SUPREME COURT OF NOVA SCOTIA
Citation: *Slauenwhite* v *Keizer*, 2010 NSSC 453

Date: 20101213
Docket: Hfx No 284491
Registry: Halifax

Between:

Jean Slauenwhite

Plaintiff

v.

Erna Keizer

Defendant

Judge:	The Honourable Justice Gregory M. Warner
Heard:	December 2, 2010, in Halifax, Nova Scotia
Counsel:	**Darlene Willcott**, counsel for the plaintiff Jean Slauenwhite
	Scott C. Norton, Q.C., and **Tricia Barry**, counsel for the defendant Erna Keizer

By the Court:

A. **The Question**

[1] Does the Department of Health ("Province") have a subrogated right to claim against a person insured by a motor vehicle liability insurer for nursing home costs arising from injuries sustained in a motor vehicle accident?

[2] The answer depends on the interpretation of Section 18 of the *Health Services and Insurance Act of Nova Scotia* ("*HSIA*").

[3] The parties agreed on the factual context of the Province's subrogated claim against the defendant tortfeasor.

B. **The Factual Context**

[4] Until December 15, 2004, Jean Slauenwhite, then aged 81, lived alone and independently in an apartment at Musquodoboit Harbour. That evening, Erna Keizer, then 78, drove her vehicle off the road into a rock cliff. Slauenwhite, a passenger, suffered injuries, including permanent loss of her eye sight. Slauenwhite's injuries prevented her from returning to her apartment. After a lengthy hospital stay, she moved into a retirement residence and assisted living facility. Under its nursing home subsidy program, the Province pays part of Ms. Slaunwhite's daily nursing home care rate.

[5] The defendant admitted liability for the accident and the plaintiff's injuries. The parties settled the plaintiff's personal injury claim, except for the Province's subsidy of the plaintiff's nursing home costs.

C. **The Legislation**

[6] Since at least 1973, when the *Medical Care Insurance Act* and *Hospital Insurance Act* were consolidated into *HSIA*, the Province has been subrogated to the rights of a person who suffers personal injury as a result of the negligence, or wrongful act or omission, of another person, when the injured person receives certain health care, services or benefits. S.N.S. 1973, c.8, s. 13, later renumbered s. 18, containing nine subsections.

[7] By S.N.S. 1992, c. 20, the legislature amended several provisions of *HSIA* and s.107 of the *Insurance Act*. The significant change was the authorization for a scheme to impose an annual levy on motor vehicle liability insurers to collect from them the actual costs to the Province of certain health-related services resulting from motor vehicle accidents. This scheme is described in new s.18(11-20) *HSIA* and s.107A (1-13) *Insurance Act*. Subsection 18(10) of these amendments states that s. 18 (effectively, the Province's right to subrogate against tortfeasors) applies except where Provincial health-related services are provided to a person injured by a motor vehicle accident for which the tortfeasor has a third-party liability policy. The defendant describes the amendments as

follows: “The Levy system . . . completely removes the Province’s subrogation rights in relation to costs incurred as a result of motor vehicle accidents but allows the Province to require insurers to pay a yearly levy to cover some costs.”

[8] By S.N.S. 2002, c. 5, s. 24, the Province further amended s.18.

[9] The description of health-related services in s. 18(1), and the definition of “insured hospital services” for s.18 (2-8) was more fully described. The additional services described in s.18(1), and the fuller description of “insured hospital services” in s.18(21), were “. . . home-care services, care for a person in a home for special care or child-care facility to which the Province has made payment and any services prescribed in the regulation as insured hospital services for the purposes of this subsection.”

[10] Subsection 18(9), which effectively discharged liability insurers from the Province’s subrogated claims when the insurer’s policy limit is reached, was repealed, and replaced with s.18(5A to 5E).

[11] The current *HSIA* provisions outline the Province’s subrogation rights as they relate to the issue in this case are:

> 18(1) Where, as a result of the negligence or wrongful act or omission of another, a person suffers personal injuries for which the person received insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment, **home-care services, care for a person in a home for special care or child-care facility to which the Province has made payment, insured professional services under this *Act*, or any other care, services or benefits designated by regulation, including the future costs of any such care, services or benefits**, the person. (The highlighted portion was part of the 2002 amendments.)
>
> ...
>
> (3) Her Majesty in right of the Province shall be subrogated to the rights of a person under this Section to recover any sum paid by the Minister for insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services provided to that person, and an action may be maintained by Her Majesty, either in Her own name or in the name of that person, for the recovery of such sum.
>
> ...
>
> (6) Where a person whose act or omission resulted in personal injuries to another is insured by a liability insurer, the liability insurer shall pay to the Minister any amount referable to a claim for recovery of the cost of insured hospital services,

> benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment and insured professional services that would otherwise be paid to the insured person and payment of that amount to the Minister discharges the liability of the insurer to pay that amount to the insured person or to any person claiming under or on behalf of the insured person.
>
> ...
>
> (10) This Section applies except where personal injury has occurred as the result of a motor vehicle accident in which the person whose act or omission resulted in the personal injury is insured by a policy of third-party liability insurance on or after the date this subsection comes into force. (Added by the 1992 amendments)
>
> (11) The Minister may impose a levy to be paid by each motor vehicle insurer with respect to each vehicle insured by that insurer for the purpose of recovering insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services pursuant to this *Act* incurred by third parties as a result of personal injury in motor vehicle accidents. (Added by the 1992 amendments)
>
> ...
>
> (21) For greater certainty, in subsections (2) to (8) "insured hospital services" includes any care, services or benefits for which costs have been or may in the future be paid by the Minister in relation to negligence or a wrongful act or omission including, without limiting the generality of the foregoing, ambulance services to which the Province has made payment, home-care services, care for a person in a home for special care or child-care facility to which the Province has made payment and any services prescribed in the regulation as insured hospital services for the purposes of this subsection." (Added by the 2002 amendments)

[12] Subsections 18(12-20) describe how the Province will estimate at the beginning of each year the amount of the levy that insurers are required to remit, and how, at the end of each year, the amount of the levy is recalculated based on actual costs. The levy is adjusted, resulting in either a credit to insurers (if the estimate exceeded actual costs) or an obligation to make a further remittance (if the estimate was less than actual costs).

[13] The parties agree that, as more fully described in the Province's brief, the levy to be paid by each motor vehicle insurer cannot and does not include the costs of nursing home services, such as those paid by the Province on behalf of the plaintiff in this case.

D. **Principles of Statutory Interpretation**

[14] The parties agreed on the general principles of statutory interpretation.

[15] The opening words in *Sullivan on the Construction of Statutes*, by Ruth Sullivan, Fifth Edition (Markham: LexisNexis, 2008) describe the principle as:

> ***Introduction***. More than thirty years ago, in the first edition of the *Construction of Statutes*, Elmer Driedger described an approach to the interpretation of statutes which he called the modern principle:
>
> > Today there is only one principle or approach, namely, the words of an *Act* are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.
>
> The modern principle has been cited and relied on in innumerable decisions of Canadian courts, and in *Re Rizzo & Rizzo Shoes Ltd*. it was declared to be the preferred approach of the Supreme Court of Canada. It has even been applied to interpretation of Quebec's Civil Code.

[16] Sullivan continues at Page 3:

> The modern principle says that the words of a legislative text must be read in their ordinary sense harmoniously with the scheme and objects of the *Act* and the intention of the legislature. In an easy case, textual meaning, legislative intent and relevant norms all support a single interpretation. In hard cases, however, these dimensions are vague, obscure or point in different directions. In the hardest cases, the textual meaning seems plain, but cogent evidence of legislative intent (actual or presumed) makes the plain meaning unacceptable. If the modern principle has a weakness, it is its failure to acknowledge and address the dilemma created by hard cases.
>
> ***Relation of modern principle to rules of statutory interpretation***. Under the modern principle, an interpreter who wants to determine whether a provision applies to particular facts must address the following questions:
>
> •what is the meaning of the legislative text?
>
> •what did the legislature intend? That is, when the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?
>
> •what are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislature is presumed to respect?
>
> In answering these questions, interpreters are guided by the so-called "rules" of statutory interpretation. They describe the evidence relied on and the techniques used by courts to arrive at a legally sound result. The rules associated with textual analysis, such as implied exclusion or the same-words-same-meaning rule, assist

> interpreters to determine the meaning of the legislative text. The rules governing the use of extrinsic aids indicate what interpreters may look at, apart from the text, to determine legislative intent. Strict and liberal construction and the presumptions of legislative intent help interpreters infer purpose and test the acceptability of the outcomes against accepted legal norms.
>
> At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.

