NOVA SCOTIA COURT OF APPEAL

Cite as: Singh v. Sun Alliance Insurance Company, 1994 NSCA 180

Hallett, Freeman and Jones, JJ.A.

BETWEEN:

KAM SINGH Appellant - and - Insurance Company	)	Christopher C. Robinson for the Appellant Robert M. Purdy for Sun Alliance
SUN ALLIANCE INSURANCE COMPANY and WILLIS B. KIRK Respondents	)	Ronald C. Giffin, Q.C. for Willis B. Kirk
	)	Appeal Heard: October 11, 1994
	)	Judgment Delivered: October 25, 1994

THE COURT: The appeal is allowed, on the first ground; appeal allowed in part on second ground, varying the order of the trial judge to terminate the right of Judgment Recovery to the assignment of Mr. Kirk's Section B benefits of his sixty-eighth birthday, with costs fixed at $500.00 plus disbursements per judgment of Freeman, J.A.; Jones and Hallett, JJ.A. concurring.

FREEMAN, J.A.:

There are two issues in this appeal: whether an insurer's liability to pay no fault loss of income benefits pursuant to Schedule "B" of Part VI of the **Insurance Act**, R.S.N.S. 1989 c. 231 continues beyond the date the accident victim was likely to retire from employment, and whether it is appropriate for the victim to assign those benefits to the third party liability insurer as a means of crediting them against his lost future income award.

THE FACTS:

In the present case the respondent Willis B. Kirk, while a pedestrian, was struck by a motorcycle driven by the appellant Kam Singh on May 26, 1989 and suffered injuries found by the trial judge to disable him from employment for the remainder of his life. Mr. Kirk was covered for Section B benefits, as they are called, under his own automobile insurance policy. Mr. Singh was not insured. Judgment Recovery (N.S.) Limited is responsible to pay Mr. Kirk's damages on his behalf, and Mr. Singh is liable to repay Judgment Recovery.

Mr. Kirk was found forty percent contributorily negligent. His general damages were assessed at sixty percent of $87,000 or $52,000. His past loss of income was assessed at $70,980 less forty percent, or $42,588. Of that amount $30,569.04 was paid under Section B leaving a net claim of $12,018.96.

The trial judge found it probable that Mr. Kirk would work until his sixty-eighth birthday, December 1, 1995. He assessed loss of future income at $63,078 less sixty percent or $37,846.80.

This appeal relates to the following two provisions in the order:

1. That the Defendant Sun Alliance Insurance Company shall continue to pay Section B loss of income benefits to the Plaintiff, or his assignee, until the Plaintiff reaches the age of 68 years, provided that the Plaintiff is continuously prevented by his injury from engaging in any occupation or employment for which he is reasonably suited by education, training or experience and that upon the Plaintiff reaching the age of 68 years, the Defendant Sun Alliance Insurance Company shall be permitted to terminate payment of such loss of income benefits.

2. That upon the Plaintiff receiving all amounts which he is entitled to receive from Judgment Recovery (N.S.) Ltd. pursuant to provisions of the Motor Vehicle Act, R.S.N.S. 1989, c. 293 as a result of this Order for Judgment and the Order for Judgment dated March 24, 1993, the Plaintiff shall assign to Judgment Recovery (N.S.) Ltd. his right to collect Section B loss of income benefits from the Defendant Sun Alliance Insurance Company.

GROUNDS OF APPEAL:

The following are the grounds of appeal:

(1). Did the learned Trial Judge err in law in ruling that the respondent, Sun Alliance Insurance Company ("Sun Alliance") did not have to continue to pay to the Respondent Willis Kirk ("Kirk") Section B loss of income disability benefits for the duration of Kirk's disability, which the learned Trial Judge had earlier ruled would be the remainder of Kirk's life?

(2). Did the learned Trial Judge err in law in holding that the Appellant was not entitled to deduct from the Judgments entered by Kirk the present value of future Section B loss of income disability benefits to be received by Kirk up to and beyond Kirk's 68th birthday?

THE FIRST GROUND:

The relevant portion of Part II of Schedule B of Part VI the **Insurance Act** provides:

> **Part II -- Loss of Income**
>
> Subject to the provisions of this Part, a weekly payment for the loss of income from employment for the period during which the insured person suffers substantial inability to perform the essential duties of his occupation or employment , provided,
>
> (a) such person was employed at the date of the accident,
>
> (b) within 30 days from the date of the accident and as a result of the accident the insured person suffers substantial inability to perform the essential duties of his occupation or employment for a period of not less than seven days;
>
> (c) no payments shall be made for any period in excess of 104 weeks except that **if**, at the end of the 104 week period, **it has been established that such injury continuously prevents such person from engaging in any occupation or employment for which he is reasonably suited by education, training or experience, the insurer agrees to make such weekly payments for the duration of such inability to perform the essential duties.** (Emphasis added.)

