NOVA SCOTIA COURT OF APPEAL
Citation: *Iannetti v. Poulain*, 2016 NSCA 93

Date: 20161221
Docket: CA 445779
Registry: Halifax

Between:

David J. Iannetti

Appellant

v.

George Poulain

Respondent

Judges:	Beveridge, Farrar and Van den Eynden, JJ.A.
Appeal Heard:	September 14, 2016, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Farrar, J.A.
Counsel:	Augustus Richardson, Q.C., for the appellant Janus Siebrits, for the respondent

Reasons for judgment:

Introduction

[1] The appellant David Iannetti is a solicitor practicing in Sydney, Nova Scotia. In a decision dated June 26, 2015 Justice Peter Rosinski found that Mr. Iannetti was negligent in failing to provide advice to the respondent George Poulain with respect to loss of income benefits under the Section B provisions of the standard Nova Scotia motor vehicle policy. He further found that Mr. Iannetti's negligence caused the plaintiff to suffer a loss in the amount of approximately $113,000 for loss of weekly indemnity benefits. (reported 2015 NSSC 181)

[2] Mr. Iannetti appeals. He does not argue that the trial judge erred in determining that he breached the standard of care he owed to Mr. Poulain. Rather, he argues that his breach did not cause Mr. Poulain a loss.

[3] For the reasons that follow, I would allow the appeal, set aside the damages awarded at trial (with the exception of nominal damages in the amount of $1,000). I would also order that the amount of costs for legal fees awarded to Mr. Poulain at trial, be reduced to $10,000. However, I would not order the return of the disbursements incurred by the respondent at trial in the amount of $12,234.28. Finally, I would award costs to the appellant in the amount of $4,000 on this appeal.

Background

[4] On June 6, 2001, Mr. Poulain, who was 49 years old at the time, was a passenger in a motor vehicle which was t-boned by another car that had run a stop sign.

[5] As a result of the motor vehicle accident, Mr. Poulain was entitled to seek redress from the driver of the at-fault vehicle. He was also entitled to receive from the insurer of the car in which he was a passenger, what are commonly known as Section B accident benefits. Section B allows for medical and rehabilitation benefits to a limit of $25,000 and weekly indemnity benefits for loss of income provided certain conditions are satisfied.

[6] Throughout the proceedings below, and before us, the at-fault driver is referred to as the Section A (liability) claim. This is a bit of a misnomer as the availability of insurance is irrelevant to the liability of the at-fault driver. It also

leaves the impression that the Section A and Section B coverage arise out of the same policy when they do not. However, with this clarification and for consistency I will also refer to the at-fault driver as the Section A claim.

[7] Weekly indemnification benefits are divided into two categories which the trial judge referred to as Stage One and Stage Two benefits. I will do the same.

[8] At Stage One an insured is entitled to weekly indemnity benefits if, as a result of the injuries sustained in the accident, he or she is unable to work at their own occupation. Stage One benefits are available for two years following the accident; in this case June 6, 2001.

[9] Stage Two benefits are available to insureds after the two year anniversary of the accident where "it has been established that such injury continuously prevents such person from engaging in any occupation or employment for which he is reasonably suited by education, training or experience".

[10] A few days following the accident Mr. Poulain retained Mr. Iannetti to represent him on the Section A claim against the driver of the other motor vehicle. The trial judge found that the two agreed that Mr. Iannetti would handle the Section A claim and that Mr. Poulain "would be solely responsible to handle the Section B claim." (Trial decision, ¶ 32.)

[11] Mr. Poulain began to receive Stage One benefits of $140 per week from the Section B insurer, CGU Insurance Company of Canada. He also received medical and rehabilitation payments from CGU.

[12] Around September 15, 2002, Mr. Poulain had a conversation with Kathy Brace, an adjuster with CGU handling his Section B claim, where she offered a settlement of his Section B claim. Ms. Brace proposed to pay Mr. Poulain the remaining balance of the medical and rehabilitation benefits and the balance of the Stage One benefits to June 6, 2003 in return for a full and final release. Mr. Poulain inquired about the weekly indemnity benefits. He was advised by Ms. Brace that if he signed the release that he would be entitled to no further payments.

[13] Although not referred to by the trial judge, Mr. Poulain said that he had been told by Ms. Brace that his Section B weekly indemnity benefits would be cut off on June 6, 2003, the second anniversary of the motor vehicle accident even if settlement was not reached.

[14] The trial judge found that Mr. Poulain's discussion with Ms. Brace left him with the mistaken impression that his Section B income replacement benefits were limited in duration to two years after the accident and that the total income replacement benefits and medical rehabilitation benefits were limited to $25,000 also within that time period. (Trial decision, ¶ 76.)

[15] Before signing the release Mr. Poulain spoke to Mr. Iannetti about the proposed settlement. The trial judge made the following finding with respect to that conversation:

> [86] In summary, I conclude on a balance of probabilities that Mr. Poulain spoke to Mr. Iannetti only once, to get his advice about whether to accept the Section B insurer's settlement proposal, and that he specifically asked, "What will happen if I sign the release?", or words to that effect. I conclude that Mr. Iannetti responded: "George, if you sign, you will not receive another penny", or words to that effect.

