlement award ought to be considered lost earnings. It proposed that each of the heads of damages claimed in Mr. Kontuk's original demand (as set out earlier at para. [7]) ought to be equally weighted, with the same ratio being applied to the settlement ultimately received. The respondent further submitted that an adjustment should be made to include that portion of pre-judgment interest claimed which would have been attributable to past losses. Ultimately, the respondent argued that because 34.3% of the original claim was designated as future earnings loss and 7% (adjusted to add pre-judgment interest) was past loss, the same percentages ought to be applied to allocate the settlement.

[23] The approach suggested by the respondent was, to a significant extent, accepted by the application judge. He did, however, make an adjustment in recognition that all of the claimed heads of damages should not be treated as having equal weight. In doing so, he noted another possible approach to the apportionment of a global settlement to various heads of damages. He wrote:

[86] However, in *Sun Life v. Solypa* [2001] B.C.J. No. 1964 (at para. 15), the Court discussed the problems associated with such a method of assessment:

> It would appear that the nature of the losses caused by damage to the conveyor belt rendered the approach taken in Affiliated FM Insurance entirely appropriate, but it does not follow that the same approach is appropriate in a case of this kind. I say that because there can be no assurance that equity will be done. The basis of the allocation for which Ms. Solypa contends is based entirely on the claim she saw fit to present to ICBC at the outset of their negotiations. It is an allocation that makes no allowance for the differing degrees of merit in the components of the claim some of which may have had little or no merit at all. For example one might expect that the past income loss component had considerable merit while the loss of future income and the cost of future care may have had very little merit. One or more of the components could have been utterly spurious - having been advanced as little more than a bargaining chip - but they could have the effect of greatly distorting the allocation. In my view, the claim presented offers no sound basis on which to make any allocation, and I consider it would be wrong to make the assumption made in Affiliated FM Insurance in this or any similar case. I regard the approaches taken in *McNally* and *Young* to be what can be expected to yield the most equitable result. (Emphasis added by application judge)

[24] Applying the above to the matter before him, the application judge reasoned:

> [89] **While the Applicant's overall approach appears logical, it suffers from the same principal defect identified in *Solypa, supra*: despite the adjustment for interest and costs, it essentially attributes an equivalent degree of merit to all of the individual components of the adjusted demand. I have earlier commented upon the probability that there was some puffery in the wage loss claims originally included in the Respondent's settlement conference brief.** I would go so far as to say that this is obvious, given the vast disparity between the original claim, as presented, and the amount for which the Respondent settled.
>
> [90] Indeed, the past wage loss in the original demand was $34,478.00 (net of LTD). The original demand for future wage loss (again, net of LTD) comprised $202,229.00 out of an original demand of almost $700,000.00.
>
> [91] Yet, the alacrity with which the Respondent reduced his demand to just over $199,000.00 (after receipt of the first settlement offer from Mr. Muth's counsel) and with which he ultimately settled for $123,750.00, strongly suggests that the Respondent recognized significant weaknesses with respect to the quantum and the strength (of at least some) of the components of his original demand. By far, the most strident attacks upon the Respondent's assessment of his damages arising out of the MVA (by counsel for Mr. Muth and Aviva) were made upon his wage loss claims. (Emphasis added)

And later:

> [101] I have considered those portions of the medical and discovery evidence referred to in the MVA settlement conference briefs. I have also considered the arguments levelled at the wage loss portions of the Respondent's claim in the MVA settlement conference briefs, and in conjunction with the vast discrepancy between the Respondent's original demand and the amount for which he settled. **I have determined that the best way to account for the weakness of the income loss claims relative to the other components of the claim is to reduce the wage loss component of the overall settlement to a ratio which reflects one half of the percentage which the combined "past and future wage loss" amounts comprised of the adjusted demand**. This method, frankly, may still overvalue the wage loss claims relative to the other components of the settlement amount, but not nearly to the same extent if the ratios in the original (or adjusted) demand were to be used for this purpose. (Emphasis added)

[25] The application judge's view of the relative weakness of Mr. Kontuk's wage loss claims is central to the respondent's cross-appeal.