It is to be noted that once disability has been established beyond the 104 week period, the criterion for payment of the benefit is no longer "substantial inability to perform the essential duties of his occupation or employment," but the continuous

inability to engage in any suitable occupation or employment. It does not follow that reaching retirement age from one's occupation or employment concludes one's working life in another occupation or employment, nor that it concludes the Section B insurer's liability.

The Section B insurer's duty continues for so long as the victim is unable to engage in any suitable occupation or employment as a result of the disability caused by the accident. The words are clear and they must be given their plain meaning. There is nothing in Part II to suggest that the victim's age, and his or her prospects for retirement, are relevant factors in determining the duration of Section B benefits. It is the duration of the disability that governs, so long as it is the disability from the accident that prevents the injured party from engaging in any suitable occupation or employment.

The anticipated date of retirement is relevant in calculating lost future income to be paid by the third person insurer, but it is not a material consideration for the Section B insurer.

All of the cases cited by counsel treat the Section B income replacement provisions as an ongoing benefit for so long as the injured party remains qualified within the meaning of Schedule B, that is, so long as the disability resulting from injury is the cause of the inability to engage in a suitable employment or occupation.

In **Morrow v. Barnhill** (1987), 82 N.S.R. (2d) 141 affirmed on appeal (1988), 96 N.S.R. (2d) 444 (S.C.A.D) Nunn J. considered likely retirement from a particular employment with respect to third party liability but concluded that the Section

B insurer was liable "for an indeterminate period which may very well extend to the life of Morrow."

In **Vasquez v. Co-operators General Insurance Co.** (1985), 11 C.C.C.I. 73 (Ont. C.A.) no fault disability benefit provisions similar to Nova Scotia's were considered. It was found that it was irrelevant that persons deemed to be employees at the time of the accident, but not actually working at the time, might have remained unemployed for the rest of their lives. "There is no requirement in Part II that a person actually employed at the date of the accident must show that he would have continued to be employed but for the accident, through the whole period of his disability.

In **Thomas v. Great West Life Assurance Co**. (1991), 3 C.C.L.I. (2d) 264 (B.C.S.C.) it was held that no fault benefits could not be withheld even though the disabled person could not have been employed during part of the benefit period because she was incarcerated. See also **Penney v. Manitoba Public Insurance Corp.** (1992), 11 C.C.L.I. (2d) 100 (Man C.A.).

In **Thompson v. Constitution Insurance Company of Canada**, [1987] I.L.R. 8354 (Ont. D.C.) it was ruled that "the benefits continue so long as the insured is qualified to receive them and do not automatically cease when the insured reaches 65 years of age."

An insurer denied benefit to a high school student employed for the summer and rendered a quadriplegic in an accident on grounds that its liability was limited only to the period of summer employment. It was found liable both for the benefits and for aggravated damages in **Thompson et al v. Zurich Insurance Co.**

(1984), 5 C.C.L.I. 251 (Ont. S.C.).

The respondent insurer cited **Dubkov. v. Junction Towing**, [1992] O.J. No. 993 (O.C.J.G.D.) in which a retirement age of sixty-five was found relevant to the third party lost income award. The court remarked that future no fault payments, which were to be credited against the damage award, would continue.

In the present case it was an error of law by the trial judge to order that Section B benefits should terminate upon Mr. Kirk's sixty-eighth birthday. The appeal is allowed on the first ground.

THE SECOND GROUND:

> Did the learned Trial Judge err in law in holding that the Appellant was not entitled to deduct from the Judgments entered by Kirk the present value of future Section B loss of income disability benefits to be received by Kirk up to and beyond Kirk's 68th birthday?

By ordering the assignment, the trial judge precluded the alternative of capitalizing the future Section B benefits and deducting them from the third party award for loss of future income, the approach urged by the appellant. Mr. Kirk had attempted to forestall the capitalization approach by making a voluntary assignment of his future Section B benefits to the appellant or Judgment Recovery on the appellant's behalf, but the assignment was not accepted until the order was issued. As this was the approach favoured by Mr. Kirk, the trial judge was not faced with imposing an assignment of benefits on an unwilling plaintiff.

Section 146 (2) of the **Insurance Act** provides:

> 146(2) 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.

