**IN THE SUPREME COURT OF NOVA SCOTIA**
Citation: Lavaute v. Canada (Attorney General), 2004 NSSC 171

Date: 20040909
Docket: S.H. No. 144354
Registry: Halifax

Between:

**Harvey Lavaute**

Plaintiff

-and-

**The Attorney General of Canada**

Defendant

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**Decision**

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**Judge:** The Honourable Justice Robert W. Wright

**Heard:** April 28, 2004 at Halifax, Nova Scotia

**Written Decision:** September 9, 2004

**Counsel:** Counsel for the Plaintiff - W.A. Richardson
Counsel for the Defendant - Cathy L. Dalziel

By the Court:

## INTRODUCTION

[1] This application raises the thorny question of whether monetary benefits paid to the plaintiff under the *Workers' Compensation Act* of Pennsylvania in respect of a slip and fall accident in Nova Scotia, which benefits the plaintiff is contractually obligated to repay to the subrogating authority designated under that legislation from any third party recovery of damages, can be deducted by the tortfeasor in the assessment of damages in a personal injury action. The application is brought under Civil Procedure Rule 25 which enables the court to make a preliminary determination of a question of law, based upon an Agreed Statement of Facts.

[2] The Agreed Statement of Facts jointly filed by counsel on this application reads as follows:

**AGREED STATEMENT OF FACTS**

1. The plaintiff is a resident of the State of Nevada, United States of America, who alleges that on or about January 15, 1996 he suffered injury in a fall in the rental vehicle lot at the Halifax International Airport.

2. The defendant The Attorney General of Canada, is the authorized representative of Transport Canada, which department operated the Halifax International Airport at the time of the alleged fall.

3. The plaintiff has made claim against the defendant for damages in respect of the injuries allegedly sustained in the fall. Included in plaintiff's claim are claims for general damages and special damages, including past and future income loss.

4. At the time of the alleged fall, plaintiff was travelling in the course of his employment with International Technology Corporation.

5. In respect of his injuries, plaintiff was entitled to and received benefits administered by the Commonwealth of Pennsylvania Department of Labor and Industry, Bureau of Workers' Compensation ("the subrogating authority") pursuant to the Workers' Compensation Act, Act of

1915, P.L. 736, No. 338, as re-enacted and amended June 21, 1939, P.L. 520, No. 281 ("the Workers' Compensation Act (Pennsylvania)"). A true copy of the Act in its consolidated form is appended as Exhibit "A" and the parties agree that the following benefits received by the plaintiff were received by him subject to a workers' compensation lien under the Workers' Compensation Act (Pennsylvania):

| | |
|---|---|
| Settlement of any entitlement to temporary partial disability benefits, whether past or future | $100,000.00 |
| Temporary Total Disability Benefits | $ 34,255.00 |
| Medical expenses | $ 79,359.66 |

6. Plaintiff's employer paid all required premiums in respect of the above benefits and plaintiff paid no contribution to premiums or other monetary consideration, nor suffered any reduction by way of deductible in order to receive the above benefits.

7. Plaintiff has entered into a third party settlement agreement with the subrogating authority by which he has agreed to distribute proceeds of this action to the subrogating authority in accordance with a distribution of proceeds formula as outlined in the Third Party Settlement Agreement, a true copy of which is appended as Exhibit "B" and explained in a letter of Alexander W. Ross, Jr., attorney at law, dated April 30, 2002, a true copy of which is appended as Exhibit "C".

8. The parties state the following issues for determination by this Honourable Court:

I. Is the plaintiff's claim subject to reduction by reason of his receipt of benefits under the Workers' Compensation Act (Pennsylvania)?

II. If so, what is the amount of the reduction?

[3] To briefly elaborate on the general scheme of the Act, it is typically a no-fault accident insurance scheme under which every employer is liable for compensation for personal injury to its employees, inflicted in the course of employment (Section 301). Every employer liable under the Act to pay compensation must insure the payment of compensation in the State Workmen's Insurance Fund or with an authorized insurer, which then assumes the employer's

liability (Section 305).

[4] The schedule of compensation established by the Act is not an indemnity scheme designed to provide full compensation for the loss incurred. Rather, it sets out certain percentage formulas to provide compensation for total and partial disabilities of various categories (Section 306). The Act goes on to provide that where the compensable injury is caused by the act or omission of a third party, the employer shall be subrogated to the right of the employee against such third party to the extent of the compensation payable by the employer.

