NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund v. Hollis*, 2024 NSCA 33

Date: 20240319
Docket: CA 524336
Registry: Halifax

Between:

The Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund by its trustees Kim Cail, Jason MacLean, Mary Lee, Mike MacArthur, Jim Mott, Janet Hazelton, Geoff Piers, and Stephen Murray

Appellant

v.

Amanda Marie Hollis

Respondent

Judge:	The Honourable Justice David P. S. Farrar
Appeal Heard:	January 24, 2024, in Halifax, Nova Scotia
Subject:	Subrogation – determination of amounts to be offset for future benefits
Summary:	The respondent, Amanda Hollis, suffered debilitating injuries caused by a malfunctioning amusement park ride at the Canadian National Exhibition in Toronto. As a result of her injuries, she was paid long term disability benefits by the appellant. The Plan under which she was paid contained a subrogation clause. Ms. Hollis commenced action against third parties in tort for the injuries which she suffered. The legal action was eventually settled for $1.25 million. The parties could not agree on how much should be repaid to NSAHO on its subrogated claim, nor could they agree on the amount to be set aside for future benefits which may become payable.

NSAHO applied to the Supreme Court of Nova Scotia for determination of the amount owing to NSAHO for past and future loss of income benefits.

The application judge determined the amount payable for past loss benefits and also a contingent fee for any future benefits which may be paid to Ms. Hollis. At the time of the application, Ms. Hollis was no longer receiving benefits.

In the calculation of the future loss of income figure, the application judge applied a 50 percent "puffery" discount to the claims made by Ms. Hollis in the lawsuit.

NSAHO disagrees with the figure arrived at by the application judge for future loss of earnings. The reimbursement for past benefits paid is not an issue on this appeal.

Issues: Did the trial judge err in applying a 50 percent "puffery adjustment" to the loss of future earnings?

Result: The application judge committed no error in applying the 50 percent puffery adjustment to the future loss of income figure. He properly recognized that the puffery adjustment was fact specific. He set out the positions of the parties with respect to the factual background regarding Ms. Hollis' potential return to work and found that a 50 percent puffery adjustment was appropriate. NSAHO has been unable to establish any error in his methodology or conclusions arrived at.

The appeal is dismissed with costs of $2,500.00, inclusive of disbursements, payable to the respondent.

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Appellant

v.

Amanda Marie Hollis

Respondent

Judges:	Farrar, Fichaud and Beaton JJ.A.
Appeal Heard:	January 24, 2024, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs in the amount of $2,500.00 payable to the respondent, per reasons for judgment of Farrar J.A.; Fichaud and Beaton JJ.A. concurring
Counsel:	David Hutt, for the appellant Charles (Chuck) Ford, for the respondent

Reasons for judgment:

Background

[1] The appellant is the Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund by its trustees Kim Cail, Jason MacLean, Mary Lee, Mike MacArthur, Jim Mott, Janet Hazelton, Geoff Piers and Stephen Murray (the Trustees).

[2] The Trustees administer a Trust Fund for the purposes of providing Long Term Disability (LTD) benefits to qualifying employees of the NSAHO members/employers who also participate in the Plan. The Trustees engage Manulife Financial to administer claims under the Plan. Eligible claimants receive LTD benefits, paid to the employees so long as they continue to meet the Plan's applicable definition of "totally disabled".

[3] The terms of the Plan were reached by agreement among the NSAHO and the original Trustees, being nominees from each of the Nova Scotia Nurses' Union, Nova Scotia Government and General Employees Union, Unifor, Canadian Union of Public Employees, along with four Trustees appointed by the NSAHO Board of Directors.

[4] In August 2017, the respondent, Amanda Marie Hollis, ceased work as a registered nurse following injuries caused by a malfunctioning amusement park ride at the Canadian National Exhibition in Toronto. Manulife approved her LTD claim under the Plan. On January 19, 2018, she began receiving monthly benefits.

