SUPREME COURT OF NOVA SCOTIA

Citation: Sabean v. Portage LaPrairie Mutual Insurance Company, 2013 NSSC 306

Date: 20130930
Docket: Hfx No. 329383
Registry: Halifax

Between:

Andrew Sabean and Cathy Hallett

Plaintiffs

v.

Portage LaPrairie Mutual Insurance Company

Defendant

Revised Decision:	The text of the original decision has been corrected according to the attached erratum dated December 11, 2013.
Judge:	The Honourable Justice Patrick J. Murray
Heard:	May 15th, 2013 in Halifax, Nova Scotia, by written submissions.
Written Decision:	September 30, 2013
Counsel:	Derrick Kimball, Nash Brogan and Nancy Cochrane, for the Andrew Sabean and Cathy Hallett James Chipman, Q.C., and Katie Marshall, for Portage LaPrairie Mutual Insurance Company

By the Court:

Introduction

[1] The matter before the court is largely a question of law. The issue involves Canada Pension Plan (CPP) disability benefits. Specifically, the question is whether the value of future CPP benefits payable to the Plaintiff, Andrew Sabean are deductible under "an SEF 44 claim"? Such a claim is for excess insurance protection for damages suffered by the insured, from an inadequately insured motorist.

[2] The parties have agreed that all CPP disability benefits received up to the date of trial are properly deducted. The sole issue to be decided is related to whether the amount(s) Mr. Sabean is entitled to recover in future CPP benefits is also, deductible?

[3] This issue is one of interpretation. It has been addressed in the caselaw in Nova Scotia, and in other provinces. There are as well, Supreme Court of Canada cases which have been submitted as relevant to this question.

SEF 44 Endorsement

[4] The relevant provisions of the SEF 44 Family Protection Endorsement is Article 4, which I shall set out below. This endorsement is contained in the insured's policy, with its own insurer. In other words, this claim is made under Mr. Sabean's own insurance policy with the Defendant, Portage LaPrairie Mutual.

[5] This is, generally speaking, "excess coverage"; net of other amounts received by the insured. The question here is, is the future value of CPP benefits, one of those amounts? The wording of the policy is key.

> 4. Amount payable per eligible claimant
>
> a) The amount payable under this endorsement to any eligible claimant shall be ascertained by determining the amount of damages the eligible claimant is legally entitled to recover from the inadequately insured motorist and deducting from that amount the aggregate amounts referenced to in paragraph 4(b), but in no event shall the insurer be obligated to pay an amount in excess of the limit of coverage as determined under paragraph 3 of this endorsement.
>
> b) The amount payable under this endorsement to any eligible claimant is excess to any amount actually recovered by the eligible claimant from any source (other than money payable on death under a policy of insurance) and is excess to any amounts the eligible claimant is entitled to recover (whether such entitlement is pursued or not) from:
>
> > i) The insurers of the inadequately insured motorist, and from bonds, cash deposits or other financial guarantees given on behalf of the inadequately insured motorist;

ii) The insurers of any person jointly liable with the inadequately insured motorist for the damages sustained by an injured person;

iii) The Société de l'assurance automobile due Québec;

iv) An unsatisfied judgment funder of similar plan or which would have been payable by such fund or plan had this endorsement not been in effect;

v) The uninsured motorist coverage of a motor vehicle liability policy;

vi) Any automobile accident benefits plan applicable in the jurisdiction in which the accident occurred;

vii) Any policy of insurance providing disability benefits or loss of income benefits or medical expense or rehabilitation benefits;

viii) Any Workers' Compensation Act or similar law of the jurisdiction applicable to the injury of death sustained;

ix) Any family protection coverage of a motor vehicle liability policy.

Position of the Parties

[6] The Plaintiff submits that on a plain reading of the endorsement, future CPP benefits do not fit into any of the enumerated sources listed in 4(b)(i) to (ix), of which there are nine. Of those nine the one in question is 4(b)(vii).

