NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Feener*, 2025 NSCA 49

Date: 20250619
Docket: CA 538338
Registry: Halifax

Between:

Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund

Appellant

v.

Sterling Feener

Respondent

Judges:	Farrar, Van den Eynden and Beaton, JJ.A.
Appeal Heard:	May 26, 2025, in Halifax, Nova Scotia
Facts:	The respondent, insured under the Nova Scotia Public Service Long Term Disability Plan, was injured in a slip and fall at his workplace in 2015, leading to a disability claim. He later settled a negligence action against his employer for $365,000. The Fund, which administers the disability plan, consented to the settlement amount but not to the allocation of damages among different heads, leading to a dispute over the distribution of the settlement funds (paras 2-7).
Procedural History:	• Justice Frank P. Hoskins, August 6, 2024: The application judge determined the allocation of the settlement funds among the heads of damages (para 1).
Parties' Submissions:	• Appellant (Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund): Argued that the application judge misapprehended evidence,

made errors in law, and failed to properly exercise discretion in determining the allocation of the settlement funds (paras 14-16).

- Respondent (Sterling Feener): Defended the application judge's decision, arguing that the allocation was fair and consistent with the evidence and legal principles.

Legal Issues:

- Did the application judge misapprehend the evidence regarding the riskiness of the income loss claim compared to other heads of damages?
- Did the application judge err in law by failing to apply the correct legal test in assessing the heads of damage?
- Did the application judge err in law by incorrectly applying the legal test regarding the puffery adjustment?
- Did the application judge err in law by holding that the appellant waived its right to be informed by not participating in the mediation?

Disposition:

- The appeal was dismissed, with costs awarded to the respondent in the amount of $5,000 (headnotes, para 13).

Reasons:

- The application judge did not misapprehend the evidence regarding the riskiness of the income loss claim. The judge was tasked with assessing the risks associated with various claims and concluded that the income loss claim was riskier due to issues of liability and causation (paras 20-28).
- The application judge's approach to the allocation of damages was consistent with previous cases and was within his discretion. The judge considered the overall claim and settlement amount, not the accuracy of individual claims, to determine a fair allocation (paras 29-37).
- The judge's method of applying the puffery adjustment after prorating the heads of damages was consistent with established case law and was a

discretionary decision aimed at achieving fairness (paras 38-46).

- The application judge did not find that the Fund irrevocably waived its rights but noted that by not attending the mediation, the Fund did not have a say in the real-time allocation of damages. This did not affect the analysis or outcome (paras 47-51).

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Appellant

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Respondent

Judges:	Farrar, Van den Eynden and Beaton, JJ.A.
Appeal Heard:	May 26, 2025, in Halifax, Nova Scotia
Written Release	June 19, 2025
Held:	Appeal dismissed, with costs, per reasons for judgment of Farrar, J.A.; Van den Eynden and Beaton, JJ.A. concurring
Counsel:	Colin D. Bryson, K.C., for the appellant Matthew Hack, for the respondent

Reasons for judgment:

Background

[1] The appellant, Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund (the "Fund") appeals the August 6, 2024 decision of Justice Frank P. Hoskins.[1]

[2] The respondent, Sterling Feener, was insured for long-term disability under the NSPS Long Term Disability Plan (the "LTD Plan") administered by the Fund. He was injured in a slip and fall on February 11, 2015. Following the fall, Mr. Feener was found to be disabled and received benefits from the LTD Plan.

[3] The LTD Plan provides that the Fund is subrogated to all rights and remedies of an employee against a third party who may be liable for damages in respect of the injury. Mr. Feener commenced a negligence action against his employer for damages as a result of injuries suffered in the fall. The LTD Plan further provides that any settlement by Mr. Feener does not bind the Fund unless the Fund has consented to it.

[4] At a mediation held on April 11, 2023, Mr. Feener settled his claim for the sum of $365,000.00.

[5] The Fund did not attend the mediation.

[6] After the mediation, Mr. Feener sought the Fund's consent to the settlement. He presented the Fund with the Minutes of Settlement broken down among various heads of damages. The Fund consented to the overall settlement of $365,000.00. However, it was not prepared to consent to the breakdown of the heads of damages.

[7] As a result, the claim was settled for $365,000.00 but as between the Fund and Mr. Feener the allocation of the settlement to heads of damages was left unresolved.

