SUPREME COURT OF NOVA SCOTIA
Citation: *Holland v. Sparks*, 2018 NSSC 136

Date: 20180618
Docket: Hfx No. 447579
Registry: Halifax

Between:

Catherine Holland

Plaintiff

v.

Josh Sparks

Defendant

Decision on Question of Law

Judge: The Honourable Justice Gerald R.P. Moir

Heard: March 15, 2018, in Halifax, Nova Scotia

Last Written Submission: May 25, 2018

Counsel: Colin Bryson Q.C. and Thomas Morehouse, for the Plaintiff
Dennise Mack, for the Defendant

Moir, J. :

Introduction

[1] The plaintiff moved under Rule 12 – Question of Law for an answer to the following:

> Do the deductions from income loss and loss of earning capacity permitted by Section 113A of the *Insurance Act*, R.S.N.S. c. 231, as amended, include *Canada Pension Plan* disability benefits received by or available to a Plaintiff after the trial of the action?

This question requires me to determine whether the decision made by our Court of Appeal last year in *Tibbetts v. Murphy* 2017 NSCA 35 is only about CPP payments made before trial and, if so, whether s. 113A applies to future CPP payments.

[2] The plaintiff's brief provides a helpful summary of the legislation at issue and a summary of her position.

> 1 In 2003 the Nova Scotia Legislature enacted the *Automobile Insurance Reform Act*, colloquially known as "Bill 1". Among other things, the purpose of Bill 1 was to legislate the lowering of motor vehicle insurance premiums and fund the lowered premiums through limitations on the amounts claimable by persons injured in motor vehicle accidents. Principally, those limitations were:
>
> - The creation of a category of "minor injury", limiting claims for minor injuries to $2500 (subsequently increased to $7500, plus inflation).
> - Limiting past income loss/earnings capacity loss recovery to "net income"/"net earnings capacity" as defined by regulation.
> - Introducing deductions for certain categories of collateral benefits.
> - Increasing the discount rate to 3.5%.

> 2 This motion relates to the third limitation, the deduction of certain collateral benefits pursuant to Section 113A of the *Insurance Act*, which reads as follows:
>
> > 113A In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by all payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income-continuation benefit plan if, under the law or the plan, the provider of the benefit retains no right of subrogation.
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> 3 Canada Pension Plan ("CPP") disability benefits, which are not deductible at common law from injury claims, became deductible pursuant to this section. This deductibility of CPP benefits was confirmed in the recent decision of the Court of Appeal in *Tibbetts v. Murphy*, [2017] N.S.J. No. 147 (Tab 1). However, Section 113A provides that the deduction is for payments that "the plaintiff has received or that were available before the trial of the action". The Plaintiff submits that this limits the deduction and that CPP disability benefits received or available after the trial of the action are not deductible. This issue was not addressed in *Tibbetts* and it is submitted remains an open issue. [footnotes omitted]

[3] The defendant's brief summarizes the facts and the question this way:

> 2. The facts are fairly straightforward. Ms. Holland was involved in a motor vehicle accident on May 15, 2013. She has been in receipt of Canada Pension Plan disability benefits as a result of injuries sustained in the aforementioned accident. The question for this Court to determine is whether those CPP disability benefits Ms. Holland will receive after her trial are in any way deductible from an award of damages for loss of earnings or loss of earning capacity. It is agreed that those benefits already received are deductible.

On the basis of that statement, I am able to separate the question of whether s. 113A applies to future CPP payments from other issues in the proceeding because all of the thresholds in Rule 12.02 are met.

[4] The defendant's brief concludes:

> 58. For the foregoing reasons, the respondent respectfully submits that this Court answer in the affirmative the question put to it: namely that future CPP disability benefits are deductible under Section 113A, or alternatively, are to be paid to the defendant when received. This accords with the wording in the legislation, the legislative intent in existence when Section 113A was enacted, and the precedents already set by our Courts. Determining the question any other way would render meaningless the word "available" in Section 113A, would run afoul the legislative intent and would be a refusal to follow binding Nova Scotia Supreme Court and Appellate authority.

Does *Tibbetts v. Murphy* Apply?

[5] The Court of Appeal in *Tibbetts* considered three trial level decisions on the application of s. 113A to CPP disability payments. They are Justice Scaravelli's decision in *McKeough v. Miller* 2009 NSSC 394, Justice Coady's decision in *Hollett v. Yeager* 2014 NSSC 207, and the trial decision by Justice MacAdam in *Tibbetts v. Murphy* 2015 NSSC 280.

