SUPREME COURT OF NOVA SCOTIA
Citation: *Poulain v. Iannetti*, 2015 NSSC 181

Date: 2015-06-26
Docket: Hfx No. 288814
Registry: Halifax

Between:

George Poulain

Plaintiff

v.

David J. Iannetti

Defendant

Revised Decision: The text of the original decision has been corrected according to the appended erratum dated August 5, 2015.

Judge: The Honourable Justice Peter Rosinski

Heard: January 5 – 7, 2015, in Halifax, Nova Scotia

Counsel: Janus Siebrits, for the Plaintiff
Ralph W. Ripley for the Defendant

By the Court:

Introduction

[1] This case concerns an allegation of professional negligence against a lawyer.

[2] It may be a surprise to some, but in England, until the 1967 decision of the House of Lords in *Rondel v. Worsley*, [1967] 3 All E.R. 993, barristers could not be sued by their clients for negligence. In Canada, clients could do so, and indeed did do so, as early as 1870: *Wade v. Ball* (1870), 20 U.C.C.P. 302 (C.A.) – see also, Aaron Franks, "A brief history of barristers' liability," *The Advocates' Society Journal* (2012), 30 Advocates' J. No. 4, pp. 11 – 15.

[3] Mr. Iannetti is a lawyer who was admitted to the Bar in 1989. Mr. Poulain was his client, and is suing him on the ground of professional negligence.

[4] Mr. Poulain was injured in a motor vehicle accident as a passenger in Gerard O' Brien's vehicle on June 6, 2001. The liability for the accident was never significantly in issue. The nominal tortfeasor (who was sued in action S.N. No. 201789, also referred to as the fault-based "Section A claim") had proceeded through a "stop" sign without stopping and struck Mr. O'Brien's vehicle. Mr. Poulain has not since been employed in any capacity.

[5] Mr. Poulain received "no-fault" Section B benefits during the first two years after the accident. Included with the medical and rehabilitation benefits, Mr. Poulain also received "loss of income" benefits (a weekly indemnity of $140) on the basis that the insurer was apparently satisfied that he suffered substantial inability to perform the essential duties of his occupation or employment. I will refer to these as the "stage one" Section B benefits.

[6] Mr. Poulain was also potentially eligible for Section B loss of income benefits of $140 per week following the two-year mark after the accident, arguably until he passes away, if he could establish that the injury he suffered in the accident "continuously prevent[ed] [him] from engaging in any occupation or employment for which he is reasonably suited by education, training or experience". I will refer to this as the "stage two" Section B benefits.

[7] Shortly after the accident Mr. Poulain and Mr. O'Brien hired Charles Broderick, Q.C., to represent them. Within two days after that, they met with Mr. Iannetti, who was already representing Mr. Poulain in relation to a family matter which had been ongoing since around 1993. They agreed that Mr. Poulain would

retain Mr. Iannetti in relation to the June 6, 2001, motor vehicle accident (instead of Mr. Broderick). The terms of the retainer were never reduced to writing. Mr. Poulain claims that Mr. Iannetti was representing him in relation to all aspects of the claim relating to the motor vehicle accident, and specifically both the Section B and Section A components of his claim. Mr. Iannetti claims that he was only representing Mr. Poulain in relation to the Section A component.

[8] In September 2002, the Section B adjuster proposed a settlement to Mr. Poulain, comprising basically the balance remaining available from the $25,000 maximum medical expenses within the first two years and the remainder of the $140 weekly income loss indemnity during that period. Thus, Mr. Poulain would have the benefit of previous reimbursements already paid on his behalf; the weekly indemnity paid to him to date; and any remaining monies therefor together representing the maximum Section B benefits available in the first two years.

[9] Mr. Poulain advised the adjuster that he wanted time to get legal advice regarding whether he should accept the settlement proposal. He contacted Mr. Iannetti, and thereafter accepted the settlement proposal, which was finalized between September 15 and 23, 2002. He received a lump sum of $7250 for the weekly indemnity, and the remainder of the medical expenses and rehabilitation funds for 14 months in the amount of $8400, for a total of $15,650.

[10] Mr. Poulain subsequently retained new counsel and sued Mr. Iannetti in contract and in tort (negligence), claiming the loss of the "stage two" Section B benefits to which he would otherwise have been entitled. Mr. Poulain claims that Mr. Iannetti gave him deficient legal advice regarding his Section B entitlement. He says Mr. Iannetti should have made him aware that he could have made a claim for "stage two" Section B benefits beyond the initial two-year period after the motor vehicle accident, and that by settling the Section B claim, he was prevented from making any further Section B claim in that respect.

[11] As stated in his brief, the plaintiff says that the defendant knew, or should have known, the following, but failed to advise him as a reasonably prudent solicitor would be required to do:

> a) There was a real risk the plaintiff could be totally disabled as a result of the motor vehicle collision
>
> b) That in that event the plaintiff would be eligible to receive Section B weekly indemnity throughout the course of his disability to age 65 years;
>
> c) That the $25,000 cap on Section B medical expenses had no relevance to the plaintiff's eligibility for weekly indemnity payments;

> d) That in the event of the plaintiff accepting the Section B offer, the defendant in the plaintiff's tort claim [the tortfeasor] would receive a deduction for all of the Section B weekly indemnity the plaintiff would have received to age 65, had he not settled with the Section B insurer. In other words, Section B payments would be deducted from the Section A settlement even though the plaintiff would never receive them.…

[12] The plaintiff argues that the defendant was retained in relation to both the Section A and Section B components of his claim, and was obligated to obtain the necessary information to properly advise him on his Section B claims. The failure to do so was a breach of contract, the plaintiff alleges.

[13] Alternatively, the plaintiff argues that even if the defendant was not obliged to advise him, he still had a duty of care requiring him to either advise Mr. Poulain to get independent legal advice from another lawyer or to obtain the necessary information and advise him of the potential negative effect of a Section B settlement on his Section A claim.

[14] In his brief, the plaintiff summarizes his view of the situation as follows:

> In other words, the settlement of the plaintiff's Section B claim without proper legal advice prejudiced the plaintiff in two ways:
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> > 1. The plaintiff lost on the right to continue to draw Section B benefits for his life expectancy at the rate of $140 per week;
> >
> > 2. The plaintiff was prejudiced in his Section A settlement. The tort defendant offset $140 per week from his loss of income claim, until age 65, even though these were never received. The defendant in the tort claim argued that it was not their problem that the plaintiff chose to settle his Section B at a compromise. The defendant argued that they should not be prejudiced by the plaintiff's bad decision. This is akin to a failure to mitigate argument. The case law is divided on this issue, but the plaintiff faced the risk that his Section A lost wages claim would be offset by his full Section B entitlement, even though he settled at a compromise. There was strong case law supporting this argument. Therefore, the plaintiff settled his Section A claim in part recognizing an offset he never received.

[15] As the plaintiff points out, the Supreme Court of Canada has stated that "if the respondent solicitors were negligent in the performance of the professional services for which they were retained they would be liable in tort as well as contract to the appellant": *Central Trust Co. v. Rafuse* [1986] 2 S.C.R. 147, at 206.

Issues regarding liability

1. Was Mr. Iannetti retained by Mr. Poulain to handle his Section B claim, either initially or when Mr. Poulain contacted him after receiving the Section B insurer's proposed settlement?

[16] The retainer was never reduced to writing, initially or at any stage. The evidence indicated that Mr. Poulain and Mr. O'Brien attended at Mr. Iannetti's office and left with a retainer in place. Mr. O'Brien did not testify.

[17] Mr. Poulain testified that his 15-year-old daughter was rendered quadriplegic in a motor vehicle accident, around 1992 or 1993. He and his wife contested her guardianship. His wife was appointed Guardian, and thereafter, Mr. Poulain was subject to *Protection of Property Act* notices not to be on the premises of the Braemore Home, the assisted-living facility, where his daughter was living. Mr. Poulain was able to retain the services of Mr. Iannetti through a legal aid certificate to assist him in getting access to his daughter. This was in approximately 1995. There were continuing difficulties in this respect, and this situation was ongoing between June 2001 and January 2003, when Mr. Poulain terminated Mr. Iannetti's retainer in relation to the Section A claim. During those years, Mr. Iannetti was assisting Mr. Poulain on a *pro bono* basis.

[18] Thus, when Mr. Poulain was at the courthouse shortly after the 2001 accident sporting a neck brace collar and arm sling, he caught the attention of Mr. Iannetti, and as a result he and Mr. O'Brien attended at Mr. Iannetti's office where the retainer was discussed. This took the form of a 25% Contingency Fee Agreement (excluding disbursements and HST).

[19] Mr. Poulain testified that there was no discussion about the difference between a Section B and Section A claims, nor was there any discussion about the different heads of damages. Moreover, Mr. Iannetti did not explain what benefits were generally available under Section B, although Mr. Poulain conceded that Mr. Iannetti did explain that there "were up to $25,000 in medical benefits" available. Mr. Poulain testified that he believed that Mr. Iannetti would represent him in relation to his claims arising from the motor vehicle accident, and that; therefore, Mr. Iannetti would be entitled to 25% of any settlement (excluding disbursements and HST).

[20] Mr. Poulain did concede that he alone had frequent contact with the Section B insurer up to and including September 2002. Mr. Iannetti wrote not one letter,

nor did he receive one, from the Section B insurer. Conversely, Mr. Poulain noted that Mr. Iannetti did not send him one letter, or copies of any letters, regarding his claim between June 2001 and January 16, 2003. Those facts were not disputed by Mr. Iannetti.

[21] Mr. Poulain also testified that during the retainer, it was very hard to get hold of Mr. Iannetti, and insinuated that Mr. Iannetti was unreasonably avoiding him and his inquiries.

[22] I note, however, that in cross-examination, Mr. Poulain's 2011 testimony from the first trial in this case (which was sent back for retrial; 2013 NSCA 10) was put to him, as follows:

> [Transcript page 134]
>
> A- Not initially, no… I was seeking legal representation, a lawyer to help me in this injustice [a reference to his complaint to the Canadian Judicial Council regarding the alleged inappropriateness of Justice N.R. (Robert) Anderson having sat as the presiding judge in the contested guardianship matter involving his quadriplegic daughter]. Mr. Iannettiannetti called it a – he said, "George" – he'd listen to me for hours and days on the family matter, but he kept putting me off. He said, "George, this is a miscarriage of justice… It took me three years talking to this man about this case."
>
> [emphasis added]

[23] Mr. Iannetti testified as part of the plaintiff's case as an adverse witness, pursuant to Rule 54.06. Since his admission to the Bar in 1989, he has conducted a general practice, and sometimes in association with another lawyer. In June 2001, approximately ten to fifteen percent of his practice involved personal injury work, and ninety percent of that involved motor vehicle claims. He noted that his practice was run with little formality. He had no standard intake form. He used his notepad to record meetings. His standard practice was not to handle Section B claims, and to use a 25% contingency fee agreement (excluding disbursements and HST) for Section A personal injury claims. He did not use a written contingency fee agreement form. He suggested that Rule 77.14, or a similar rule did not exist in 2001: "I don't know if that Rule was in place at the time." Apparently, he believed that there was no requirement that contingency fee agreements be confirmed in writing at the time that Mr. Poulain approached him in June 2001.

[24] At this point, I interject to point out that Rule 63.17 of the *Nova Scotia Civil Procedure Rules* (1972) expressly permitted contingency fee agreements, and Rule 63.18 required:

> (1) the agreement shall be in writing and signed by the client or his authorized agent.
>
> (2) The agreement shall contain,
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> (a) the name and address of each client,
>
> (b) the name and address of the solicitor,
>
> (c) a statement of the nature of the claim,
>
> (d) a statement of the contingency upon which the compensation is to be paid, and whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected by the solicitor,
>
> (e) a statement that reasonable contingent compensation is to be paid for the services, and the maximum amount or rate which the compensation is not to exceed, after deduction of all reasonable and proper disbursements, and
>
> (f) a statement to the following effect: "This agreement may be reviewed by a taxing officer at the client's request, and may either at the instance of the taxing officer or the client be further reviewed by the court, and either the taxing officer or the court may vary, modify or disallow the agreement."