[5] Ms. Hollis, represented by counsel, commenced an action in tort in the Ontario Supreme Court, claiming damages against the owners and operators of the amusement park ride on which she had been injured.

[6] By way of correspondence dated July 31, 2018, July 15, 2021, and February 8, 2022, counsel was provided with notice of NSAHO's claim for subrogation and repayment of LTD benefits.

[7] In the February 8, 2022 letter,[1] NSAHO explained its position as to the parties' contractual rights and obligations:

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[1] Sent in anticipation of mediation scheduled for February 17, 2022 to attempt to settle the lawsuit.

> The trustees are entitled to be repaid out of a claimant's compensation for past lost income, future lost income and loss of earning capacity, up to the amount of benefits paid and payable regardless of full indemnity ...
>
> ...
>
> Article 8.09 (5) deals with earnings compensation exceeding past LTD benefits paid. In that case, where the employee remains totally disabled, the "surplus" compensation is treated as an advance on future benefits. Monthly LTD payments are suspended until the advance is depleted. At that point, if the employee remains totally disabled and eligible for benefits, monthly payments resume.
>
> Subrogation is a contractual obligation between an employee and the trustees. It is not a claim the trustees make against the third party. Accordingly, we are not asking you to represent the trustees or advance or collect the trustees claim on their behalf. Rather we want your client to pursue her unreduced loss earnings claims against the third party. The trustees' repayment rights are embedded in those claims.
>
> We look forward to receiving the mediation briefs as soon as possible, so the trustees are in a position to consider and provide their approval of any final settlement.

[8] Mediation briefs were provided. The mediation took place on February 17, 2022. Ms. Hollis' initial demand set forth in her mediation brief is outlined below:

General Damages:	$275,000
Past Loss of Income:	$417,762
PJI on Generals and Past LOI @ 5% per year (22%):	$152,407
Future Loss of Income:	$3,081,246
Pension Loss:	$241,508
Future Care Costs:	$150,000
Housekeeping Claim:	$100,000
NSAHO Subrogation:	$19,735
TOTAL	**$4,437,658**

[9] Also in her mediation brief, Ms. Hollis advised the representatives of the defendant that she had received benefits from the NSAHO in the amount of $139,656.37 up to that point.

[10] At the mediation, both sides accepted the mediator's recommendation of a $1.25 million all-inclusive settlement.

[11] In accepting the all-inclusive figure, counsel for Ms. Hollis did not consult with NSAHO. Counsel drafted Minutes of Settlement which allocated the settlement through various heads of damages as follows:

Pain and suffering damages	$400,000.00
Future health care costs, housekeeping benefits, and caregiving benefits	$676,488.13
Nova Scotia Medical Services Insurance subrogated claim	$5,178.97
Canada Life subrogated claim	$5,908.33
Manulife subrogated claim	$34,914.09
Costs inclusive of HST	$111,698.65
Disbursements	$15,811.83

[12] The Minutes made no allocation for future income losses or diminished earning capacity. NSAHO and Ms. Hollis were unable to agree on the applicability of the subrogation provisions of the Plan or the proper interpretation of that provision.

[13] As a result of the parties' inability to resolve the subrogation rights, NSAHO filed a Notice of Application in chambers seeking:

> A determination of the amount owing to the applicant by the respondent, arising from the subrogation, repayment, and offset provisions of the Nova Scotia Association of Health Organizations Long Term Disability Plan, and the allocation of that amount to disability benefits paid and payable, as a result of the respondent's receipt of compensation for lost earnings from a third party who caused or contributed to her disabling condition;

[14] On January 31, 2023, the matter was heard before Justice D. Timothy Gabriel. He rendered his decision on March 30, 2023.[2]

[15] His decision identified the following two issues requiring determination:

1. Is it the Plan or the Minutes of Settlement which prevail when the Applicants' compensation is calculated?
2. If the former:
   (i) What portion of Ms. Hollis' total personal injury settlement constitutes "compensation" per the Plan, for repayment and offset of LTD benefits? And
   (ii) How is that "compensation" to be applied to repayment and offset?[3]

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[2] *The Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund v. Hollis*, 2023 NSSC 111 [*Hollis*].
[3] *Ibid* at ¶16.