[6] Mr. McKeough was one of several people whose vehicles became trapped in a snow blind. Mr. Miller ran into him. Mr. McKeough was badly injured. He sued and claimed for loss of past and future income, among other damages. He also applied for, and received, CPP disability pension payments.

[7] Justice Scaravelli deducted the CPP payments from both past and future income losses (para. 62). He interpreted s. 113A as the Ontario Superior Court had interpreted somewhat similar Ontario legislation in *Meloche v. McKenzie*, [2005]

O.J. 3761 (O.S.C.). Justice Scaravelli reaffirmed his opinion that s. 113A had general application in *Dartt v. Decoste* 2018 NSSC 24.

[8] In Justice Coady's case, Mr. Hollett's vehicle was rear-ended by Mr. Yeager on a road near Prospect. Mr. Hollett was badly injured. He received CPP disability payments and he sued for loss of income capacity, both past and future.

[9] Justice Coady referred to the interpretation of the Ontario legislation provided after *McKeough* by the Court of Appeal for Ontario in *Demers v. B.R. Davidson Mining & Development Ltd.* 2012 ONCA 384. It held that CPP disability pension payments are not deducted from awards for loss of income or diminished earning capacity. On that basis, Justice Coady reached a conclusion opposite to that in *McKeough*. Section 113A did not apply to CPP payments.

[10] Ms. Tibbetts was badly injured when her motorcycle collided with Mr. Murphy's truck on a road near Livingstone Cove in Antigonish County. She received CPP disability pension benefits and sought damages for past and future loss of income or loss of earning capacity.

[11] Justice MacAdam reached the same conclusion as in *McKeough*, the opposite of *Hollett*. The CPP payments are covered by "in respect of the injuries" in s. 113A (para. 84).

[12] Ms. Tibbetts' CPP plus her Section B benefits were greater than her award for loss of past income, but Justice MacAdam saw that there may be a balance in favour of Ms. Tibbetts on her award for loss of future earning capacity.

[13] What Justice MacAdam said in his decision on this point, and what the order provided, are important to understanding the decision of our Court of Appeal, which upheld the decision and the order.

[14] Justice MacAdam wrote at para. 86:

> For the periods when the plaintiff was unable to work, CPP payments, as well as Section B payments, are to be deducted from the damages received for loss of income. In view of the fact that the Section B loss of income payments and the CPP payments exceed the past loss of income there is no sustainable claim for past loss of income. For the period after the plaintiff became able to return to work, future CPP disability payments, to the extent received by the plaintiff, are deductible from damages awarded for lost earning capacity. The plaintiff is required to remit the amount of any future disability benefit when received until the defendant is fully compensated for the amount of loss of earning capacity damages received by the plaintiff.

The award for "loss of earning capacity damages" appears to have been $40,000. See, para. 75. This was subject to a two-thirds reduction for contributory negligence. See, paras. 56 and 92.

[15] Justice MacAdam retired before an order was granted. The final order that was before the Court of Appeal had been settled by Chief Justice Kennedy. It provided for five kinds of damages "calculated as follows". The forth and fifth calculations read:

d. Past loss of income in the amount of $0.00 (being one-third of $18,113.00 less $17,413.09 in Section B payments less $470.00 per month in CPP disability Benefits);

e. Loss of earning capacity in the amount of $0 (being one-third of $40,000,00 less CPP disability benefits of $469.00 per month over 34 months).

[16] All three of these decisions dealt with both past CPP payments and future CPP payments. Two determining to reduce damages by both, and one determining not to reduce either. However, none of the three judges were required to determine whether past and future CPP payments were treated differently in s. 113A and no one interpreted the phrase "before the trial of the action".

[17] With that in mind, let us turn our attention to the Court of Appeal decision in *Tibbetts*.

[18] Justice Oland wrote the decision and Justices Fichaud and Bryson concurred. She reviewed *McKeough*, *Demers*, and *Hollett*.

[19] Justice Oland introduced her discussion of s. 113A by referring to the principle of contextual interpretation (para. 31) and the three questions in *Slauenwhite v. Keizer* 2012 NSCA 20 at para. 7. For the present decision the second and third questions, about legislative intent and consequences, are answered by the appeal decision in *Tibbetts* in ways that are binding on me.