[17] The plaintiff (Province) refers the Court to *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27; *Bishop-Beckwith Marsh Body* v *Wolfville* (1996), 135 DLR (4th) 456 (NSCA) at ¶¶ 13 and 14; *MacNutt* v *Nova Scotia*, 2009 NSSC 70 at ¶ 16, and s.9(5) of the *Interpretation Act of Nova Scotia*, which reads:

> Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
> (a) the occasion and necessity for the enactment;
> (b) the circumstances existing at the time it was passed;
> (c) the mischief to be remedied;
> (d) the object to be attained;
> (e) the former law, including other enactments upon the same or similar subjects;
> (f) the consequences of a particular interpretation; and
> (g) the history of legislation on the subject.

[18] The defendant (insurer) referred the Court to *Cape Breton (Regional Municipality)* v *Nova Scotia (Attorney General)*, 2009 NSCA 44 at ¶¶ 36 to 38 and 40. It submitted that there are no apparent significant differences in the interpretative steps as outlined in the Fourth Edition (2002) of *Sullivan and Driedger*, the Fifth Edition of *Sullivan* (2008) and s. 9(5) of the *Nova Scotia Interpretation Act*. It noted the application of these principles to *HSIA* in *Doctors Nova Scotia* v *Nova Scotia (Department of Health)*, 2006 NSCA 59.

E. **The Defendant's Position**

[19] While the Court must go on to address the second and third steps of interpretation, the defendant argued that significant weight should be attached to the first step, which was described as the plain and ordinary meaning of s.18(10) and (11). It argued that the wording of s.18(10) is clear and unambiguous: s. 18 does not apply, and therefore the Province has no right of subrogation when health-related costs result from a motor vehicle accident.

[20] The wording of s.18(10) is an absolute exclusion of the right to subrogate under s.18(3) respecting injuries from motor vehicle accidents. Because s.18(10) applies to all of s. 18, it:

- removes a plaintiff's right to recover sums paid by the Province under 18(1)(a);
- removes the plaintiff's duty to recover sums paid by the Province under 18(1)(b), (2), (4), (5A-C);
- removes a third-party insurer's duty to provide information to the Province about claims in regards to settlement under 18(5D);
- removes the insurer's duty to pay the Province amounts related to a claim for insured services under 18(6); and
- removes the Province's right to authorize payment of legal fees (18(5E)), to set rates for insured services (18(7)), or to provide a certificate for sums paid for insured services (18(8)).

[21] Nothing in s.18(10) indicates that the Province can maintain a subrogation claim for nursing home costs or any insured service costs resulting from motor vehicle accidents. Nothing in the levy provisions (s.18(11) to (20)) creates an exemption for nursing home costs, or any other insured service cost, from the absolute exclusion in 18(10).

[22] Most important, nothing in s.18 indicates that costs not covered by the levy (including, for example, nursing home costs) are exempt from the application of 18(10).

[23] The *maxim expressio unius est exclusio alterius* (the implied exclusion rule) applies. The legislature would have expressly excluded nursing home and residential care costs, which are not covered by the levy, from 18(10) if the Province's subrogation right for those costs were intended to be preserved. It failed to mention any exceptions to the absolute exclusion in 18(10). One may infer that it was deliberate. The defendant noted the application of this *maxim* in *Central Halifax Community Assn* v *Halifax (Regional Municipality)*, 2007 NSCA 39 at ¶ 22.

[24] Turning to 18(11), the defendant submitted that the wording creating the levy is permissive. For this, it cites s. 9(c) of the *Interpretation Act* - "in an enactment, . . . 'may' is permissive." While agreeing with the Province that nursing home costs are, by definition, not included in the amount for which the Province is authorized to impose the levy, it argued that 18(11) does not require the Province to impose any levy. Consequently, the operation of 18(10) is not dependant on whether, or how, the Province imposed the levy. Moreover, no language in 18(11) imposed a limit on the Province's subrogation right - the limit is in 18(10).

[25] Said differently, the proper interpretation of 18(10) is not dependent upon the implementation of a levy pursuant to 18(11). Citing *MacNutt v. Nova Scotia*, ¶ 10, it argued that when words are precise and unequivocal, their ordinary meaning plays a dominant role; only when words support more than one meaning, does ordinary meaning play a lesser role. For that reason, the precise and unequivocal words of 18(10) should dictate the interpretation. Its interpretation of 18(10) creates no incoherence or internal conflict. The defendant argued: "The two provisions are not inter-related or dependent upon each other."

[26] The second interpretative question is "What did the legislation intend?" The defendant submitted that the Province provided no evidence of the legislature's intent; that is, as to the scheme and context of *HSIA*. The Province did not argue that the intent of 18(11) was to include nursing home costs in the levy, or to exempt nursing home costs from the exclusion in 18(10). The Province did not argue that a drafting mistake was made. From this, the court can infer the legislature's intent is in harmony with the words of 18(10) and 18(11): "the [Province] cannot subrogate in the event of motor vehicle accidents, and nursing home costs are not included in 18(11)."