[16] On September 23, 2002 Mr. Poulain settled the Section B claim with CGU for a lump sum payment of $12,280. The payment was composed of two cheques, one in the amount of $5,000, being the balance of the medical and rehabilitation benefits, and one in the amount of $7,280, being the balance of his Section B, Stage One benefits to June 6, 2003.

[17] In return for the settlement, Mr. Poulain signed a release in favour of CGU releasing them from "any and all actions, causes of actions, claims and demands for Accident Benefits including PAST, PRESENT AND FUTURE CLAIMS for medical and funeral expenses and death benefits and loss of income benefits". He also executed an acknowledgement that the loss of income benefits was a benefit that compensates the insured person for lost income.

[18] In the meantime, Mr. Poulain also applied for CPP disability benefits. His claim for those benefits was denied on November 19, 2002.

[19] By January 2003, Mr. Poulain had grown dissatisfied with Mr. Iannetti's representation of him in the Section A claim. In or about the middle of January 2003 he discharged Mr. Iannetti as his counsel and retained the firm of McGillivray Law Office Inc. and, in particular, Jamie McGillivray to represent him. At this time, the action relating to the Section A claim had not yet been commenced.

[20] In June 2003 Mr. Poulain submitted a second CPP disability claim. That claim was rejected in September 2003.

[21] In October 2003, Mr. Poulain provided Mr. McGillivray with a detailed account of his discussions with Ms. Brace and Mr. Iannetti. By that point, he had learned that he may have been entitled to ongoing loss of income benefits if he had not signed the release. He said that he had not been informed of this by either Ms. Brace or Mr. Iannetti.

[22] In November 2003, Mr. Poulain requested a review of the denial of his CPP claim.

[23] Although not altogether clear on the record as to the exact date, Mr. McGillivray commenced the action on the Section A claim at some point after his retainer in 2003.

[24] Mr. Poulain's CPP claim was allowed in the summer of 2006. He was held to have been disabled within the CPP disability provisions as of August 2002 and was entitled to CPP benefits retroactive to that date.

[25] A mediation of the Section A claim took place on August 24, 2006. The claim was settled for $160,000 all-inclusive (plus the cost of the mediation). The settlement was not broken down into general damages, special damages, nor loss of income (past or future). It was simply expressed as a lump sum.

[26] On October 18, 2006, Mr. Poulain was advised that his total retroactive CPP benefit would be $28,630.70 and that $23,770 of that amount would be paid by way of reimbursement to the Department of Community Services with respect to Social Services benefits that he received between January 2003 and October 2006.

[27] On November 20, 2007, Mr. Poulain commenced an action against Mr. Iannetti alleging that Mr. Iannetti was negligent in the advice that he gave to Mr. Poulain prior to Mr. Poulain settling the Section B claim.

[28] The matter originally went to trial before the Honourable Justice Arthur W. D. Pickup. At the end of the plaintiff's case, the defendant made a motion for a nonsuit which was granted. That decision was appealed and a new trial ordered (*Poulain v. Iannetti*, 2013 NSCA 10).

[29] In his prehearing brief on the retrial, Mr. Poulain alleged that as a result of the defendant's negligence he was prejudiced in two ways: 1) he lost the right to

continue to draw Section B benefits for his life expectancy; and 2) in his negotiations on the Section A claim. He alleged that he had to accept a settlement with the Section A insurer at a discount in recognition that the defendant could receive full credit for the weekly indemnity benefits Mr. Poulain ought to have received but for the settlement.

[30] In his statement of claim he only claimed the value of the Section B benefits to age 65. However, in his pretrial brief he expanded the claim to include the value of the Section B benefits retroactive to the date of settlement and the present value of the Section B weekly indemnity benefits to the age of 84 (his purported life expectancy), plus prejudgment interest and costs.

[31] The retrial before Justice Peter Rosinski resulted in the plaintiff being awarded the damages in the amount of approximately $113,000 for loss of weekly indemnity benefits.

Issues

[32] Mr. Iannetti raises 10 issues in his Notice of Appeal. I would restate the issues and address only three in disposing of the appeal. They are:

1. Did the trial judge err in finding that the negligence of Mr. Iannetti caused a loss to Mr. Poulain?
2. Did the trial judge err in his calculation of the damages owing to Mr. Poulain?
3. Did the trial judge err in concluding that Mr. Poulain was eligible to receive Section B benefits?

Standard of Review

[33] The standard of review on causation is well known. A trial judge's identification of the test for causation is reviewed on a correctness standard. However, his application of that test to the facts is reviewed on a palpable and overriding standard (*Awalt v. Blanchard*, 2013 NSCA 11, ¶ 9, *Ediger v. Johnston*, 2013 SCC 18, ¶ 29).