[20] The discussion of legislative intent concludes at para. 39:

> I agree with the respondents that the Legislature intended to change the collateral benefits rule as part of a wide-reaching statutory scheme to reduce insurance premiums, and that deducting those payments achieves that intent.

And, the discussion of consequences is at para. 57:

> Deducting CPP disability benefits under s. 113A would accord with the legislative intention to reduce automobile insurance premiums. It would result in an injured person being fully compensated, but not overcompensated, for her loss of income or earning capacity. Deducting CPP disability benefits would change the collateral benefits rule by reducing tort awards to facilitate the reduction of automobile insurance premiums.

[21] It is the first question, "what is the meaning of the legislative text" (para. 7 of para. 31 of *Tibbetts*) that may distinguish *Tibbetts* from the present case.

[22] Justice Oland emphasized the phrase that concerned her the most when she quoted s. 113A (para. 24):

> **113A** In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, **the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by all payments in respect of the incident** that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income-continuation benefit plan if, under the law or the plan, the provider of the benefit retains no right of subrogation. [emphasis in original]

She said (also at para. 24) that the section "changed the collateral benefits rule by reducing damages for loss of income or earning capacity by 'all payments in respect of the incident.' " And she concluded at para. 25:

> Thus, the issue before the trial judge distilled to whether CPP disability payments were "payments in respect of the incident" which should be deducted from an award for loss of earning capacity.

[23] As Justice Oland saw it, Justice MacAdam determined this issue at the trial level on the basis "that CPP disability payments should be deducted from the award of lost past earnings" (para. 30). I emphasize the word "past".

[24] The treatment of the legislative text in the appeal decision began with a determination of "whether CPP disability payments are payments: (a) for loss of earning capacity; (b) pursuant to the laws of any jurisdiction; and (c) without any right of subrogation" (para. 41). This tracks the concluding words in the predicate of s. 113A establishing three conditions or limits on the abolition of the collateral benefits rule.

[25] The three limits are covered in para. 42. It was essential to the appellate decision. It reads:

> Section 42(2) of the *Canada Pension Plan*, R.S.C., 1985, c. C-8 (the "CPP Act") provides, among other things, that a person shall be considered disabled only if determined to have a severe and prolonged mental or physical disability. According to s. 42(2)(a)(i), a disability is only severe if the person is "incapable regularly of pursuing any substantially gainful occupation." Applicants must show that they cannot work; that is, that they have a loss of earning capacity. This means that CPP disability payments are for loss of earning capacity. Further, those payments are pursuant to the CPP Act, a law of Canada and thus pursuant to "the laws of any jurisdiction." The CPP Act does not provide for any right of subrogation. Therefore, if they are "in respect of the incident," CPP disability payments would be deducted from tort awards under s. 113A.

[26] The three limitations are not the only modifiers in the predicate of s. 113A. The verb "shall be reduced" is also modified by "in respect of the incident", which was Justice Oland's primary concern, and "that the plaintiff has received or that

were available before the trial", which was not analyzed. The latter phrase did not need analysis because lost past earnings or past capacity was at issue (para. 30), rather than lost future income or future earning capacity.

[27] The analysis of the crucial phrase, "in respect of the incident", extends from para. 43 of the appellate decision in *Tibbetts* to para. 55. It concludes at para. 56 that Justice MacAdam made no reversible error when he determined as fact that the damages at issue were in respect of the incident.

[28] The appellate decision in *Tibbetts* determined that CPP disability payments were paid in respect of the incident that underlies a claim to damages for lost income or lost earning capacity resulting from a motor vehicle injury. Also, CPP disability payments fit the three limitations: that they be for a loss of earning capacity, they are paid pursuant to laws of a jurisdiction, and they are paid without right of subrogation. The court did not have to determine, and it did not comment on, whether CPP disability payments that may be made in future are within "that the plaintiff has received or that were available before the trial of the action".

[29] The defendant drew my attention to *Ryan v. Curlew* 2018 NLSL 72. That was an extensive decision by Justice Handrigan about liability for a motor vehicle collision and serious injuries.

[30] The plaintiff had long term disability insurance. She received $3,142 a month before trial and settled the balance for $200,000. She also received $140 a week under Section B insurance and $749.05 a month in CPP disability payments.

[31] Subsection 26.5(1) of the Newfoundland and Labrador *Automobile Insurance Act* is identical to ours except it does not include the restriction "before the trial of the action" (see para. 178).