[25] More significantly, Rule 63.19(1) required that within ten days of such agreement being signed a copy thereof "shall be filed with the prothonotary of the county where the solicitor practices… and… the agreement is not available for inspection….": see, e.g., *Lacelles v. Rizzetto*, (1996) 158 N.S.R. (2d) 336, [1996] N.S.J. No. 569 (S.C.), J.M. MacDonald, J (as he then was). Also, significantly, Rule 63.19(2) read:

> Where an agreement as mentioned in Rule 63.17 does not comply with Rule 63.18, or is not properly filed as provided in paragraph (1), the solicitor is, upon the successful disposition of the subject matter, entitled only to the compensation as would have been payable in the absence of any contingency arrangement and without regard to the contingency.

[26] Mr. Iannetti testified that he remembered "vividly" some things about the meeting with Mr. Poulain, but mostly he could only describe his general practice at

the time for dealing with clients at such meetings. This was to outline his fees and practices, and explain the differences (in this case) between a Section B and Section A claim. He had a specific recollection that he told Mr. Poulain he would handle the Section A claim, and that Mr. Poulain would be responsible to handle the Section B claim on his own behalf.

[27] In cross-examination by plaintiff's counsel, Mr. Iannetti's attention was drawn to his discovery examination of June 17, 2008 [Exhibit 6]. There he stated:

> Q: You mentioned previously that Mr. Poulain was really as far as you can remember, at all times involved directly in his own Section B claim. Do you specifically remember ever saying to him [words to the effect] that " I'm not handling section B, don't speak to me about that, I'm not involved"?
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> A: No, absolutely not. I have no recollection of that. I can't imagine that would be anything I'd say.

[28] As I understand his testimony at trial, he accepted that he had said those words, but that the "that" he referred to, namely "I have no recollection of that", was a specific reference to the phrase: "Don't speak to me about that".

[29] In summary, I find Mr. Iannetti's testimony was that he did not expressly say to Mr. Poulain that he could not ask Mr. Iannetti about the Section B benefits, but that he did make it clear that any efforts respecting the Section B benefits would have to be conducted exclusively by Mr. Poulain. Moreover, he expressly testified that it was his practice to give his Section A clients "some direction" regarding their Section B matter, if requested.

[30] The court has no written material of any kind upon which it could rely as a touchstone to establish the terms of the retainer of Mr. Iannetti vis-à-vis Mr. Poulain's claim, or claims arising out of the June 6, 2001, motor vehicle accident. I only have the testimony of Mr. Iannetti and Mr. Poulain. Recently, Bryson J.A. has canvassed the law regarding enforceable oral contracts in *Jeffrie v. Hendriksen*, 2015 NSCA 49, at paras. 16 – 17, 40 and 58. I will apply the relevant principles herein.

[31] The major difference in their testimony is that Mr. Poulain insists that there was no discussion about the difference between Section B and Section A benefits, and it was not clear that Mr. Iannetti would not be representing his interests insofar as the Section B claim was concerned.

[32] While I recognize that: Mr. Iannetti has a very personal interest in the outcome here; that he has no records from which he can refresh his memory, and that courts generally expect legal counsel to be better situated than their clients in providing evidence of the nature and extent of the terms of the contract by which the client retains the services of the legal counsel; on balance, I accept his testimony that he explained the differences between a Section B and Section A claim to Mr. Poulain at the meeting. I also accept his testimony that they agreed on a division of labour such that Mr. Poulain would be solely responsible to handle the Section B claim, while Mr. Iannetti would be responsible for the Section A claim, for which he would claim 25% of the settlement amount (excluding disbursements and HST).

[33] I come to this conclusion in part, because the independent evidence establishes that Mr. Iannetti was not once involved on Mr. Poulain's behalf regarding the stage one Section B claim. There is no evidence that Mr. Poulain even once contacted Mr. Iannetti for legal advice regarding the Section B claim until September 2002. I bear in mind that during that time, Mr. Iannetti was still in contact with Mr. Poulain regarding the family matter which he was concurrently dealing with on Mr. Poulain's behalf. Moreover, it seems reasonable that, given a 25% contingency fee agreement, that Mr. Iannetti would deal exclusively with the Section A claim. The Section B claim is inherently much more labor intensive in the first two years, and generally can be said not to require a legal specialist's expertise. I also accept that Mr. Poulain is, as described by Mr. Iannetti, in spite of his limited formal education, "a very bright guy", and was not disadvantaged in the handling of his Section B claim insofar as the stage one benefits thereof were concerned.

[34] Mr. Poulain's own actions, intensively and exclusively managing the Section B claim on his own behalf in the first two years after the accident, belie his position that he had initially retained Mr. Iannetti to represent him in relation to the Section B claim. Moreover, he had no records upon which to refresh his memory, and did not in his testimony suggest that he was significantly dissatisfied by Mr. Iannetti's provision of services until sometime in January 2003. Thus, it would not have been until then, some 18 months later that he would have had cause to reflect carefully on what was actually discussed with Mr. Iannetti at their meeting in June 2001.

[35] In relation to the formation of a binding contract, difficulties often arise where the parties involved are not subjectively on the same page as to what is the specific nature and extent of the terms of the contract. In such situations the law is that the court must take an objective view. Thus, the question is not what one of

the parties (for example, Mr. Poulain) subjectively intended as a matter of fact, but what a reasonable person in a position of that party would have understood that the other party (for example, Mr. Iannetti) intended to do as their part of the bargain, given what was said and what was done in the circumstances.

[36] In the case at bar, I need not rely on such analysis, however. I conclude that Mr. Poulain knew that he was retaining Mr. Iannetti to represent him in relation to only the Section A aspect of the potential claims arising out of the June 6, 2001 motor vehicle accident, and that this was his intention. This conclusion is, however, also supported by an objective assessment of the parties' intentions, in my view.

[37] Therefore, I find that the contract between Mr. Poulain and Mr. Iannetti did not contemplate Mr. Iannetti providing legal advice to Mr. Poulain regarding his stage one Section B claim.

[38] Moreover, when Mr. Poulain called Mr. Iannetti in September 2002, there was no contractual basis, existing or newly created, that obligated Mr. Iannetti to provide legal advice to Mr. Poulain regarding his stage one Section B claim.

[39] I should add that for similar reasons, I also conclude that the contract between Mr. Poulain and Mr. Iannetti did not, initially or later, contemplate Mr. Iannetti providing legal advice regarding Mr. Poulain's stage two Section B claim.

2. Did Mr. Iannetti have a duty of care to Mr. Poulain at the time when Mr. Poulain contacted him in September 2002 regarding the Section B insurer's proposed settlement (of stage one and stage two benefits)?

[40] As noted earlier, a solicitor may be liable in tort or negligence. Justice LeDain spoke for the court in *Central Trust Co. v. Rafuse*, [1986] 2 SCR 147, on the question of whether a solicitor is liable to a client in tort, as well as in contract, for the damage caused by a failure to meet the requisite standard of care in the performance of services for which the solicitor has been retained. He stated:

> **48** I must now attempt to draw conclusions from what I fear has been a much too lengthy survey of judicial opinion on the question of concurrent liability. My conclusions as to what I conceive, with great respect, to be the opinion with which I am in agreement on the various issues underlying this question may be summarized as follows.
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> **49 The common law duty of care that is created by a relationship of sufficient proximity**, in accordance with the general principle affirmed by Lord

Wilberforce in *Anns v. Merton London Borough Council*, **is not confined to relationships that arise apart from contract**. Although the relationships in *Donoghue v. Stevenson, Hedley Byrne* and *Anns* were all of a non-contractual nature and there was necessarily reference in the judgments to a duty of care that exists apart from or independently of contract, I find nothing in the statements of general principle in those cases to suggest that the principle was intended to be confined to relationships that arise apart from contract. Indeed, the dictum of Lord Macmillan in *Donoghue v. Stevenson* concerning concurrent liability, which I have quoted earlier, would clearly suggest the contrary. I also find this conclusion to be persuasively demonstrated, with particular reference to *Hedley Byrne*, by the judgment of Oliver J. in *Midland Bank Trust*. As he suggests, the question is whether there is a relationship of sufficient proximity, not how it arose. The principle of tortious liability is for reasons of public policy a general one. See *Arenson v. Casson Beckman Rutley & Co.*, [1977] A.C. 405, per Lord Simon of Glaisdale at p. 417. *Junior Books Ltd. v. Veitchi Co.*, [1983] 1 A.C. 521, in which an owner sued flooring subcontractors directly in tort, is authority for the proposition that a common law duty of care may be created by a relationship of proximity that would not have arisen but for a contract.

50 What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. **The distinction, in so far as the terms of the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract**. Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort. The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.

51 A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence.

52 The above principles apply to the liability of a solicitor to a client for negligence in the performance of the professional services for which he has been retained. There is no sound reason of principle or policy why the solicitor should be in a different position in respect of concurrent liability from that of other professionals.

> **53 The basis of the solicitor's liability in tort for negligence** and the client's right in such case to recover for purely financial loss is the principle affirmed in *Hedley Byrne* and treated in *Anns* as **an application of a general principle of tortious liability for negligence based on the breach of a duty of care arising from a relationship of sufficient proximity. That principle is not confined to professional advice but applies to any act or omission in the performance of the services for which a solicitor has been retained**. See *Midland Bank Trust Co. v. Hett, Stubbs & Kemp*, at p. 416; *Tracy v. Atkins* (1979), 105 D.L.R. (3d) 632, at p. 638.
>
> **54** Applying these conclusions to the facts of the case at bar, I am of the opinion that if the respondent solicitors were negligent in the performance of the professional services for which they were retained they would be liable in tort as well as contract to the appellant, subject, of course, to the other defences which they have raised.
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> [my emphasis added]

[41] The parties do not dispute the applicable law, regarding legal advice and duty of care, including in my view, the principles of negligent misrepresentation: *Queen v. Cognos Inc.* [1993] 1 S.C.R. 87, per Iacobucci J. at paras. 34, 47 and 55. Nor is there any dispute that Mr. Iannetti owed Mr. Poulain a duty of care. The dispute is centered on whether that duty of care was breached in the circumstances of this case?

3. Did Mr. Iannetti breach the duty of care he owed to Mr. Poulain regarding his potential acceptance of the Section B insurer's settlement proposal?

(a) The standard of care and the duty to warn

[42] As stated succinctly by Justice Hamilton in *Poulain v Iannetti*, 2013 NSCA 10, at para. 19, "the standard of care is that expected of a reasonably competent solicitor."

[43] Furthermore, as Justice LeDain stated for the court in *Central Trust Co.*:

> 58 A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken… The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor, and the ordinary prudent solicitor…
>
> 59 **The requirement of professional competence that was particularly involved in this case was reasonable knowledge of the applicable or relevant law**. A solicitor is not required to know all the law applicable to the performance of a particular legal service, in the sense that he must carry it around with him as

part of his "working knowledge", without the need of further research, but **he must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points**… The duty or requirement of professional competence in respect of knowledge is put by *Jackson and Powell, Professional Negligence* (1982) pp. 145 – 46 as follows: '… He ought generally to know where and how to find out the law in so far as it affects matters within his field of practice. However, before the solicitor is held liable for failing to look a point up, circumstances must be shown which would have alerted the reasonably prudent solicitor to the point which ought to be researched, citing *Bannerman Brydone Folster & Co. v Murray*, [1972] N.Z.L.R. 411. In that case, where a solicitor undertook on very short notice to prepare the necessary document to give effect to an oral agreement providing that a mortgagee would have an option to purchase, the New Zealand Court of Appeal held that it was not negligence to have failed to perceive that making the option to purchase a condition of the mortgage rendered it void or unenforceable as a clog on the equity of redemption. The point was referred to as a rather old and obscure principle which had not been the subject of judicial commentary for many years… It is clear, however, that the determining considerations in the court's conclusion were the time available to the solicitor and the fact that the client was already committed to the transaction in the form that proved defective. See Turner J. at page 427. The decision is nevertheless instructive concerning the duty of a solicitor to perceive problems and to warn the client of them. **For a statement of the solicitor's duty "to identify problems and to bring their effect to the attention of the client", with reference to cases in which this duty has been applied, see Dugdale and Stanton, Professional Negligence (1982), p. 203.**

60 While the solicitor's duty of care has generally been stated, for obvious reasons, in the context of contractual liability as arising as an implied term of the contract or retainer, the same duty arises as a matter of common law from the relationship of proximity created by the retainer. In the absence of special terms of the contract determining the nature and scope of the duty of care in a particular case, the duties of care and contract and in tort are the same [citations omitted].

