

**NOVA SCOTIA COURT OF APPEAL**

Citation: *Lombard Insurance Company v. Campbell-MacIsaac*, 2004 NSCA 87

Date: 20040623  
Docket: CA 202471  
Registry: Halifax

Between:

Lombard Insurance Company

Appellant/  
Respondent by Cross-Appeal

v.

Katherine Campbell-MacIsaac, Ronald MacIsaac,  
Chanelle Campbell-MacIsaac, Kielly Carlyn MacIsaac  
and Lisa Deveaux

Respondents/  
Appellants by Cross-Appeal

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**Judge:** The Honourable Justice Jamie W. S. Saunders

**Appeal Heard:** April 14 & 15, 2004

**Subject:** Motor vehicle accident. SEF 44 Endorsement. Past and future LTD benefits, and Section B benefits. Set-off. Subrogation. Assignment. Collateral Benefits Rule. Quantification of Damages. Standard of review on appeal. Loss of future earning capacity. Contingencies. Special damages. Loss upon sale of dental practice. Family trust. Severance paid to employees. *Quantum Meruit*. Fair trial interests. Costs.

**Summary:** Dr. Campbell-MacIsaac, a dentist, was seriously injured in a car crash in 1995, due to the negligence of the oncoming driver Deveaux. She suffered a permanently disabling fracture to her right ankle and after multiple surgeries and treatment was forced to give up her career and sell her dental practice. Deveaux's insurer's paid-in limits were not enough to compensate Dr. Campbell-MacIsaac for her extensive losses. Following the withdrawal of Deveaux's insurer from the litigation the principal cause of action related to the respondents' claims to indemnity under their own motor vehicle liability insurance policy issued by the appellant, Lombard Insurance Company. The policy contained an SEF 44 family protection endorsement, which provided additional underinsured motorist coverage. Dr. Campbell-MacIsaac had also acquired her own disability insurance with Canada Life with an "own occupation rider" which entitled her to LTD benefits for as long as she remains unable to practice dentistry. From the date of the accident until the date of trial, Dr. Campbell-MacIsaac had received a total of \$567,000.00 in LTD benefits from Canada Life as well as an additional

\$55,000.00 in Section B benefits.

At trial Lombard argued that in calculating its own liability to Dr. Campbell-MacIsaac pursuant to the SEF 44 endorsement, it was entitled to deduct from the amount of damages awarded by the trial judge in her favour, the amounts she had recovered from Deveaux's insurer, together with the amounts received for LTD benefits up to trial, and the present value of her future LTD benefits, and the present value of her future Section B benefits. The trial judge rejected those arguments and in quantifying Dr. Campbell-MacIsaac's very sizeable damage award, declined to allow Lombard any right of set-off to future LTD and future Section B benefits. The judge also rejected Lombard's claim for subrogation and assignment.

Lombard appealed on these and a host of other issues alleging error of law or palpable and overriding error of fact in the trial judge's disposition of several insurance and related matters; in his assessment of the evidence; in his calculation of damages; in his awards under certain heads of damage; in his treatment of contingencies; and in denying Lombard a fair trial.

Dr. Campbell-MacIsaac and the other respondents cross-appealed alleging error in the judge's assigning to her a residual earning capacity of \$50,000.00 per year for ten years.

**Held:**

Appeal allowed in part. Cross-appeal dismissed. The trial judge erred in applying the collateral benefits rule to this a first-party claim in contract. Lombard is entitled to set-off against its own liability to Dr. Campbell-MacIsaac the present and future LTD benefits from Canada Life, as well as her future Section B benefits. Lombard enjoys both a right of subrogation, and entitlement to an assignment with respect to Dr. Campbell-MacIsaac's LTD benefits, to the extent of its liability to her. The trial judge's awards for the cost of prescription drugs, severance paid to employees, and *quantum meruit* to Dr. Campbell-MacIsaac's husband were all reduced. The matter of costs is reserved for reasons stated in the judgment. In all other respects the trial judge's decision is upheld.

**This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 55 pages.**