**POSITIONS OF THE PARTIES**

[5] Neither counsel has been able to refer the court to any decided cases directly on all fours with the fact situation at hand. They therefore have developed their legal arguments based on general principles of tort law. While they generally agree on what those principles are, they disagree on how they should be applied to the facts of this case.

[6] Counsel for the defendant, who has brought this application, essentially builds the argument for deductibility of the plaintiff's workers' compensation benefits on the following principles:

(1) Under general compensatory principles, affirmed by the Supreme Court of Canada in *Ratych v. Bloomer* (1990) 69 D.L.R. (4th) 25 as modified in *Cunningham v. Wheeler* [1994] 1 S.C.R. 359, the plaintiff in a tort action is entitled to recover the full extent of the loss, and no more. Double recovery is not generally permitted;

(2) The plaintiff cannot bring himself within the so-called “insurance exception” to the rule against double recovery because he paid no contribution to premiums or other monetary consideration, nor suffered any reduction by way of deductible in order to receive the workers’ compensation benefits;
(3) Because the workers’ compensation scheme in Pennsylvania does not provide for full indemnity to the plaintiff of his losses, no right of subrogation at common law can arise;
(4) Although the Pennsylvania statute does confer a statutory right of subrogation in favour of the employer (who in turn must insure its risk with the State Workmen’s Insurance Fund or an authorized insurer), that statute has no extra-territorial effect and is not capable of being enforced in Nova Scotia (relying on *Grimm v. Co-operative Fire & Casualty Co.* (1982) 129 D.L.R. (3rd) 304 (NSSC).

[7] Accordingly, it is argued that the workers’ compensation benefits received by the plaintiff are not subject to any right of subrogation recognized in Nova Scotia, either at common law or by statute.

[8] In short, counsel for the defendant argues that the workers’ compensation benefits here claimed do not fall within any of the established exceptions to the rule against double recovery and hence must be taken into account in the assessment of damages in this proceeding. In defence counsel’s submission, the fact that there exists a Third Party Settlement Agreement as described in paragraph 7 of the Agreed Statement of Facts is irrelevant to the analysis as between the litigants.

[9] Counsel for the plaintiff argues, on the other hand, that indeed the entire application turns on the operation of the Third Party Settlement Agreement because it precludes the possibility of any double recovery ever being realized. Although he acknowledges that he is taking instructions from both the plaintiff and the subrogating authority, he emphasizes that this action is being brought by the plaintiff Lavaute as his own action seeking to enforce his own legal rights. He is asking the court to award the plaintiff compensation under Nova Scotia law subsequent to which the plaintiff must pay back to the subrogating authority the amounts required under the Third Party Settlement Agreement. The plaintiff will then be left in the end with only the recovery of his actual loss. It is pointed out that to permit the defendant to deduct the workers' compensation benefits paid would result in a placement of the financial burden of the loss away from the tortfeasor, where it belongs, leaving it unjustly reposited with the workers' compensation authority.

[10] In short, it is argued that because there is no prospect of double recovery by the plaintiff, no deduction ought to be made in the assessment of damages in this proceeding for the workers' compensation benefits already paid to him. It is emphasized that the plaintiff is not asking this court to enforce foreign legislation (i.e., the statutory right of subrogation), but rather is asking the court to award compensation under Nova Scotia law in his own action which will then be distributed between the plaintiff and the subrogator under the terms of the Third Party Settlement Agreement.

**LEGAL ANALYSIS AND CONCLUSIONS**

[11] The landscape of collateral benefits law in Canada is dominated by the two decisions of the Supreme Court of Canada in *Ratych* and *Cunningham*, decided in 1990 and 1994 respectively. Although the latter modified the former in some respects, both decisions strongly affirmed the general rule against double recovery of damages in a tort action.

[12] The legal principles which emerged from the decision in *Cunningham* (as one of a trilogy of cases) were nicely summarized in *Dalex Co. v. Schwartz Levitsky Feldman* (1994) 19 O.R. (3d) 463 (at p.468) as follows:

> 1. The general proposition is that the plaintiff in a tort action is not entitled to a double recovery for any loss arising from an injury;
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> 2. An exception to this general principle is the "insurance exception". To qualify, the plaintiff must show that the benefits received were in the nature of an insurance, i.e., some type of consideration must have been given up by the plaintiff in return for the benefit. Generally, subrogation is not relevant to a consideration of the deductibility of the benefits if they are found to be in the nature of insurance.
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> 3. If the benefits do not fall within the insurance exception, then they must be deducted from the damages recovered, unless the third party who paid the benefits has the right of subrogation.

