<u>SUPREME COURT OF NOVA SCOTIA</u>
Citation: *MacDonald v. MacVicar*, 2018 NSSC 272

Date: 20180920
Docket: SYD No. 413101
Registry: Sydney

Between:

Kim MacDonald

Plaintiff

v.

Ralph MacVicar

Defendant

LIBRARY HEADING

Judge:	The Honourable Justice Patrick J. Murray Supplemental Reasons to decision rendered September 7, 2018. 2018 NSSC 271.
Written Decision:	September 20, 2018
Subject:	Interpretation of s. 113BA(1) of the Insurance Act and s. 2(1) of the Automobile Tort Recovery Limitation Regulations.
Issue:	Deductibility of income tax, CPP and other amounts from damage award for future loss of income. Whether an award for loss of future income should be granted net on a gross basis without deductions for income tax and other deductions as listed in the legislation?
Result:	[1] Award for future loss of income should be determined on a gross and not net basis. [2]
Cases cited:	[3] *McKeough v. Miller*, 2009 NSSC 394, [2009] N.S.J. No. 618; *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc., 2014); *Dillion v. Catelli Food Products Ltd;* In *Hill v.*

William Hill (Park Lane) Ltd.; Hornick v. Kochinsky, [2005] O.T.C. 292, [2005] O.J. No. 1629 (Ont. Sup. Ct. J.); *Tibbetts v. Murphy*, 2017 NSCA 35, [2017] N.S.J. No. 147; *Holland v. Sparks*, 2018 NSSC 136, [2018] N.S.J. No. 232; and *Gillies Lumber Inc. v. Kubassek Holdings Ltd.*, [1999] OJ No. 2692 (CA).

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Kim MacDonald

Plaintiff

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Defendant

Judge: The Honourable Justice Patrick J. Murray

Supplemental Reasons to decision rendered September 7, 2018 re: s. 118BA(1) of Insurance Act (N.S.) and s. 2(1) of Automobile Insurance Tort Recovery Limitation Regulations.

Written Decision: September 20, 2018

Counsel: Hugh McLeod, for the Plaintiff, Kim MacDonald
Lisa Richards, for the Respondent, Ralph MacVicar

By the Court:

[4] On September 11, 2018, I released my decision in *MacDonald* v. *MacVicar*, 2018 NSSC 271. In it, I indicated that I would provide supplementary reasons for my conclusion that the plaintiff's damages for loss of future income should be awarded on a gross, and not net, basis. These are those reasons.

The Common Law

[5] At common law, an award for future lost earnings is calculated on the basis of gross loss of income without deduction for income tax and other items. In Ken Cooper-Stephenson & Elizabeth Adjin-Tettey, *Personal Injury Damages in Canada*, 3rd ed. (Toronto: Thomson Reuters, 2018), the authors write at pages 390-391:

> **Damages for loss of earnings are awarded on the basis of gross before-tax earnings.** This had been affirmed by the Supreme Court of Canada in *Jennings v. Cronsberry* under the old global system, and the solution has now been approved in a brief treatment of the issue in *Cooper v. Miller*, albeit with some suggestion that there may be legislative reform. As conceded by Cory J. in *Cunningham*, "the plaintiff receives damages to replace income, but the damages, unlike the income, are not taxable". Although the lump sum itself is not taxable, any interest generated by investment is taxable as income. To that extent, as noted by McLachlin J. in *Watkins v. Olafson*, "the plaintiff is, in fact, paying tax on the award for lost earning capacity".
>
> An alternative solution would be to award damages based on "net" earnings, and to "gross-up" such an award to take account of projected tax on interest generated by the lump sum. …

[6] The question, then, is whether legislation has replaced the common law on this issue in Nova Scotia.

Interpretation of s. 113BA(1) of the *Insurance Act*

[7] Section 113BA(1) (formerly s. 113B(2)) of the *Insurance Act*, R.S.N.S. 1989, c. 231, provides:

> 113BA (1) Notwithstanding any enactment or any rule of law, but subject to subsection (6) of Section 113B and subsection (4) of Section 113E, the owner, operator or occupants of an automobile, any person present at the incident and any person who is or may be vicariously liable with respect to any of them, are not liable in an action in the Province for the following damages for income loss and loss of earning capacity from bodily injury or death arising directly or indirectly from the use or operation of the automobile:

> (a) damages for income loss suffered before the trial of the action in excess of the net income loss, as determined by regulation, suffered during that period;
>
> (b) damages for loss of earning capacity suffered after the incident and before the trial of the action in excess of the net loss of earning capacity, as determined by regulation, suffered during that period.