[34] On the second issue, we will not alter a damage award made at trial unless there is no evidence on which the trial judge could have reached the conclusion that he did, or he proceeded upon a mistaken or wrong principle, or the result at

trial was wholly erroneous (*Halifax (Regional Municipality) v. Willis*, 2010 NSCA 76, ¶45).

[35] On the third issue, to the extent it engages a question of law, the test is correctness. On issues of fact, or mixed law and fact, it is palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33).

Analysis

[36] In *Clements v. Clements*, 2012 SCC 32, the Supreme Court of Canada reviewed the test for causation and concluded that a plaintiff must establish "but for" the negligent act the loss would not have been suffered:

> [46] The foregoing discussion leads me to the following conclusions as to the present state of the law in Canada:
>
> (1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. …
>
> [Emphasis added]

[37] The trial judge in this instance embarked on two calculations of damages relating to the breach of the standard of care of Mr. Iannetti. The first being a calculation of damages for the loss of Mr. Poulain's right of action against CGU for Section B benefits. That calculation resulted in an award of damages for the past and future loss of Stage Two benefits to Mr. Poulain to the age of 84. The second analysis related to the damages Mr. Poulain suffered as a result of being prejudiced in his negotiations with the Section A claim. With respect to the latter, he found that there were only nominal damages.

[38] As I will explain, in my view the trial judge failed to properly apply the "but for" test to the unique circumstances of this case.

[39] At this point some further explanation of the interaction between Section B and Section A is necessary. The simplest way to explain it is to describe what may have occurred if Mr. Iannetti had not been negligent and Mr. Poulain had not signed the release. If CGU discontinued benefits at the two-year mark, Mr. Poulain would have a choice of either commencing an action against CGU for the Section B benefits or he could simply choose to proceed against the Section A insurer for the totality of his loss of income. If he chose to proceed against only

the Section A insurer, the Section A insurer would not be entitled to deduct any amount for Stage Two benefits because Mr. Poulain would not be eligible to receive them. (See for example *MacKay v. Rovers*, [1987] N.S.J. No. 279 (C.A.) and *MacDougall v. Edmunds*, [1988] N.S.J. No. 85 (C.A.)).

[40] It is only if he is unable to recover those damages from the Section A insurer as a result of signing the release that the negligence of Mr. Iannetti becomes relevant.

[41] As a result of signing the release, Mr. Poulain opened up the argument by the Section A insurer that it could reduce the amount of its damage award or settlement to Mr. Poulain by the amount he was eligible to receive from the Section B insurer.

[42] With this backdrop in mind, I will turn now to the trial judge's analysis and conclusions.

[43] The trial judge proceeded on the assumption that if he found that there was a breach of the standard of care it gave rise to two distinct claims for damages—one relating to the amounts Mr. Poulain could have received from the Section B insurer had he not signed the release and the second being the extent to which he was prejudiced in his negotiations or settlement with the Section A insurer.

[44] This can be seen in two passages from the decision. Prior to doing the first damage calculation the trial judge says the following:

> [108] I do not accept that Mr. Poulain would have agreed to sign the release in any event, even if he was properly informed of what he was giving up. I conclude that, since Mr. Iannetti's negligence caused Mr. Poulain to lose his right of action for stage two benefits against the Section B insurer it is "reasonable that the proper measure of damages would be what the court would have assessed if the plaintiff's action had gone to trial": per Hallett, J.A. in *Rose v. Mitton*, (1994) 122[sic] N.S.R. (2d) 99 (C.A.), …
>
> [Emphasis added]

[45] I make two comments with respect to the trial judge's reliance on *Rose v. Mitton*. First, Stage Two benefits are income replacement benefits and although Mr. Poulain gave up his right of action for Stage Two benefits against the insurer, he did not lose his right of action to claim for loss of income against the Section A insurer. Secondly, Justice Hallett's comments are taken somewhat out of context. *Rose v. Mitton* involved negligence on the part of the solicitor settling the claim.

The issue was when was the appropriate time to assess damages. Jones, J.A., with whom Hart, J.A. concurred, concluded that the appropriate time to assess damages was at the time the solicitor settled the claim. Hallett, J.A. concurred in the result but questioned whether the right question had been asked of the trial judge. He said the following:

> [24] I agree with Mr. Justice Jones that the appeal should be dismissed. Given the question the chambers judge was asked to answer I agree that he correctly answered the question as to the time the damages are to be assessed; that was the only issue before us. However, he may not have been asked the right question.
>
> [25] It seems to me that in cases of this nature where the alleged error is that the solicitor settled for too low an amount the damages should be assessed as the difference between the amount a reasonably competent solicitor would have recommended as a settlement figure considering all the circumstances existing at the time and what the defendant's solicitor recommended as an appropriate settlement (assuming the former is greater than the latter). …
>
> [26] The decisions in all the cases cited in Mr. Justice Jones' opinion, with the exception of **Riggins**, deal with situations where the solicitor's negligence caused the loss of the plaintiff's cause of action. In such cases it is reasonable that the proper measure of damages would be what the court would have assessed if the plaintiff's action had gone to trial.
>
> [Emphasis added]

[46] Justice Hallett felt that the question to be considered was what was the difference between what a competent solicitor recommended as settlement and the amount actually received. Applying that rationale to the circumstances of this case, the damages are the difference between the reasonable amount which Mr. Poulain settled for with the Section A insurer and the amount he could have received had Mr. Iannetti not been negligent.