[27] In oral argument, counsel expanded on this argument. Absent extrinsic evidence, it would be speculative for the Court to infer a legislative intent other than that obtained from a grammatical reading of the statute.

[28] The third interpretative step is analysis of the consequences of adopting the proposed interpretation. The defendant argued that "the interpreter can consider 'the strict and liberal construction and the presumptions of legislative intent' to infer purpose and 'test the acceptability of outcomes against accepted legal norms'."

[29] It argued that its interpretation, derived from the ordinary meaning of 18(10) "is not only plausible, but the only interpretation that harmonizes with the grammatical meaning of the text and legislative intent." It cited Sullivan's conclusion that the plausibility requirement is a constraint on interpretation; that is, it represented the outer limit within which a legitimate interpretation must occur.

[30] A Court may adopt a strained interpretation, or cure a drafting error, where the ordinary meaning is not in line with the legislative intent. Neither tool is appropriate in this circumstance because there is no indication that the legislature intended the provisions to operate differently from how they read on their face. "The meaning proposed by the plaintiff that because the Levy does not cover nursing home costs the [Province] should maintain the right to subrogate under 18(3), is one that the wording of 18(10) **cannot** reasonably bear."

[31] To allow the Province a right of subrogation for nursing home costs would require the Court to "read in" an exemption to the removal of the Province's right of subrogation; that is, it would require the Court to rewrite a statute under the guise of interpreting it.

[32] Finally, the defendant submitted that "the principle that legislation is strictly construed where it takes away the rights of its subjects applies to restrict the Court's power to read in or amend the *HSIA*." If the legislature chooses to interfere with the rights of its subjects, it must do so clearly. Counsel cited *Cameron* v *Nova Scotia (Attorney General)*, 1999 NSCA 14, as an example of the strict interpretation of a term in *HSIA*. In *Cameron*, the Court interpreted "insured hospital services" so as to exclude out-patient services incurred by the plaintiffs outside Nova Scotia (except when the Minister does so on a discretionary basis).

F. ***Analysis***

F.1 Overview

[33] As Elmer Driedger wrote, "Today there is only one principle or approach, namely, the words of an *Act* are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament." (My emphasis)

[34] As Ruth Sullivan wrote, this sentence incorporates a complex multidimensional analysis. She divided Driedger's principle into three analytical steps. Her description of the three steps is consistent with the approach taken by the Supreme Court of Canada in many decisions after *Rizzo*, including *Bell ExpressVu Limited Partnership* v *The Queen*, 2002 SCC 42 and *Canada Trustco Mortgage Co* v *Canada*, 2005 SCC 54.

[35] I summarize the three steps as:

1. Analysis of the "textual" meaning (that is, the words of the Act in their entire context). Sullivan notes that finding the grammatical or ordinary sense of words may involve complex issues of linguistic convention, expression and understanding.
2. Analysis of legislative intent. Legislation has a purpose and is intended to achieve certain goals. Courts must try to identify purposes and goals, and the means devised to achieve them.
3. Analysis of established legal norms, as part of the context for reading words in legislation. According to Driedger, there are four kinds of legislative intention: expressed, implied, presumed and declared intention. Presumed intention embraces the evolving legal norms found primarily in the common law but also in constitutional, quasi-constitutional and international law.

[36] The three analyses are sometimes turned into three questions.

1. What is the meaning of the text?
2. What goals (purposes) and methods did the legislature intend to adopt?
3. What are the consequences of adopting a proposed interpretation?

[37] When applying these analytical steps, the resulting interpretation must be justified in terms of its plausibility (compliance with the text), its efficacy (promotion of the legislative intent) and its acceptability (compliance with accepted legal norms).

[38] The history of legislation of health services includes the history of the right of the Department of Health (Province) to recover from tortfeasors and their liability insurers, the costs of some health-related services provided to persons who are injured by wrongful or negligent acts or omissions. This purpose, and the method by which it is achieved, is contained in s. 18 of *HSIA*. Before the 1992 amendments, the purpose and scheme of the legislation was clear from a reading of the words, in their grammatical and ordinary sense, in the context of s.18 as a whole. No evidence extrinsic to the legislation as a whole was necessary to answer the question: What did the legislature intend?