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[1] Unpublished.

[8] The Fund filed an Application in Court requesting a declaration determining:

(a) The amount to be allotted to past income loss and pre-judgment interest recovered by Mr. Feener from the proceeds of settlement of his personal injury claim; and

(b) The amount to be allotted to future income loss and/or loss of earning capacity recovered by Mr. Feener from the proceeds of settlement of his personal injury claim.

[9] The parties provided the application judge with an Agreed Statement of Facts as follows:

1. Sterling Feener was injured in a slip and fall on ice at his workplace on February 11, 2015 in Sydney, Nova Scotia. One week later, on or about February 18, 2015, Mr. Feener was injured in a slip and fall in his driveway. He sought medical treatment for the first time the following day.
2. Mr. Feener obtained a full-time position with the Nova Scotia Community College ("NSCC") in 1998. As a result of his employment, Mr. Feener was an insured under the Nova Scotia Public Service Long Term Disability Plan (the "LTD Plan") (Tab 1).
3. The Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund (the "Trustees"), is a board of trustees appointed by the Nova Scotia Government Employees Union (the "NSGEU") and the Province of Nova Scotia (the "Province") to administer the Nova Scotia Public Service Long Term Disability Plan Trust Fund (the "LTD Fund") in accordance with a trust agreement between the NSGEU, the Province and the Trustees and in accordance with the LTD Plan.
4. Mr. Feener had been on a leave of absence from NSCC since 2012. During that time, he continued to pay into his pension and benefit package with NSCC and, as a result, Mr. Feener remained an insured under the LTD Plan.
5. At the time of the two falls, Mr. Feener was working as a consultant for 3248461 Nova Scotia Limited ("OTS"). Mr. Feener went off work from OTS in March 2015 and has thereafter not returned to any employment. He commenced receiving disability benefits under the LTD Plan as of November 20, 2015 and has received disability benefits since.
6. Mr. Feener commenced legal action against OTS (Syd. No. 466418) for personal injury damages sustained in his fall on February 11, 2015.
7. Subrogation provisions of the LTD Plan require that the Trustees consent to the settlement of Mr. Feener's claim against OTS in order for the settlement to be effective. Mr. Feener was aware of this.

8. Mr. Feener and OTS arranged to attempt resolution of the action through mediation. The parties adopted positions at mediation which were set out in their respective briefs and exhibit books (Tabs 2, 3, 4 and 5). The Trustees were provided with briefs and books of both sides in advance of the mediation. The Trustees did not participate in the mediation.

9. During a mediation held April 11, 2023, Mr. Feener and OTS agreed to settle for the all-inclusive sum of $365,000, which was subject to the consent of the Trustees per the LTD Plan. The breakdown of the settlement was captured in Minutes of Settlement signed by Mr. Feener and OTS (Tab 6).

10. Immediately following the mediation, Mr. Feener made the Trustees aware of the tentative settlement and the Minutes of Settlement, asking for the Trustees consent to the settlement, including the breakdown of the settlement. While the Trustees had been made aware of the mediation and the mediation briefs prior to the mediation, the Trustees were not made aware of settlement offers made at the mediation and first became aware of the tentative settlement and the Minutes of Settlement when advised by Mr. Feener following the mediation.

11. The Trustees advised Mr. Feener that they consented to the settlement amount of $365,000.00, but did not consent to the breakdown of the heads of damage as set out in the Minutes of Settlement.

12. The Trustees and Mr. Feener attempted but failed to resolve this dispute, and have agreed to set aside in trust a sufficient amount of the settlement funds to pay the Trustees' subrogation claim.

13. Mr. Feener's legal fees for this settlement were a contingency fee of 30% of the $365,000.00, plus HST ($125,925.00 in total), plus disbursements of $3,618.72.

14. Mr. Feener received $365,074.06 in long term disability benefits pursuant to the LTD Plan for the period from November 20, 2015 to April 11, 2023. Attached as Tab 7 is a complete record of the LTD payments made to Mr. Feener for benefits to May 1, 2023.

[10] In addition to the Agreed Statement of Facts, the parties provided the application judge with the following:

- Long Term Disability Plan Trust Fund Plan Documents;
- Pre-mediation brief of Mr. Feener;
- Mr. Feener’s Exhibit Book prepared for the mediation, which included medical reports;
- Mediation brief of the defendant;

- Book of Evidence and Book of Authorities on behalf of the defendant prepared for the mediation;
- Minutes of Settlement;
- Claim Payment Detail Report for Mr. Feener from the Fund;
- Pre-application brief of the Fund; and
- Pre-application brief of Mr. Feener.