[47] Returning to the trial judge's reasons in this case, in the summary portion of his decision he again repeats his view that there were two avenues of recovery by Mr. Poulain against Mr. Iannetti:

> [166] I am satisfied that Mr. Iannetti was negligent; that negligence caused an ill-informed Mr. Poulain to sign a release with the Section B insurer waiving any entitlement to stage two Section B benefits; placing him in an arguably disadvantaged position once he entered settlement negotiations with the tortfeasor/Section A insurer.
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> [167] Regarding the former, I am satisfied that Mr. Poulain would have been successful in a claim for stage two Section B benefits had the trial been held in

> August 2006, and the damages flowing from Mr. Iannetti's negligence were the loss of those stage two Section B benefits (weekly indemnity) from June 6, 2003 to his 84th birthday. Mr. Poulain lost $16.70 weekly for 627 weeks (from June 6, 2003, to June 27, 2015), to which a 2.5% pre-judgment interest rate ought to be applied. He also lost the net present value of the $16.70 weekly indemnity from June 27, 2015, until his CPP disability benefits are scheduled to cease at age 65, i.e. October 23, 2016; and a $140 weekly indemnity from October 24, 2016, to his actuarially estimated notional date of death (October 23, 2035). It is appropriate to apply a 5% reduction for contingencies to that amount.
>
> [168] Regarding the latter, I am unable to ascertain the amount of damages flowing from Mr. Iannetti's negligence *vis-à-vis* the Section A settlement, therefore, I award nominal damages of $1,000.
>
> [Emphasis added]

[48] As can be seen from these passages, the trial judge jumps to the conclusion that because of Mr. Iannetti's negligence, it automatically sounded in a loss based on what Mr. Poulain could have received from the Section B insurer.

[49] With respect, the trial judge misses the point. There can be only one loss of income claim. Mr. Poulain's damages arose out of the motor vehicle accident in June 2001. He had at that point a cause of action against the defendant driver for his injuries and for any loss of income attributable to those injuries. Mr. Poulain could recover those damages from the Section A insurer or a combination of Section A and Section B. That was the cause of action that was relevant for the trial judge's consideration on causation.

[50] The only way in which Mr. Poulain could suffer a loss is the extent to which he was not able to recover from the Section A insurer. To put it another way, he was entitled to claim the full amount of his past loss of income and future loss of income from the Section A claim. The Section A insurer is entitled to deduct the amounts he received or otherwise would have been entitled to receive on the Section B claim. Mr. Poulain's loss, if any, would only be the difference between what he would otherwise have received from the Section A insurer for loss of income and the amount by which the Section A insurer reduced the loss of income claim after deducting payments he was entitled to receive from the Section B insurer.

[51] The trial judge failed to ask himself the question "but for" the negligence of Mr. Iannetti would Mr. Poulain have suffered a loss. If he asked this question, the only conclusion he could come to is that Mr. Poulain would only suffer a loss if he were in some way prejudiced in his settlement with the Section A insurer. At the

risk of being repetitious, the question is whether Mr. Poulain received less on his settlement of the Section A claim than he would have, had he not signed the release.

[52] The trial judge comes to this point later in his decision. He found that Mr. Poulain was not prejudiced in a meaningful way in his settlement with the Section A insurer. I will set out his reasoning in some detail:

> [160] The plaintiff makes two arguments regarding how he was prejudiced in his settlement negotiations with the Section A insurer: first, he implicitly settled it on the basis that he would not be able to prove his disability to engage in "any occupation" after the two year mark; and second, though he had not actually received stage two Section B benefits, the Section A insurer could still argue his entitlement allowed it to offset those amounts against his loss of income claim.
>
> [161] The former argument is not compelling in the circumstances of the case at bar. Although Ms. Avery and Mr. Machum, as counsel for the Section A insurer, took the position that he was not totally disabled, Mr. Poulain was not necessarily estopped or otherwise prevented from taking a different position with the Section A insurer, than his settlement with the Section B insurer might suggest, and he did in fact claim he was totally disabled in his settlement brief. I conclude that he likely suffered a loss as a result of his weakened bargaining position. <u>However, more significantly, the onus is on Mr. Poulain to establish the extent of his loss as he claims is reflected in a lesser settlement with the Section A insurer. He has not satisfied that onus. The court would be speculating if it attempted a quantification of that loss</u>.
>
> [162] <u>The latter argument is also not compelling</u>. Although according to *Dugas-Mattatall* Section B benefits are deductible from Section A lost income compensatory obligations (but not vice versa), so that it is arguably preferable to settle the Section A claim before the Section B claim, in the case at bar the most that can be said is that this likely influenced Mr. Poulain in his settlement negotiations with the Section A insurer. Mr. Machum stated that whether Mr. Poulain was disabled from "any occupation" and entitled to stage two Section B benefits was a "very live issue," and that the income loss issue was "hotly contested". Ms. Avery's evidence confirmed that the Section A insurer's position at settlement was that it should receive a full deduction for any Section B benefits actually paid to Mr. Poulain or to which he was entitled, even if he did not claim them (Exhibit 8 – transcript of evidence from the first trial, at p. 284 (3-11)). Nevertheless, even if Mr. Poulain was correct in principle regarding this matter, the settlement they reached only produced a global amount: that ambiguity and the lack of any evidence elucidating this, makes it very difficult for the court to reliably quantify any notional offset of the stage two Section B benefits which Mr. Poulain did not actually receive, but which arguably he was entitled to receive.