[39] It is relevant, and important to the interpretative exercise in this case, that the amendments enacted in 1992 contain two basic provisions:

1. Authorization for the Province to impose an annual levy on motor vehicle liability insurers, estimated at the beginning of the year and adjusted at the end of the year to reflect actual costs for certain insured health-related services during the year. This was effected by s. 18(11-20).

2. A provision, s. 18(10), stating that Section 18 - the section which unambiguously authorizes recovery of certain health service costs from tortfeasors and their insurers, applies except where personal injury has occurred as a result of a motor vehicle accident in which the tortfeasor is insured by a liability policy.

[40] The defendant's argument is that s. 18(10), read alone, clearly exempt tortfeasors and their liability insurers from the Province's right to subrogate for recovery of health-related services caused by the tortfeasors in motor vehicle accidents. No evidence, extrinsic to *HSIA* itself, has been tendered to demonstrate that the legislative intent is not to achieve the goal or purpose that is apparent from the interpretation of the words of 18(10) in their grammatical and ordinary sense. Effectively this would exempt tortfeasors and their liability insurers from responsibility for nursing home costs incurred by those injured as a result of motor vehicle accidents, because nursing home costs are not recoverable under the levy, and 18(10) is an absolute exemption from the Province's subrogation remedy. All tortfeasors and their liability insurers, other than those causing injuries by motor vehicle accidents, remain responsible to the Province for health-related costs, including nursing home costs.

[41] I have two preliminary problems with the defendant's analysis.

[42] First, while 18(10), read in isolation, on its face, clearly releases motor vehicle accident tortfeasors and liability insurers from responsibility to the Province for certain health costs by subrogation, other subsections of s. 18, read in isolation, on their face, equally clearly impose liability on tortfeasors and their liability insurers for health costs resulting from personal injuries caused by any wrongful or negligent act or omission, and does not exclude automobile accidents. Subsection18(10) was part of an amendment scheme that changed the method by which the Province recovered health-related costs. In respect of motor vehicle accident tortfeasors, it replaced the Province's general subrogation right with a levy scheme. Subsection 18(10) must be read in the context of the subrogation scheme that existed and was amended in 1992. Said differently, s.18(10) must be read harmoniously with s.18(11-20) and s.18 as a whole.

[43] Secondly, I do not agree that the modern principle of statutory interpretation holds that it is mere speculation to infer legislative intent, absent evidence extrinsic to the legislation itself; that is, other than by adoption of the grammatical and ordinary sense of the words of the *Act*.

[44] With respect to my first disagreement, the missing element in the defendant's analysis is the obligation on the Court to read the words of the *Act* **in their entire context** and in their grammatical and ordinary sense **harmoniously** with the scheme and object of the *Act* and legislative intention. While it is not improper to first analyze the words of a section or subsection itself, it is improper to reach any conclusion until those words are placed in the context of the remaining words of the legislation and with awareness of the scheme and object of the legislation.

[45] The words of s. 18(6), read in their grammatical and ordinary sense, in isolation, are as clear as 18(10), and in direct conflict with 18(10). It is not helpful to reason that the grammatical and ordinary sense of the words in 18(6) or 18(10), read in isolation, have the most significant weight in interpreting s. 18 as a whole. The starting point for the interpretation of every enactment is set out in s. 9(5) of the *Interpretation Act*. Every act is deemed remedial and interpreted to insure attainment of its objects when considered in the context of seven enumerated factors.

[46] Section 18, as a whole, applying all the words of the section in their grammatical and ordinary sense but harmoniously and in context, expresses an intention, goal or purpose of enabling the Province to recover from tortfeasors and their liability insurers some of the health costs incurred by persons injured by wrongful acts or omissions or negligence. It is not argued that, before the 1992 amendments, the Province could subrogate against a tortfeasor for health-related costs provided to a person who suffered personal injuries as a result of a motor vehicle accident where the tortfeasor was insured by a third-party liability policy.

[47] This clear intent is obvious from the nine subsections that constituted s. 18 before the 1992 amendments.

[48] The 1992 amendments must be read in this context. The words in the 1992 amendments must be interpreted harmoniously with the scheme and object of the *Act* evident as of the date of those amendments.

[49] Contrary to the defendant's submission, it is necessary to read the entirety of the 1992 amendments including 18(10 to 20) - each in the context of the other, and harmoniously with s. 18 as a whole (and, indeed, *HSIA* as a whole).

[50] The subsections in the 1992 amendments are interrelated. Subsection 11 to 20 set up an alternative scheme for the recovery by the Province of certain health-related costs incurred for persons who received personal injuries in motor vehicle accidents as a result of wrongdoing by a tortfeasor who was insured by third-party liability policy.