[11] There was no sworn evidence before the application judge. He was asked to make the allocations to the heads of damages based on the submissions of the parties at the mediation and pre-hearing briefs and arguments made before him.

[12] The application judge found that the past wages lost and the corresponding pre-judgment interest apportionment would be $32,442.91[2] and the future wage loss apportionment would be $65,703.00.[3]

[13] The Fund now appeals. For the reasons that follow, I would dismiss the appeal with costs to Mr. Feener in the amount of $5,000.00.

Issues

[14] In its Notice of Appeal the Fund cites seven grounds. They are as follows:

1. THAT the Learned Application Judge misapprehended the evidence cited at paragraphs 57 and 58 of the decision, leading to the palpable and overriding error that the said evidence supported the position that Mr. Feener's claim for income loss was riskier than his claims under the other heads of damage.
2. THAT the Learned Application Judge made a palpable and overriding error by failing to recognize that Mr. Feener's claim of $345,266 for Manulife was double counting, and in fact should be $0.00, leading to the decision understating the past and future income claimed as a percentage of the total claim.
3. THAT the Learned Application Judge made a palpable and overriding error by failing to recognize that Mr. Feener's claim of $8,070 for prejudgment interest in his mediation brief grossly undervalued the claim for prejudgment interest.
4. THAT the Learned Application Judge err in law by failing to apply the legal test he articulated, specifically, in assessing the relative merits of the heads of

[2] Decision at para. 71.
[3] Decision at para. 71.

damage claimed by Mr. Feener, he failed to look at all the heads of damage claimed.

5. THAT the Learned Application Judge erred in law by failing to apply the legal test he articulated, specifically, having determined that the income loss claim should be reduced by 50% for puffery, by failing to examine what the recoveries for all heads of damage were to determine whether then 50% puffery conclusion led to a just conclusion.

6. THAT the Learned Application Judge erred in law by incorrectly applying the legal test he articulated, specifically, by applying the 50% puffery adjustment after prorating the heads of damage rather than before, resulting in an effective puffery adjustment of substantially more than the intended 50%.

7. THAT the Learned Application Judge erred in law by holding that the appellant waived its right to be kept informed of Mr. Feener's claim by choosing not to participate at the mediation.

[15] In the Fund's factum it addresses grounds 2, 3 and 4 together and grounds 5 and 6 together. I will do the same. Grounds 1 and 7 are addressed individually.

Standard of Review

[16] Although the Fund coaches the wording of its grounds of appeal as errors of fact and errors of law, it is really alleging the application judge misapprehended the evidence (Issues 1, 2 and 3), erred in law (Issues 4 and 7), and failed to properly exercise his discretion (Issues 5 and 6).

[17] To the extent the Fund is arguing the application judge misapprehended the evidence, the standard of review is as set out by this Court in *Butt v. Patterson* as follows:[4]

> [17] In *Van de Perre v. Edwards* the Supreme Court of Canada set out the standard of review when the appellant alleges a misapprehension of evidence. The approach was summarized by the Prince Edward Island Court of Appeal in *O.(P.D.) v. W.(S.L.)* as follows:
>
> > [39] The approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. ***However, omissions in the reasons will not necessarily imbue the appellate court***

[4] 2025 NSCA 2.

> ***with jurisdiction to review the evidence heard at trial. The test is that an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored, or misconceived the evidence in a way that affected his conclusion***. Without this reasoned belief, the appellate court cannot reconsider the evidence.
>
> [Emphasis added]

[18] This Court elaborated on the standard in *Novak v. Novak*:

> [8] It is not just any misapprehension of evidence that warrants appellate intervention. The appellant must demonstrate that there was a material misapprehension of the evidence that could reasonably have affected the result. …

[18] With respect to errors of law, the standard of review is well known; it is correctness (*Housen v. Nikolaisen*).[5]

[19] To the extent the application judge was exercising his discretion, this Court will only intervene if the application judge erred in principle in directing himself in the exercise of his discretion or that the result is so clearly wrong as to amount to an injustice (*K.B. v. Nova Scotia (Community Services)*).[6]