This provision causes difficulty with respect to the release of claim for Section B benefits payable in the future, after the injured party has been paid damages for loss of future income by or on behalf of the third party. See **General Accident Assurance Company of Canada v. Carmen Dugas-Mattatall** (Unreported--June 15, 1994, N.S.C.A. No. 102073). The criteria for determining entitlement to Section B benefits vary from the criteria for determining the loss of future income component of a damage award and there is no completely satisfactory basis for setting one off against the other. The gross sum amount awarded for loss of future income involved calculations and considerations quite different from those used in the straightforward calculation of the weekly Section B entitlement, and any approach can only result in an approximation. Surprisingly, counsel were unable to cite any authorities directly on point from courts of appeal, although other jurisdictions have similar legislation.

Nova Scotia has no equivalent to s. 24(5) of the **Insurance (Motor Vehicle) Act**, R.S.B.C. 1989, c. 204 which provides for the deduction of the estimated value of the equivalent of Section B benefits from damage awards for lost future income. That provision was applied in **Conn v. Conn** (1992), 14 C.C.L.I. (2d) 264 (B.C.S.C.) and **Trifunovic v. Anderson** (1992), 9 C.C.L.I. (2d) 120 (B.C.S.C.).

Despite the absence of similar legislation providing a clear statutory method for dealing with the problem in Nova Scotia, s. 146(2) cannot be ignored in orders for judgment awarding damages for loss of future income to recipients of Section B benefits. While trial judges are entitled to assume a discretionary jurisdiction to give effect to the legislation, it is questionable whether they are entitled to go so far as to order either assignment or capitalization without the consent of the affected party, that is, the plaintiff. 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. Unlike Section B benefits, an award of damages for lost future income is a projection. Its purpose is to bring litigation to a close and to settle damages between the plaintiff and the defendant or its insurers as of the time of trial by a lump sum award calculated on the basis of evidence of future probabilities known at that time. It is immaterial to the award whether the actual condition of the claimant improves or worsens after the trial. Section B benefits are paid only for the duration of the disability, and may cease to be available either as a result of death or recovery soon after the award of damages. When they cease, they no longer operate as a release from the claim for damages.

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.

Without assuming authority to impose either assignment or capitalization on an unwilling plaintiff, a trial judge is limited to ordering that a portion of the damages for lost future income be withheld until the amount to be released by the future Section B benefits can be fully known and credited or an assignment or other suitable arrangement entered into. The award for loss of future income is a capitalized amount taking interest factors into account which is usually arrived at with the assistance of actuarial evidence. To avoid the perils of a separate calculation for the Section B benefits involving different considerations, a reasonable holdback figure can be arrived at by determining the relationship between the actual weekly Section B benefit and the weekly income of the claimant on which the loss of income calculation is based. If , for example, a plaintiff who was awarded $100,000 for lost future income based on loss of an income of $500 a week, and was receiving the maximum $140 Section B benefit, the Section B benefit would equal twenty-eight per cent of the lost income. Therefore a trial judge would be justified in ordering $28,000 held back from the damage award until assignment of the Section B benefits or other appropriate compliance with the

release provision of s. 146(2).

The maximum amount available on behalf of the defendant from the Section B assignment should not exceed the amount ordered held back--that is, the portion of the damages award directly related to Section B benefits--nor continue beyond any date used as a cutoff for the calculation of the loss of future income damage award, such as retirement age. Any assignment must end when the total recovered from the assignment equals the holdback, or when the cutoff date is reached. Any balance of the held back amount remaining unreleased when Section B benefits cease to be available would, or course, be payable to the claimant or his estate.

In the circumstances of the present case the trial judge did not err in law in holding that the appellant was not entitled to deduct from the judgments entered by Mr. Kirk the present value of future Section B loss of income disability benefits. Nor was there any necessity for him to consider a holdback because Mr. Kirk had concurred in the assignment. The assignment does not operate unfairly to Judgment Recovery because s. 146(2) requires that the claim be released only for the Section B benefits paid or available to the injured party. Mr. Kirk's head injuries left him with headaches, dizziness and difficulty in walking and the trial judge found on the medical evidence that his disability was permanent, thus disposing of any contingency arising from his possible recovery. In my view the assignment approach used by the trial judge is rational and fair and satisfies the requirements of s. 146(2). It cannot be said that the approach represents an error of law.

However it is the appellant's position that:

> Sun Alliance must continue to make Section B loss of income disability payments to Kirk for the rest of Kirk's life. At trial, evidence was given as to Kirk's life expectancy. It is submitted that in order to calculate the Section B deduction to which the Appellant is entitled, an actuarial calculation should be made of the present value of the future Section B benefits which Kirk is entitled to receive for the rest of his life. This figure then should be deducted from the damages payable by the Appellant to Kirk.