[emphasis added]

[44] Moreover, as the Ontario Court of Appeal stated in *McNeil v Kansa Gen. International Insurance Company Ltd.* (2000), 138 O.A.C. 28, [2000] O.J. No. 3309 (Ont. C.A.) at para. 50:

… **The duty to advise a client of a risk associated with litigation only arises when an ordinarily competent and prudent solicitor would have issued a warning**… The scope of the solicitor's retainer is a factor in determining whether an ordinarily competent and prudent solicitor would have realized there was a risk associated with the litigation… All of the surrounding circumstances constitute another consideration.

[emphasis added]

[45] The plaintiff in his brief under the heading "duty of care – the law," has as the following introductory paragraph:

> As a starting point in examining the duty of care expected of a solicitor towards his client with respect to a matter from which the solicitor has been retained in Nova Scotia, one has to turn to the *Legal Ethics Handbook*, which states in chapter 3 that: '[Rule] a lawyer has a duty to provide a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation'.

[46] The plaintiff relies on other such rules as well. These references raise the question of the evidentiary value of the rules in the *Legal Ethics Handbook*, in defining the nature and scope of the duty of care to be taken by lawyers in Nova Scotia. I note that the *Handbook* was replaced on September 23, 2011, by the *Code of Professional Conduct*.

[47] Incidentally, the arguments in the case at bar also raise the question of whether expert opinion evidence is required to establish the nature and scope of the duty of care required of lawyers in Nova Scotia.

(b) <u>When is expert evidence required to prove a lawyer is negligent?</u>

[48] In *Central Trust Co., supra*, both the plaintiff and defendant called expert opinion evidence from senior Nova Scotia lawyers. In that case, the court concluded at para. 63:

> With respect, I am in agreement with the conclusion of the Appeal Division on the issue of negligence. The fact that the capacity of a corporation to borrow and give security may be limited or subjected to certain conditions by the provisions of the applicable Companies Act is such basic knowledge that a reasonably competent solicitor must be held to possess it, whether he is a general practitioner or a specialist.

[49] Notably, in *Poulain v. Iannetti,* 2013 NSCA 10, at para. 20, Justice Hamilton stated:

> Mr. Poulain's testimony that he retained Mr. Iannetti to represent him on his Section B claim gave rise to a duty of care, as the judge recognized. Mr. Poulain's

> evidence that the only advice he received from Mr. Iannetti, with respect to whether he should accept the settlement offer with respect to his entitlement to wage replacement benefits under Section B, was that he should take it if he needed the money, allows an inference to be drawn that the standard was breached. There was nothing technical in this situation. Such advice would not inform Mr. Poulain of what he was giving up – the possibility of receiving 14 years, as opposed to two years, of wage loss replacement benefits under Section B if his evidence that he is totally unable to work as a result of the injuries he sustained in the accident is accepted. **An ordinary person without particular expertise could draw an inference that this frugal advice, if it was the advice given by Mr. Iannetti, was negligent without the need for expert evidence**.
>
> [Emphasis added]

[50] I have also reviewed various additional cases regarding the issue of whether expert opinion evidence is required to establish negligence by lawyers. In *Malton v. Attia*, 2013 ABQB 642, Moen J. provided a comprehensive review of the law across Canada, concluding that judges of superior courts are generally in a position to determine such cases without the benefit of expert opinion evidence, except where there are gaps in a judge's knowledge such that expert evidence becomes necessary to assist the court in making a determination. In *Tran v. Kerr*, 2014 ABCA 350, in the context of a negligence claim against a lawyer who represented multiple parties in what turned out to be a fraudulent real estate transaction, the court stated at para. 21:

> When a suit is brought for professional malpractice (either in the form of a breach of contract claim, or for negligence) it is customary, and usually necessary, for there to be expert evidence on the standard of care: *Krawchuk v Scherbak*, 2011 ONCA 352 (CanLII) at para. 130, 106 OR (3d) 598; *Kopp v Halford*, 2013 SKQB 128 (CanLII) at para. 102, 418 Sask R 1. There are cases where the breach of the standard of care will be apparent without expert evidence: *ter Neuzen v Korn*, 1995 CanLII 72 (SCC), [1995] 3 SCR 674 at paras. 44, 51-2. There is also possibly a narrow exception with respect to malpractice by lawyers. Since all judges were once lawyers, and are familiar with the practice of law and the legal system generally, there are cases where a judge can take judicial notice of the standard of care expected of lawyers.

[51] In *Krawchuk v. Scherbak*, 2011 ONCA 352, in the context of an allegation of negligence against a real estate broker, the court commented that while the authorities indicated that "as a general rule, it will not be possible to determine professional negligence in a given situation without the benefit of expert evidence," (para. 132) there were two exceptions to this general rule:

> 133 The first exception applies to cases in which it is possible to reliably determine the standard of care without the assistance of expert evidence. As explained by Southin J.A. at para. 44 of [*Zink v. Adrian* (2005), 37 B.C.L.R. (4th) 389 (C.A.)], this will be the case only where the court is faced with "nontechnical matters or those of which an ordinary person may be expected to have knowledge."
>
> ….
>
> 135 The second exception applies to cases in which the impugned actions of the defendant are so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard: see *Cosway v. Boorman's Investment Co.*, 2008 BCSC 1482, at para. 35. As can be seen, this second exception involves circumstances where negligence can be determined without first identifying the parameters of the standard of care rather than identifying a standard of care without the assistance of expert evidence.

[52] In the present case, given the simple circumstances, which are such that I, and any judge of this court, could, and should, take judicial notice of the standard of care required by a lawyer, I am satisfied that expert opinion evidence is not necessary to assist the court in making its determinations, particularly in relation to the standard of care, and whether the settlement regarding the Section A claim hereunder was within the appropriate range of outcomes or not. That said, I am of the opinion that generally speaking the preferred practice should be for the parties to present expert evidence.

(c) The Evidentiary value of professional guidelines/rules in professional negligence claims

[53] As to the evidentiary value of the *Legal Ethics Handbook* (now *Code of Professional Conduct*) the plaintiff has directed my attention to the following cases:

1. *MacDonald v. Spears*, 2006 NSSC 31, [2006] N.S.J. No. 35 (S.C., per MacAdam J.);
2. *R v. Clarke*, 2012 NSSC 406, [2012] N.S.J. No. 616 (S.C., per Hood J.);
3. *Brogan v. Bank of Montréal*, 2013 NSSC 76, [2013] N.S.J. No. 298 (S.C., per Smith A.C.J.);
4. *R v. Hobbs*, 2009 NSCA 90,[2009] N.S.J. No. 409 (C.A.);

5. *Stewart McKelvey Stirling Scales v. Nova Scotia Barristers' Society*, 2005 NSCA 149, [2005] NSJ No. 466 (Oland J.A. in Chambers);

6. *Lienaux v. Nova Scotia Barristers' Society*, 2009 NSCA 11, [2009] N.S.J. No. 32 (C.A.).

[54] The defendant points out that the decisions in *MacDonald*, *Clarke*, and *Brogan* all involved applications for the removal or disqualification of counsel; they were not concerned with whether a counsel was negligent by having breached a duty of care which arose as a result of the rules in the *Legal Ethics Handbook*. In *Hobbs*, the issue was whether a defendant should be permitted to argue that he had incompetent trial counsel as a ground of appeal, and maintain the full protection of solicitor client privilege otherwise available.

[55] I note that the chambers decision of Justice Oland in *Stewart McKelvey* involved her granting an application to stay an order directing the law firm to abide by subpoenas issued to it by the Nova Scotia Barristers' Society. One of its lawyers had represented Daniel Potter, who was being sued by the National Bank. Their lawyer was also named as a defendant. The law firm reported the action to the Barristers' Society and thereupon the Society's Complaints Investigation Committee issued two subpoenas requiring the firm's managing partner to appear before it and bring with him documents relating to the action as well as the lawyer's communications with Mr. Poulain and a corporate defendant. The decision focused on the extent of solicitor client privilege. The decision is of no assistance in this case.

[56] In *Lienaux*, a lawyer was appealing from the Nova Scotia Barristers' Society finding that he engaged in conduct unbecoming a barrister by making disparaging comments about another lawyer and several judges. The Handbook became relevant because it was the basis for the administrative decision by the Barristers' Society to discipline Mr. Lienaux. The Court of Appeal was asked to review the decision of a Hearing Panel regarding the complaints against Mr. Lienaux in his capacity as a lawyer. While the court discussed the effect of the *Legal Profession Act*, S.N.S. 2004, c. 28, and the regulations made thereunder, as well as its conclusion that "regulation 8.1 elevates the Society's *Legal Ethics Handbook* … to the status of rules for all members" (para. 45), the decision is of limited assistance in this case.

[57] My own research revealed useful commentary in several additional cases. In the context of alleged negligence by a real estate agent, for instance, the Ontario

Court of Appeal considered the use of the relevant real estate Code of Ethics in *Krawchuk, supra*. Epstein J.A. said, for the court, at para. 125:

> To avoid liability in negligence, a real estate agent must exercise the standard of care that would be expected of a reasonable and prudent agent in the same circumstances. This general standard, a question of law, will not vary between cases and there is no need for it to be established through the use of expert evidence... **The translation of that standard into a particular set of obligations owed by a defendant in a given case, however, is a question of fact... External indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standard, may inform the standard**. Where a debate arises as to how a reasonable agent would have conducted himself or herself, recourse should generally be made to expert evidence.
>
> [emphasis added]

[58] The trial judge had allowed the Code into evidence on the issue of the standard of care, but declined to admit expert evidence "to explain the duties of a real estate broker when acting under a dual agency agreement and the requirements of various documents, including the Code," holding that such evidence was not necessary to determine if there was a breach of the standard of care (para. 127). The trial judge did not refer to the Code in his reasons. The Court of Appeal held that "the trial judge erred in concluding that he could identify the applicable standard of care without the benefit of expert evidence. This error was compounded by his failure to identify the standard of care that he thought was applicable and by his failure to address the import of the Code in relation to the question of the governing standard of care" (para. 129).

[59] In *Malton, supra*, the court was addressing an allegation of professional negligence against a lawyer. The lawyer argued that the Law Society's Code of Conduct was "of limited assistance in assessing lawyer negligence, as breaches of the Code may not be sufficient to indicate negligence" (para. 198). The clients argued that "professional standards and practices, such as Canadian Law Societies' Codes of Conduct, indicate the standard of care" (para. 199). Moen J. disagreed with the lawyer's argument that the Code of Conduct was "of limited use to establish a lawyer's standard of care and evaluate [his] misconduct" (para. 200). Justice Moen said:

> 201 Usual practices and professional standards are a basis to establish competence, but a failure to follow such guidelines implies misconduct. As Professor Klar observes in *Tort Law* at pp 378-381:

> A defendant accused of having fallen short of the standard of care may be able to rely on the fact that his or her conduct was in accordance with customary, general and approved practice in the profession, trade or business in which he or she was engaged. ... The corollary of this doctrine is that if the defendant deviates from an approved practice, he or she will be more likely to be found to have been negligent.
>
> 202 Instead, professional codes are often used as a basis to evaluate professional misconduct. That includes breach of legal duties of lawyers. This is made explicit in *MacDonald Estate v. Martin*:
>
> > A code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings. See, for example, *Law Society of Manitoba v. Giesbrecht* (1983), 24 Man. R. (2d) 228 (C.A.). The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. Nonetheless, an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy ... [Emphasis by Moen J.]
>
> 203 Justice La Forest affirms this principle in [*Hodgkinson v. Simms*, [1994] 3 SCR 377]: "... the rules set by the relevant professional body are of guiding importance in determining the nature of the duties flowing from a particular professional relationship ...".