[26] In conclusion, the application judge determined:

> [109] The Fund is entitled to reimbursement of $2,533.00 by way of past wage loss in partial repayment of the $47,592.48 LTD benefits it had paid to Mr. Kontuk as of May 23, 2013. The $12,682.80 (future wage loss) component of his settlement is to be offset against the LTD benefits to be paid to Mr. Kontuk after May 23, 2013, in the manner adopted in *Warner, supra*.
>
> [110] The Respondent turns 65 on June 19, 2022, which is 9 years after the date of settlement. Therefore, the annual amount of $1,409.20 ($117.43/month) will be offset from the Fund's payments to Mr. Kontuk from May 23, 2013 to June 19, 2022.

Issues

[27] In his Notice of Appeal, Mr. Kontuk lays out one ground of appeal:

> The ground of appeal is that the Learned Chambers Judge erred in holding that the Ontario *Insurance Act*, R.S.O. 1990, c. I.8 does not eliminate the LTD Fund's subrogation rights to recover payments made to Mr. Kontuk.

[28] In his factum, Mr. Kontuk refines the above to two questions:

> (1) Does Section 267.8(17) of the Ontario *Insurance Act* Eliminate the LTD Fund's Subrogation Right to Recover Payments Made to Mr. Kontuk?

(2) Does Section 267.8(17) of the Ontario *Insurance Ac*t Eliminate the LTD Fund's Subrogation Right to Recover Payments from Mr. Kontuk Through an Offset of Benefits?

[29] The respondent filed a Notice of Cross-Appeal in which it sets out a single ground of appeal:

> The learned trial judge erred in concluding that the Appellant's wage loss claim "was easily the weakest component" of his claim and from that erred in determining the amount of the Appellant's settlement properly attributable to past income loss and future income loss and the resulting reimbursement and offset entitlements of the Respondent.

[30] In my view, the appeal and cross-appeal each give rise to one issue respectively. They are:

1. Did the application judge err in concluding s. 267.8(17) of the *Insurance Act* did not preclude the respondent's right to seek recovery against Mr. Kontuk pursuant to the Plan?
2. Did the application judge err in his determination that Mr. Kontuk's past and future wage loss claims were the "weakest component" of the claim, resulting in an unduly low quantification of the reimbursement owed to the respondent and the offset against future LTD benefits payable?

Standard of Review

[31] The standard of review is not controversial. Errors of law attract a standard of correctness – the application judge must get the law right. For findings of fact and inferences drawn therefrom, an error must be palpable and overriding to justify appellate intervention. A palpable error is one that is clear on the evidence. An error must also be overriding, meaning, in the context of the whole case, it is so serious as to be determinative when assessing the balance of probabilities with respect to the fact in question. Findings of mixed fact and law are also reviewed for palpable and overriding error unless there is an extractable error of law (*Housen v. Nikolaisen*, 2002 SCC 33; *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2011 NSCA 43).

[32] The parties are in agreement respecting the standard of review to be applied. The first issue engages statutory interpretation, which is a question of law. As

such, the application judge's decision will be reviewed on a standard of correctness.

[33] With respect to the second issue, the application judge's determination that Mr. Kontuk's demands for past and future earnings loss were the "weakest components" of his claim is a finding of fact. In order for this Court to intervene, we must be satisfied that he made a palpable and overriding error.

Analysis

> *Did the application judge err in concluding s. 267.8(17) of the Insurance Act did not preclude the respondent's right to seek recovery against Mr. Kontuk pursuant to the Plan?*

[34] Although in his submissions Mr. Kontuk makes an incidental argument that the respondent's claim to his settlement was fundamentally unfair and contrary to the equitable principles of subrogation, the questions he poses in his grounds of appeal are very narrow. As noted earlier, he narrowly questioned the application judge's interpretation of s. 267.8(17) of the *Insurance Act.* Before this Court, Mr. Kontuk focuses on the principles of statutory interpretation to support his view that the application judge misinterpreted the intent of s. 267.8(17). I have combined Mr. Kontuk's questions into a single issue, as both rest on the assertion that the section serves to negate the contractual terms governing the parties.