[51] The submission by the defendant, that the levy did not provide for the recovery of nursing home costs, a right to recover retained by the Province's right to subrogate against all other tortfeasors and their liability insurers, constitutes an acknowledgment from which this Court can infer a legislative intent, without resort to speculation. I can and do infer that the creation of the levy system for recovery by the Province of certain health-related costs, but not nursing home costs, supports the Province's interpretation of 18(10) - that the exemption from cost recovery by subrogation is limited by the parameters of the levy scheme. The 1992 amendments are interrelated.

[52] The scheme and object of the legislation are clear from reading, in their ordinary sense, the words of s. 18 and the history of amendments. It is not mere speculation to interpret the objects of the legislation from the whole of the legislation itself.

[53] No extrinsic evidence is necessary to clearly identify the circumstances, mischief and object of s. 18 of *HSIA*. It is obvious that, as of 1992, the circumstance was that persons injured by tortfeasors received insured health-related services and benefits, and lawmakers desired to recover those costs from tortfeasors and their liability insurers. The legislation before the 1992 amendments clearly enabled the Province to do so on an accident-by-accident basis.

F. 2 The Three Sullivan Questions

Question #1 ***What is the meaning of the legislative text?***

[54] It is not argued that before the 1992 amendments, the words of s. 18, read in their grammatical and ordinary sense and in their entire context, clearly gave the Province the right to recover from any tortfeasor insured health-related service costs.

- Section 18 also set out what insured services were recoverable and the scheme for recovery of those costs - on an accident-by-accident basis, from the injured person who recovered from a tortfeasor, or by subrogation from the tortfeasor or her/his insurer.
- Subsection 18(1) set out the Province's right to recover the cost of certain insured services.
- Subsection 18(2) set out the obligation of an injured person who recovered a sum for the insured services to pay them to the Province.
- Subsection 18(3) gave the Province the right to subrogate for those services in the name of the injured person.
- Subsection 18(4) precluded certain defences to the Province's subrogated action.
- Subsection 18(5) provided that no settlement or judgment for personal injuries, for which the injured person received insured services, was binding on the Province without its written approval.
- Subsection 18(6) extended the responsibility of a tortfeasor to the Province for recovery of the cost of insured services from the tortfeasor and her/his liability insurer.
- Subsection 18(7) described the cost of insured services as the amount, at rates approved by the Province, that the injured person would have been required to pay if she/he had not been an insured person under *HSIA*.
- Subsection 18(8) provided for admissibility of a certificate as *prima facie* proof of the cost of insured services in 18(7).
- Subsection 18(9) discharged a liability insurer from liability to the Province to the extent that the full amount/limit of its policy was insufficient to satisfy the injured person's claim, other than for the Province's claim for insured services.

[55] Subsequent to 1992, specifically in 2002, *HSIA* was amended to expand the scope of insured health-related services for which the Province's right of subrogation applies. (See Paragraphs 8 to 11 of this Decision, and a copy of the legislation in the Defendant's Book of Authorities, Tab 8).

[56] The parties agreed that the definition of 'insured services' for which tortfeasors and their liability insurers are liable was expanded to include nursing home costs. Because the 2002 amendments do not reference subsections 18(10 to 20), the defendant submitted that the Province

has neither a right under the subrogation scheme, nor any right under the levy scheme, to recover these costs. For this, the defendant relies upon an interpretation of subsection 18(10) by reference only to the grammatical and ordinary sense of the words of 18(10).

[57] I agree that, without context, the words of 18(10) read in their ordinary sense, preclude a right of subrogation for nursing home costs against tortfeasors and their liability insurers for injuries resulting from motor vehicle accidents. I do not agree that the analysis of the first Sullivan question ends there.

[58] Interpretation involves consideration of the words in the context of the enactment as a whole and their factual matrix or setting. Words cannot be interpreted in a vacuum or without knowledge of the genesis (occasion, circumstances and mischief) and purpose of the legislation.

[59] I disagree with the defendant's approach that if the words of 18(10) in their grammatical and ordinary sense mean one thing, then the interpretative process ends.

Question #2 ***What did the legislature intend? When the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?***

[60] As noted, subsection 9(5) of the *Interpretation Act* deems every enactment to be remedial and directs that it is interpreted to ensure attainment of its object by considering a non exhaustive list of seven factors:

- the occasion and necessity for the enactment,
- the circumstances existing at the time it was passed,
- the mischief to be remedied,
- the object to be obtained,
- the former law,
- the consequences of a particular interpretation, and,
- the history of the legislation on the subject.