[16] Justice Gabriel found the compensation payable to NSAHO was governed by the Plan itself.[4] His determination the Plan governed is not in issue on this appeal.

[17] He then determined what amount should be repaid to NSAHO for past benefits.

[18] By the time of the application before Justice Gabriel, the total amount paid to Ms. Hollis by the Plan was $175,732.86. He calculated the amount owing for past benefits by reducing the amount by the legal costs associated with recovery (30 percent) and adding 13 percent Ontario HST. He calculated the amount owing for past benefits (less legal costs and 13 percent Ontario HST) as $116,159.70.[5] The repayment of past benefits is also not in issue on this appeal.

[19] The application judge then determined the amount to be applied to future amounts payable and explained the methodology used to do so.

[20] First, he took the initial demand for past loss income, interest and future lost income amounting to $3,590,952.80 as a percentage of the total demand of $4,437.658.00 (80.92 percent). He then took the agreed upon settlement amount which amounted to approximately 28 percent of the initial demand. He then reduced the amount of the damage award by the disbursements incurred arriving at a figure of $1,234,288.00.[6]

[21] Then he multiplied that number by 80.92 percent to arrive at the percentage of the settlement amount compared to the initial demand. That figure came to $998,775.50 for past and future loss of income, including disbursements.[7]

[22] He then applied a 50 percent "puffery" adjustment to that amount taking into account contingencies upon which the loss of income was predicated, arriving at a figure of $449,387.75. Then he deducted the amount of past benefits, resulting in a figure of $383,226.05. After legal fees and HST were deducted from that amount, the final number for the future loss of income pursuant to the Plan was $253,312.71.[8]

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[4] *Ibid* at ¶28.
[5] *Ibid* at ¶65-66.
[6] *Ibid* at ¶56-57.
[7] *Ibid* at ¶58.
[8] *Ibid* at ¶62-64.

[23] The sole issue for determination on this appeal is whether the application judge erred in the manner he applied the "puffery" adjustment. The appellant, in its factum, identifies the issue as follows:

> Did the Chambers Judge err in law, or in mixed fact and [law], by considering only the earnings heads of damage, and not all heads of damage claimed and resolved, when determining the appropriate "puffery adjustment" to apply in distributing the total settlement among heads of damage?

Standard of Review

[24] NSAHO says the application judge articulated a legal test but failed to properly apply it. It says it is a question of law because it involves "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor".[9]

Analysis

[25] NSAHO says the application judge erred in his interpretation of Article 8.09 of the Plan which provides:

> 8.09 Subrogation and Reimbursement
>
> 1) In the event a third party is or may be responsible in whole or part for the Employee's Total Disability, the Trustees have and reserve rights of subrogation and reimbursement.
>
> 2) The Trustees' subrogation and reimbursement rights apply to any lump-sum or periodic payment the Employee receives or is entitled to receive from a third party for past lost income, future lost income, and diminution of earning capacity, regardless of whether or not the Employee has been fully indemnified (the "Compensation").
>
> 3) ***The Trustees are subrogated to the Employee's rights of recovery of Compensation against the third party up to the amount of Benefits paid and payable, and reserve the right, on notice to the Employee, to begin an action against the third party in the Employee's name to pursue such rights***.
>
> […]
>
> 5) ***If Compensation from the third party exceeds the amount of Benefits paid up to the date such Compensation is received, then unless the Trustees and Employee agree otherwise no further***

[9] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at ¶53 as cited by NSAHO in ¶44 of its factum.

> ***Benefits will be paid to the Employee until such time as the monthly Benefits that would otherwise be payable equals the amount by which the Employee's Compensation exceeds past Benefits***.
>
> [Emphasis added.]