[7] It is the Defendant's position that CPP disability benefits properly fall within 4(b)(vii) "any policy of insurance providing disability benefits or loss of income benefits or medical expense or rehabilitation benefits". The Defendant

states, therefore, that the future value of these benefits should be deducted from any award of damages.

The Caselaw

[8] In **Doran** v. **Commercial Union Insurance (2000)**, 182 NSR (2d) (S.C.), the court held that the insurer was permitted to deduct, all disability benefits paid to the insured to the date of the "tort judgment". The court held further, that the insurer could not deduct from its liability, CPP disability benefits which the insured may be entitled to recover in future.

[9] The reasoning of the court in **Doran** is relevant as it impacts on the meaning to be taken from the later decision in **Campbell-MacIssac** v. **Deveaux**, 2004 NSCA 87, relied upon by the Defendant, Portage. In **Campbell-MacIssac**, the court found that **Doran** was decided without the benefit of the Supreme Court of Canada case in **Somersall** v. **Friedman**, 2002 SCC 59. As a result, **Doran** was overruled.

[10] Justice Wright in **Doran** considered the words "any amount actually recovered" and "is entitled to recover" in determining whether there was a distinction to be made that would allow for the deductibility of future CPP disability benefits to be paid to the Plaintiff. In addition, consideration was given to whether there was a further distinction between "past" CPP benefits actually received and those which the Plaintiff is entitled to recover prior to the judgment at trial, "but simply did not pursue or collect".

[11] Justice Wright concluded that the wording of the SEF 44 Endorsement "at the very least", created an ambiguity. That ambiguity was resolved in favour of the Plaintiff, on the basis of the "contra-preferendum" rule (See paragraph 19).

[12] One may question the benefit of discussing a decision which has been over turned, as was **Doran** in **Campbell-MacIssac**. As stated, there is value in the reasons, if only to assess the present state of the law emanating from the decisions put forth by the parties.

[13] It may be implied that **Campbell-MacIssac** in over ruling **Doran** stands for the proposition that past and future CPP benefits are included in clause 4(b)(vii).

This was not expressly stated in **Campbell-MacIssac,** nor do I think the implication naturally arises, as the decision dealt with a private policy of disability insurance. The Defendant, Portage, relies heavily on the **Campbell-MacIssac** decision.

[14] In **Campbell-MacIssac**, the Court of Appeal, decided that both past and future benefits of the Plaintiff, a dentist, payable under a long term disability policy of insurance, were to be deducted. In its ruling, the court stated at paragraph 77 as follows:

> To conclude on this point, leaving aside sums to be set off as falling into the category of "actually recovered" and about which, accordingly, there may be no dispute, I am of the opinion that upon proof of present entitlement, the words "entitled to recover" encompass both benefits payable to the insured in future, and equally to past benefits to which the insured was entitled, but which have not yet been received.

[15] At paragraph 79, the court spoke further as to timing of the legal entitlement, when considering the SEF 44 Endorsement. Present entitlement, is to be determined at the time of the accident. This was the seminal finding in the case of **Somersall** . As noted the Court of Appeal shared this point with the court in **MacNeil** v. **Cooperators General Insurance Company**, (2003) 224 DLR (4th) 85.

[16] Referring back to the reasoning in **Doran**, it was the timing of the entitlement that resulted in the ambiguity; "arising from the distinctions between present and future benefits", now since resolved by **Somersall**. The decision in **Doran**, therefore, appears to have been overruled by **Campbell-MacIssac** on that basis.

[17] A key point on the issue before me is whether **Campbell-MacIssac** overruled **Doran** on any basis other than that upon proof of present entitlement, the words "entitled to recover" encompass benefits payable to the insured in future, and equally to past benefits.

[18] In assessing this point, I refer to paragraphs 53, 54 and 55 of **Campbell-MacIssac**, where Saunders, J.A. discussed the principles and objectives of the SEF 44 Endorsement coverage.