[13] Unchanged, however, was the general rule laid down in *Ratych* which was articulated by McLachlin J. (as she then was), writing for the majority, as follows:

> As a general rule, wage benefits paid while a plaintiff is unable to work must be brought into account and deducted from the claim for lost earnings. An exception to this rule may lie where the court is satisfied that the employer or fund which paid the wage benefits is entitled to be reimbursed for them on the principle of subrogation. This is the case where statutes, such as the *Workers' Compensation Act*, R.S.O. 1980, c. 539, expressly provide for payment to the benefactor of any wage benefits recovered. It will also be the case where the person who paid the benefits establishes a valid claim to have them repaid out of any damages awarded.

[14] These decisions (along with *Grimm*, *supra*) sustain the submissions of counsel for the defendant (summarized in paragraph 6 herein) that the workers' compensation benefits at issue here do not fall within the insurance exception to the rule against double recovery and further that there is no right of subrogation enforceable in Nova Scotia (either at common law or by foreign statute). But what of the Third Party Settlement Agreement by virtue of which the plaintiff is obligated to repay the workers' compensation benefits he received to the subrogating authority out of any recovery of damages from the tortfeasor?

[15] I draw two inferences in respect of that agreement (which perhaps is the preferred avenue of recovery by the subrogating authority because of the very difficulty inherent in enforcing its statutory right of subrogation in foreign jurisdictions). The first is that the workers' compensation benefits received by the plaintiff (subject to a workers' compensation lien) were paid to him on the condition that he sign such an agreement. The subrogating authority has thereby established a valid claim to have the benefits repaid out of any damages awarded. The second is that the agreement will actually be enforced by the subrogating authority should there be recovery from the tortfeasor, considering that Mr. Richardson is taking instructions from both the plaintiff and the subrogating authority. I hasten to add that notwithstanding that dual role, it has been made clear that the present action is a personal injury claim brought by Mr. Lavaute in his own name and as his own action, rather than a subrogated action seeking to enforce a foreign statute in Nova Scotia.

[16] Counsel for the defendant nonetheless contends that the Third Party

Settlement Agreement is extraneous to the determination of the recoverable damages as between the litigants, based on compensatory principles of tort law. I respectfully disagree. In my view, the court cannot examine these compensatory principles in isolation from the practical consequences of the Third Party Settlement Agreement which operates as an adjustment mechanism to prevent double recovery.

[17] The permitted exceptions to the rule against double recovery, and the underlying theory, principle and policy considerations, are well canvassed in *Personal Injuries Damages in Canada* (2nd Ed.) published by the author K.D. Cooper-Stephenson in 1996. A reading of Chapter 9 on Collateral Benefits illustrates the complexity of this area of the law and how the courts have struggled with various aspects of it over many decades. For purposes of the present case, however, I need only concern myself in the final analysis with the narrow question of whether or not the Third Party Settlement Agreement should be treated in the same vein as the subrogation exception to the general rule.

[18] I have reached the conclusion that this question ought to be answered in the affirmative. In my view, the present fact situation falls within the last category of exceptions described in *Ratych* above quoted, namely, where the person who paid the benefits establishes a valid claim to have them repaid out of any damages awarded. I find further support for this conclusion by the statement in the Cooper-Stephenson text (at p.619) that "If a contractual scheme includes an undertaking to repay as a condition of receipt of benefits, as many do, the position is similar to the insurance right of subrogation." In the present case, the undertaking to repay by

virtue of the Third Party Settlement Agreement is obviously predicated upon the right of subrogation contained in s. 319 of the Pennsylvania statute.

[19] I also briefly refer to the decision of the British Columbia Court of Appeal in *Pesonen v. Melnyk* (1994) 17 C.C.L.T. (2d) 66. Although that case involved a slightly different factual scenario, its reasoning and result are consistent with that which I have reached in the present case. I would add that this result also conforms to the interests of justice in ensuring both that the tortfeasor bears the full cost of the wrong and that the plaintiff is not over compensated. I am satisfied that because of the operation of the Third Party Settlement Agreement, the plaintiff will not get any double recovery in this case.

[20] In conclusion, the answer to the first question posed for determination in paragraph 8 of the Agreed Statement of Facts is “No”. It follows that the answer to the second question is “None”.

[21] Having been successful in this application, the plaintiff shall be entitled to costs of the application and if counsel are unable to agree on an appropriate amount, I invite written submissions from them by month’s end to conclude the matter.

J.