[8] The Automobile Insurance Tort Recovery Limitation Regulations, N.S. Reg. 182/2003 state at s. 2(1):

> 2 (1) For the purposes of Section 113BA of the *Insurance Act* and these regulations,
>
> (a) "net loss of earning capacity" means total loss of earning capacity or loss of future income less that portion of probable future income that would be paid by a plaintiff in
>
> (i) income and payroll taxes,
>
> (ii) employment insurance or similar costs,
>
> (iii) union or professional dues, and
>
> (iv) pension contributions, including Canada Pension Plan contributions;
>
> (b) "net income loss" means total income lost less that part of total income that would have been paid by a plaintiff in
>
> (i) income and payroll taxes,
>
> (ii) employment insurance or similar costs,
>
> (iii) union or professional dues, and
>
> (iv) pension contributions, including Canada Pension Plan contributions;

[9] While s. 113BA(1) has never been judicially considered, s. 113B(2), the former provision, was briefly discussed in *McKeough v. Miller*, 2009 NSSC 394, [2009] N.S.J. No. 618, in relation to the deductibility of CPP disability benefits from a loss of income claim. In analyzing that issue, Scaravelli J. noted that s. 113B and the regulations apply to past and future lost income:

> 55 Section 113B and the regulations are principally concerned with the calculation of damages for past income loss, loss or [*sic*] earning capacity **and lost future income**, in view of the deductions required to provide quantum for "net loss of earning capacity" and "net income loss." Both forms of loss are net of CPP contributions. [*Emphasis added*]

[10] In my respectful view, *s*. 113BA(1) limits damages for income loss or loss of earning capacity suffered "before the trial of the action" to the net income loss or net loss of earning capacity "suffered during that period". There is no mention of damages for future lost income or future loss of earning capacity. Section 113BA(1) indicates that "net income loss" and "net loss of earning capacity" are "as determined by regulation". The Regulation however, seeks to expand the reach of these definitions beyond the words of the legislation itself, which limits them to losses suffered "before the trial of the action".

[11] It is a presumption of statutory interpretation that statutes and regulations are meant to work together as internally consistent parts of a functioning whole. Put another way, there is a presumption against conflict between a statute and subordinate legislation. In *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc., 2014), Ruth Sullivan writes at §11.56:

> ***Statutes are paramount over subordinate legislation***. The presumption of coherence applies to regulations and by-laws as well as statutes. It is presumed that subordinate legislative provisions are meant to work together, not only with their own enabling legislation but with other Acts and other subordinate legislation. However, if conflict is unavoidable, in the absence of evidence of a contrary legislative intent, the statutory provision prevails. This was explained by La Forest J. in *Friends of Oldman River Society v. Canada (Minister of Transport)*:
>
>> Just as subordinate legislation cannot conflict with its parent legislation,… so too it cannot conflict with other Acts of Parliament,… unless a statute so authorizes…. Ordinarily, then, an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation.

[12] The question, then, is whether a true conflict exists between s. 113BA(1) of the *Insurance Act*, and s. 2(1) of the Automobile Insurance Tort Recovery Limitation Regulations. Although s. 113BA(1) refers to losses suffered before trial, I have considered whether it applies to future losses on the basis that the trial judge's task is to determine the present value of future losses or the impairment of a capital asset (the impairment having occurred at the time of the injury). It is my view however, that such an outcome would be inconsistent with the principles of statutory interpretation and the jurisprudence.

[13] As discussed above, s. 113BA(1) limits liability for damages for income loss "suffered before the trial of an action" to the "net income loss" "suffered during that period". Damages for loss of earning capacity "suffered after the incident and before the trial of the action" are limited to the "net loss of earning capacity" "suffered during that period". "Net income loss" and "net loss of earning capacity" are *"*as determined by regulation*"*.

[14] There are a several presumptions in legislative drafting that inform the proper interpretation of s. 113BA(1). First, there is the presumption against changing the common law, described at §17.5 in *Sullivan on the Construction of Statutes*:

Presumption against changing the common law. Although legislation is paramount, it is presumed that legislatures respect the common law. It is also presumed that legislatures do not intend to interfere with common law rights, to oust the jurisdiction of common law courts, or generally to change the policy of the common law. As explained in *Halsbury*, in a formulation adopted by many Canadian courts:

> Except in so far as they clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law.

These presumptions permit the courts to insist on precise and explicit direction from the legislature before accepting any change. The common law is thus shielded from inadvertent legislative encroachment.

[15] There is also the presumption of perfection, described at §8.14:

Presumed perfection. Although ordinary speakers or writers require much co-operative guesswork from their audience, a legislature is an idealized speaker. Unlike the rest of us, legislatures are presumed to always say what they mean and mean what they say. They do not make mistakes. In *Dillion v. Catelli Food Products Ltd.*, Ridell J.A. wrote:

> The modern principle is to credit the legislators with knowing what they intend to enact into law, and with a knowledge of the English language which enabled them to express their meaning.

In Spillers Ltd. v. Cardiff (Borough) Assessment Committee, Lord Hewart said:

> It ought to be the rule, and we are glad to think that it is the rule, that words are used in an Act of Parliament correctly and exactly, and not loosely and inexactly. Upon those who assert that that rule has been broken the burden of establishing their proposition lies heavily.