[32] Justice Handrigan reviewed *Tibbetts* at paras. 182 to 185 and applied it at para. 186 to past lost earnings. At para. 202, he reduced the award for future earning capacity by the amount settled for long term disability benefits. Either Section B and CPP payments had ceased or they were not deducted from the award for lost future earning capacity. See, paras. 202 and 225.

[33] The adoption of *Tibbetts* in *Ryan v. Curlew* embraces our appellate court's interpretation of "in respect of the incident", not "before the trial of the action". First, Newfoundland and Labrador do not have the "before the trial of the action" limitation. Second, this was not interpreted in *Tibbetts*.

[34] In Nova Scotia, the question of deducting future CPP disability payments from an award for lost future earnings or diminished future earning capacity remained to be determined after *Tibbetts*.

Does s. 113A apply to future CPP disability payments?

[35] I must follow the legislative intent of s. 113A found by *Tibbetts*. The legislature intended "to change the collateral benefits rule as part of a wide-reaching statutory scheme to reduce insurance premiums" (para. 39).

[36] I must recognize consequences as part of context in the same way as did *Tibbetts*. If s. 113A applies to future CPP disability payments the collateral benefits rule is further changed in a way that would reduce the amount of claims for losses from motor vehicle collisions, so as to allow insurance companies to reduce premiums if they wished.

[37] Keeping those in mind, we turn to the text. The arguments emphasize two elements in the text.

[38] The subject in s. 113A is "damages" and this noun is modified. It is modified by the opening phrase "In an action…". And, it is also modified by "the damages to which a plaintiff is entitled for income loss and loss of earning capacity".

[39] The predicate in the sentence begins with the main verb "shall be reduced". And, the predicate also includes the phrase "for income loss or loss of earning capacity".

[40] The defendant argues that "loss of earning capacity" contemplates a loss that will occur in future.

[41] The plaintiff emphasizes another element in s. 113A. The predicate has "shall be reduced by all payments in respect of the incident". Then follows a verbal modifier of "payments": "that the plaintiff has received or that were available". This modifier is itself modified twice. The plaintiff emphasizes the first of these: "before the trial of the action".

[42] I will deal first with "loss of earning capacity", then the predicate, especially "before the trial of the action".

Loss of Earning Capacity

[43] The defendant argues that "the use of the words 'loss of earning capacity' contemplates a loss that will occur in the future." He emphasizes "at some time in the future" in para. 22 of the reasons of Justice David Chipman in *Newman v. LaMarche*, [1994] NSJ 457 (CA):

> We must keep in mind this is not an award for loss of earnings but as distinct therefrom it is compensation for loss of earning capacity. It is awarded as part of the general damages and unlike an award for loss of earnings, it is not something that can be measured precisely. It could be compensation for a loss which may never in fact occur. All that need be established is that the earning capacity be diminished so that there is a chance that at **some time in the future** the victim will actually suffer pecuniary loss. [emphasis added]

The defendant suggests that the following passages from the reasons of Justice Cromwell in *Ryan v. Sun Life Assurance Co. of Canada* 2005 NSCA 12 support the view that loss of earning capacity refers to future losses:

> 32 In personal injury damage assessment, income loss to the point of trial or settlement is conceptually distinct from the anticipated loss of income to occur in the future. The former, as noted, is an item of special damages while the latter is an item of general damages. But the anticipated loss of income in the future is viewed as the loss of a capital asset – the present loss of the capacity to earn income in the future: see e.g., Andrews at page 251; Waddams at para. 3.710. However, in common parlance among lawyers, the term loss of income may be used somewhat loosely to refer to both past and future losses. In a discussion of a loss of income claim, it would be quite usual for lawyers to differentiate between the special damages – that is the past loss of income to the date of judgment or settlement and the general damages – that is the loss of earning capacity into the future.
>
> 33 So, while the term general damages has a strict legal meaning which includes damages for future pecuniary losses as well as all non-pecuniary losses, lawyers often use the term somewhat loosely to refer only to one or the other of these types of damages depending on the context. Similarly, the term loss of earnings strictly means the special damages claimed for income lost up to the date of trial or settlement. But in common parlance among lawyers, the term may be used, depending on the context, to refer to both past and future claims. Therefore, in interpreting the terms "general damages" and "loss of income", one must pay close attention to the context in which the terms are used.