Analysis

1. **The Application Judge misapprehended the evidence cited at paragraphs 57 and 58 of the decision, leading to the palpable and overriding error that the said evidence supported the position that Mr. Feener's claim for income loss was riskier than his claims under the other heads of damage.**

[20] To provide context for the Fund's complaint about the application judge's findings, I consider paragraphs 56 - 59 of his decision:

> [56] Notwithstanding that, having reviewed the evidence, I conclude that there are varying degrees of strength between the heads of damages. Let me explain.
>
> [57] In this case, the evidence suggests that there were issues of liability and causation that present a real risk for Mr. Feener to account for the weakness of income loss claims relative to the other components of the claim in respect to the first fall that occurred on February 11, 2015. In other words, the strength of the claim in respect to general damages is much stronger than is the claim for the

[5] 2002 SCC 33.
[6] 2010 NSCA 75 at para. 15.

> wage loss component because it is easier to quantify the injuries, he sustained from the first fall than it is to determine the impact of the two falls relative to his ability to earn an income now and into the future.
>
> [58] An additional reason why Mr. Feener's wage loss claim is riskier than the others is because of his pre-existing mental illness, which may, in and of itself, have prematurely curtailed his working career, even if the accident had not occurred. LTD Fund argues that none of the treating neurologists believe Mr. Feener sustained a head injury. LTD Fund point out that Dr. McKelvey opined that Mr. Feener may have sustained a mild concussion, but it is not the source of his current symptoms (at LTD Fund brief, at para. 137). The LTD Fund says that all indications point to Mr. Feener issues being psychological in nature. The psychiatric records point to a number of potential causes unrelated to a slip and fall (LTD Fund brief, at para. 138).
>
> [59] Thus, given the vast discrepancy between the original claim and the settlement amount, 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 reduces past wage loss and future wage by 50%, as they were in *Kontuk* to represent puffery and the possibly that the claim would be unsuccessful.

[21] The application judge refers to the "impact of the two falls". As noted in the Agreed Statement of Facts, a week following Mr. Feener's fall at his employer's place of business, he suffered another fall at home, for which he did not have a tort claim.

[22] Not surprisingly, in its mediation brief, the defendant questioned which fall caused the injury and downplayed the significance of the workplace injury. The defendant further took the position that his injuries appeared to be psychological in nature. The mediation brief provides:

> 137. None of his treating neurologists believe he sustained a head injury. Dr. McKelvey believes he may have sustained a <u>mild</u> concussion, but it is not the source of his current symptoms.
>
> 138. All indications point to his issues being psychological in nature. The psychiatric records point to a number of potential causes unrelated to a slip and fall. It is unlikely the court will accept a reasonably minor slip and fall in a parking lot is a source of such significant psychological complications, particularly when compared with the other personal and family stressors that have been present, before and after.
>
> 139. As such, quite apart from issues of liability and which fall caused injury, there remains considerable doubt that his current issues will be attributable to

> either fall, particularly where a head injury has been ruled out by his own doctors.

[23] The Fund in its factum on this appeal goes through the medical evidence in some detail, and suggests based on that evidence the application judge could not have reached the conclusions he did in paragraphs 57 and 58 to find that the loss of income claim was riskier than the other heads of damages.

[24] It is clear is that both parties asked the application judge to speculate on the relative merits of the heads of damages claimed by Mr. Feener.

[25] The application judge was not making findings of fact about Mr. Feener's injuries and how they would result in damages. What he was looking at was simply the "risks" associated with the various claims Mr. Feener was making. He concluded:

> [60] Consequently, in my view, the amount [claimed] for wage loss is a much riskier proposition than the amounts sought under the other heads of damages.
>
> […]
>
> [64] In this case the evidence suggests that there were issues of liability and causation that affected Mr. Feener's claim. As such, the award should be reduced to account for the possibility that these claims would fail, or that the damages suffered would be significantly reduced as a result. A 50% reduction is appropriate. This reduction accounts for the weaknesses in Mr. Feener's claim. These weaknesses affect all heads of damage and a pro rata reduction for lost income specifically is not necessary. As I noted above, the Applicant set out a past lost wage estimation that was similar to the amount claimed by Mr. Feener. The evidence before this court suggests that Mr. Feener did not inflate his claims under these heads of damage.
>
> [65] It should be stressed that based on the evidence, it appears that Mr. Feener did not inflate his claim for general damages. The amount he claimed is within the range set out in the cases he cited in his mediation brief.