[16] Finally, there is the presumption against tautology. Sullivan reviews this presumption at §8.23:

Governing principle. It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. In *Hill v. William Hill (Park Lane) Ltd.*, Viscount Simons wrote:

> [A]lthough a Parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to

> what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out.

In *R. v. Proulx*, Lamer C.J. wrote:

> It is a well-accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage.

As these passages indicate, every word and provision found in a statute is supposed to have a meaning and a function. For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.

[17] Returning to s. 113BA(1), this section should not be construed as interfering with a plaintiff's common law right to damages for future lost income based on gross before-tax earnings without clear and unambiguous language. If the legislature intended for s. 113BA(1) to apply to both past and future income loss, it could have readily achieved that purpose, by omitting the words "before the trial of the action" and "suffered during that period". These words are equally superfluous if the legislature viewed "loss of earning capacity" as the impairment of a capital asset that occurs at the time of the incident (in other words, with no future/post-trial loss component).

[18] By including the words "before the trial of the action" and "suffered during that period" in both s. 113BA(1)(a) and (b), the legislature clearly intended to distinguish between past and future losses. This interpretation finds support in *Hornick v. Kochinsky*, [2005] O.T.C. 292, [2005] O.J. No. 1629 (Ont. Sup. Ct. J.). In that case, the Ontario Superior Court of Justice commented on the proper interpretation of "before the trial of the action" in s. 267.5(1) of the Ontario *Insurance Act*:

> **399 S. 267.5(1) of the *Insurance Act* deals with past-lost income. There is a distinction in the measure of loss of income "before the trial of the action" and "after the trial of the action."** It states:
>
> > 267.5(1) Despite any other Act and subject to subsection (6), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for the following damages for income loss and loss of earning capacity from bodily injury or death arising directly or indirectly from the use or operation of the automobile:
> >
> > 1. Damages for income loss suffered in the seven days after the incident.

> 2. Damages for income loss suffered more than seven days after the incident and before the trial of the action in excess of 80 per cent of the net income loss, as determined in accordance with the regulations, suffered during that period.
>
> 3. Damages for loss of earning capacity suffered after the incident and before the trial of the action in excess of 80 per cent of the net loss of earning capacity, as determined in accordance with the regulations, suffered during that period. 1996, c. 21, s. 29.

> **400 "Before the trial of the action," loss of income is determined on the basis of 80% of the net loss calculated after deducting income tax, CPP and UIC. Future loss of earning capacity is assessed on the basis of the gross loss of income without deduction for income tax and other items.** [Emphasis added]

[19] The Ontario provision uses similar language as s. 113BA(1). It dates back to 1996, while the Nova Scotia provision was introduced in 2003. Although it is not unusual for legislative drafters in one province to be influenced by the provisions adopted in another province, the difficulty in this case is that lost future income and loss of earning capacity are often treated interchangeably in Ontario, but in Nova Scotia, they are distinct: *Tibbetts v. Murphy*, 2017 NSCA 35, [2017] N.S.J. No. 147, at paras. 47-49. In the result, we are left with a statute and regulations that refer to "net loss of earning capacity", a phrase that has no meaning in Nova Scotia, where damages for loss of earning capacity are intended to compensate for loss or impairment of a capital asset, not future lost income that would have been subject to income tax.

[20] Also relevant is Justice Moir's very recent decision in *Holland v. Sparks*, 2018 NSSC 136, [2018] N.S.J. No. 232. The issue in that case was whether s. 113A of the *Insurance Act* applied to future CPP disability payments. Resolving that issue required Moir J. to consider the words, "before the trial of the action" in s. 113A. Section 113A states:

> Effect of income-continuation benefit plan
>
> 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 added*]

[21] Justice Moir began by citing the presumption against tautology:

> 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 No.

> 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.

[22] He then compared s. 113A of the Nova Scotia Act to s. 26.5 of the Newfoundland *Automobile Insurance Act*, which provides:

> 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.

[23] He noted that the Newfoundland provision, unlike the Nova Scotia provision, uses the present tense to refer to "payments in respect of the incident that the plaintiff has received or to which the plaintiff *is entitled*", and does not include the words "before the trial of the action". This observation led him to find:

> 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.
>
> …
>
> 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".** [*Emphasis added*]

[24] On the main issue, Moir J. concluded:

> 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.** [*Emphasis added*]

[25] Based on all of the foregoing, I am satisfied there is a conflict between s. 113BA(1) of the *Insurance Act*, and s. 2(1) of the Automobile Insurance Tort Recovery Limitation Regulations. Section 113BA(1) refers only to damages for income loss or loss of earning capacity suffered before the trial of the action. It has no application to damages for future income loss or future loss of earning capacity, as contemplated by the regulation. The scope of the section cannot be enlarged by subordinate legislation. As a result, the common law applies to any damages awarded for future lost income or diminished earning capacity.

[26] This concludes my supplementary decision.

Murray, J.