[35] I will set out the application judge's reasoning again for ease of reference:

> [25] The Respondent argues that these provisions preclude the Applicant from seeking recovery with respect to any payments made to him by way of wage loss or wage replacement. In particular, the Respondent contends:
>
> > An issue very similar to the matter at hand was dealt with in the Ontario case of *Landry v. Roy*, [2001] O.J. No. 3366 (ONSCJ). In *Landry*, the plaintiff , a New Brunswick resident, was involved in an accident in Welland, Ontario. Justice Pitt of the Ontario Superior Court of Justice was called on to determine the following question of law:
> >
> > > whether the New Brunswick Ministry of Health and Community Services has a subrogated claim against the alleged tortfeasor for any medical services provided to the plaintiff as a result of injuries sustained in the subject motor vehicle accident, pursuant to the *Medical Services Payments Act*, R.S.N.B. 1973, c. M-7.
> >
> > (Respondent's brief, p. 5)
>
> [26] He continues thus:

> … Both cases involve the applicability of Ontario law to parties located outside Ontario. Both of the benefits in these cases were issued in a province that was different from the province where the tort occurred. Despite this, Ontario law was still held to be applicable and the insurer's subrogated claims were disallowed under s. 267.8(17) of the *Insurance Act.*
>
> (Respondent's brief, p. 6)

[27] With respect, I disagree. In my view, this argument fails to give proper effect to the Court's determination in *McNally, supra.* Subrogation has two components: first, the right to pursue the insured's claim against the third party in the name of the insured and second, the right to the benefit of any other amounts available to the insured for the particular loss to which the paid benefits apply.

[28] These two aspects are not contingent or co-dependant. The Fund's right to recovery is not obviated by its failure (or its inability, in this case) to assert its right to pursue Mr. Kontuk's action in Ontario and obtain recovery in his name.

[29] The Plan and, in particular, Sections 9(8) and 16(1) thereof, govern the rights of Mr. Kontuk and the Fund *inter se*. As we have already seen, the Plan does not require full indemnification of Mr. Kontuk before the Fund's contractual right to recover "any benefits received by the insured" is triggered.

[30] What the Ontario legislation can and does do is prevent the Fund from pursuing compensation with respect to the MVA in Mr. Kontuk's name. It does not, nor can it, purport to alter the contractual relationship between the Respondent and the Fund.

[31] Put differently, there is no need to give the Ontario *Insurance Act* extra provincial effect in order to fulfill its intended purpose in this case. The purpose of the Ontario legislation is to protect automobile insurance consumers by allowing insurers to deduct (from their obligation to reimburse for wage loss) amounts recoverable by the victim arising out of the accident from other sources, and thereby keep premiums as low as possible. There is no need, nor does the legislation purport, to override the clear provisions of the contract between Mr. Kontuk and the Applicant.

[32] Therefore, I conclude that nothing in the Ontario legislation prevents the Applicant from relying upon its rights as contained in ss. 9(8) and 16(1) of the Plan.

[36] In my view, the application judge was correct when he interpreted s. 267.8(17) as only preventing a third party from taking a subrogated claim against a tortfeasor. If the respondent had sought to sue Mr. Muth in Mr. Kontuk's name, this provision would have precluded it from doing so. But that was not the factual scenario before the court.

[37] Here, the respondent sought to exercise its contractual right to seek repayment of benefits paid to Mr. Kontuk. As correctly noted by the application judge, this is the second aspect of subrogation as set out in *McNally*. It does not conflict with the statutory provision prohibiting a subrogated claim against a tortfeasor.

[38] Section 267.8(17) of the *Insurance Act*, a provision passed by the Ontario Legislature, has no bearing on the respondent's ability to exercise its contractual remedies against Mr. Kontuk in Nova Scotia.

[39] I would dismiss this ground of appeal.

> *Did the application judge err in his determination that Mr. Kontuk's past and future wage loss claims were the "weakest component" of the claim, resulting in an unduly low quantification of the reimbursement owed to the respondent and the offset against future LTD benefits payable?*

[40] The respondent's sole issue on the cross-appeal is also a narrow one. Its only concern with the application judge's approach to quantifying the repayment and offset is his determination that income loss was the "weakest component" of Mr. Kontuk's claim. The respondent says there was no evidence on which the application judge could find or infer that the income claims were of questionable merit. As such, it argues the application judge ought to have treated all heads of damages as being equally meritorious. Instead, he improperly reduced that portion of the settlement attributable to income loss.

