

IN THE SUPREME COURT OF NOVA SCOTIA

**Citation:** Nova Scotia (Public Service) v. Warner, 2006 NSSC 160

**Date:** 20060518

**Docket:** SH 263483

**Registry:** Halifax

**Between:**

Trustees of the Nova Scotia Public Service  
Long Term Disability Plan Trust Fund

Applicant

v.

Karen Warner

Respondent

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**DECISION**

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**Judge:** The Honourable Justice J. Edward Scanlan

**Heard:** May 18, 2006, in Halifax, Nova Scotia

**Written Decision:** June 19, 2006

**Counsel:** Colin D. Bryson, for the applicant  
Josh Martin for Jamie MacGillivray, for the Respondent

**By the Court:**

[1] This is an application wherein the Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund (“the Fund”) asks the court to allow them to recover all or part of the diminished earnings capacity award in a civil action against a third party. (See: **Warner v. 2331653 N.S. Ltd.** (2004), 226 N.S.R. (2d) 28) Under the heading **Loss of Future Earning Capacity** Justice MacAdam said at para. 89:

In awarding an amount for loss of future income, more accurately described in the present circumstances as for a diminution of future earning capacity. I have taken into account the various related losses associated with a loss of future income on future earning capacity.

I am satisfied Justice MacAdam’s reference to a diminution of future earnings capacity is a direct reference to probable loss of future earnings.

[2] The parties have provided an agreed statement of facts in which they agree that the net amount to be used in terms of the possible recovery by the “Fund” is \$77,212. The question is whether that recovery represents “earnings recovered” within the provisions of the plan. I refer specifically to para. **9 (8)**:

9. The benefit to which an employee is entitled under this section shall be reduced by:

(8) the amount of **earnings recovered** through a legally enforceable cause of action against some other person or corporation. (My emphasis added)

[3] If the diminished earnings capacity award is “earnings recovered” the “Fund” is entitled, pursuant to the subrogation provisions of 16 of the plan, to receive monies which are recovered from a third party. Section 16 of the plan reads as follows:

- (1) Where a long-term disability benefit is payable for an injury or illness for which any third party is, or may be, legally liable, the Trustees will be subrogated to all the rights and remedies of the employee against the third party, to recover damages in respect of the injury or death, or may maintain an action in the name of such employee against any person against whom such an action lies, and any amount recovered by the Trustees shall be applied to:
  - (a) payment of the costs actually incurred in respect of the action, and reimbursement to the Trustee of any disability benefits paid, and the balance, if any, shall be paid to the employee whose rights were subrogated ;
  - (b) any settlement or release does not bar the rights of the Trustee under subsection (1) unless the Trustees have concurred therein;
  - (c) an employee will fully cooperate with the Trustees in order to allow the Trustees to do what is reasonably necessary to assert the Trustees’ rights to subrogate.

[4] The respondent employee argues that the *contra proferentem* rule should apply, and the plan should be interpreted as against the Trustee. This is a plan that is worked out as between the union and the employer. There is nothing to suggest that any one party drafted the contract or was in a position of dominance in the negotiation process. This was not a situation where a single employee negotiated with an employer and then the employer prepared the resulting contract. This is a joint agreement worked out by an employer and a union and the *contra proferentem* has no application here.

[5] The parties have provided an agreed statement of facts as follows:

1. Karen Warner, formerly known as Karen Murphy, is an individual resident in Lower Sackville, Nova Scotia.
2. The Nova Scotia Public Service Long Term Disability Plan (the "LTD Plan") is a long term disability plan established as a result of collective negotiations between the Province of Nova Scotia and the Nova Scotia Government Employees Union (the "NSGEU"), and forms part of the employee benefits available to members of the NSGEU pursuant to their collective agreements with the Province. By virtue of her employment as a "Clerk 3" with the Nova Scotia Department of Transportation and Public Works, Ms. Warner was covered under the Civil Service Master Agreement between the NSGEU and the Province and insured under the LTD Plan. A copy of the said Master Agreement, with the LTD Plan attached to it as Appendix 9, is attached hereto as Schedule 1q.