[60] Moen J. went on to observe that "the Code is a broad document, and includes what one might call purely ethical, and even moral prohibitions, such as the prohibition against harassment and discrimination … and requirements for courteous conduct... I agree … that these aspects of the Code do not generally form a basis for a finding of negligence" (para. 205). Referring to authority indicating that the Code was persuasive, but not binding on the court, Moen J. noted, at para. 207, that:

> The fact the Code did not prohibit a certain scenario did not prohibit the Court from evaluating whether that scenario was or was not illegal. **Put another way, the Code cannot be used by a lawyer as a shield on the basis that anything not prohibited by the Code must be permitted.** The courts retain the authority to reject a Code-sanctioned practice in the interest of fairness and justice. **That does not mean, as *Attia* has suggested, that the Code is not a useful tool to evaluate lawyer negligence.** Rather, *Dow Chemical Canada Inc. v. Nova Chemicals Corp.* [2011 ABQB 509] re-affirms the principle that the Code does not provide a *carte blanche* to a lawyer, as the court retains the authority to scrutinize and find negligence, whenever appropriate.
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> [My emphasis added.]

[61] Moen J. also referred to Rothstein J.'s comments in *R. v. Cunnigham*, 2010 SCC 10, to the effect that "that the court's inherent supervisory function trumps guidelines set by law societies on the withdrawal of a lawyer in a criminal court context" (para. 208). Similarly, McLachlin C.J.C. said, in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, at para. 16, cited by Moen J. at para 208:

> Both the courts and law societies are involved in resolving issues relating to conflicts of interest -- the courts from the perspective of the proper administration of justice, the law societies from the perspective of good governance of the profession ... In exercising their respective powers, each may properly have regard for the other's views. Yet each must discharge its unique role. Law societies are not prevented from adopting stricter rules than those applied by the courts in their supervisory role. Nor are courts in their supervisory role bound by the letter of law society rules, although "an expression of a professional standard in a code of ethics . . . should be considered an important statement of public policy" ... [citations omitted.]

[62] Moen J. concluded by rejecting the lawyer's argument that "the Code cannot be used to evaluate his misconduct. Not all aspects of the Code are relevant, but a deviation from provisions that place a duty and responsibilities on a lawyer in relation to that lawyer's client could favour a court coming to the conclusion that a lawyer has not met his standard of care" (para. 209).

[63] The third case to which I wish to refer is *Rice v. Condran*, 2012 NSSC 95, where A. Boudreau J. discussed how common professional or prevailing practices may inform the court's assessment of whether a lawyer has breached the standard of care of a reasonably competent lawyer and the duty to warn a client (see generally paras. 29-37).

[64] While not exhaustive, I conclude this jurisprudence is representative of the correct approach to, and use of, the Legal Ethics Handbook provisions in this case.

[65] Thus, I agree with Moen J.'s conclusion that "the Code cannot be used by a lawyer as a shield on the basis that anything not prohibited by the Code must be permitted. The courts retain the authority to reject a Code – sanctioned practice in the interests of fairness and justice. That does not mean… that the Code is not a useful tool to evaluate lawyer negligence… the Code does not provide a *carte blanche* to a lawyer, as the court retains the authority to scrutinize and find negligence, whenever appropriate… Not all aspects of the Code are relevant, but a deviation from provisions that place a duty and responsibilities on a lawyer in relation to that lawyer's client could favour a court coming to the conclusion that a lawyer has not met his standard of care" (see *Malton* at paras. 207 and 209).

[66] Having established the general parameters of the standard of care, I will now examine the question of whether the standard of care was breached in this case. I will look to the factual circumstances in the case at bar, including the terms of the initial retainer; and consider any applicable rules of the *Legal Ethics Handbook*.

The Standard of Care was breached

[67] While Mr. Iannetti maintains that he did not provide legal advice to Mr. Poulain in September 2002 regarding the Section B insurer's proposed settlement, I conclude that Mr. Poulain called Mr. Iannetti in order to get his legal advice, and that Mr. Iannetti was well aware of why Mr. Poulain had called him – he had called him in his capacity as a lawyer; and to request his advice regarding the proposed settlement.

[68] Mr. Poulain and Mr. Iannetti disagree on whether they had only one telephone conversation about the proposed settlement, or whether they had one telephone conversation and one office meeting.

[69] In his testimony, Mr. Poulain agreed that up to that point in time he had dealt exclusively with the Section B insurer and represented himself, and that he was very desperate for money since he had no source of income other than the Section B indemnity of $140 per week. He stated that he specifically recalled that he telephoned Mr. Iannetti and spoke to him shortly after receiving the September 15, 2002, settlement offer. He acknowledged that the first stage Section B insurer's agent, Ms. Brace, left him with the mistaken impression that he was only entitled to two years of income loss replacement benefits under Section B and that there was a $25,000 cap in relation to such indemnity and any medical/rehabilitation expenses, such that if he signed the release, there would be no more money forthcoming – "that was the end of it".

[70] In spite of having spoken to Mr. Iannetti on the telephone, he testified that he also went to Mr. Iannetti's office at 4:00 p.m. on a day thereafter and advised Mr. Iannetti of the proposal. He insisted Mr. Iannetti said to him: "George you need the money, take it". Mr. Poulain asked him: "Am I entitled to anything else?" To which Mr. Iannetti responded: "I have to go home it's getting late." Mr. Poulain says he also asked Mr. Iannetti: "If I sign it, is there anything else I am entitled to?" He testified that "I remember those words like it was yesterday".

[71] He testified that Mr. Iannetti did not ask him for any other information, nor did he mention the effect that settling the Section B claim would have on any other part of his motor vehicle accident claim. Mr. Iannetti did not ask him for any

underlying documents. He testified that he asked Mr. Iannetti specifically if there was anything beyond the Section B claim that he could get, and Mr. Iannetti told him there was nothing more.

[72] Mr. Poulain testified, in response to a permitted leading question in redirect examination: "Were you influenced in your decision to accept the Section B settlement due to Mr. Iannetti's advice?" He answered, "Yes".

[73] Mr. Iannetti adamantly testified that Mr. Poulain contacted him only once, and that it was by telephone, to discuss the Section B insurer's settlement proposal. Mr. Iannetti testified that the only question Mr. Poulain asked was, "What will happen if I sign the release?" To which Mr. Iannetti said he responded: "George if you sign, you will not receive another penny." Mr. Iannetti was equally emphatic that he did not say to Mr. Poulain, "If you need the money, take the offer."

[74] Mr. Iannetti elaborated that "If he had asked me more I would have told him he would have to decide that himself". He testified that, "he called to get my opinion as to what would happen if he signed the release." He was well aware that Mr. Poulain was in financial difficulty at the time. He had requested in writing dated September 13, 2001, and July 29, 2002, that the Section A insurer provide Mr. Poulain with advances on his expected settlement monies, to sustain Mr. Poulain financially in the interim.

[75] I keep in mind that I may accept all, none, or some testimony from any witness. Moreover, the weight I ascribe to aspects of their testimony may vary, depending on my view of the evidence available generally.

[76] On balance, I am satisfied that Ms. Brace made a proposal to Mr. Poulain on or about September 15, 2002. She left him with the mistaken impression that his Section B income replacement benefits were limited in duration to two years after the accident, and that the total income replacement benefits and medical/rehabilitation benefits were limited to $25,000, also within that time period. Although Mr. Poulain had not retained Mr. Iannetti in relation to the Section B claim, I am satisfied that Mr. Iannetti owed a duty of care toward Mr. Poulain at the time he made his inquiry of Mr. Iannetti regarding the proposed Section B settlement offer.

[77] On balance, I am not satisfied that Mr. Poulain met with Mr. Iannetti at his office. I conclude that Mr. Poulain only spoke to Mr. Iannetti via telephone regarding the proposed Section B settlement offer. Mr. Poulain's focus was on whether he was entitled to anything else beyond what the Section B insurer was

offering to him. His inquiry was straightforward. To his straightforward inquiry, Mr. Iannetti responded, "George if you sign you, will not receive another penny…" While their conversation is difficult to re-constitute accurately, I accept that these comments capture its essence.

[78] I come to this conclusion in part, because I find Mr. Iannetti was not inconsistent in his evidence, nor was he contradicted by independent evidence. Moreover, the weight of the evidence supports his position that there was only a telephone conversation, and it was straightforward.

[79] Mr. Poulain testified that it was very hard to get a hold of Mr. Iannetti, and he virtually never saw him in his office. Thus, Mr. Poulain would have no expectation of having a meeting on short notice with Mr. Iannetti in Mr. Iannetti's office in September 2002. Even Mr. Poulain's evidence indicates that his inquiry was straightforward, and would not appear to have required a face-to-face meeting in Mr. Iannetti's office. There is no suggestion that Mr. Poulain brought any documents to the meeting that he says took place in Mr. Iannetti's office. According to Mr. Poulain's evidence, there was no substantial difference between the answers that Mr. Iannetti gave in the telephone conversation and those he gave at the alleged office meeting. The reason why Mr. Poulain would have sought an office meeting, or what extra value it would bring, is not clear from his testimony.

[80] Mr. Poulain was confronted with his own October 2003 and March 2004 typewritten letters to MacGillivray Law outlining what he claimed were the circumstances of his contact in September 2002 with Mr. Iannetti regarding the proposed settlement offer. As pointed out in cross examination, his October 6, 2003 letter, which does appear to be written chronologically, contains no express reference to a meeting in Mr. Iannetti's office. That letter was written approximately one year after the September 2002 contact between the two, and when I find his memory generally would be expected to be better than in 2004 or later. His March 6, 2004, letter to MacGillivray Law expanded upon the previous letter, in which he claimed that in a telephone call Mr. Iannetti said, "If you need the money take it." The 2004 letter added: "I did not feel comfortable with his quick answer so I made an appointment to see him the next day. In his office the following day, he stated that he did not have much time to talk to me and I asked him… "By taking the payout from Section B would it affect any further monies that I may be entitled to? He stated… "If you need the money then take it." He said that I was only entitled to a limit of $25,000 anyway.

[81] Later, in his June 17, 2008, discovery examination, Mr. Poulain was asked:

Q-And then one where you called Ms. Brace correct?

A-Yes

Q-Asked her some questions correct?

A-Mmm

Q-It doesn't detail any discuss… Any further discussions with Mr. Iannetti after speaking with Ms. Brace the second time does it?

A-No

Q-And that's because no further discussions… You didn't have any further discussions on this issue with Mr. Iannetti after that second conversation with Ms. Brace correct?

A-After the second conversation…

Q-With Ms. Brace

A-Ah, that sounds correct, yes.

[82] The discovery transcript thus suggests that Mr. Poulain spoke to Ms. Brace on the telephone, after which he telephoned Mr. Iannetti.

[83] Mr. Poulain claims that he attended at Mr. Iannetti's office and spoke to him there on one of the next days, and then phoned Ms. Brace back with essentially the same questions he says Mr. Iannetti had answered for him previously.

[84] Mr. Poulain believed that the Section B and Section A insurer representatives in his case (Penny Pushie, Kathy Brace and Glen Howe) were in a conflict of interest and that he had made this pointedly and disruptively known to them. (see Exhibit No. 1 Plaintiff's Exhibit Book at pps. 487 – 488 and 495 – 496). Coincidentally, the Section A insurer in this case was CGU Insurance Company of Canada, having a local office representative (Crawford Adjusters Canada) at 500 Kings Road, Suite 104 in Sydney, whereas the Section B insurer's representative was Crawford Healthcare Management, having a local office at Suite 110, of the same building. Crawford Healthcare Management was apparently owned by Crawford Adjusters Canada, but functioned as a separate and independent entity.