[61] These factors relate to all three Sullivan questions. Except for the consequences of a particular interpretation, all are directly relevant to the second Sullivan question.

[62] In my view, it is obvious that the 1992 amendments provide for a different method or scheme by which the Province was entitled to recover from tortfeasors and their liability insurers for insured services provided to persons injured in motor vehicle accidents. It is plain that rather than recover these insured health-related costs on an accident-by-accident basis, the costs would be recovered by way of a levy on motor vehicle insurers (all motor vehicle owners in the Province are obligated to be insured). The recovery would still be equal to the actual total cost of the insured services, but would be prorated amongst insurers based on their share of the total number of insured motor vehicles.

[63] The reason for the change is not expressly stated in the legislation nor was extrinsic evidence tendered that would identify the reason. It is not necessary to determine the reason for the amendment from expressly stated goals or extrinsic evidence. It is enough to find, on the basis of the purpose and scheme of the *Act* and of section 18, that the 1992 amendments read as a whole and in the context of s. 18 and the *Act* can reasonably be interpreted as intending to do no more than change the method by which the Province recovered its cost of insured services in the case of motor vehicle accidents.

[64] While both parties to this motion focussed on the 1992 amendments, and the defendants' submissions focussed on the argument that 18(10) and 18(11) are not interrelated, in my view a key interpretative issue in this case arises from the 2002 amendments. Again, the circumstances, mischief and purpose of the 2002 amendments are not expressly set out in the enactment, and no extrinsic evidence was tendered.

[65] The key change to s. 18 by the 2002 amendments was the expansion of the kinds of insured health-related services for which the Province can recover. The changes were to subsections 18(1) and 18(21). Subsection 18(21) expressly applies only to subsections 18(2) to (8). Nursing home costs were included in the expanded list of insured health-related services. The 2002 amendments do not expressly address subsection 18(10) to (20).

[66] An important interpretative question is whether the expanded list of insured health-related services for which recovery from tortfeasors was authorized, was intended to apply to tortfeasors in motor vehicle accidents, or only to all tortfeasors other than those in motor vehicle accidents.

[67] In my view, the answer is clear. Before the 2002 amendments, the circumstances and legislation provided that the Province was entitled to recover for the same insured health-related services from tortfeasors in motor vehicle accidents as from all other tortfeasors. The only difference between the two classes of tortfeasors was the method of recovery of those costs.

[68] I do not interpret the 2002 amendments as intending to give tortfeasors in respect of motor vehicle accidents a free ride with respect to nursing home costs that is not available to all other tortfeasors. There is no evidence of a new factual matrix or circumstance, or a change in the mischief to be remedied, or object to be obtained, that can be inferred from any reading of the 2002 amendments.

Question #3 ***What are the consequences of the defendant's proposed interpretation? Are they consistent with accepted legal norms?***

[69] *HSIA* is a remedial or public welfare enactment, not a penal, punitive or taxation-like statute. It is not one of the kinds of legislation that historically was construed in favour of the person to whom the legislation was directed.

[70] As Elmer Driedger stated, and the Supreme Court of Canada has often repeated, there is now but one principle of interpretation.

[71] The consequences of the defendant's interpretation would be to create two classes of tortfeasors. There is no equitable basis or logical reason why tortfeasors in motor vehicle accidents should be treated any differently from all other tortfeasors in respect of liability for (as opposed to the method of recovery of) insured health-related services.

F.3 Plausibility, Efficiacy, and Acceptability

[72] Answering the three questions does not end the analysis. I am obligated to adopt an interpretation that can be justified in terms of its plausibility, efficacy and acceptability.

[73] ***Plausibility***. Departure from the ordinary meaning of a legislative text is permissible so long as the interpretation adopted is one the words can reasonably bear (Sullivan text, c. 6, page 163). The constraint is that the interpretation must be plausible. The difficult distinction, according to Sullivan, is between paraphrasing (permissible) and amending (not permissible).

[74] Courts are required to carry out an analysis to determine legislative intent or purpose, but the result does not necessarily control the decision. Determining the purpose is important, but it will not justify adopting an implausible interpretation.

[75] Subsection 18(10) cannot be read in isolation from the subsections creating the levy or the existing subsections that impose on tortfeasors and liability insurers responsibility for certain health costs. There is nothing in the legislative text from which a Court can appropriately interpret an intention to exempt motor vehicle tortfeasors and their liability insurers from responsibility for health costs for which all other tortfeasors and liability insurers are responsible.

