

**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

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**Judge:** The Honourable Justice Peter Rosinski

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

**Subject:** Professional negligence by lawyer – liability and damages

**Summary:** Shortly after a June 6, 2001 motor vehicle collision injuring Mr. Poulain, he retained Mr. Iannetti as his counsel. The terms of the retainer were never reduced to writing, though it was purportedly a contingency fee agreement. Mr. Poulain received stage one [the first two years during which she was considered disabled from his “own occupation”] Section B benefits, including the \$140 per week indemnity on an ongoing basis. He had repeated contacts with the Section B insurer’s representatives throughout, whereas Mr. Iannetti was not once involved with them. In September 2002, Mr. Poulain was offered a settlement by the Section B insurer. He telephoned Mr. Iannetti for advice, and was advised that if he signed the settlement he would receive not a penny more from the Section B insurer. Mr. Poulain signed the release, and in January 2003, he retained new counsel, who sued Mr. Iannetti in contract and for negligence regarding his handling of Mr. Poulain’s inquiry in September 2002. Mr. Poulain claimed that Mr. Iannetti was negligent in not advising him that by signing the release he was potentially giving up stage two

Section B benefits [i.e available after the first two years if he could show he was disabled from “any occupation” to which he was reasonably suited]. In August 2006 Mr. Poulain settled with the tortfeasor/section A insurer for a global settlement amount, which took account of s.146(2) of the *Insurance Act* which permits the Section A insurer in such circumstances to deduct the Section B weekly indemnity payments “made or available to the claimant” under s. 140 (see *Dugas-Mattatal v. General Accident Assurance Co. of Canada*, [1994] NSJ No 289(CA)). Thus, Mr. Poulain argued that even if he did not receive any stage two Section B weekly indemnity, because he was arguably entitled to receive it, the Section A insurer could claim it as a deduction to his detriment in the Section A settlement negotiations. Mr. Poulain argues that this detriment or loss is also attributable to Mr. Iannetti’s negligence.

**Issues:**

- (1) Was Mr. Iannetti retained in relation to any Section B claim that Mr. Poulain might have arising from the June 6, 2001 motor vehicle collision, and therefore, arguably be liable in contract for damages to Mr. Poulain?
- (2) Did Mr. Iannetti have a duty of care to Mr. Poulain at the time he was contacted in September 2002 regarding the Section B insurer’s proposed settlement?
- (3) Did Mr. Iannetti breach the duty of care he owed to Mr. Poulain regarding his potential acceptance of the Section B insurer settlement proposal
  - (a) What is the standard of care and is there a duty to warn?
  - (b) When is expert evidence required to prove a lawyer’s negligence?
  - (c) What is the evidentiary value of professional guidelines/rules in professional negligence claims?
- (4) Regarding the assessment of damages:

- (a) Is it proper to conduct an assessment of the extent to which Mr. Poulain suffered a loss in negotiating the settlement with the tortfeasor/Section A insurer?
- (b) Is it proper to conduct an assessment of the value of the stage two Section B benefits lost as a result of the signed release with the Section B insurer?
- (c) If the proper approach is an assessment of the value of the stage two Section B benefits lost, and reference is had to clause 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*, 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, ...”?
- (d) If, absent the negligence of Mr. Iannetti, Mr. Poulain would have been entitled to stage two Section B continued weekly indemnity payments, what is the prejudgment interest rate that should apply to those payments to date, and what is the discount factor that should apply to future payments thereof?
- (e) Are stage two Section B weekly indemnity payments payable to age 65 [a notional retirement age] or until the actuarially determined notional date of death for a recipient?

**Result:**

- (1) Mr. Iannetti was not retained to handle the Section B claim;
- (2) Mr. Iannetti had a duty of care when advising Mr. Poulain in September 2002 about the Section B insurer’s proposed settlement;
- (3) Mr. Iannetti breached the standard of care.

- (a) The standard of care is that of a reasonably competent lawyer, which in this case required that either Mr. Iannetti should have emphatically advised Mr. Poulain to retain separate counsel for advice regarding the Section B proposal, or properly advised him so he could make a fully informed decision about the Section B insurer's proposal. He did not do so in this case and thereby breached the standard of care;
- (b) Courts seem to acknowledge that if any judge of the Superior Court in question would be in a position to determine such cases without the benefit of expert opinion evidence, then no expert evidence is required. Nevertheless, generally it is preferred that expert evidence be presented in such cases (so that there will be a record which can be tested at trial/appeal), unless it can be said that the impugned actions of the defendant are so egregious that it is obvious that the conduct has fallen short of the standard of care even without knowing precisely the parameters of that standard - *Malton v. Attia*, 2014 ABQB 642 and *Krawchuk v. Scherbak*, 2011 ONCA 352.
- (c) Different aspects of a code of professional conduct could be relevant from case to case. A deviation from those 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 (correspondingly the provisions of a code of professional conduct cannot be used by a lawyer as a shield on the basis that anything not prohibited by the code must be permitted, since the court has an inherent supervisory function which trumps guidelines set by Law Societies).

#### (4) Assessment of damages

- (a) Yes
- (b) Yes, the proper approach is an assessment of the value of the stage two Section B benefits lost as a result of the signed release with the Section B insurer
- (c) CPP disability benefits are “payments for loss of income from employment received by or available to such person under (i) the laws of any jurisdiction...” and thereby are properly deductible from the 80% of gross weekly income from employment in determining whether the lesser amount of the indemnity is that amount, or \$140 weekly
- (d) An appropriate prejudgment interest rate is 2.5%; the appropriate discount rate in calculating the net present value of the future payments of weekly indemnity is 2.5% – Section 113C of the *Insurance Act*.
- (e) Section B weekly indemnity payments are payable so long as the disability resulting from the injury is the cause of the inability to engage in any suitable employment or occupation, and arguably could be payable to the date of a claimant’s actuarially estimated death, which is 84 years old in the case at bar. Thus, Mr. Poulain has lost (from June 6, 2003 to June 27, 2015) and will lose (from June 27, 2015) Section B weekly indemnity benefits to age 84. There should be a modest deduction [5%] of the net present value of the future weekly indemnity payments as a general contingency that Mr. Poulain may not survive to age 84 years: *Campbell – MacIsaac v. Deveaux*, 2004 NSCA 87.

Regarding Mr. Poulain’s claim that his Section A settlement (insofar as loss of future earnings is concerned) was prejudiced by his accepting the Section B insurer’s proposal

for settlement and signing a release, the court was unable to quantify any such loss, and therefore awards nominal damages of \$1000 to recognize the wrong committed and as a minor deterrent to others.

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