[85] As to what prompted Mr. Poulain to terminate the services of Mr. Iannetti, Mr. Poulain testified that he "grew tired of constantly calling him and not getting a response. I told him your services are no longer required." I bear in mind here that Mr. Iannetti was continuing to assist Mr. Poulain on a *pro bono* basis in his family dispute matter which had been ongoing since 1995, and that matter would account

for some of these telephone calls. In response, Mr. Iannetti wrote a letter dated January 17, 2003, confirming the termination:

> Further to our telephone conversation yesterday, this is to confirm as per your instructions that I will no longer be representing you in relation to your personal injury claim. The outstanding disbursements owing on this file amount to $1179.25. Your file will be released to you upon payment of these disbursements.

[86] In summary, I conclude on a balance of probabilities that Mr. Poulain spoke to Mr. Iannetti only once, to get his advice about whether to accept the Section B insurer's settlement proposal, and that he specifically asked, "What will happen if I sign the release?", or words to that effect. I conclude that Mr. Iannetti responded: "George, if you sign, you will not receive another penny", or words to that effect.

[87] Do these facts then represent a breach of the duty of care which rested upon Mr. Iannetti in his capacity as a lawyer?

[88] Mr. Iannetti was retained by Mr. Poulain to deal with his Section A claim arising out of the June 6, 2001, accident. Stage one Section B benefits are limited to two years, with a weekly indemnity of $140 while unable to return to one's own "occupation or employment", and up to $25,000 in medical/rehabilitation benefits. Stage two Section B benefits, including wage loss replacement, are available beyond the initial two years post-accident, upon demonstration that the injured party continuously cannot return to "any occupation or employment" to which they are reasonably suited by education, training or experience.

[89] Mr. Iannetti's advice that "you will not receive another penny" was accurate, in so far as stage one Section B benefits are concerned, and I am satisfied that the advice was not a breach of the duty of care to that extent.

[90] However, I must also go on to ask: Did Mr. Iannetti breach the duty of care to Mr. Poulain. by not making Mr. Poulain aware that settling the stage one Section B benefits would have the effect of making him ineligible to apply for stage two benefits (namely income loss replacement to age 65 years), and that even though he might not actually receive stage two benefits, the Section A insurer would likely be entitled to claim them as an offset against Mr. Poulain's claim for lost wages?

[91] I bear in mind that at that time the medical information was unclear about Mr. Poulain's precise prognosis. Some reports suggested that Mr. Poulain would not return to his own employment because he could no longer tolerate standing, based on his subjective complaints of pain associated therewith; however a May

24, 2002, functional capacity assessment suggested that he could do sedentary work for seven to eight hours per day. At that time he was not yet in receipt of CPP disability benefits, for which he only applied in 2003. Dr. Collicutt's IME report dated July 23, 2002, concludes that Mr. Poulain "is clearly not disabled from all occupations based on objective data presented … subjectively remains disabled based strictly on his perception and reporting of pain".

[92] I am satisfied that it is more likely than not, based on Mr. Iannetti's testimony on this topic, which I accept, and on Exhibit No. 5 (his November 28, 2002, letter to adjuster Ken MacLeod enclosing the functional capacity assessment) that at the time of Mr. Poulain's telephone call in September 2002, Mr. Iannetti had not received a copy of the May 2002 functional capacity assessment, but did have Dr. James Collicutt's IME report of June 23, 2002, which referred to the functional capacity assessment; Dr. Collicut wrote that it "states that the best he could do is a sedentary occupation. Certainly his job as a cook rates as light to medium". Mr. Iannetti was therefore aware of Dr. Collicutt's opinion that "his diagnosis is evolving chronic pain symptom complex. His subjective symptomology is as described above and in reality, other than discordant features, there are no objective findings on this man's examination… The issue of disability in this man is very equivocal to my mind." This information is consistent with what Mr. Poulain communicated to Mr. Iannetti regarding his condition in the summer and fall of 2002. He did not expect to return to his previous employment and presented serious concerns about whether he would return to any employment for which he might be suited.

[93] When asked by Mr. Poulain for an opinion regarding the consequences of signing the release in relation to the Section B benefits, Mr. Iannetti was under a duty, at a minimum, to either clearly and emphatically recommend that Mr. Poulain obtain independent legal advice from another lawyer before signing the release (since Mr. Iannetti was, strictly speaking, only retained in relation to the Section A claim), or to have obtained the necessary information which he should have then provided to Mr. Poulain with his advice, to allow him to make an informed decision regarding what he was receiving and what he was giving up, by signing the release.

[94] Mr. Iannetti did not recommend to Mr. Poulain that he obtain independent legal advice. Mr. Iannetti did not provide Mr. Poulain with sufficient information to allow Mr. Poulain to make an informed decision regarding his inquiry as to what he was giving up by signing the release. He did not make Mr. Poulain aware that he was potentially entitled to further Section B benefits beyond the two-year mark, and that he might be compromising his Section A benefits claim through the

application of section 140 of the *Insurance Act* and the associated jurisprudence at that time, which suggested that a Section A insurer could deduct weekly indemnity Section B benefits received, or to which the plaintiff was entitled even if he did not apply for and receive such benefits, from any loss of income it would be otherwise responsible to pay after the two-year mark. These failures by Mr. Iannetti constitute a marked departure from the conduct one would expect from a reasonably competent counsel, and amount to professional negligence.

[95] I am satisfied that it is more likely than not that Mr. Poulain was unaware, that by signing the Section B release form, he was giving up the opportunity to claim stage two Section B benefits, which potentially would provide him with a continued weekly indemnity of $140 (or some lesser amount) if he could establish that he was disabled from "any occupation" on an ongoing basis.

[96] Therefore, Mr. Iannetti breached his duty of care to Mr. Poulain.

Determination of the damages award

[97] I will first comment on the documentary and opinion evidence going to damages. Insofar as the plaintiff's exhibit book is concerned, counsel agreed, as reflected in Mr. Ripley's December 30, 2014 letter to the Court, that the documents therein could be presented to the court for the truth of their contents without the necessity of calling the authors. However, medical opinions in these documents were not to be considered evidence, with the exception of those in Dr. Watt's reports. Dr. Watt did not testify, however. Since Dr. Collicutt testified and adopted his report, his medical opinion, as given in his report, is also before me in evidence. The reports of Dr. Worth are admissible as physician's narrative pursuant to Rule 55.14. In relation to the latter, I find helpful the comments of Justice Duncan in *Russell v. Goswell*, 2013 NSSC 383.

[98] Next, I move on to assess the aspect of this case, referred to in the jurisprudence as "a trial within the trial". As stated by Justice Martin in *Adeshina v. Litwiniuk & Co.*, 2010 ABQB 80, at paras. 408-409:

> Personal injury action: conducting a trial within a trial
>
> The trial within a trial is a distinct aspect of litigation involving allegations of lawyer negligence. It involves adjudicating on the merits of the underlying personal injury action to determine what loss, if any, arose from a breach of the lawyers professional obligations. I undertake this analysis for the sake of completeness as I have found no actionable breach of duty.

> **The task is to approximate what would likely have taken place at a trial that was not held**. At this stage no matters subject to solicitor client privilege may be taken into account, such as the evidence given by Mr. Steinfeld concerning assessment of the strengths and weaknesses of the case and his impression of Mr. Adeshina's credibility. Nor can this court consider any aspects of the JDR [judicial dispute resolution]. Similarly, the court must assess Mr. Adeshina's personal injury claim on the basis of the evidence before it and not speculate about matters, like surveillance video evidence, not put into evidence.
>
> [my emphasis added]

[99] In *Adeshina*, liability was admitted and the issue dividing the parties was the extent of the plaintiff's injuries and loss. The plaintiff asked Justice Martin to do the best he could and analyze the loss based on three different factual scenarios. Justice Martin recognized that in some circumstances a "trial within a trial" would be impossible yet the court must still, to the best of its ability, calculate the value of the opportunity lost to the plaintiff and award damages against the lawyer on that basis. He stated at para. 414:

> Thus, in the unusual circumstances when it has become impossible to conduct a trial within a trial, the loss of chance damage assessment is awarded. Normally the law has been reluctant to view the loss of a chance as recoverable.

[100] Justice Martin went on to consider three different scenarios. He noted that the analysis was "problematic" given that conflicting expert witnesses had not been tested by cross-examination, and by the inherent difficulty in assessing evidence presented by way of documentation rather than witnesses. Justice Martin said:

> 472 The plaintiff alleges extensive suffering as a result of chronic pain syndrome and argues that it explains any inconsistencies between objectively demonstrable injury and his subjective experience of pain.
>
> 473 In *Goertzen v. Sandstra*, 2005 ABQB 623, the court quoted the following passage from the judgment of Gonthier, J. in *Martin v. Worker's Compensation Board (Nova Scotia)*, [2003] 2 SCR 504 describing chronic pain, at paragraph 66:
>
> > Pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real.

474 Chronic pain results in the sufferer being in constant pain. The pain may be psychosomatic, that is, the more psychologically-based than physical, but it is real to the sufferer: *Goertzen* at para. 67.

….

D - Employability and loss of income

479 A key issue concerned the plaintiff's employability. The most significant single head of damage claimed related to lost past and future income.

480 Mr. Adeshina claimed that his injuries prevented him from any type of work for the remainder of his employment years, until a proposed retirement at age 70.

…

500 … The totality of the evidence indicates that Mr. Adeshina was competitively employable and does not establish a permanent disability from all employment. I find that he could have worked at least part-time, and likely full-time, from January 2003 forward.

E. Assessing damages

501 **The most basic principle is that a plaintiff is entitled to be put into the position he or she would have been in, but for the accident so far as money can do that**… *Rose v. Mitton* (1994), 128 N.S.R. (2d) 99 (C.A.) at para 15.

502 In conducting a trial within a trial, **the date for assessment of damages is the date at which the notional trial or settlement would have taken place. The loss crystallizes at the time the lawyer's actions cause the client to lose his or her rights**: see the Alberta Court of Appeal's judgment in [*Pasko v. Willis*, 2004 ABCA 395] at paras. 6 –8 and *Rose* at para. 15.

503 **In a case where the allegation is that the lawyer has settled for too low an amount, damages should be assessed as the "difference between the amount a reasonably competent solicitor would have recommended as a settlement figure considering all the circumstances existing at the time and what the defendant solicitor recommended as an appropriate settlement". An appropriate settlement figure might be less than the amount that counsel would estimate is an appropriate award had the matter gone to trial, since settlement usually involve compromises**: *Rose* at para. 25.

504 – **Past loss must be proved on a balance of probabilities; future loss must be proved on a "simple probabilities" basis. "A future hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation" and future hypothetical possibilities are simply given weight according to their relative likelihood**: *Athey v. Leonati*, [1996] 3 SCR 458 at para. 27.

[Emphasis added]

[101] While in *Adeshina*, Justice Martin was dealing with different underlying factual circumstances that allegedly supported the claim of professional negligence

against the lawyer, his reasons contain a number of helpful comments regarding my assessment of damages in the case at bar.

The plaintiff's position

[102] Mr. Poulain argues that Mr. Iannetti's breach of his duty of care caused him to settle his Section B claim without understanding the adverse impact of doing so on his Section A claim. Having done so, he says, "the plaintiff had to contend with an argument and real risk that at trial the Section B [benefits] he did not receive would still be deducted [pursuant to Section 140 of the *Insurance Act*]": plaintiff's pretrial brief, para. 46.

[103] In his written materials the plaintiff has made clear his position that "this claim is not about speculating what Mr. Poulain might have done had he been given proper and sufficient legal advice – it is about the fact that he was deprived of the chance to make an informed decision": rebuttal submission, January 28, 2015, para. 31.