[76] It is plausible to adopt an interpretation that recognizes the 1992 amendments as simply a change in the method or scheme by which motor vehicle tortfeasors and their insurers would pay actual health-related costs, as opposed to an intention to alter what costs they would be liable for. Subsection 18 (10) to (20) are thus related and can be read as a whole. Furthermore, it is plausible that the 2002 amendments, which expanded the kinds of recoverable insured services recoverable under the subrogation scheme, but not through the levy, were intended to mean that the new kinds of recoverable services are recoverable from motor vehicle tortfeasors under the subrogation procedure.

[77] It seems unfair and unreasonable, and therefore implausible that motor vehicle tortfeasors and insurers would get a free ride.

[78] ***Efficiacy*** is described as the promotion of the legislative intent. The legislative intent is not promoted if all other tortfeasors and liability insurers are liable for nursing home care costs, but motor vehicles tortfeasors and liability insurers are not.

[79] It seems unreasonable, unjust, possibly absurd, and certainly illogical, to exempt motor vehicle tortfeasors and their liability insurers from responsibility for a wrongful act or omission for which every other tortfeasor and liability insurer remains liable.

[80] ***Acceptability***. The interpretation must be appropriate in the sense of complying with accepted legal norms. The defendant raised the interpretative maxim of implied exclusion or "*expressio unius*." The force of the implication of an implied exclusion depends upon the strength and legitimacy of an expectation that if the legislature intended to include liability on motor vehicle insurers, it would have expressly done so. The 1992 amendments did not deal with what insured costs motor vehicle liability insurers were liable for, but only how they would discharge their liability. There was (and is) no basis for an expectation that motor vehicle tortfeasors and insurers would be exempt from liability for insured health-related costs that all other tortfeasors and insurers are liable.

[81] A second maxim advanced by the defendant is that legislation that takes away rights of its subjects should be strictly construed. In light of s. 9(5) of the *Interpretation Act*, that maxim has little or no relevance in these circumstances. This is social welfare legislation, not penal, punitive or taxation-like legislation.

[82] To interpret s. 18 in a manner consistent with the imposition of the levy scheme for motor vehicle accidents in 1992 and the expansion of insured services in 2002, or in a manner that does not exempt motor vehicle tortfeasors and their liability insurance from liability to the Province for nursing home costs, does not involve application of a strained interpretation to cure a drafting error or mistake. It is simply reading the words of 18(10) in the context of Section 18 as a whole and harmoniously with the clear scheme and object of the enactment, and the legislative intention.

G. ***Conclusion***

[83] The answer to the question the parties posed is: yes, the Province has a subrogated right pursuant to Section 18 to claim against a person insured by a policy of third-party liability insurance for nursing home costs arising from personal injuries sustained in a motor vehicle accident.

[84] Based on submissions made during oral argument, costs are awarded to the plaintiff in the amount of $1,500.00.

J.

SUPREME COURT OF NOVA SCOTIA
Citation: *Slauenwhite* v *Keizer*, 2010 NSSC 453

Date: 20101216
Docket: Hfx No 284491
Registry: Halifax

Between:

Jean Slauenwhite

Plaintiff

v.

Erna Keizer

Defendant

Judge:	The Honourable Justice Gregory M. Warner
Heard:	December 2, 2010, in Halifax, Nova Scotia
Counsel:	**Darlene Willcott**, counsel for the plaintiff Jean Slauenwhite
	Scott C. Norton, Q.C., and **Tricia Barry**, counsel for the defendant Erna Keizer

Erratum:

[1] In the last line of ¶ 6, the word “contained” should read “containing”.

[2] In the fifth line of ¶ 7, the phrase “Section 18(10) of these amendments state ...” should read “Subsection 18(10) of these amendments states ...”

[3] In the second line of ¶ 10, the phrase " ... limit, was reached, repealed and replaced ..." should read "... limit is reached, was repealed and replaced ..."

[4] In the second line of ¶ 13, the word "home-care" should read "nursing home".

[5] In the second line of ¶ 30, the hyphen in the word "in-line" on the second line should be "in line".

[6] In the first line of ¶ 45, the phrase "Subsection 18(6)" should read "s. 18(6)".

[7] In the fourth line of ¶ 45, the phrase "Section 18" should read "s. 18".

[8] In the fifth line of ¶ 46, the phrase "health costs" should read "health-related costs".

[9] In the second line of ¶ 51, the phrase "right to recover" should read "remedy".

J.