> 53 In the recent case of Somersall v. Friedman,
>
> [2002] 3 S.C.R. 109, the Court had to make certain findings regarding the interpretation of the SEF 44. In its analysis the Court considered the nature of the coverage and its objective. The Court found the SEF 44 was a policy of indemnity, such that an insured is to receive no more and no less than full indemnity thus limiting the insurer's liability to the actual loss proved and denying an insured "profit" or overcompensation under the policy. In my opinion these are

> important principles to be applied when interpreting the whole of the SEF 44 and those of its provisions engaged in this case.
>
> 54 While the specific issue under consideration in Somersall was whether a limits agreement entered into between the injured insured claimants and the tortfeasor precluded a claim by the claimants for compensation under their SEF 44 endorsement against their own insurer, the analysis and observations of the Court are most instructive and in my opinion apposite in this appeal.
>
> 55 It has been consistently recognized by the courts that SEF 44 coverage is "last ditch" or "safety net" coverage. It is, as its own provisions make clear, "excess" insurance. The principle that SEF 44 protection is "excess" coverage only and ought not to provide a "windfall" or double recovery was recognized by Glube, C.J.S.C., (as she then was) in Myers v. Zurich Insurance Co. [1992], 118 N.S.R. (2d) 379...

[19] These principles as enunciated, explain the SEF 44 as a policy of indemnity, providing no more and no less than full indemnity. These principles were clearly reflected in the Court's decision in **Campbell-MacIssac**. The true intent of the parties in entering the "contract of insurance" was considered as instrumental in the court's interpretation, and ultimate ruling (at paragraph 78).

[20] I pause here to consider whether these principles have any impact on the type or nature of the policy of insurance. Specifically, whether they play a role in interpreting whether an SEF 44 policy would encompass the CPP disability legislation, as a policy of the (indemnity) insurance, within clause 4(b)(vii).

[21] Put another way, was the rejection of **Doran**, by the Court of Appeal in **Campbell-MacIssac**, either expressly or by implication, a statement that future CPP disability benefits are deductible under the SEF endorsement wording, in all instances?

[22] The Plaintiff submits that the policy in **Campbell-MacIssac** was a private insurance policy. Further, the issue of CPP disability benefits was not before the Court of Appeal, in **Campbell-MacIssac**. The Plaintiff submits that because **Campbell-MacIssac** did not involve the deductibility of CPP benefits, there was no dispute that the SEF endorsement properly referred to “any policy of insurance”.

[23] The Defendant Portage argues that the finding in **Campbell-MacIssac** has not been overturned in this province. Therefore, it stands and remains binding on the lower courts in Nova Scotia.

[24] For the sake of emphasis, I repeat the finding of the Court of Appeal at paragraph 78 of **Campbell-MacIssac**:

> Any other interpretation would in my view render meaningless and would not reflect the true intent of the parties when they enter into the contract of insurance.
>
> Accordingly, the earlier decision... in Doran v. Commercial Union Assurance Company... is wrongly decided and is therefore overturned.

I turn now to the meaning of "policy of insurance" within 4(b)(vii).

Policy of Insurance

[25] In **Gill** v. **Canadian Pacific Railway,** (1973) 37 DLR (3d) 229, the Supreme Court of Canada made a close comparison between the CPP and a "privately arranged insurance policy". At paragraph 30, the court stated:

> The plan, therefore, is an exact substitute for a privately arranged insurance policy made between the deceased person and an insurance company, with the benefits payable upon death or disablement of the insured. There is an element of risk to both the contributor under the Canada Pension Plan and to the Government which pays the benefits under the Plan. It may well be that a person who is a contributor may make but a few payments and then become disabled and be paid pension amounts over a long period;..

[26] In **Gill**, Spence, J.A. spoke further referring to "the social insurance now exemplified by the CPP". The court stated at paragraph 31 as follows:

> Insofar as the word "contract" is concerned, there is in result, a contract between the contributor to the CPP and the Government, which by virtue of the statute, exacts from each contributor weekly deductions from his wages.