[26] The issue for determination, which the parties could not agree upon, is the amount by which the compensation for future loss of earnings exceeded the benefits paid up to the date of settlement. There is no dispute the amount of compensation received from the third party for past and future loss of income exceeded the amount of money Ms. Hollis received from NSAHO.

[27] At the time of the mediation on February 17, Ms. Hollis was no longer receiving benefits from NSAHO.

[28] The application judge queried whether to calculate the amount to be applied to future payments when NSAHO says that there will not be any. The application judge answered his own question as follows:

> [69] Why, then, bother calculating the amount to be applied to future payments, when the Applicant says that there will not be any? Because this may not necessarily be the case. The Respondent may appeal her disqualification. If she were to do so successfully, she would become eligible for payments under the Plan post January 18, 2023.

[29] The application judge calculated the amount to be allocated towards future payments in the event Ms. Hollis was successful in having her benefits reinstated.

[30] The application judge recognized he had to consider an approach which, based upon the contract and the evidence, does justice between the parties:

> [42] So how do we go about assigning a value to "Compensation" in this case? To begin, we must respect the contractual wording of the Plan, and article 8.09 in particular. ***We then proceed to consider an approach which, in the circumstances of the case, based upon the contract under consideration and all of the evidence, is best suited to do justice between the parties insofar as their respective contractual rights and obligations are concerned***.
>
> [43] In circumstances where a global amount is negotiated by way of settlement, without approval by the Trustees and without allocation to the various heads of damages, or where the Court is satisfied that the allocation which has been assigned is not a good faith allocation, or it for some other reason does not do justice between the parties on the basis of their contractual rights and

> obligations, the Respondent carries an onus. The settlement is presumed to be entirely "Compensation" (or "income loss recovery" as it was in *Kontuk* – it will depend on the term employed in the contract) except to the extent that the Respondent is able to show otherwise.
>
> [Emphasis added.]

[31] Both parties refer to the application judge's decision in *Kontuk*[10] to support their arguments on how much of the settlement should be allocated to future loss of income.

[32] The application judge referred to his decision in *Kontuk*:

> [49] We will begin with lost income up to the date of settlement. In *Kontuk*, a formula was used in an attempt to derive lost income as a function of the breakdown of the initial demand. A two-step approach was employed. First, the overall compromise in the total percentage recovered as a function of the initial demand was applied to all of the various heads of damage.
>
> [50] Second, because such an approach did not adequately account for the various degrees of merit with respect to the individual components inter se (or the "puffery" built into some of them) the Court applied a further reduction to account for the fact that the lost income claims (in *Kontuk*) were weaker than some of the others. At the second stage, therefore, a further 50% reduction to the lost earnings was applied, since it would have been inequitable to treat all of the individual heads of damages as possessing equal merit. ***Everything, including the "puffery adjustment" is completely (and necessarily) fact specific***.
>
> [Emphasis added.]

[33] I agree with the application judge that everything, including the "puffery" adjustment is fact specific. The application judge then set out the positions of the parties with respect to the factual background regarding Ms. Hollis' potential return to work:

> [52] By way of contrast, the Applicant argues that, in this case, Ms. Hollis clearly sustained a traumatic brain injury on August 22, 2017. She has not gone back to work since her injury (*Eisener-Murphy affidavit, Exhibit "4", p. 67*). There is no suggestion, in the materials with which the Court has been provided, that any workplace issues have impacted her situation. Mr. Preszler, in the mediation brief, referenced her frequent headaches, mood fluctuations, cervical problems, and her difficulties while attempting to focus or concentrate. The Tortfeasor's vocational expert predicated her ability to return to work upon

[10] *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Kontuk*, 2018 NSSC 89, aff'd 2019 NSCA 33 [*Kontuk*].

assistance from an Occupational Therapist. The Respondent's own expert concluded that she was completely unable to return to her pre-incident employment (*Eisener-Murphy affidavit, Exhibit "4", pp. 71-74*).