[41] In his reasons, the application judge set out in detail the various approaches that could be used to apportion a global settlement to various heads of damages. He noted, correctly in my view, that the approach to be used in any situation will necessarily depend on the context and evidence.

[42] I am satisfied that, in the present case, there was evidence upon which the application judge could reasonably conclude that Mr. Kontuk's lost income demand was the weakest component of his claim. I note in particular the following from his reasons:

> [33] It will be recalled that Mr. Kontuk was not yet employed with the Province of Nova Scotia in July 2005 when he was involved in the MVA. It was later in that year that he relocated to Nova Scotia. He became a Nova Scotia provincial employee, which led to his becoming a Plan member, in 2006.

[34] Nonetheless, it is clear that Mr. Kontuk left this employment ("the job") in 2010. He did so on the basis that he was unable to continue performing it. He maintained (when he brought action for personal injuries arising out of the MVA) that his inability to do so was causally related to the MVA, even though he had acquired the job afterward.

[35] In the course of the discovery examinations associated with his personal injury claim, the Respondent indicated that his reason for leaving the job in 2010 was different. He said it was due to the stressful interaction between himself and a new supervisor on the job.

[43] With respect to the settlement discussions, the application judge noted:

[38] Mr. Muth, although he admitted liability, took issue with most of the monetary components of the original demand. He focussed upon the claims of past and future wage loss in particular.

[39] The tortfeasor contended (in the settlement conference brief filed by his counsel):

> 55. The Defendant denies that the Plaintiff has suffered any past loss of income as a result of the injuries he sustained in 2005 MVA.
>
> 56. The Plaintiff continued working on a full-time basis with his employer in Ontario until December 2005 when he returned to Nova Scotia and abandoned his job, ostensibly to pursue medical treatment which was reasonably available to him in Ontario.
>
> 57. He immediately began working for the Nova Scotia Department of Highways and remained employed in that capacity until 2010 when he went off on work due to stress in his workplace arising from an interpersonal conflict with his supervisor.
>
> 58. For the reasons mentioned above, the Defendant denies any causal connection between the injuries sustained in the 2005 MVA and his reported inability to work after 2010.

[40] With respect to future income loss, the Mr. Muth had this to say:

> 67. As above, the Defendant denies that the Plaintiff has suffered any future loss of income as a result of the injuries he sustained in the 2005 MVA. Any loss in that regard arises solely from workplace issues which have nothing to do with the injuries he sustained in the 2005 MVA. (Agreed Statement of Facts, Tab 3)

[44] The application judge concluded:

[101] I have considered those portions of the medical and discovery evidence referred to in the MVA settlement conference briefs. I have also considered the arguments levelled at the wage loss portions of the Respondent's claim in the

> MVA settlement conference briefs, and in conjunction with the vast discrepancy between the Respondent's original demand and the amount for which he settled. I have determined that the best way to account for the weakness of the income loss claims relative to the other components of the claim is to reduce the wage loss component of the overall settlement to a ratio which reflects one half of the percentage which the combined "past and future wage loss" amounts comprised of the adjusted demand. This method, frankly, may still overvalue the wage loss claims relative to the other components of the settlement amount, but not nearly to the same extent if the ratios in the original (or adjusted) demand were to be used for this purpose.

[45] It was not lost on the application judge that in negotiating with Mr. Muth, Mr. Kontuk had strenuously argued he had a strong and legitimate claim for past and future income loss. The application judge was not required to accept that argument as dispositive of the strength of the claim. Rather, he looked at the totality of the evidence and concluded that, contrary to the respondent's assertions, the income components of the claim likely accounted for a lesser portion of the global settlement. I am satisfied there was an evidentiary basis for his conclusion.

[46] I see no error, palpable or otherwise, in the application judge's conclusion. I would dismiss this ground of appeal.

Disposition

[47] For the reasons above, I would dismiss Mr. Kontuk's appeal and further dismiss the cross-appeal brought by the respondent. In light of the outcome, with each party successfully staving off the challenge of the other, I would decline to award costs.

Bourgeois, J.A.

Concurred in:

Beveridge, J.A.

Derrick, J.A.