[104] In his pretrial brief the plaintiff did not expressly quantify the damages claimed in tort. He put it this way:

> Alternatively, if the retainer did not cover Section B, [Mr. Poulain] was still compromised in his settlement with Section A insurer by the defendant's advice, or lack thereof. [Mr. Poulain] is entitled to the value of section B benefits as damages.

[105] The plaintiff also makes counter-arguments to the defendant's position that: his CPP disability benefits should operate to reduce his entitlement to Section B benefits (using the 80% all sources maximum wording in the policy as per *Hollett v. Yeager*, 2014 NSSC 207), and that such reduction would render his Section B settlement not improvident; Mr. Poulain was not eligible to be paid the weekly indemnity of $140 per week in any event (before or after the two-year mark) because he was not employed or "deemed to be employed," as per *Logan v. Pafco Insurance Company*, 2000 NSCA 58; there was no expert evidence presented as to what was a reasonable range of settlement amounts for the Section A claim that would allow the court to reliably conclude that Mr. Poulain was prejudiced in his Section A settlement as a result of his Section B settlement; and Mr. Poulain has not satisfied the "but for" test of causation, since the evidence supports the defendant's position that he was so desperate for money that he would have agreed to the Section B settlement offer made to him by the insurer in September 2002

even if he understood he was giving up his right to seek stage two Section B benefits.

Assessing the amount of damages

[106] Generally speaking a plaintiff is entitled to be compensated for all direct or indirect losses flowing from commission of the tort, subject to the operation of legal principles such as causation, remoteness (not reasonably foreseeable yet still arising as a result of the tort), avoidance of double recovery, and mitigation, to the extent that any of those are applicable. Where no actual loss has been demonstrated, or where the plaintiff is unable to provide sufficient evidence as to the amount of the loss, nominal damages, which are not meant to compensate or punish, may be awarded to serve as a deterrent and to acknowledge the existence of a legal right and its violation.

[107] Although in tort claims, damages must be "reasonably foreseeable", they are also referred to as "reliance damages" because the assessment thereof is backward looking and intended to put the plaintiff in the position he would been, but for the commission of the tort.

[108] I do not accept that Mr. Poulain would have agreed to sign the release in any event, even if he was properly informed of what he was giving up. I conclude that, since Mr. Iannetti's negligence caused Mr. Poulain to lose his right of action for stage two benefits against the Section B insurer it is "reasonable that the proper measure of damages would be what the court would have assessed if the plaintiff's action had gone to trial": per Hallett, J.A. in *Rose v. Mitton*, (1994) 122 N.S.R. (2d) 99 (C.A.), Leave to appeal refused, [1994] S.C.C.A. 132. The loss crystallized in September 2002 when Mr. Poulain signed the release, but potential lost payments only accrued after June 6, 2003. A reasonable notional trial date is the August 2006 Section A settlement date.

[109] In the case at bar Mr. Poulain is to be compensated for the consequences to him of the negligence of Mr. Iannetti. As a result of the negligence, Mr. Poulain settled his Section B claim as if he recognized that he was not disabled at that time from employment in "any occupation" to which he was suited. What, then, would have been the expected liability outcome of a trial on the Section B stage two claim had it proceeded in August 2006? Would Mr. Poulain have satisfied a court that as a result of the June 6, 2001, accident he was disabled from employment in "any occupation" to which he was suited?

[110] In order to successfully claim stage two Section B benefits, Mr. Poulain would first have to demonstrate that at the time of the motor vehicle collision he was [pursuant to the Automobile Insurance Contract Mandatory Conditions Regulations N.S. Reg. 181/2003]:

> (a)…actively engaged in an occupation or employment for wages or profit at the date of the accident; or
>
> (b)… so engaged for any six months out of the preceding 12 months and in these circumstances shall be deemed to have suffered loss of income at a rate equal to that of his most recent employment earnings;…

[111] Next, he would have to establish that he was not precluded from eligibility:

> 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 [of such occupation or employment].

[112] Having established this, he would be entitled to the following payments:

> The lesser of $140 per week or 80% of the insured person's gross weekly income from employment, less any payments for loss of income from employment received by or available to such person under (i) the laws of any jurisdiction, (ii) wage or salary continuity plans available to the person by reason of his employment, and (iii) subsection 2A, but no deduction shall be made for any increase in such payment due to a cost-of-living adjustments subsequent to the insured persons substantial inability to perform the essential duties of his occupation or employment

This necessitates a consideration of whether his CPP disability benefits, which he had applied for in 2002, and were awarded in August 2006, retroactively to August 2002, were deductible or not thereunder.

[113] If these preconditions are met, then the question does arise as to what extent Mr. Poulain's failure to claim stage two Section B benefits realistically diminished the settlement amount the Section A insurer would otherwise have agreed to in August 2006. As I alluded to earlier, although counsel has presented the damages issue on this basis for resolution by the court, I find it more appropriate to directly assess the likely damages Mr. Poulain would have been entitled to had the matter gone to trial.

Is it more likely than not that Mr. Poulain could have established that he was disabled from employment in "any occupation" in August 2006?

[114] I have chosen August 2006 as the point at which a notional trial is deemed to have taken place, being five years after the accident. I conclude that medically Mr. Poulain would be expected to have plateaued around the two-year mark post-accident, and his condition in 2006 would therefore be a reliable indication of his likely employability over the remainder of his working life. Additionally, the court has the benefit of the information, materials, and legal positions of the parties upon which the Section A settlement was based at that time.

[115] The court has the benefit of the medical opinions of Drs. Watt and Collicutt in their reports, as well as the treating physician's narratives of Dr. Worth.

[116] Dr. Worth's last dated report is a letter September 27, 2005 (plaintiff's exhibit book, pg. 9). His report chronicles his contacts with Mr. Poulain until July 2005. In summary, he records that, with some variations, Mr. Poulain's subjective core complaints remained the same over the period from the accident until July 2005. His first report, dated July 3, 2001, was sent to Mr. Iannetti in response to his written request on June 19, 2001.

[117] Dr. Watt's October 7, 2003, report to Mr. Poulain's counsel indicates that, as a specialist in physical medicine and rehabilitation, he initially assessed Mr. Poulain on November 1, 2001, and subsequently on January 14, March 18, April 17, June 20, August 28, and October 23, 2002. He was also assessed on October 7, 2003. Dr. Watt had a copy of the key functional assessment regarding Mr. Poulain dated May 21, 2002. Dr. Watt concluded that:

> … he suffered a whiplash injury in his motor vehicle accident… He reported having pain and stiffness about his right shoulder. The pain can spread into his upper arm. Pain in the shoulder area is often associated with a whiplash associated disorder. It can be referred from the neck area or can be due to a primary problem affecting the shoulder joint or its associated bursa or tendons. Referral of symptoms from the neck is the commonest cause of shoulder pain. The specific cause of his shoulder symptoms was difficult to determine clinically… He reported having pain, stiffness and tightness of his back. He associates the timing of onset of his back problems with his motor vehicle accident… The clinical findings do not indicate a specific cause of his back problems. I feel that it is most likely that he suffered a soft tissue injury of his back in his motor vehicle accident, given the reported timing of onset of his back symptoms.

[118] Dr. Watt goes on to state:

> The pattern of persistent symptoms at such a late date after his motor vehicle accident is considered a poor prognostic indicator, suggesting that it is much more likely that he is going to continue to have complaints of pain indefinitely… He described pain to be his major limiting factor… I would expect that these types of activities would aggravate symptoms in his neck shoulder area and back. I do not feel he would tolerate working as a cook… Tolerance for aggravation of pain would be the factor that would determine whether or not he could successfully resume some type of sedentary work. His persistent complaints of pain and his description of being limited by pain suggests that he would find it difficult to tolerate returning to even sedentary work at this time.

[119] On January 19, 2004, Dr. Watt reported to Mr. Poulain's counsel that:

> Given the functional capacity evaluation results, I have to consider that it is possible for him to attempt sedentary work, though I am very pessimistic, given the consistency of limitations he is described over a long period of time due to pain, that he would actually tolerate this on a day-to-day basis. The only way I could foresee him returning to any type of work, would be for his tolerance for activity to improve despite pain, which I feel would be dependent upon the severity of his pain being less.
>
> Examples of activities that would be more likely to aggravate his symptoms include prolonged standing or sitting, lifting, overhead work, work requiring sustained positioning of the arms, such as when using a computer, or any work requiring full range of motion of the neck or sustained positioning of the neck, for example sustained flexion while doing paperwork… I feel that his motor vehicle accident has been the main cause of his current condition and disabilities… Unfortunately as pain is subjective in nature, it is difficult to give definitive white or black statements in regards to work capacity, for example, number of hours that could be worked.

[120] In his September 9, 2004, report Dr. Watt stated:

> Mr. Poulain has had pain on a very long-standing basis. Given this pattern I do not anticipate that his pain will ever resolve. He is, however, focused on there being something out there that is going to eliminate his pain. I cannot suggest anything that I can say with any reasonable assuredness would lead to resolution of his pain. Unfortunately, I do not have anything substantially different to suggest. I again indicated that he does not cause himself harm by trying to be active and encouraged him to be active.

[121] Dr. James Collicutt is an orthopedic surgeon licensed to practice medicine in Nova Scotia. He was qualified as an expert in the field of orthopedic surgery, capable of giving an opinion on the subject of chronic pain and disability. He performed an independent medical examination (IME) on Mr. Poulain on July 23, 2002, at the request of the insurer, CGU Insurance Company of Canada (adjuster Kathy Brace). His report was available to the Court [Exhibit No. 1, plaintiff's exhibit book, p. 19], as was his testimony.

[122] In his report he stated:

> This fellow's current status is as follows: he remains very much focused on pain and the dysfunction that this produces… I do believe that there are discordant features on his physical examination.
>
> For example, when I was doing straight leg raises in the supine position, lifting one leg seemed to produce shoulder pain while lifting the other leg seemed to produce chest pain. There is certainly no anatomic reason for this. Straight leg raise did produce subjective reporting of back pain, but was possible to approximately 60° bilaterally. It is important to note that his sitting straight leg raise was completely normal. There are no demonstrable abnormalities in the neurological system of the lower extremities.

[123] Under "final assessment", Dr. Collicutt stated:

> I will now attempt to answer your questions as posed.
>
> I do believe that his diagnosis is evolving chronic pain symptom complex. His subjective symptomology is as described above and, in reality, other than discordant features, there are no objective findings on this man's examination.
>
> I do believe that the diagnosis is related to the motor vehicle accident of June 6, 2001. This fellow seemed to be functioning well vocationally and socially prior to that. I am afraid to say that this man's prognosis is exceptionally guarded. I have not identified any pathology that requires further investigation. There is no risk of re-injury were he to choose to participate in the work hardening program. I do believe that the length of treatment would be in the range of two – three months. It is my own personal belief that this is not likely to be successful, however, it is the only possible way this fellow could be rehabilitated to the workforce.
>
> The issue of disability in this man is very equivocal, to my mind. The physical data from the key functional assessment states that the best he could do is a sedentary occupation… This fellow is clearly not disabled from all occupations based on the objective data presented. He would seem to be capable of working at a sedentary job. This statement is based on objective data only. I do believe that any return to work date for this man remains indefinite.
>
> The major limitation or restriction that prevents this man from returning to work is the pain symptom complex. Statistically this fellow has not yet received

> maximum medical recovery. That would occur anywhere from 18 – 24 months following the motor vehicle accident.
>
> The summary, therefore, is that this fellow subjectively remains disabled based strictly on his perception and reporting of pain. I could not find anything objective in this circumstance.
>
> I think that the only hope of restoring normal function in this man is, indeed, to undertake a work hardening program, but I must say I do find his prognosis to be very guarded, and I am not at all certain that this would be successful.