[27] Ultimately, the court concluded that pensions payable under the CPP are "so much of the same nature as contracts of insurance, that they should be excluded from consideration when assessing damages under the provisions" of the *Families Compensation Act*, R.S.B.C. 1960, c. 138. This was due to the "remedial character" of that legislation as contained in sec. 4(4) of that *Act*.

[28] This, of course, does not mean that they should not be deducted in the case before me. It does mean, however, that the nature and character of the *Insurance Act*, R.S., c. 231, s.1, and the SEF 44 Endorsement are relevant considerations in determining whether the benefits "should" be excluded from consideration, when assessing damages.

[29] This brings to light, once again, the stated principles and objectives of "excess insurance" discussed at length in **Campbell-MacIssac**. It is reasonably clear from those principles that the SEF, as a policy of indemnity, lends support to the Defendant's position that CPP benefits should be deducted. The question is do such benefits emanate from a "policy of insurance" in respect of clause 4(b)(vii).

[30] In further support of its position, the Defendant submits the case of **Fraser** v. **Hunter Estate**, 2000 NSCA 63, in which the Nova Scotia Court of Appeal stated at paragraph 35:

> CPP benefits have for many years, been found to be a form of insurance and therefore not-deductible from an award for loss of income.

[31] In **Fraser** the Appeal Court required the trial judge to adjust the ruling to add collateral benefits which had been wrongly deducted. I refer to **Fraser** for the relevancy of the statement as to CPP benefits, that is CPP benefits are a form of insurance. It should be noted that the SEF 44 Endorsement was not before the court for consideration.

[32] The Plaintiff submits that this entire issue was considered in a comprehensive way in **Lapalme** v. **Economical**, 2010 NBCA 87. That decision is based upon the insurance scheme in place in New Brunswick.

[33] In **Lapalme** the court determined that "policy of insurance" did not include legislation providing for the payment of disability benefits (see paragraph 92). At paragraph 93 the court states:

> Finally, the more immediate context provided by Clause 4(b) of the NBEF 44 weighs against the interpretation urged by Economical. If the expression "policy

> of insurance" were designed to cover legislation providing for disability benefits, Clause 4(b)(viii) would have been unnecessary. It provides for the deduction of "amounts" the eligible claimant is entitled to recover from "any Worker's Compensation Act or similar law of the jurisdiction applicable to the injury or death sustained". Laws of that nature provide for the payment of disability benefits, yet the drafters chose to reference those laws explicitly in 4(b)'s list. It is trite law that courts must strive to give meaning to every contractual clause and word (see, for example, Theriault v. Fidelity Insurance Company of Canada, (1984), 52 N.B.R. (2d) 236, [1984] N.B.J. No. 84 (C.A.) (QL), at para. 6, and the cases cited herein above in paragraph 42).

[34] The court's decision then referred specifically to disability benefits under the CPP, in paragraph 94 as follows:

> The scheme by which disability benefits are recoverable under the Canada Pension Plan may well be a "substitute" for a disability insurance policy, "tantamount", "comparable", "similar" or "akin" to schemes under policies of disability insurance for the purposes of the collateral benefits rule in tort, but that does not morph the Canada Pension Plan into a "policy of insurance" for Clause 4(b)(vii) purposes.

[35] It is significant that the wording of the NBSEF 44 is identical to that contained in Nova Scotia and the clause 4(b)(vii), which is before this court.

[36] The court in **Lapalme** considered **Campbell- MacIssac** and distinguished it on this basis that the source for the amounts in dispute was "explicitly mentioned" in clause 4(b)(vii); namely a policy of insurance providing disability benefits.

[37] The court in **Lapalme** further considered **Somersall** v. **Freidman** and distinguished it as being specific to clause 2, and to the date for determining legal entitlement and "does not inform the interpretation of clause 4" (see paragraph 96).

[38] In **Lapalme** the court considered clause 4(b)(vii) and ruled that it does not capture disability benefits under CPP (stating at para 96) :

> Only actually recovered CPP disability benefits are deducted pursuant to clause 4.

