NOVA SCOTIA COURT OF APPEAL
Citation: *Tibbetts v. Murphy*, 2017 NSCA 35

Date: 20170502
Docket: CA 451934
Registry: Halifax

Between:

Shirley Tibbetts

Appellant

v.

Reginald Greg Murphy and Joseph George Joyce

Respondents

Judge:	The Honourable Justice Linda Lee Oland
Appeal Heard:	January 24, 2017, in Halifax, Nova Scotia
Subject:	Motor Vehicle Accident – Negligence – Liability – *Insurance Act*, s. 113A – General Damages – Calling Witnesses - Rule 4.18
Summary:	An oncoming truck struck a motorcycle. The motorcyclist suffered several fractures and underwent multiple surgeries. She brought an action in negligence. None of the parties called any of the first responders who arrived at the scene to testify, although the truck driver had included police officers on his list of witnesses. The motorcyclist received Canada Pension disability payments. The trial judge apportioned liability two-thirds to the injured motorcyclist and one-third to the driver of the truck. He held that, under s. 113A of the Insurance Act, the disability payments were on account of lost earning capacity and deducted them from the damages awarded under that head of damages. In assessing general damages, the judge referred to *Smith v. Stubbert*.
Issues:	(1) Whether the trial judge made a palpable and overriding error in his assessment of liability

(2) Whether he correctly interpreted s. 113A of the *Insurance Act*
(3) Whether he erred in his assessment of general damages
(4) Whether he erred by not directing, on his own motion, that the defendant call witnesses or to commit to calling witnesses before the close of the plaintiff's case

Result: Appeal dismissed with costs. There is no basis to intervene with the judge's decision on liability. He correctly interpreted s. 113A and deducted the disability benefits from the award for loss of earning capacity. His assessment of general damages was not wholly erroneous, and was within the range of acceptable awards. In accordance with Rule 4.18, the truck driver had given immediate notice when he decided not to call the police officers to testify. The appellant's argument that he should have done so prior to the close of the plaintiff's case is inconsistent with our adversarial trial system and the Rules, and the judge did not err by not requiring that defendant to do so.

NOVA SCOTIA COURT OF APPEAL
Citation: *Tibbetts v. Murphy*, 2017 NSCA 35

Date: 20170502
Docket: CA 451934
Registry: Halifax

Between:

Shirley Tibbetts

Appellant

v.

Reginald Greg Murphy and Joseph George Joyce

Respondents

Revised Judgment: The text of this original judgment has been corrected according to the attached erratum dated **May 3, 2017**

Judges: Fichaud, Oland and Bryson, JJ.A.

Appeal Heard: January 24, 2017, in Halifax, Nova Scotia

Held: Appeal dismissed with costs, per reasons for judgment of Oland, J.A.; Fichaud and Bryson, JJ.A. concurring

Counsel: Jamie MacGillivray and Chuck J. Ford, for the appellant
Christopher W. Madill and Tipper McEwan, for the respondent Mr. Murphy
Chad G. Horton and Joshua E. Martin, for the respondent Mr. Joyce

Reasons for judgment:

[1] Two motorcyclists, one behind the other, drove along the Livingstone Cove Wharf Road in Antigonish County. An oncoming truck struck the second motorcycle. The injured motorcyclist, Shirley Tibbetts, brought an action in negligence against the truck driver, Reginald Murphy. He added the driver of the lead motorcycle, Joseph Joyce, as a third party.

[2] Justice A. David MacAdam of the Nova Scotia Supreme Court apportioned liability between the injured motorcyclist and the truck driver, dismissed the claim against the driver of the lead motorcycle, and awarded damages and costs. Ms. Tibbetts appeals from his decision (2015 NSSC 280) and his Order dated April 26, 2016.

Background

[3] During the eight-day trial, the judge heard the evidence of each of the three parties. Ms. Tibbetts called Brigid McDonnell, a witness who came to the scene of the collision. Mr. Murphy called two medical experts and David Crawford, another witness who arrived at the scene. A report by one of the RCMP officers who attended there was admitted into evidence by consent.