[124] During his testimony Dr. Collicutt stated, "there is no foolproof objective way to measure pain… There is no one best way to describe the pain process with a number that most people would recognize." He elaborated, testifying that "this fellow's prognosis was indeed guarded, and he was evolving into a chronic pain symptom complex … I have used a pretty consistent definition for chronic pain over my years in practice, and my own personal definition is – pain which has persisted for a period of time, longer than expected, based on the objective magnitude of injuries sustained and for which there is no foreseeable remediation."

[125] Dr. Collicutt elaborated that his statement that Mr. Poulain's "prognosis is exceptionally guarded" could equally be phrased as: "overall this fellow is not going to do very well"; and that his reference to "discordant features on his physical examination" were references to items that were noted to be inconsistent on examination of Mr. Poulain. For example, on straight leg raising, anatomically the patient should not feel pain in the shoulder when lifting one leg, or in his chest while lifting the other leg while in a supine position. If there is difficulty with bilateral leg raises that usually indicates lower back pains/problems. Whether supine or in the sitting position, straight leg raises would not indicate anything about the neck or shoulder area. He noted that Mr. Poulain's sitting straight leg raise was "completely normal". That outcome is discordant with his straight leg raise in the supine position, which was limited to 60° bilaterally because the 60° restriction suggests problems in the low back, but should also then be present when the sitting straight leg raise is done. He concluded that from these observations that one could conclude that Mr. Poulain was feigning pain.

[126] Dr. Collicutt noted that his comments in his report that "there are no objective findings on this man's examination", were not intended to be taken as him "commenting on Mr. Poulain's truthfulness". He conceded that there are some objective findings of pain and disability, and that there is no foolproof objective measure of pain.

[127] Dr. Collicutt's opinion was that if an injured worker had not returned to their original work by 18 to 24 months after the injury, then there was less than a ten percent chance that they likely will in future. Given that his report was prepared in July 2002, which was just over a year after the accident, he agreed that "there was [still] room for improvement" by Mr. Poulain at the time of his examination.

[128] In August 2006, Mr. Poulain's position was that it was more likely than not that he would never be able to return to any form of work and thus was disabled from "any occupation" for which he was reasonably suited. The defendant Section A insurer disagreed. At the time of its settlement conference brief, the defendant insurer was aware that Mr. Poulain was appealing his denial of CPP disability benefits. However, the order was only issued August 21, 2006. Attached to the order was an amended consent to judgment dated August 14, 2006, between Mr. Poulain and the Department of Human Resources, agreeing to issuance of a judgment declaring:

> (A) The appellant became disabled within the meaning of the Canada Pension Plan as of April 2002;
>
> (B) The appellant is entitled to a disability pension under the Canada Pension Plan as of August 2002.

[129] In spite of the limited materials available to me, and being aware of my restricted capability to make such a finding of fact, I still find that it is appropriate for me to estimate the likelihood or not, that in August 2006, Mr. Poulain would have been found to be disabled from "any occupation" for which he was reasonably suited.

[130] I am satisfied that Mr. Poulain's pain evolved into a chronic pain complex, and, in spite of the "discordant features on his physical examination," noted by Dr. Collicutt in July 2002, I accept that that pain would have been the major limiting factor preventing Mr. Poulain from returning to the workforce. Moreover, I accept Dr. Collicutt's assertion that if Mr. Poulain had not returned to his original work in the workforce within two years of the injury for legitimate disability reasons, the chances of him doing so were greatly diminished thereafter.

[131] I am satisfied that, more likely than not, by August 2006: Mr. Poulain could not have returned to his previous work as a cook or chef; and that Mr. Poulain's level of disability arising from the motor vehicle accident was such that he could not have returned to any form of employment to which he was reasonably suited.

[132] Having come to the conclusion that Mr. Poulain would have satisfied a court in August 2006 that he was, more likely than not, disabled from employment in "any occupation" to which he was suited, I will go on to consider the other preconditions to his making a successful claim for stage two Section B benefits.

Was Mr. Poulain "actively engaged in an occupation or employment"?

[133] On the limited evidence available to me, it does not appear that Mr. Poulain was employed at the time of the accident, nor that he had been employed for six months out of the preceding twelve months, which would allow him to be deemed to have been employed: *Logan v. Pafco Insurance Company*, 2000 NSCA 58.

[134] On the other hand, the Section B insurer had apparently been so satisfied since it paid Mr. Poulain the weekly indemnity for the first stage two-year period. I will proceed on the basis that Mr. Poulain would have been able to satisfy this precondition, at least vis-à-vis the Section B insurer, as I would not expect them to change their position regarding this issue.

Should CPP disability benefits received by Mr. Poulain be deducted from his "gross weekly income from employment"?

[135] The *Automobile Insurance Contract Mandatory Conditions Regulations*, N.S. Reg. 181/2003, made under s. 159 of the *Insurance Act*, R.S.N.S. 1989, c. 231, (and extant until September 23, 2011), provide as follows:

> Amount of weekly payment – the amount of the weekly payment shall be the lesser of,
>
> (a) $140 per week; or
>
> (b) 80% of the insured person's gross weekly income from employment, less any payments for loss of income from employment received by or available to such person under
>
> (i) the laws of any jurisdiction,
>
> (ii) wage or salary continuation plans available to the person by reason of his employment, and
>
> (iii)subsection 2A;
>
> but no deduction shall be made for any increase in such payment due to a cost-of-living adjustment subsequent to the insured persons substantial inability to perform the essential duties of his occupation or employment.

[136] I acknowledge that the defendant takes the position that since Mr. Poulain was not an employee within the meaning of this regulation, it is not possible to say that he had a "gross weekly income from employment" which can be used as a starting point in that calculation. As I stated above, the Section B insurer was content for the first two years to accept that Mr. Poulain had satisfied that precondition. I continue the analysis on the basis that the Section B insurer would likely not be permitted to resile from that position in relation to the stage two Section B benefits, and the defendant is bound thereby.

[137] An examination of Mr. Poulain's pre-accident T4 income amounts of $8317 (1997), $5932 (1998), $4231 (1999), and $5639 (2000) suggests that, but for the injuries consequent to the June 6, 2001, accident, he would have likely continued to earn an average of at least $6000 to $8000 from employment per year. He also received (and would likely have continued to receive) employment insurance benefits and/or other monies. Using approximate figures, I conclude that, but for, the June 6, 2001 collision, in total Mr. Poulain would have had an average "gross weekly income from employment" of $230, or $12,000 annually between June 6, 2003 to at least the date of his notional retirement on his 65th birthday.

[138] Eighty percent of $230 is $184 weekly.

[139] Mr. Poulain began receiving CPP disability benefits of $725 per month, or $167.30 per week, effective August 2002. The defendant argues that these benefits must be deducted from Mr. Poulain's "gross weekly income from employment" relying on *Paese v. United States Fidelity and Guaranty Company* (1985), 54 O.R. (2d) 43 (Dist. Ct.). He also cites as authority a decision of Justice Richard, upheld on appeal: *Dugas-Mattatall v. The General Accident Assurance Company of Canada* (1994), 128 N.S.R. (2d) 1 (S.C.), affirmed at 132 N.S.R. (2d) 149 (C.A.).

[140] A number of questions arise. I will briefly set them out with the attendant answers.

1. How long are claimants eligible to receive stage two Section B benefits (to age 65 – a nominal retirement age, or to the date of their actuarially estimated death)?

[141] Stage two Section B benefits are payable for so long as the disability resulting from the injury is the cause of the inability to engage in any suitable employment or occupation, and could arguably be payable to the date of a claimant's actuarially estimated death:

Kirk v. Singh, (1994) 135 NSR (2d) 55; [1994] NSJ No 486 (CA) per Freeman J.A. at paras 8 – 18;

Dillon v. Kelly, 1996 NSCA 79 per Pugsley J.A. at paras. 129 – 130 and 143;

Humphrey v. Portage LaPrairie Mutual Insurance Co., 2009 NSSC 153 per Beveridge J. (as he then was) at paragraphs 11, 15 – 16.

2. In cl. 4 (b)(vii) of Schedule 2, Part II: "loss of income" of the Automobile Insurance Contract Mandatory Conditions Regulations made under Section 159 of the *Insurance Act*, OIC 2003 – 456 N.S. Reg. 181/2003, are Canada Pension Plan disability benefits deductible as "payments for loss of income from employment received by or available to such person under (i) the laws of any jurisdiction.…?

Yes they are:

Paese v. United States Fidelity and Guaranty Co., (1985) 54 OR(2d) 43 (Dist Ct) per McMahon J.

Fraser v. Hunter Estate, 2000 NSCA 63, at para. 25, per Glube CJNS

Dugas-Mattatall v. General Accident Assurance Co. of Canada (1994) 132 NSR (2d) 379, [1994] NSJ No 289 (CA) at paras. 17 - 20 and 24 – 25 per Freeman J.A.

Humphrey v. Portage la Prairie Mutual Insurance Co., 2009 NSSC 153, per Beveridge J. (as he then was) at paras. 35 and 38

Portage LaPrairie Mutual Insurance Co. v. Sabean, 2015 NSCA 53 at para. 19 per Scanlan J.A.

[142] CPP disability benefits are not only in effect a substitute for a privately arranged insurance policy, but also constitute "payments for loss of income from employment" per clause 4(b) (vii) noted above, and therefore are deductible from "80% of the insured person's gross weekly income from employment".

3. What is the actuarially estimated date of death of Mr. Poulain?

[143] The plaintiff argued based on actuarial materials, all other things being equal, that Mr. Poulain should survive to approximately age 84 – October 23, 2035. The defendant did not dispute this proposition.

[144] Paragraph 10 of the statement of claim reads:

> The plaintiff claims against the defendant damages, including the following:
>
> a. The value of Section B weekly indemnity benefits retroactive to the date of settlement;
>
> b. The present value of future Section B weekly indemnity benefits to the age of 65;
>
> c. Prejudgment interest;
>
> d. Costs;
>
> e. Such other relief as this Honourable Court deems appropriate.

[145] Paragraph 13 of the statement of defence reads:

> The defendant claims the plaintiff became eligible for Canada Pension Benefits and began receiving such benefits effective August 2002, and that such benefits, in accordance with Section B of the policy of insurance under which he made a claim, would be included in the calculation of the lesser of 80% of his gross income from all sources(or $140 per week) and that such would have either eliminated or substantially reduced the payment of Section B benefits to which the plaintiff was entitled. [See also paragraph 19]

[146] Under "quantum of Section B weekly benefit," in its pretrial brief filed December 16, 2014, the plaintiff stated at para. 52:

> The following represents a quantification of Mr. Poulain's claim against the defendant:
>
> Date of birth – October 23, 1951(age 63 at present)

Future life expectancy (as per McKellar online calculator): 20.39 years

Section B claim settlement date: September 23, 2002

Section A claim settlement date: August 25 2006

Section B weekly indemnity(WI) amount: $560/month from date of settlement to trial: $80,640

Prejudgment interest at 2.5%/year from September 23, 2002 to trial: $24,192

Present value of future benefit: $6720 per year, paid monthly, for 20.39 years using a discount rate of 2.5% is $107,544.27

Total value of claim: $212,376.27.

[147] Although Mr. Poulain pleaded a claim for nominal continued Section B benefits only to age 65, he made clear in his argument that his claim for entitlement would only end with his death, being estimated at 84 years of age, and the case was so argued. I find no prejudice to the defendant in dealing with a claim as if the statement of claim was for nominal continual Section B benefits to the date of Mr. Poulain's death.

[148] Thus, Mr. Poulain is entitled to claim damages for the loss of stage two Section B weekly indemnity payments from June 6, 2003 [being two years after the accident date] through to and including October 23, 2035 [his 84th birthday].

4. In calculating a net present value of the lost stage two Section B weekly indemnity payments over the above-noted period, what is the appropriate discount rate?

[149] Our Civil Procedure Rule 70 deals with "Assessment of Damages. Rule 70.06 states:

(1) Subject to the *Insurance Act*, the discount rate to be used in calculating the difference between estimated investment and price inflation rates for capitalizing the value of future pecuniary damages, other than damages for loss of business income, is 2.5% per annum;

(2) A party may prove a discount rate to be used in calculating the difference between estimated investment and price inflation rates for calculating the value of damages for future loss of business income.