This approach would be undoubtedly more advantageous to the appellant. It would fix the amount for which Mr. Singh is liable to repay Judgment Recovery from the date of the order. However if Mr. Singh is attempting to settle that liability the same actuarial calculation could be made between him and Judgment Recovery without involving Mr. Kirk. The approach sought by the appellant would be significantly to Mr. Singh's advantage because it would increase the period during which the value of the Section B benefits would be calculated from Mr. Kirk's sixty-eighth birthday to the end of his life expectancy, that is, the amount the appellant seeks to have deducted from the loss of future income award would be increased. This approach is not available to the appellant for the reasons stated above.

The calculation of the loss of future income was based upon Mr. Kirk's probable retirement as of his sixty-eighth birthday. The trial judge correctly saw no reason for payment of Section B benefits beyond that date to Judgment Recovery pursuant to s. 146(2). However it was determined with respect to the first ground of appeal that he was in error in terminating the duty of Sun Alliance to pay Section B benefits as of that date. That date simply marks the termination of Judgment

Recovery's right to the assignment of Mr. Kirk's Section B benefits. Following Mr. Kirk's sixty-eighth birthday the assignment of the Section B benefits will cease to be effective, and Mr. Kirk will again be entitled to receive them in replacement of any income he might have earned from any occupation or employment following retirement from his regular employment, but for the disability resulting from the accident, for so long as he remains qualified pursuant to the Section B provisions.

CONCLUSION:

I would allow the appeal on the first ground and allow the appeal in part on the second ground, varying the order of the trial judge to terminate the right of Judgment Recovery to the assignment of Mr. Kirk's Section B benefits as of his sixty-eighth birthday. Mr. Kirk was not represented by counsel at the hearing of the appeal and I would allow him no costs but award no costs against him. Because of the novelty of the issues and limited success of the appellant on what I consider his main ground I would fix costs at $500 plus disbursements.

J.A.

Concurred in: Jones, J.A.

Hallett, J.A.

C.A. No. 102254

NOVA SCOTIA COURT OF APPEAL

Hallett, Freeman and Jones, JJ.A.

BETWEEN:

KAM SINGH	)	Christopher C. Robinson
	)	for the Appellant
Appellant	)	
	)	
	)	
- and -	)	
	)	
	)	Robert M. Purdy
	)	for Sun Alliance
Insurance Company		
	)	

SUN ALLIANCE INSURANCE COMPANY and WILLIS B. KIRK Respondents	)	Ronald C. Giffin, Q.C. for Willis B. Kirk
	)	Appeal Heard: October 11, 1994
	)	Addendum Issued: December 1st, 1994

ADDENDUM

(Original Judgment delivered October 25, 1994

FREEMAN, J.A.:

We agree with counsel that the question whether the assignment of Section B benefits to Judgment Recovery should be terminated on December 1st, 1995, was not before the court.

The decision is amended by deleting the following paragraphs:

> " The calculation of the loss of future income was based upon Mr. Kirk's probable retirement as of his sixty-eighth birthday. The trial judge correctly saw no reason for payment of Section B benefits beyond that date to Judgment Recovery pursuant to s. 146(2). However it was determined with respect to the first ground of appeal that he was in error in terminating the duty of Sun Alliance to pay Section B benefits as of that date. That date simply marks the termination of Judgment Recovery's right to the assignment of Mr. Kirk's Section B benefits. Following Mr. Kirk's sixty-eighth birthday the assignment of the Section B benefits will cease to be effective, and Mr. Kirk will again be entitled to receive them in replacement of any income he might have earned from any occupation or employment following retirement from his regular employment, but for the disability resulting from the accident, for so long as he remains qualified pursuant to the Section B provisions.
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The following will be substituted:

" The trial judge was in error in terminating the duty of Sun Alliance to pay section "B" Benefits beyond Mr. Kirk's probable retirement at age 68.

CONCLUSION

The appeal is allowed on the first ground.

Mr. Kirk was not represented by counsel at the hearing of the appeal and I would allow him no costs but award no costs against him because of the nullity of the issues and the limited success with the appellant. On what I consider his main ground I would fix costs of $500 plus disbursements."

Freeman, J.A.

Concurred in:

Hallett, J.A.

Jones, J.A.

C.A. No. 102254

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

KAM SINGH

Appellant

- and -

SUN ALLIANCE INSURANCE COMPANY and WILLIS B. KIRK

Respondents

ADDENDUM

C.A. No. 102254

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Appellant

Christopher C. Robinson for the Appellant

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	)	
	)	Robert M. Purdy
	)	for Sun Alliance Insurance Company
	)	
SUN ALLIANCE INSURANCE COMPANY and WILLIS B. KIRK	)	Ronald C. Giffin, Q.C. for Willis B. Kirk
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Hallett, J.A.

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