> [163] I am not satisfied on a balance of probabilities that due to Mr. Iannetti's negligence, Mr. Poulain has demonstrated that he was prejudiced in a meaningful way in his settlement negotiations with the Section A insurer.
>
> [164] I am unable to quantify any loss vis-à-vis the settlement with the Section A insurer. In these circumstances, I am inclined to consider the awarding of nominal damages to serve as a symbolic recognition of the wrong committed and as a minor deterrent to others – H. MacGregor, *MacGregor on Damages*, 17th ed. (London: Sweet and Maxwell, 2003) at p. 362 (10-004 and 10-008); and *Salman v. Al-Sheik Ali*, 2010 NSSC 450, at para. 63, per Hood J.
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> [165] In relation to the alleged loss arising from Ms. Iannetti's negligence and reflected in an arguably less provident settlement with the Section A insurer, I conclude that $1,000 is an appropriate amount of nominal damages.
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> [Emphasis added]

[53] It is not surprising that the trial judge found that the evidence did not establish anything other than a nominal loss relating to the Section A claim. Mr. McGillivray, Mr. Poulain's solicitor, did not give evidence as to what amount related to loss of income in the settlement nor what the amount would have been had the release not been signed. There was no attempt to quantify the difference between what Mr. Poulain received from the Section A insurer and what he would have received but for the signing of the release. As noted by the trial judge, the solicitors for the Section A insurer gave evidence, however, that evidence was not particularly helpful in determining a loss relating to the Section A claim.

[54] Having found that the plaintiff had failed to establish on the balance of probabilities what loss—what reduction—in his claim for lost income could be attributed to the Section B settlement the trial judge should have concluded that the breach of the standard of care by Mr. Iannetti did not result in a loss to Mr. Poulain (other than the nominal damages which are not under appeal).

[55] I would allow this ground of appeal.

Issue 2 Did the trial judge err in his calculation of the damages owing to Mr. Poulain?

[56] As I have already found that the appeal should be allowed on the causation argument, it is not strictly necessary to address the damages calculation by the trial judge. However, because of his errors in the calculation of the damages, it is instructive to do so. Further, had the trial judge properly calculated the damages, it may have informed his analysis on the causation question.

[57] I say this because if the damages had been correctly calculated, in accordance with the evidence and the pleadings, it would have become apparent to the trial judge that much more evidence about the settlement of the Section A claim would be necessary before he could conclude that Mr. Poulain suffered any loss.

[58] In calculating the damages owing to Mr. Poulain, the trial judge determined that he would have continued to receive the benefits until he turned 84 years of age, his estimated date of death. He starts out by saying:

> [141] Stage two Section B benefits are payable for so long as the disability resulting from the injury is the cause of the inability to engage in any suitable employment or occupation, and could arguably be payable to the date of a claimant's actuarially estimated death: …

[59] No one can take issue with that statement. However, he continues:

> [143] The plaintiff argued based on actuarial materials, all other things being equal, that Mr. Poulain should survive to approximately age 84 – October 23, 2035. The defendant did not dispute this proposition.

[60] In the Statement of Claim, Mr. Poulain only claimed Stage Two benefits until age 65. The trial judge addressed this issue as well:

> [147] Although Mr. Poulain pleaded a claim for nominal continued Section B benefits only to age 65, he made clear in his argument that his claim for entitlement would only end with his death, being estimated at 84 years of age, and the case was so argued. I find no prejudice to the defendant in dealing with a claim as if the statement of claim was for nominal continual Section B benefits to the date of Mr. Poulain's death.
>
> [148] Thus, Mr. Poulain is entitled to claim damages for the loss of stage two Section B weekly indemnity payments from June 6, 2003 [being two years after the accident date] through to and including October 23, 2035 [his 84th birthday].

[61] There are a number of problems with the trial judge's conclusion on this issue. First, there was no actuarial evidence or materials presented at trial as to Mr. Poulain's life expectancy. The only reference to his life expectancy is contained in the pre-hearing brief filed on behalf of Mr. Poulain where it is stated:

> …Future life expectancy (as per McKellar online calculator): 20.39 years.