[44] The plaintiff refers me to Justice Cromwell's reasons in *B.M.G. v. Nova Scotia (Attorney General)* 2007 NSCA 120. He said at para. 175:

> [A]n award for past and future income loss is a pecuniary award; the award is for losses that are financial in nature and may be measured in money. As Professor Waddams has pointed out, **both the pre-trial and post-trial awards** are directed to valuing the impairment of the plaintiff's earning capacity… What is being compensated is the impairment of a capital asset, the capacity to earn. This asset is valued on the basis of what the plaintiff would have earned had the injury not occurred… The difference between pre-trial and post-trial losses is that, in many cases, the pre-trial portion of the award may be measured more precisely because it is based on knowledge of what happened rather than, as is the case of the future loss, prediction about what will happen. [emphasis added]

[45] In *Newman*, at the paragraph relied upon by the defendant, Justice Chipman was reviewing a trial award for future lost income. He upheld the award. In para. 22, he distinguished loss of earnings from loss of earning capacity and he speaks of the latter as a loss to be experienced in the future. However, he does not say that past losses cannot be compensated on the basis of lost earning capacity or that future losses can never be compensated as special damages, loss of earnings.

[46] Indeed, right after para. 22 Justice Chipman quoted from the leading decision in this province on future losses, the decision of Justice Davison in *Gaudet v. Doucet*, [1991] NSJ 138 (SC, TD). Justice Chipman quoted paras. 98 and 99.

[47] Justice Davison observed at para. 98 of *Gaudet* "there are generally two ways to prove loss of future income." In some cases, "definitive findings can be made by a trial judge". These are based on a comparison of income that would have been made with any income actually made after the injury. "In these situations, actuarial evidence is helpful as a guide to the court."

[48] Paragraph 99 described the other way to prove loss of future income. In some cases the plaintiff cannot prove the extent of his income loss "and this is particularly true of young victims who have not had the opportunity to develop an

employment history". Also, "where injuries do not represent a total disability". In those cases, "the loss should be considered as the loss of an asset – a diminution in capacity to earn income in the future."

[49] *Newman* does not support the proposition that "the use of the words 'loss of earning capacity' contemplates a loss that will occur in the future". Rather, loss of income and loss of earning capacity are not inclusively referable to past loss and future loss respectively.

[50] *Ryan* interpreted subrogation provisions in a disability insurance policy. The insured was required to hold a percentage of "net recovery" in trust for the disability insurer. That phrase was defined in the policy to include "general damages, damages for loss [of] income, interest and legal costs".

[51] The remarks relied upon by the defendant were part of Justice Cromwell's description of context for interpreting the provisions of the policy. In addition to para. 33 referred to by the defendant, the discussion starting at para. 27 and ending at para. 33 makes it clear that Justice Cromwell turned to the text in question after observing that "general damages" has two different general usages. One includes "claims for earnings to be lost in the future" (para. 31) and the other "only… damages for non-pecuniary loss" (also, para. 31).

[52] *Ryan* does not stand for the proposition that loss of income earning capacity is restricted to future losses.

[53] *B.M.G.* involved a claim for income losses caused by Cesar Lalo abusing a boy. As the passage referred to by the plaintiff shows, in a case like that neither past nor future income loss can be assessed as special damages, as "income loss". Both have to be assessed as loss of earning capacity compensable as general damages.

[54] *B.M.G.* is authority for the proposition that loss of earning capacity is not restricted to future losses.

[55] As I see it, the references to income loss and loss of earning capacity in s. 113A are to different ways of compensating for loss of earnings and do not distinguish between past losses and future losses.

"Payments… the Plaintiff has Received or Were Available Before the Trial"

[56] The defendant refers to *Cox v. Carter*, [1976] O.J. 2279, which interpreted a partial abolition of the collateral benefits rule applicable in Ontario at that time. Then s. 237(2) of the *Ontario Insurance Act* provided disability insurance payments constituted "a release by the claimant of any claim against the person liable to the claimant or his insurer".

[57] The release applied "to the extent of payments made or available to the claimant". Justice Horden held that this applied to future disability payments. His reasoning included "the word [available] must include a measure of futurity". The defendant says I should treat available in our statute in the same way.

[58] Respectfully, available is an adjective. It has no tense. You have to look to an associated verb for that. For example, X was available in the past, Y is available now, and Z will be available in the future. The verb associated with available in our s. 113A is in the past tense.

[59] The plaintiff's position is that applying s. 113A to future disability payments leaves "before the trial of the action" meaningless. In oral argument, the defendant submitted that the meaning of "before the trial" is that s. 113A applies to disability payments applied for by the time of trial.