[26] Determining which heads of damages were more viable was clearly within the application judge's domain. The Fund may disagree with the determination he made but that does not lead to a conclusion he misapprehended the evidence.

[27] As was stated in *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Kontuk* [*Kontuk*][7] and this Court's decision in *Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund v.*

[7] 2018 NSSC 89 at para. 100.

Hollis [*Hollis*],[8] there is no formula or approach that is going to bring scientific precision. The application judge was left in a situation where he had to make an assessment based on the limited information he had before him. That is exactly what he did. In doing so he did not misapprehend the evidence.

[28] I would dismiss this ground of appeal.

2. **The Application Judge made a palpable and overriding error by failing to recognize that Mr. Feener's claim of $345,266.00 for Manulife was double counting, and in fact should be $0.00, leading to the decision understating the past and future income claimed as a percentage of the total claim.**

3. **The Application Judge made a palpable and overriding error by failing to recognize that Mr. Feener's claim of $8,070.00 for prejudgment interest in his mediation brief grossly undervalued the claim for prejudgment interest.**

4. **The Application Judge err in law by failing to apply the legal test he articulated, specifically, in assessing the relative merits of the heads of damage claimed by Mr. Feener, he failed to look at all the heads of damage claimed.**

[29] The Fund argues that Mr. Feener's future income loss is overstated by $345,000.00 because of the Manulife claim. It says the LTD benefits paid to Mr. Feener would comprise part of the past income loss and therefore the total claim set out in the mediation brief should be reduced from approximately $2.3 Million down to $1.95 Million.

[30] If this correction is made, the appellant says that the past income loss (plus interest) and the future income loss become a higher percentage of the total claim. Therefore, they would be entitled to recover more under its subrogated rights.

[31] The same argument was made before the application judge. He referred to it as follows:

> [34] The LTD Fund further submits that Mr. Feener's future income loss claim is overstated, as it does not apply the standard 2.5% discount rate for future income loss and, the Defendant noted, does not apply a general contingency

[8] 2024 NSCA 33 at para. 34.

> reduction, which is typically in the 10% range. The multiplier for a 2.5% discount rate for this 12-year claim is 10.37 making the future loss of $91,721 per year $951,146. Reducing this by 10% makes the claim $856,000. The claim includes $345,000 for Manulife, which claim is intended to represent the LTD benefits paid to Mr. Feener to December 12, 2022. Thus, the LTD Fund submits that the LTD benefits paid are part of the past income loss, not a claim in addition to the past income loss.

[32] He then discussed the positions of the parties and set out the charts which the Fund and Mr. Feener provided in their briefs. In the Fund's chart the Manulife claim was reduced to zero.

[33] The problem with the Fund's position is that the application judge was basing his percentages on the amount claimed in the mediation brief, whether they were inflated or not. The mediation brief claimed total damages of approximately $2.3 Million. Mr. Feener settled for $365,000.00. Obviously, the claims were overstated. However, having considered both approaches, i.e., what was being suggested by Mr. Feener and the Fund, the application judge concluded that the fairer approach was suggested by Mr. Feener:

> [66] In my view, the approach to determining the pro rata apportionment that is most fair is the first approach proposed by Mr. Feener, and the approach used in *Kontuk.* However, in his calculations Mr. Feener neglected to include the [pre-judgement] interest on the lost income. The pre-judgement interest is a part of the damages related to lost income and should be included in the pro rata calculations.

[34] Implicit in the application judge's reasoning is that he considered the $365,000.00 settlement to be a percentage of the overall claim. Put another way, if the overall claim was reduced as the Fund suggests, the ultimate settlement may not have been as much as it was. Therefore, it was not so much the accuracy of the individual amounts claimed, but the settlement amount compared to the overall claim which he considered important. In doing so, he was exercising his discretion. His approach was not so clearly wrong as to amount to an injustice.

[35] The Fund's second argument under these grounds of appeal was that the application judge erred in the same way with respect to the claim of $8,070.00 for pre-judgment interest. It says the pre-judgment interest on past income loss should be approximately $49,000.00. In its pre-hearing memorandum to the application judge, the Fund states:

> 45. […] d) It is not clear why Mr. Feener claimed so little interest in the past income loss. At 2.5% over 7.5 years, pre-judgment interest on $522,000.00 is $48,937.00. It is submitted that $50,000.00 is an appropriate adjustment.