It appears that Mr. Poulain's solicitor did an online calculation as to Mr. Poulain's life expectancy. There was absolutely no evidence with respect to the assumptions that went into that calculation. With respect, the plaintiff's solicitor doing an online calculation of Mr. Poulain's life expectancy does not satisfy the evidentiary burden on the plaintiff.

[62] Secondly, the trial judge in his decision says that "the defendant did not dispute this proposition" (¶ 143), referring to Mr. Poulain's life expectancy being 84 years of age. In both Mr. Iannetti's prehearing brief and post hearing brief, the defendant took the position that Mr. Poulain was only entitled to Section B benefits to age 65 as claimed in the pleadings. There was no acknowledgement by the appellant that he was in agreement with the calculation of Mr. Poulain's life expectancy.

[63] For Mr. Poulain to have been entitled to benefits he would have had to establish "that such injury continuously prevents such person from engaging in any occupation or employment."

[64] I now turn to the actual calculation of damages. The trial judge found that as a result of the setoff of CPP disability benefits, Mr. Poulain would have only been entitled to $16.70 per week for the period from June 6, 2003 and when Mr. Poulain turned 65 on October 23, 2016. This would have resulted in a damage award somewhere in the range of $11,500 to $12,000 as of that date. The amount of the benefit to the date of trial would have been $10,470.90

[65] Having properly calculated the damages, the trial judge would then have to look at the settlement which was reached with the Section A insurer to determine whether they had reduced the amount of the settlement by that amount, or at least consider whether the settlement had been impacted in some way. As noted earlier, he found that it had not impacted the settlement negotiations in a meaningful way.

[66] Finally, on the issue of damages, the trial judge did a present day calculation to Mr. Poulain's actuarial death date of 84. However, at best, Mr. Poulain would have been entitled to a declaration that he would be entitled to future weekly indemnity benefits so long as he continued to satisfy the terms and conditions of Stage Two payments under the Section B provision. In *Kirk v. Singh*, 135 N.S.R. (2d) 55, Freeman, J.A. explained that the availability of Section B future benefits cannot be projected:

> [24] ….it can only mean payments which at some future time are to be actually made, and that cannot be determined in advance because of the contingencies of death and recovery. …

[67] In other words, if Mr. Poulain ceased to be disabled from any occupation or if he were to die at an age earlier than 84, his entitlement to Section B benefits would cease.

[68] In my view, the trial judge also erred in his calculation of the damages. I would also allow this ground of appeal.

Issue 3 Did the trial judge err in concluding that Mr. Poulain was eligible to receive Section B benefits?

[69] At trial, it was undisputed that the Section B insurer paid Mr. Poulain Stage One, Section B benefits. The benefits were paid to Mr. Poulain from the date of his accident until September of 2002, when he accepted the settlement offer from CGU. As noted earlier, Ms. Brace, CGU's Section B adjuster, informed Mr. Poulain that this lump sum settlement encompassed CGU's maximum obligation to him for weekly indemnity and rehabilitation benefits.

[70] At trial, the question arose as to whether Mr. Poulain was *actually* entitled to any Section B benefits given his employment situation prior to his accident. The trial judge recognized Mr. Poulain would have to establish this entitlement at the time of the accident:

> [110] In order to successfully claim stage two Section B benefits, Mr. Poulain would first have to demonstrate that at the time of the motor vehicle collision he was [pursuant to the Automobile Insurance Contract Mandatory Conditions Regulations N.S. Reg. 181/2003]:
>
> > (a)…actively engaged in an occupation or employment for wages or profit at the date of the accident; or
> >
> > (b)… so engaged for any six months out of the preceding 12 months and in these circumstances shall be deemed to have suffered loss of income at a rate equal to that of his most recent employment earnings;…

[71] The trial judge went on to confirm that Mr. Poulain would also need to establish that his injury prevented him from engaging in any occupation or trade

for which he was reasonably suited in order to claim entitlement to Stage Two benefits.

[72] Having set out these parameters in the analysis, the trial judge found Mr. Poulain did not meet the preconditions for eligibility for Stage Two benefits, but that the Section B insurer was unlikely to have resiled from its previous position that Mr. Poulain was so entitled:

> [133] On the limited evidence available to me, it does not appear that Mr. Poulain was employed at the time of the accident, nor that he had been employed for six months out of the preceding twelve months, which would allow him to be deemed to have been employed: *Logan v. Pafco Insurance Company*, 2000 NSCA 58.
>
> [134] On the other hand, the Section B insurer had apparently been so satisfied since it paid Mr. Poulain the weekly indemnity for the first stage two-year period. I will proceed on the basis that Mr. Poulain would have been able to satisfy this precondition, at least vis-à-vis the Section B insurer, as I would not expect them to change their position regarding this issue.
>
> [Emphasis added]

[73] Mr. Iannetti appeals this finding, contending Mr. Poulain had not worked the requisite period prior to the accident to be eligible for income replacement, and therefore, his claim for continued Section B benefits should have failed. In response, Mr. Poulain asserts in his factum that it was not in issue and, in any event, was a moot point:

> 11 The question as to whether the Respondent was entitled to the $140 per week benefit at all was not in issue and it is a moot point insofar as the claim brought by the Respondent against the Appellant. CGU assessed the Respondent to be initially entitled to this benefit – the only question was what the duration of this weekly benefit would be and whether their offer as communicated to the Respondent (and subsequently to the Appellant) fairly represented the Respondent's interests.