3. The Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund administer the LTD Plan. The Trustees are a board of eleven (formerly eight) trustees appointed to administer the LTD Plan pursuant to a trust agreement between the Province and the NSGEU, ~~a copy of which is attached hereto as Schedule 2.~~ (The Trust Agreement in effect from 1985 to 2004 ~~is attached as Schedule 3~~) Five of the Trustees are appointed by the Province, four by the NSGEU, one by the Canadian Union of Public Employees and one (the Chairman) jointly appointed by the Province and the NSGEU.
  
4. On November 17, 1996, Ms. Warner was injured as a result of an accident (the "Bulk Barn Accident") that occurred at the Bulk Barn Food Store in Lower Sackville, owned and/or operated by 2331653 Nova Scotia Limited and Bulk Barn Foods Limited (hereafter referred to as the "Bulk Barn").
  
5. Ms. Warner stopped work at her job with the Province in June 2001 as a result of the combination of the injury sustained by her in the Bulk Barn Accident and another accident that occurred in June 2001, and has not worked since. Ms. Warner became disabled (as defined in the LTD Plan) effective October 31, 2001, and has been disabled (as defined in the LTD Plan) since that time.
  
6. Ms. Warner commenced a legal action in 1997 in the Supreme Court of Nova Scotia against the Bulk Barn, claiming damages for the injury sustained by her from the Bulk Barn Accident. The action was tried in April 2004, with the Court rendering a decision on July 14, 2004, awarding Ms. Warner the following:

General damages	\$ 75,000.00
Past Wage loss (from November 21, 2001 to October 31, 2002)	*
Loss of Earnings Capacity	125,000.00
Loss of Valuable Services	30,000.00
Special damages	3,580.00**

\*Amount to be determined by the parties.

\*\*Less the cost of certain medical prescriptions

~~A copy of the trial decision is attached hereto as Appendix 2~~

7. Following the trial decision, Ms. Warner and the Bulk Barn quantified the past wage loss and special damages and negotiated the amount of costs, interest and disbursements owing to Ms. Warner as a result of the decision, with Ms. Warner and the Bulk Barn settling on a total award of \$298,000.00, consisting of the following:

General damages	\$ 75,000.00
Past Wage loss	\$ 31,275.40
Interest on Past Wage Loss	3,648.60
Loss of Earnings Capacity	125,000.00
Loss of Valuable Services	30,000.00
Special damages, with interest	4,117.00
Costs	12,955.00
Disbursements	<u>16,004.00</u>
TOTAL	\$ 298,000.00

8. Ms. Warner's legal fees and disbursements incurred in connection with pursuing her claim against the Bulk Barn were \$131,812.89.
9. Ms. Warner received \$13,451.99 in long term disability benefits pursuant to the LTD Plan for the period from November 1, 2001 to October 31, 2002, that being the same period for which she was awarded past income loss in the decision in the claim against the Bulk Barn. Ms. Warner and the Trustees agreed that, pursuant to the subrogation provision at paragraph 16 of the LTD Plan, Ms. Warner was to reimburse to the Trustees this \$13,451.99, plus interest at the rate paid by the Bulk Barn. Ms. Warner has paid this amount to the Trustees.
10. The Trustees and Ms. Warner have been unable to agree on how much, if any, of the \$125,000.00 recovered by Ms. Warner from the Bulk Barn for lost earnings capacity is available to be used by the Trustees pursuant to paragraph 9(8) of the LTD Plan as an offset to LTD benefits payable to Ms. Warner from July 15, 2004, the date of the trial decision in the Bulk Barn claim.

*(Note: various schedules as crossed out are not attached to this decision)*

[6] I am satisfied the diminution in future earnings capacity represents “earnings” which likely will be lost in the future. Those earnings fall within the provisions of s. 9(8) of the plan. In some cases it may be that the trial judge may be able to determine the period for which losses are likely to be incurred in the future. For example the trier of fact may find that a disability, partial or complete, will resolve in a given number of years. If that were the case a recovery schedule could be implemented for the “Fund” to recover pursuant to the terms of the plan. A difficulty I have in relation to this case is that, it is not clear from the decision of Justice MacAdam as to whether the diminished earnings capacity award relates to any specific period of time. I find no deficiency in Justice MacAdam’s decision. One would expect that in the vast majority of cases diminished earning capacity awards would be for an indefinite time frame. That does not change the fact that the award is intended to represent probable loses in earnings during the plaintiff’s career. The mere fact that it is difficult to calculate loss on a per month or per year basis should not be used as the basis to allow the employee to enjoy the benefit of a double recovery. It is clear the parties to the plan intended to cover the employee as against loss of income. If the employee receives that income from a third party there is in fact no loss. In saying this I am aware of the comments of Justice

Chipman in **Newman (Guardian as litem of) v. LaMarche** (NSCA) [1994] N.S.J.