[60] Not all interpretative issues concern vocabulary. As the phrase "grammatical and ordinary sense" in Professor Driedger's formulation indicates, interpretation is about grammar, among other things. In this case, grammar including syntax.

[61] Let us start by acknowledging that we must give meaning to all words in the complex sentence that is s. 113A. Then, Newfoundland can help us with the syntax.

[62] "[E]very word used in legislation must, to the extent that it is possible, be given meaning." *Gillies Lumber Inc. v. Kubassek Holdings Ltd.*, [1999] OJ 2692 (CA). See also, Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Lexis Nexus, 2014) at p. 337 and Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto, Carswell, 2011) at pp. 293-296.

[63] Nova Scotia enacted s. 113A of the *Insurance Act* in 2003 and Newfoundland and Labrador enacted s. 26.5 of the *Automobile Insurance Act* in 2004. Compare the two.

> s. 113A In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by all payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income-continuation benefit plan if, under the law or the plan, the provider of the benefit retains no right of subrogation.
>
> s. 26.5 In an action for loss or damages from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for loss of income and loss of earning capacity shall be reduced by all payments in respect of the incident that the plaintiff has received or to which the plaintiff is entitled, for loss of income, or loss of earning capacity, under the laws of this province or another jurisdiction, or under an

> income continuation benefit plan where, under the law or the plan, the provider of the benefit retains no right of subrogation.

[64] The subject of the sentence in s.113A is “the damages to which a plaintiff is entitled” and the subject is modified in three ways “in an action etc.”, “for income loss” and “[for] loss of earning capacity”. There is only one slight difference in the subject of s. 26.5(1), “income loss” is replaced by “loss of income”.

[65] The predicate in s. 113A starts with the verbal phrase “shall be reduced”. The verb is followed by a lengthy and complex object that starts with the phrase “by all payments in respect of the incident”, the crucial phrase in *Tibbetts*. Newfoundland and Labrador have the same text as Nova Scotia for the verb and the beginning of the object in s. 26.5(1).

[66] Then the two provinces part company substantially. In Nova Scotia, “payments” is heavily modified. There are two modifying clauses, “that the plaintiff has received” and “that were available”. Note that the first is in the present perfect tense and the second, past tense. On Newfoundland and in Labrador the second modifying clause is in the present tense. We soon find out why.

[67] Both of these clauses modify “payments” and, in turn, are modified in Nova Scotia by subordinate clauses:

1) “before the trial of the action”,

2) “for income loss or loss of earning capacity” and

3) “under the laws of any jurisdiction or under an income-continuation benefit plan if…[there is]… no right of subrogation”.

With slight modifications, Newfoundland and Labrador have the second and the third. Not the first.

[68] The switch to the present tense and the absence of “before the trial of the action” made it clear that Newfoundland and Labrador included future payments in the changes it made to the collateral benefits rule.

[69] Laws are usually enacted in the present tense, and for good reasons: Côté, pp. 80-82. While the enacted commands or permissions almost have to be in the present tense, the full range of tenses are available to accurately describe fact situations, such as with conditions and exceptions: Elmer A. Driedger Q.C. *The Composition of Legislation*, 2 ed. (Ottawa, Department of Justice, 1976).

[70] The main verb in s. 113A “shall be reduced” is not in the future tense. It is present tense, indicative mood, and passive voice. The subordinate verb phrase

"were available" is past tense. It points to the past. Immediately, s. 113A tells you when in the past: "before the trial of the action".

[71] The text, especially "payments… that were available before the trial", does not extend to benefits only available after the trial.

[72] I referred to the intent in s. 113A as settled by *Tibbetts*. The consequence of the text is that the collateral benefits rule was not changed as much by our legislature as that for Newfoundland and Labrador. There would be less money available to insurers to reduce premiums. However, an intent to change the collateral benefits rule is not an intent to abolish it.

Conclusion

[73] I was satisfied on the three criteria for separating a question of law specified in Rule 12.02.

[74] My answer to the question is no, the deductions from damages for income loss and loss of earning capacity required by Section 113A of the *Insurance Act* do not include CPP disability benefits received by, or available to, a plaintiff after the trial of an action.

[75] In particular, I say that the decision of our Court of Appeal in *Tibbetts* does not cover this issue, the references in s. 113A to loss of earning capacity are not necessarily about future losses, and the correct interpretation of the text in context is that it does not apply to future payments.

[76] Counsel may write to me about costs, if they wish. I thank counsel for their assistance.

J.