[74] Mr. Poulain in his factum continues:

> 54 […] [T]he Lower Court was in fact presented with a case where the Section B insurer had already made its determination as to eligibility for benefits and had been paying the Respondent for close to two years. There was no evidence that the weekly indemnity benefits were in danger of being cut off and certainly not due to the Respondent not meeting the initial qualification requirements.

> 55 The [trial] decision reflects the point that the Lower Court properly considered the issue, correctly applied the law, but found that this issue was irrelevant to the question before it[.]

[75] With respect to the respondent's submissions, the eligibility for Stage Two benefits was far from a moot point at trial. In the Statement of Defence filed on behalf of Mr. Iannetti he says the following:

> 10. The Defendant furthermore claims that to be eligible for Section "B" income replacement benefits for income replacement, the Plaintiff was required to be employed at the time of the accident. Employment however, is defined under that Policy as having been employed in six of the twelve months prior to the accident for which a claim is made.
>
> 11. The Defendant claims that the Plaintiff had not been employed in six of the twelve months prior to his accident on June 6, 2001, and as a result, was not eligible for income replacement benefits under the Section "B" of the policy of insurance under which he made a claim.

[76] Mr. Iannetti's pre- and post-trial brief also make argument on the point. Mr. Poulain was cross-examined on it at length at trial. The issue is simply not addressed in the trial judge's decision. On what legal basis or evidence could the trial judge conclude that the Section B insurer would not change their position regarding eligibility?

[77] The trial judge does not say that the Section B insurer was precluded from arguing Mr. Poulain was not entitled to Section B benefits. He says … "I would not expect them to change their position regarding this issue." It is unclear on the record how he could have reached this conclusion.

[78] On the evidence before the trial judge he was not satisfied Mr. Poulain was entitled to claim Section B benefits at all. Having reached that conclusion it was then incumbent upon him to address the arguments made by Mr. Iannetti.

[79] In argument before the trial judge Mr. Iannetti referred to this Court's decision in *Pafco Insurance Co. v. Logan*, 2000 NSCA 58 where Bateman, J.A. found Mr. Logan had not satisfied the statutory conditions:

> [24] In **Proctor v. Guarantee Co.** (1976), 13 O.R. (2d) 1 (Ont.C.A.) the court considered the application of the six months requirement in subsection (b). There, at the time of the accident (August 9, 1973) the plaintiff was unemployed. Prior to the accident, he had worked for a moving and storage company as a labourer. In

> the 12 months preceding the accident he had worked from August 5, 1972, to the week of January 26,1973 and was considered to be a full time employee of the company. The court accepted the insurer's submission that the language of the statute is clear and explicit and that the Legislature intended that an individual must show that he or she has been employed for a full six calendar months before becoming qualified for benefits. Lacourciére J.A. said for the court:
>
> > I am of the opinion that the Court cannot strain the unambiguous language of the section. To be actively engaged in occupation or employment for any six months in my view cannot be read as so engaged in any part of any six months within the 12. Six consecutive months are not required, nor active employment on all working days of the period, if the employee is a full time employee. However, no recognized principle of statute interpretation would allow this Court to interpret the wording of the section in a way that would appear to extend the eligibility for Sch. E benefits not expressed by the Legislature.
>
> [25] Mr. Logan was not "actively engaged" for wages or profit for 6 of the past twelve calendar months as is required.

[80] Mr. Iannetti argued that the failure to comply with the statutory conditions for eligibility were a complete answer to the claim for damages by Mr. Poulain. Nowhere in his decision does the trial judge address this argument.

[81] Although there is a derth of case law on the issue, at least one decision in Nova Scotia has determined that an insurer can change its position after initially finding an individual eligible for Section B benefits.

[82] In *Langille v. Midway Motors Ltd.*, [1999] N.S.J. No. 425 (affirmed 2002 NSCA 39), Ms. Langille was injured in a motor vehicle accident while a passenger in a van driven by her common law husband. Guardian Insurance was the insurer of the vehicle. After the accident Guardian paid Ms. Langille Section B benefits for 2½ years before claiming she was able to resume work. When Ms. Langille sued for continuation of the Section B benefits, Guardian claimed she was not employed at the time of, or within the six months prior to, the accident and thus was never eligible for the benefits in the first place. It sought to discontinue the benefits and recover all of the money it had previously paid to Ms. Langille.