[39] In terms of **Gill**, the court in **Lapalme** considered, **Gignac** v.**Neufeld**, 43 O.R. (3d) 741, which relied upon **Gill**. Like other cases mentioned above, **Gignac** was distinguished (at paragraph 88) on the basis that "the insured favoured principles of policy of interpretation", enumerated at paragraph 28 of **Lapalme**, had not been "brought to bear" in **Gignac**. The court in **Lapalme** stated the issue before it was not the same as in **Gignac,** where the Ontario Court of Appeal decided that the expression "policy of insurance" as defined in s. 2(1)(b) of the *Insurance Act*, R.S.O. 1990, C.I.-8, intended to include CPP disability benefits. At paragraph 44 of the **Lapalme** the court stated:

> However, the debate in this case is materially dissimilar to the one settled by Gignac v. Neufeld: the issue here is whether CPP disability benefits are provided under a policy of insurance for clause 4(b)(vii) purposes. (Emphasis added).

[40] The court noted if that if CPP disability benefits are not provided under a policy of insurance for clause 4(b)(vii) purposes, it would be unnecessary to go further and determine whether the clause "catches" any future disability benefit.

[41] In further support for its position, the Plaintiff referred to **Melanson** v. **Co-operators General Insurance Co. et al**, (1997), 192 N.B.R. (2d) 273, another New Brunswick case, which was decided much earlier than **Lapalme**, in 1997. The court in **Melanson** was required to answer the same question as in **Doran**.

[42] In **Melanson** the court of Appeal held that the future CPP disability benefits were not deductible. **Melanson,** like **Doran** which followed it, was decided before **Somersall**, on the issue of when the insured is entitled to recover. Plainly stated, it is not at the time that damages are determined, (the tort judgment), but rather at the time of the accident. This is referred to as the so-called "crystallization" effect for clause 4 purposes.

[43] In **Lapalme**, the New Brunswick Court of Appeal decided that **Melanson** rightly decided that CPP disability benefits are not caught by 4(b)(vii) of the SEF 44 or the NBEF 44, and therefore, were not deductible by the SEF 44 insurer.

[44] In was conceded by the Plaintiff in **Doran** that the wording of clause 4(b)(vii) included CPP disability benefits (See paragraph 8 of **Doran**). In the present case, the Plaintiff, Mr. Sabean makes no such concession.

[45] It is reasonably clear that in **Lapalme**, the Court of Appeal concluded that **Melanson** was rightly decided, because CPP disability benefits did not constitute a "policy of insurance" within 4(b)(vii). It is less clear that the trial judge in **Melanson** based his analysis on such a finding.

[46] Despite its mention at paragraphs 8 and 14, **Doran** was not decided on the basis of whether CPP constituted a policy of insurance, within 4(b)(vii).

[47] Consequently, in my respectful view, **Campbell's** overturning of **Doran** is neither a rejection or affirmation of the notion that CPP disability benefits constitute a policy of insurance, within 4(b)(vii).

[48] Whether the CPP disability plan is a policy of insurance was not squarely before the court in **Campbell-MacIssac**. This same question was not before the court in **Somersall**.

[49] On the contrary the issue of whether the CPP benefits constituted a policy of insurance under an SEF 44 policy with wording identical to Nova Scotia, was the issue before the court in **Lapalme**.

[50] I am not satisfied that the decision in **Campbell-MacIssac** was intended to rule explicitly that the CPP disability plan constituted a "policy of insurance" within 4(b)(vii). This is so notwithstanding the courts statement in **Hunter**, that the CPP was a "form of insurance". Deductibility was the issue in **Hunter**, but not under an SEF endorsement. According to **Lapalme**, such a distinction made a difference, and formed the basis for distinguishing **Gill**.

[51] As a universally accepted form of disability insurance, the parties did not designate CPP disability benefits specifically in the wording of the SEF 44

Endorsement, so as to remove any doubt about it being included in “any policy of insurance”as referred to therein.

[52] In conclusion, I am unable to concur that **Campbell-MacIssac** is binding with respect to the proposition put forth by the Defendant, Portage.