[4] The judge referred to the evidence he heard, and the view he had taken of the site of the accident, when he described the collision:

> [16] On July 19, 2011, Tibbetts and Joyce set out to travel from their home in Durham, Pictou County, to Antigonish. Both were inexperienced motorcyclists. Tibbetts had only recently received a license, while Joyce was driving on a beginner's license. What experience they had was mainly on paved roads. They took a scenic route through northern Antigonish County, avoiding the heavier traffic on the Trans-Canada Highway. Travelling on Highway 333, they stopped and turned down the Livingstone Cove Wharf Road ("the "Wharf Road"), a gravel road running from Highway 333 to the Livingstone Cove Wharf. They stopped at the wharf, then headed back towards Highway 333. Joyce was in the lead and Tibbetts followed close behind him. The Wharf Road has no marked centreline. There was no evidence of the width of the road, or of the distance between certain identifiable features referred to by witnesses or observed by the court while taking a view at the request of, and in the presence of, all the parties.
>
> [17] While Tibbetts and Joyce were on the Wharf Road, the defendant, Murphy, an employee of the Department of Natural Resources, was heading to the Wharf

in the course of his work. He had driven the Wharf Road before. He estimated he was coming down the road at between ten and twenty km/h.

[18] Tibbetts testified that she was nervous on the Wharf Road, and kept her speed reasonably low. She said she was particularly conscious of the need for safety on the gravel road, leading her to focus her attention both on Joyce ahead of her and on the roadway itself. She said she travelled in a groove, close to the right-hand side of the roadway. Murphy suggested that the "groove" was actually nothing more than tire marks. In any event, Tibbetts was following a mark or groove along the right side of the road, heading back towards Highway 333. To her right was a narrow grassy area leading to an embankment over the Northumberland Strait, with no railing; the proximity of the embankment caused her further concern. The grassy area became wider leading up to the point where the collision occurred.

[19] The collision occurred in the vicinity of a bend in the road. Joyce went around the turn first, and met Murphy's truck. Although there was disagreement about whether Joyce encroached on Murphy's side of the road, it is clear that they were close enough that they each found it necessary to veer to the right. Joyce turned in the direction of some trees. Tibbetts, following him, saw him veer to the right, but did not see Murphy's truck. Murphy veered right, towards a shallow or level ditch. He drove over the lip of a driveway, across the driveway entrance, then back onto the roadway. Murphy testified that he recovered into his own lane after the near-miss with Joyce.

[20] Murphy said the collision with Tibbetts occurred almost as soon as he re-entered the roadway. He said he never saw the Tibbetts motorcycle until the instant before the collision. The evidence of both the plaintiff and the defendant was that neither saw the other until immediately before the collision. Neither of them explained this.

[21] It was agreed that the roadway was in much worse condition at the time of the view than at the time of the collision. Tibbetts stated on direct examination that she did not see potholes, but appeared to agree on cross-examination that there had been potholes in the road at the time of the accident.

[22] The bend where the collision occurred was described by counsel at various times as "partially blind." It was apparent, however, from taking a view, that, even accounting for the difference in tree and bush cover between the time of the accident and the time of the view, there was a considerable distance over which each party could have been seen by the other before the collision. Despite the description of the turn as "partially blind", it was clear during the view that from the position of the collision to a mailbox located on the plaintiff's side, and beyond, there was a clear view along the road. The parties having invited the court to view the scene, I can conclude that in the vicinity of the collision there was no obstruction that would prevent the plaintiff and defendant from seeing one another at some point while they converged on the curve, if they were looking. At the instant of the near miss, Tibbetts would have been further down the road,

> towards the wharf; however, it would have been only slightly after the near-miss that she would have seen Joyce heading for the trees. There has been no suggestion that any of the three vehicles were speeding.
>
> [23] As Murphy pulled back onto the road after the near-miss with Joyce, Tibbetts was approaching. She testified that her focus, after passing along the embankment, was on the road immediately in front of her. With her focus on the embankment, however, and on Joyce ahead of her, she was clearly not focused on watching for other vehicles on the road. Similarly, Murphy's evidence was that he did not see the Tibbetts motorcycle until the instant of the collision, though she would have been visible on the roadway ahead of him. His view may have been blocked in part by trees and brush, but I am satisfied that the turn was not completely blind. He did not suggest that his focus on the roadway was disturbed by the near-miss with Joyce. In short, he gave no explanation for not seeing Tibbetts. **Murphy testified that he never crossed the centreline of the gravel road, and that Tibbetts was therefore on his side of the road**.
>
> [24] **Tibbetts testified that Murphy's truck hit her motorcycle while she was on her own side of the road**. She described herself being thrown into the air and coming down on her right side, with her head on the motorcycle's saddlebag.
>
> [Emphasis added]

[5] With regard to the evidence presented at trial, the judge commented:

> [33] Although there were various witnesses called to give evidence with respect to the collision, it is striking how many witnesses were not called who would appear likely to have relevant evidence on the central issue of where on the road the collision occurred. The court is left to determine how the accident occurred as well as it can, based on the evidence available, without speculating.