[83] Chief Justice Joseph P. Kennedy found that before Ms. Langille could lay claim to any benefit other than the provisions of the policy she had to show that she met the statutory definition. He found, based on the evidence, that she did not. He also found that Ms. Langille's husband, who filled out her Section B form, had misrepresented Ms. Langille's employment situation. In conclusion, Kennedy, C.J. found:

> 57 I have considered the totality of the evidence put forward herein, and do not find on the balance of probabilities that Bertha Langille was "employed at the date of the accident."
>
> 58 I find further that the plaintiff has not shown that she worked for any six months out of the preceding 12 months and so does not fall within the deeming provisions.
>
> 59 The plaintiff has not been able to satisfy the threshold employment requirement and so cannot succeed on this claim against Guardian.
>
> 60 It has not been necessary to consider the evidence relative to her continued disability. I find that she is not entitled to any benefit under Schedule "B".

[84] Turning to Guardian's claim for the repayment of Section B benefits, Ms. Langille argued it was estopped from claiming repayment. Specifically, she contended that by "failing to indicate any interest in claiming repayment of those benefits until after the commencement of this litigation, [Guardian] caused [her] to 'alter her position to her detriment' by continuing to accept the money." (¶66)

[85] Kennedy, C.J. S.C. rejected Ms. Langille's estoppel argument:

> 68 I do not find that the defendant should be prevented from seeking recovery of monies paid on the basis of what have turned out to be misrepresentation and unprovable assertions.
>
> 69 I find that the defendant acted expeditiously to comply with its contractual obligation, on the basis of the representations put forward on behalf of the plaintiff, to provide income replacement when the need was made apparent to it.
>
> 70 Such quick and uncomplicated response by insurance companies in such circumstances is to be encouraged. It would be in my mind, illogical to prevent Guardian from getting its money back when it is found that the benefits were paid on the basis faulty information provided on behalf of the plaintiff.
>
> 71 The plaintiff did not "alter her position to her detriment" by accepting the benefits paid. This is not a situation in which estoppel lies against the defendant. The Schedule "B" benefits should not have been collected by the plaintiff herein.
>
> 72 I find that the defendant is entitled to the repayment of those benefits in full.
>
> 73 Costs in favour of the defendant. I will accept written submission if the parties cannot agree.
>
> [Emphasis added]

[86] In this Court, Roscoe, J.A. held "the principle issue at trial and on appeal was whether the appellant proved that she was engaged in an occupation or employed for wages at the time of the accident […]." (¶9). This Court concluded

that Kennedy, C.J.S.C. had not erred in finding non-entitlement on the facts, and awarding repayment of the Section B benefits as a remedy (¶10). Ms. Langille's appeal was dismissed.

[87] Although there are additional facts in *Langille* with respect to how Ms. Langille came to be paid Section B benefits, it is apparent that the insurer was entitled to change its positon on her initial eligibility. In this case, there is no evidence from the Section B insurer or anyone, for that matter, as to the information provided to them by Mr. Poulain when he was paid Section B benefits. Nor is there any explanation as to why CGU paid him Section B benefits in the first place, or whether it would have continued benefits if it became aware he did not meet the statutory preconditions.

[88] The initial eligibility for Section B benefits was a live issue at trial. It was incumbent upon Mr. Poulain to lead evidence on that issue and to make submissions with respect to it. He failed to do so.

[89] Once again this goes to the heart of the causation issue. If Mr. Poulain was never eligible for Section B benefits, how could he have suffered any loss as a result of the negligent advice given by Mr. Iannetti? He would not have any claim against the Section B insurer, nor could he have been prejudiced in his negotiations with the Section A insurer. [As noted earlier, the trial judge found that Mr. Poulain suffered nominal damages. I would not interfere with that award as it has not been appealed.]

[90] I would also allow this ground of appeal.

Costs

[91] For these reasons I would allow the appeal and set aside the quantification of damages by the trial judge with the exception of the nominal award in the amount of $1,000.

[92] The trial judge awarded $17,250 in costs and $12,234.28 inclusive of HST for disbursements. In argument before us, Mr. Iannetti's solicitor Mr. Richardson, in my view, appropriately conceded that he is not seeking the disbursements which were awarded to Mr. Poulain at trial. I say this is an appropriate concession considering that there was negligence found on the part of Mr. Iannetti. However, Mr. Richardson urges us to award costs based on the amount involved being $1,000, the nominal damages awarded. With respect, I am not satisfied that would

be adequate in these circumstances. However, a reduction in the costs award is warranted. Taking into account the length of the hearing, the issues involved, and the determination of negligence on the part of Mr. Iannetti, I would reduce the costs award to $10,000.

[93] With respect to the costs on appeal, I would award the amount of 40 percent of the trial costs ($10,000) for an award of $4,000 payable to the appellant. That award is inclusive of disbursements.

Conclusion

[94] The appeal is allowed, the damage award reduced to $1,000 with costs to the appellant in the amount of $4,000 inclusive of disbursements.

Farrar, J.A.

Concurred in:

Beveridge, J.A.
Van den Eynden, J.A.