No. 457 at paragraph 22:

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. ...

[7] Justice Chipman's comments reference the nature of the award in that they are difficult to measure precisely and in fact the losses may never occur. That does not however alter the fact that the amount awarded is directly linked to anticipated loss of earnings. If the court was not satisfied there was a probable loss, or diminishment of future earnings through loss of earning capacity, there could not be an award under the heading of diminished earnings capacity. The plaintiff would not have met the burden of proving a loss under that head of damages. For the purpose of this application the difficulty is not in the characterization of the loss as relating to "earnings". The difficulty for the applicant "Fund" is calculating the recovery of earnings by the employee hence the triggering of the subrogation right for the "Fund"



[8] When a court reviews a claim for diminished earnings capacity the courts' acknowledge that in many cases, it is nothing more than an educated guess based on the evidence as to what the losses may be over the career or lifetime of the individual. It is not necessary to say with precision this is a loss of earnings over a specific period. That, however, does not change the nature of the recovery.

[9] In some cases the court has noted the loss relates to loss of a "capital asset" as opposed to loss of earnings. In this regard Justice Freeman noted in **Webb v. Exide Electronics Ltd.** [1999] N.S.J. No. 228;

... it can be compensated for even when it is not accompanied by reduction in income.. This can occur when an injured person is able to return to his or her job, but with a disability that restricts the scope of other employment that might become available in the future.

[10] This actually goes to the heart of the long term disability scheme in the case at hand. If at some time in the future the employee does go back to work the Long Term Disability benefits (LTD) will end. In the mean time she is receiving both the long term disability benefits and monies related to diminished earning capacity. That would result in a double recover for loss of earnings.

[11] The issue then is whether the amount should be recovered by the “Fund” through an immediate deduction of the LTD payments. If that were the case the “Fund” would not have to pay any LTD payments until \$77,212. dollars is recovered.

[12] I, again, refer to the decision of Justice Chipman where he says an award for diminished earning capacity could be compensation for a loss which may never in fact occur. In this case as pointed out by counsel for the applicant LTD benefits are potentially payable for the entire period up to retirement age at 65. It would be inappropriate for the “Fund” to recover for any period of time when the employee might return to work. The more appropriate way to calculate the amounts that are recovered as earnings is to pro-rate the \$77,212 over the entire period from the date of recovery to the end of the employees period of entitlement to LTD. That is to the age of 65. The appropriate way to calculate the LTD deduction is to take the \$77,212. divided by the 22 plus or minus years of eligibility and deduct monthly from the LTD benefits payable.

[13] There may be other cases in which the trial judge could in fact find that the diminished earnings capacity relates more to a specific time frame in an

employee's career. For example it may be that a decision based on medical opinions suggests that the diminished earning capacity will likely result from things, for example, such as early onset of Osteo-arthritis. In so doing the court may say that the diminished earning capacity relates more to a specific period. If that were the case the "fund" would only be entitled to a deduction for that period of time, not over the entire period in which benefits would be payable. In this case, in the absence of any clear direction as to when the loss will likely be incurred, I am satisfied the "fund" is entitled to their prorated share based on a career to age 65.

[14] If at any time the employee is able to go back to work then the LTD benefits come to an end and the "Fund" will no longer be able to recover from any portion of the diminished earning capacity amounts recovered. It will not then be a matter of the employee getting double recovery from the insurance plan. It is that double recovery from a wage loss plan that must be guarded against when considering the LTD scheme.

**Costs:**

This case involves a rather novel issue. That must be taken into account on the issue of costs. It is an issue that is of interest and importance to the Trust Fund moving forward in other cases. I should think they would keep that in mind in relation to costs. Each party is responsible for their own costs.

**J.**