[150] I observe here that, s. 113C of the *Insurance Act* reads as follows:

> Discount rate
>
> In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, under any enactment or rule of law, an award against the owner, operator or occupants of an automobile, any person present at the incident and any person who is or may be vicariously liable with respect to any of them, shall not be calculated using a discount rate less than the amount prescribed by the Governor in Council by regulation. 2003 (2nd Sess.), c. 1, s. 12.

[151] Moreover, the *Automobile Insurance Tort Recovery Limitation Regulations* [made under Sections 5, 113 B and 113 C of the *Insurance Act*, NS Reg 182/2003 effective November 1, 2003, and NS Reg 93/2010 effective July 1, 2010] presently reads in part:

> Discount rate for calculating loss or damage from bodily injury or death
>
> **(1)** For the purpose of Section 113C, the discount rate for calculating loss or damage from bodily injury or death is 3.5%.
>
> **(2)** Effective January 1, 2005, the discount rate for each calendar year may be based on the difference between the rate set for Government of Canada bonds and the consumer price index for the previous 12 months.
>
> Section 5 repealed: O.I.C. 2010-254, N.S. Reg. 93/2010.

[152] Thus, after January 1, 2005, the discount rate for calculating losses arising as a result of the use or operation of an automobile which caused bodily injury, is the "difference between the rate set for Government of Canada bonds and the consumer price index for the previous 12 months". This is an attempt to quantify the "real rate of return" possible on investments, after the effect of price inflation in the economy is taken into account.

[153] In my view 2.5% is an appropriate discount rate. It is justifiable as the "real" rate of return on investments over time.

5. What then is the net present value of the lost stage two Section B payments between June 6, 2003 and October 23, 2035?

[154] The starting point is the lesser of either: $140 per week; or 80% of the insured person's gross weekly income from employment [$230], viz. $184, "less any payments for loss of income from employment received by or available to such person…" [$167.30 weekly CPP payments], being $16.70 per week.

[155] Between June 6, 2003 and June 27, 2015 there are 627 weeks. I would apply a 2.5% prejudgement interest rate to those payments in totalling the damages amount as of June 27, 2015.

[156] Between June 27, 2015 and October 23, 2035 lie 1004 weeks. I would apply a discount factor of 2.5% to those weekly payments throughout that period, to arrive at a net present value thereof.

6. Should the net present value of the future lost stage two Section B be reduced by a contingency percentage factor?

[157] Generally speaking, claims for future losses of employment income may be subjected to a contingency percentage factor, which may be positive or negative in nature, in order to best estimate the loss. As Justice Hallett stated for the court in *MacPhail v. Desrosiers*, (1998) 170 NSR (2d) 145, [1998] NSJ No.353 (CA) at paragraph 78 and 83, respectively:

> The task of assessing damages for reduction in earning capacity is assisted by actuarial evidence, but that evidence is invariably based on certain assumptions and in the final analysis on the conclusions reached by the trial judge as to the effect of the injuries on the plaintiff's employability, retirement dates, prospects for employment and contingencies, all of which turn on the difficulty of looking into the future.
>
> …
>
> I have reviewed the record and while there is no obligation on a trial judge to make a deduction from a damage award for negative contingencies the reality is that there normally are negative contingencies that can affect a person's future earning capacity, and that they may or may not be offset by positive contingencies… It would seem to me that a 15% deduction for negative contingencies would be appropriate and in line with the reduction for negative contingencies in the majority of cases dealing with loss of future earnings.

[158] More recently, Justice Saunders stated for the court in *Campbell – MacIsaac v. Deveaux*, 2004 NSCA 87 under the title "The principles that apply" at paras. 100 – 103:

> Whenever we speak of contingencies in the context of calculating an award of damages for future loss, one is obliged to measure, by way of estimate, the chances that a particular thing will occur or would have occurred and then reflect those chances, whether they are positive or negative in calculating the damage award. This engages the trier of fact in an exercise of prediction, based not on

> guesswork but on proper proof and requires a careful consideration of the evidence of a healthy dose of common sense.
>
> The analysis undertaken by Justice Oland in *Kern v. Steele*, [2003] N.S.J. No. 478, 2003 NSCA 147 beginning at para. 56 is most instructive. Her approach, together with the authorities upon which she relies, may be briefly summarized. When assessing contingencies the court is engaged in the exercise of examining possibilities, probabilities and chances against the likelihood that they might prevail in any given factual situation. The evidence upon which such estimations are based must be "cogent evidence and not evidence which is speculative"…. Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility"…. Justice Oland also endorsed the approach in *Graham*, supra, which was to distinguish general contingencies from special ones. Into the category of general contingencies fall those features of human experience that are likely to be common to all of us, things like the aging process, sickness, or promotions at work; whereas circumstances falling into the category of special contingencies are peculiar to that particular claimant. For example, remarkable talents, education, a unique illness or a poor employment history would be characterized as special contingencies.
>
> As was noted in *Graham*, *supra*, and endorsed by Oland J.A., in *Kern*, the impact of general contingencies may not be easily susceptible to formal proof. A trial judge has a discretion whether to adjust an award for future pecuniary loss in order to take into account general contingencies, but any such adjustment ought to be a modest one. Where, however, a party relies upon a specific contingency, whether negative or positive, there must be sufficient proof on the record that would support an allowance for that type of contingency. At all events, as noted by Oland J.A., the overall approach is that which best achieves fairness between the parties… Fairness and adequacy are concepts rooted in fact and also to some extent in inferences drawn from facts. As such, in the assessment of fairness and adequacy, considerable deference is owed to the findings of a trial court.

[159] While I have found no jurisprudence regarding the application of a contingencies factor to lost Section B weekly indemnity payments beyond the initial 104 week period, in circumstances such as these, I am of the opinon that general principles of damages require the court to assess the appropriateness of a contingencies factor in this case, where the benefits, though contractually and statutorily payable, are limited to the lifetime of the insured. Regarding Mr. Poulain, the significant contingency regarding his continued eligibility for stage two Section B benefits is his health condition. That is a general contingency in my view, and the possibility of his passing away before the actuarially estimated date in 2035 only requires a "modest" reduction of the net present value of his stage two Section B benefits. I would assess that negative contingency as a 5% reduction of the net present value.

[160] The plaintiff makes two arguments regarding how he was prejudiced in his settlement negotiations with the Section A insurer: first, he implicitly settled it on the basis that he would not be able to prove his disability to engage in "any occupation" after the two year mark; and second, though he had not actually received stage two Section B benefits, the Section A insurer could still argue his entitlement allowed it to offset those amounts against his loss of income claim.

[161] The former argument is not compelling in the circumstances of the case at bar. Although Ms. Avery and Mr. Machum, as counsel for the Section A insurer, took the position that he was not totally disabled, Mr. Poulain was not necessarily estopped or otherwise prevented from taking a different position with the Section A insurer, than his settlement with the Section B insurer might suggest, and he did in fact claim he was totally disabled in his settlement brief. I conclude that he likely suffered a loss as a result of his weakened bargaining position. However, more significantly, the onus is on Mr. Poulain to establish the extent of his loss as he claims is reflected in a lesser settlement with the Section A insurer. He has not satisfied that onus. The court would be speculating if it attempted a quantification of that loss.

[162] The latter argument is also not compelling. Although according to *Dugas-Mattatall* Section B benefits are deductible from Section A lost income compensatory obligations (but not vice versa), so that it is arguably preferable to settle the Section A claim before the Section B claim, in the case at bar the most that can be said is that this likely influenced Mr. Poulain in his settlement negotiations with the Section A insurer. Mr. Machum stated that whether Mr. Poulain was disabled from "any occupation" and entitled to stage two Section B benefits was a "very live issue," and that the income loss issue was "hotly contested". Ms. Avery's evidence confirmed that the Section A insurer's position at settlement was that it should receive a full deduction for any Section B benefits actually paid to Mr. Poulain or to which he was entitled, even if he did not claim them (Exhibit 8 – transcript of evidence from the first trial, at p. 284 (3-11)). Nevertheless, even if Mr. Poulain was correct in principle regarding this matter, the settlement they reached only produced a global amount: that ambiguity and the lack of any evidence elucidating this, makes it very difficult for the court to reliably quantify any notional offset of the stage two Section B benefits which Mr. Poulain did not actually receive, but which arguably he was entitled to receive.

[163] I am not satisfied on a balance of probabilities that due to Mr. Iannetti's negligence, Mr. Poulain has demonstrated that he was prejudiced in a meaningful way in his settlement negotiations with the Section A insurer.

[164] I am unable to quantify any loss vis-à-vis the settlement with the Section A insurer. In these circumstances, I am inclined to consider the awarding of nominal damages to serve as a symbolic recognition of the wrong committed and as a minor deterrent to others – H. MacGregor, *MacGregor on Damages*, 17th ed. (London: Sweet and Maxwell, 2003) at p. 362 (10-004 and 10-008); and *Salman v. Al-Sheik Ali*, 2010 NSSC 450, at para. 63, per Hood J.

[165] In relation to the alleged loss arising from Ms. Iannetti's negligence and reflected in an arguably less provident settlement with the Section A insurer, I conclude that $1,000 is an appropriate amount of nominal damages.

Summary

[166] I am satisfied that Mr. Iannetti was negligent; that negligence caused an ill-informed Mr. Poulain to sign a release with the Section B insurer waiving any entitlement to stage two Section B benefits; placing him in an arguably disadvantaged position once he entered settlement negotiations with the tortfeasor/Section A insurer.

[167] Regarding the former, I am satisfied that Mr. Poulain would have been successful in a claim for stage two Section B benefits had the trial been held in August 2006, and the damages flowing from Mr. Iannetti's negligence were the loss of those stage two Section B benefits (weekly indemnity) from June 6, 2003 to his 84th birthday. Mr. Poulain lost $16.70 weekly for 627 weeks (from June 6, 2003, to June 27, 2015), to which a 2.5% pre-judgment interest rate ought to be applied. He also lost the net present value of the $16.70 weekly indemnity from June 27, 2015, until his CPP disability benefits are scheduled to cease at age 65, i.e. October 23, 2016; and a $140 weekly indemnity from October 24, 2016, to his actuarially estimated notional date of death (October 23, 2035). It is appropriate to apply a 5% reduction for contingencies to that amount.

[168] Regarding the latter, I am unable to ascertain the amount of damages flowing from Mr. Iannetti's negligence *vis-à-vis* the Section A settlement, therefore, I award nominal damages of $1,000.

[169] The parties may make their written submissions regarding costs no later than 30 days after receipt of the decision. I direct the plaintiff to prepare an order to reflect my decision.

Rosinski, J.

SUPREME COURT OF NOVA SCOTIA
Citation: *Poulain v. Iannetti*, 2015 NSSC 181

Date: 2015-08-05
Docket: Hfx No. 288814
Registry: Halifax

Between:

George Poulain

Plaintiff

v.

David J. Iannetti

Defendant

Revised Decision: **The text of the original decision has been corrected according to the appended Erratum dated August 5, 2015.**

Judge: The Honourable Justice Peter Rosinski

Heard: January 5 – 7, 2015, in Halifax, Nova Scotia

Counsel: Janus Siebrits, for the Plaintiff
Ralph W. Ripley for the Defendant

Erratum:

Paragraph 167, where it reads: "He also lost the net present value of the $16.70 weekly indemnity from June 27, 2015, until his actuarially estimated notional date of death (October 23, 2035). It is appropriate to apply a 5% reduction for contingencies to that amount"; should read instead:

"He also lost the net present value of the $16.70 weekly indemnity from June 27, 2015, until his CPP disability benefits are scheduled to cease at age 65, i.e. October 23, 2016; and a $140 weekly indemnity from October 24, 2016, to his actuarially estimated notional date of death (October 23, 2035). It is appropriate to apply a 5% reduction for contingencies to that amount."