He stated that credibility determinations were important and very much in issue, and continued:

> [37] The oral evidence is supplemented by documentary evidence, which is similarly of limited assistance. A report prepared by an RCMP officer who attended at the scene, Corporal A. Hamilton, was admitted into evidence by consent. However, neither police officer who came to the scene was called as a witness, nor was either of the two ambulance personnel who transported the plaintiff. Thus there was no direct evidence from any "first-responder" personnel as to what they observed when they arrived on the scene.

[6] The parties disagreed on whether Ms. Tibbetts had been in her lane when Mr. Murphy's truck hit her motorcycle. Mr. Murphy and Mr. Crawford testified that Ms. Tibbetts' motorcycle had come to rest close to or at the centre of the road.

Ms. Tibbetts maintained that she had been in her lane, and her motorcycle had been moved after the collision and before the taking of a photograph showing it on the road. The judge did not accept that the motorcycle had been dragged from its original location.

[7] The judge determined:

> [54] Having regard to all the evidence – including the observation by Cst. White that "from all evidence gathered it appears that no one would be visibly in the wrong as center line is difficult if not impossible to determine" – I conclude on a balance of probabilities that the collision occurred at or near the centre of the roadway. I also conclude that the parties failed to see each other. This was primarily because the plaintiff was not looking forward on the road, but was focused on the road surface itself, likely looking for potholes. Further, she was in a slightly better position to see Murphy's truck than Murphy was to see her motorcycle, given the size of the truck. Additionally, having seen Joyce turn towards the woods, Tibbetts did not look to see what caused him to turn, but remained focused on the road surface.
>
> [55] Murphy's evidence was that he had recovered from the near-miss with Joyce. He said he had fully recovered into his lane of travel and was in the position he would have been in but for that encounter. He did not attribute the accident to the near-miss. He gave no explanation for not seeing Tibbetts's motorcycle. I have no basis to make any finding that would not be speculation, other than to find fault for Murphy's failure to see the second motorcycle, driven by Tibbetts, until immediately before the collision.
>
> [56] I have concluded that the plaintiff was primarily responsible for the collision, but the defendant was not without fault. I apportion liability two-thirds to the plaintiff and one-third to the defendant. The evidence does not support a finding of any liability on the part of the third party.

[8] As a result of the collision, Ms. Tibbetts suffered a dislocated and fractured hip, a fractured left tibia, and a fractured left fibula. She spent 11 days in hospital and underwent multiple surgeries.

[9] In his decision, the judge reviewed the medical evidence and the effect her injuries had had on the appellant, including her ability to work. He awarded and assessed her damages as follows:

(a)	loss of earning capacity:	$40,000
(b)	loss of housekeeping and valuable services:	$10,000
(c)	costs of future care:	$15,000

(d) general damages: $30,000.

[10] The judge held that, under s. 113A of the *Insurance Act*, the Canada Pension Plan disability payments that the appellant was receiving were on account of lost earning capacity. After her CPP disability payments over 34 months were deducted from one-third of the $40,000 awarded, Ms. Tibbetts received nothing for lost earning capacity. The judge also reduced the general damages award by 10% for failure to mitigate. This left her with general damages of $9,000 (one-third of $30,000 less 10%). The other awards were also reduced in accordance with the judge's apportionment of liability between Ms. Tibbetts and Mr. Murphy.

Issues

[11] The issues on appeal can be summarized and restated as follows:

1. Did the trial judge make a palpable and overriding error in the assessment of liability?
2. Did he correctly interpret s. 113A of the *Insurance Act*?
3. Did he err in assessing general damages for pain and suffering at $30,000?
4. Did he err by not directing, on his own motion, that the defendant call witnesses or to commit to calling witnesses before the close of the plaintiff's case?

Mr. Murphy responded to all of these, and Mr. Joyce only to the second issue. I will address the appropriate standard of review of each in my analysis of that issue.