[53] With that said, the Tortfeasor, in its mediation brief, made reference to a pre-accident history of issues with partner abuse, and pre-existing depression, in its arguments directed at causation, as contained in its mediation brief. As noted above, it rejected the assertion that Ms. Hollis was completely unable to return to work in any capacity (*p. 76*).

[54] The Defendant, in its Pre-Application Brief, raises the following additional points, which I paraphrase below:

(a) The Respondent is the mother of three young children who are eight years, five years, and a six months old, the last of whom was born just prior to mediation. The latter could not have been accounted for in the Loss of Income (LOI) Report prepared by the Respondent's actuary, as it predated the child's birth by several months;

(b) The past lost income calculation included some (partial) 2017 earnings, but the Respondent's return from maternity leave was not to occur until early 2018;

(c) The maternity leave to which the Respondent was entitled as a result of the birth of her youngest child was not factored into the calculations;

(d) The Respondent earned a great deal of overtime and shift premium pay in 2016, her last full year of work prior to the accident. In that year, she earned 143% of her base pay, which 2016 earnings were used in the LOI report as the prototype for her yearly earnings up to the projected date of her retirement;

(e) This resulted in an over attribution of future income loss, as well [as] failure to address a significant contingency, the likelihood that the Respondent would have had to reduce her work hours on a go-forward basis to care for her three children, which, following mediation, now included a child less than one year old.

[55] Some of these points will be reflected, among other things, in the "puffery" adjustment to be adopted. However, I hasten to repeat a point which was earlier made in *Kontuk*. No approach or formula, will ever achieve scientific precision. It is an approximation, at best, based upon the evidence in the specific case before the Court.

[34] As the application judge pointed out, there is no formula or approach to which he could assign scientific precision.

[35] The NSAHO's suggestion that the application judge was obligated to apply a uniform degree of "puffery" to all of the heads of damages is without merit. It is up to the application judge to determine on the limited evidence he had before him which claims may be weaker than others. Before the application judge, NSAHO suggested that a 30 percent "puffery" adjustment would be appropriate. The application judge considered that figure and concluded it was insufficient in light of the factors in this case:

> [62] However, fairness also requires me to recognize some of the other factors urged by the Respondent which would also be expected to impact upon that figure. These include the possibilities that she would not be able to work to the age upon which the LOI report is predicated, or health or childcare responsibilities which might negatively impact even her regular base pay rate. After all, I am certain that counsel for the Respondent, and for the Tortfeasor, were aware of these potential contingencies, and the fact that they deserved greater emphasis than they received in the LOI report. It is obvious that these were some of the reasons why the initial demand was compromised in mediation to the extent that it was.
>
> [63] When these additional factors are considered, the adjustment to be applied in this case requires more than the 30% adjustment advocated by the Applicant. The factors in this case, on a balance of probabilities is (as it turns out) more appropriately set at the one adopted in *Kontuk*: 50%. Application of that 50% figure yields $998,775.50 x 50% = $499,387.75.

[36] It is somewhat ironic NSAHO is arguing the "puffery" amount should be less than 50 percent. It has taken the position that Ms. Hollis is no longer totally disabled and thus there will be no future payments. Therefore, there may be nothing to offset if no further payments are made. If anything, its position suggests the "puffery" amount should be greater. However, as the application judge correctly noted, there is potential for Ms. Hollis' benefits to be reinstated. If so, there may be some future payments coming from NSAHO which should be set off against the compensation received from the third party.

[37] I can identify no error in the approach taken by the application judge. He was asked to exercise a discretion based on the information he had before him, to arrive at a figure for the purposes of calculating the compensation payable under the subrogation clause. He did so in a thoughtful, well-written decision. I find no merit with NSAHO's argument.

[38] I would dismiss the appeal with costs to the respondent in the amount of $2,500, inclusive of disbursements.

Farrar J.A.

Concurred in:

Fichaud J.A.

Beaton J.A.