[53] The decision in **Lapalme** settles the question (albeit in New Brunswick), following a thorough review of most if not all of the relevant cases, including those in Nova Scotia. While it is not binding, it is nonetheless persuasive in respect of the issue before me.

[54] I am satisfied the issue in **Lapalme** (and **Melanson**) aligns itself closely with the issue presently before this court. The difference is the respective laws in each province pertaining to insurance. I have not been briefed separately or to any extent as to the wording of the various *Insurance Act(s)*, except for the wording of the policy in question, and related cases.

[55] I have conducted a rather cursory and routine review of the *Insurance Act,* R.S.N.S.,1989 c.231. of Nova Scotia and as well the *Canada Pension Plan Act*,

R.S.C., 1985, c. C-8, of Canada. I make the following observations, not intending that they will be determinative of my decision, but to provide some context.

[56] Under the *Insurance Act* of Nova Scotia, "policy of insurance" is not defined but the terms "insurance" and "policy" are defined separately. The term "policy" is defined as "the instrument evidencing a contract". The term "insurance" is defined as "the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril".

[57] The term "person" is defined as "a firm; partnership or corporation".

[58] The term "contract" is defined as "a contract of insurance and includes a policy, certificate in writing evidencing the contract". It may also include a binding oral agreement.

[59] The term "premium" is defined as "the single or periodic payment to be made for the insurance and includes dues and assessments".

[60] The term “instrument” is not defined in the *Insurance Act*. It is defined in Osborne’s Concise Legal Dictionary as “a formal legal document in writing”.

[61] I have no evidence before me as to what documentary evidence in writing constitutes or would constitute the “policy” or “contract”, within the meaning of the *Insurance Act*. The *Insurance Act* is a provincial statute. The *Canada Pension Plan Act* is a federal statute.

[62] Under the *CPP Act*, there is no definition contained therein for the terms, “insurance”, “policy”, “premium”, or “instrument”. Instead of premiums the *Act* discusses “contributions”. Instead of payments, indemnify or proceeds of insurance the *Act* discusses pensionable earnings, and pension as the form of payment, constituting the payout or indemnity which the contributor receives. The term “contract” is defined as a contract of service in the employment context. The term “instrument’ is not defined.

Decision

[63] The narrow question to be answered in this matter is whether Canada Pension Plan disability benefits are included in "any policy of insurance providing disability benefits". For the foregoing reasons, I am persuaded that the interpretation given to clause 4(b)(vii) by the court in **Lapalme** is to be preferred, as that court had before it, that exact issue. With respect, the authorities cited by the Defendant, and in particular, the decisions of **Campbell-MacIssac** and **MacNeil v. Co-Operators General Insurance Co.** , were not exactly on point.

[64] In the result, I respectfully concur with the position of the Plaintiff and reject the position of the Defendant, in ruling that the amount for future CPP disability benefits of Mr. Sabean shall not be deducted from the amount payable in damages pursuant to clause 4(b)(vii) of the SEF 44 claim, in this matter.

[65] In the further result, I find that the Plaintiff Andrew Sabean has, on the balance of probabilities, established his entitlement to the award of damages, without deducting future CPP disability benefits, the CPP not being a policy of insurance within the said clause 4(b)(vii).

[66] Order accordingly.

Murray, J.

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ERRATUM

Revised Decision:	The text of the original decision has been corrected according to the erratum below dated December 11, 2013
Judge:	The Honourable Justice Patrick J. Murray
Heard:	May 15th, 2013 in Halifax, Nova Scotia, by written submissions.
Written Decision:	September 30, 2013
Counsel:	Derrick Kimball, Nash Brogan and Nancy Cochrane, for the Andrew Sabean and Cathy Hallett James Chipman, Q.C., and Katie Marshall, for Portage LaPrairie Mutual Insurance Company

Erratum:

Paragraph 45
The word "constituted" should be replaced by the word "constitute".

Paragraph 49
The case name "Lepalme" shall be replaced by the name "Lapalme".

Paragraph 61
The word "that" shall be deleted.