[36] This argument fails for the same reason the Manulife adjustment fails. The application judge was basing his percentages on the amount claimed in the mediation brief – not what should have been claimed but what was actually claimed.

[37] I would dismiss these grounds of appeal.

5. **The Application Judge erred in law by failing to apply the legal test he articulated, specifically, having determined that the income loss claim should be reduced by 50% for puffery, by failing to examine what the recoveries for all heads of damage were to determine whether then 50% puffery conclusion led to a just conclusion.**

6. **The Application Judge erred in law by incorrectly applying the legal test he articulated, specifically, by applying the 50% puffery adjustment after prorating the heads of damage rather than before, resulting in an effective puffery adjustment of substantially more than the intended 50%.**

[38] The Fund's first complaint is that the application judge erred by failing to examine what the recoveries for each head of damages would be to determine whether the 50% puffery led to a just conclusion. As noted earlier, both the Fund and Mr. Feener provided a pro rata allocation of damages. The pro rata allocation was across all heads of damages. The application judge had before him the pro rata allocation of all heads of damages provided by Mr. Feener and accepted that approach. For ease of reference, I repeat the application judge's conclusion on his choice of methodology:

> [66] In my view, the approach to determining the pro rata apportionment that is most fair is the first approach proposed by Mr. Feener, and the approach used in *Kontuk*. However, in his calculations Mr. Feener neglected to include the pre-judgement interest on the lost income. The pre-judgement interest is a part of the damages related to lost income and should be included in the pro rata calculations.

[39] He was clearly aware of how the pro rata allocation of damages affected the individual heads of damages.

[40] The second concern under these grounds of appeal is the application judge should have applied the 50% puffery before prorating the heads of damages.

[41] In *Kontuk*,[9] Gabriel J. applied a similar approach as the application judge in this case. He determined the pro rata allocation between the amount of the settlement and the amount claimed and did a pro rata calculation across the heads of damages. He then reduced it by half for puffery.[10]

[42] A similar approach was taken by Gabriel J. in *Hollis.*[11]

[43] *Hollis* was appealed to this Court and the appeal was dismissed.[12]

[44] The Fund suggests that the *Kontuk* and *Hollis* analyses are flawed. It argues the puffery adjustments should be made first, followed by a pro-rating.

[45] As noted earlier, there is no formula or approach that is universal in these cases. The application judge is essentially trying to reach an allocation that is fair to the parties. The approach taken by the application judge in this case is consistent with *Kontuk* and *Hollis*. He was exercising his discretion in coming to what he considered a fair result for the parties.

[46] I would dismiss these grounds of appeal.

7. The Application Judge erred in law by holding that the appellant waived its right to be kept informed of Mr. Feener's claim by choosing not to participate at the mediation.

[47] The application judge stated:

> [44] The LTD Fund was provided with the global settlement amount and the breakdown of damages in the minutes of settlement and Mr. Feener asked for their consent to both. The LTD Fund consented to the global amount but not the breakdown. The LTD Fund noted in their brief that they had the right to be kept informed about Mr. Feener's claim and the right to assume conduct of the litigation. The LTD Fund chose not to assume those rights when it chose not to participate in the mediation despite being invited to do so by Mr. Feener.

[9] 2018 NSSC 89.
[10] 2018 NSSC 89 at para. 101.
[11] 2023 NSSC 111.
[12] 2024 NSCA 33.

[48] The application judge did not find the Fund irrevocably waived its right to be kept informed.

[49] The Fund was informed of the settlement following the conclusion of the mediation. The settlement was contingent upon the LTD Fund's approval. It approved it, but the parties could not agree on the allocation of the heads of damages proposed by Mr. Feener. As a result, the Fund made an application to resolve the issue.

[50] The application judge simply found the Fund, by not attending the mediation, did not have a say in the real-time allocation of the damages. It had no effect on his analysis or the outcome.

[51] I would dismiss this ground of appeal.

Conclusion

[52] I would dismiss the appeal, with costs to the respondent in the amount of $5,000.00 inclusive of disbursements.

Farrar, J.A.

Concurred in:

Van den Eynden, J.A.

Beaton, J.A.