Liability

[12] Ms. Tibbetts argues that the judge erred in finding her partially liable for the collision. In particular, she challenges his refusal to accept that her motorcycle had been moved before the photograph of it on the road was taken.

[13] Here is what the judge wrote:

> [44] The plaintiff suggests that the court should conclude from the photograph of the motorcycle on the road that the accident occurred in the Tibbetts lane and that the marks visible in the photographs were drag marks made by the motorcycle being moved before the picture was taken. In my view, to come to such a conclusion would be speculation, not a reasonable inference from the

> evidence. Apart from Joyce and Tibbetts, no other witness thought the marks resulted from dragging the motorcycle. While this may be the case, it would be a speculative conclusion, not a common-sense inference.

[14] The standard of review for findings of fact and the drawing of inferences is palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at ¶10 and 25.

[15] On appeal, as at trial, Ms. Tibbetts relied heavily on the photograph and on her evidence and that of Mr. Joyce. According to the appellant's testimony at trial, a combination of the ambulance personnel and police officers moved the motorcycle in order to attend to her. Her evidence was that she heard scraping as it was dragged, smelled gas, and saw a dark area which she believed was spilled gas. Mr. Joyce testified that he saw a couple of people pull the motorcycle away from where gas was leaking, which was where the appellant was lying after being hit. When Ms. McDonnell testified, she stated that a dark area on the road was from gasoline coming out of the bike.

[16] According to Ms. Tibbetts, it is clear and obvious from the evidence that her motorcycle had been moved before the photograph was taken, and it and she had been near the location of the gas spill, which was well within the middle of her lane, at the time of impact. She submits that the judge's description of how many witnesses were not called as "striking" shows that he was frustrated, and suggests that his frustration and disappointment led to a failure to give the photograph sufficient weight. The appellant argues that the judge made a palpable and overriding error on this issue, and Mr. Murphy should have been found entirely liable for the collision.

[17] Ms. Tibbetts' argument does not refer to the conflicting evidence presented by Mr. Murphy and Mr. Crawford. Mr. Murphy testified that her motorcycle was never moved. Mr. Crawford testified that he passed Mr. Joyce's motorcycle as Mr. Joyce was dismounting and running back towards the impact. His evidence was that the appellant's motorcycle was lying in the centre of the road.

[18] As pointed out earlier, none of the police officers and ambulance personnel gave evidence at the trial. So the judge heard nothing from them as to, for example, any dragging of Ms. Tibbetts' motorcycle from its original resting place, whether the dark spot depicted in the photograph was indeed a gas spill, or when the photograph was taken. He did hear that the only evidence of damage to the gas tank was on its top, pointing to the sky, and submissions that even if one could smell gas, a leak sufficient to stain the road surface was unlikely. Mr. Murphy had

pointed out that the disturbances on the ground which Ms. Tibbetts alleged were drag marks did not show any extending from the exhaust pipe or tail pipe, which were touching the ground, and the dark mark could have been something else, such as a pothole. His submissions at trial also observed that there was some evidence that where the motorcycle had come to rest may not be determinative of the location of the impact.

[19] In deciding liability, the judge determined credibility, weighed the conflicting evidence, and considered the submissions made by all the parties. I see nothing to support the argument that he was frustrated by the extent of the evidence before him, or that frustration or disappointment in that regard resulted in an error on the issue of liability which requires appellate intervention. I detect no palpable and overriding error in his conclusion that the photograph was not conclusive evidence that Ms. Tibbetts was well within her lane when struck, and without fault.

[20] I would dismiss this ground of appeal.

Section 113A of the *Insurance Act*

[21] When deciding whether the CPP disability payments the appellant was receiving were deductible from damages awarded for loss of earning capacity, the judge was faced with two lines of authority respecting the interpretation of s. 113A of the *Insurance Act*. After reviewing the case law, he concluded that the CPP disability payments were on account of lost earning capacity. The appellant submits that he erred in law, and both respondents argue that he did not.

[22] Statutory interpretation is a question of law. The standard of review on a question of law is correctness: *Housen* at ¶8-9, *Hartling v. Nova Scotia (Attorney General)*, 2009 NSCA 130 at ¶31.

[23] Before examining the legislation, it is helpful to provide some context. It has long been accepted as a fundamental principle of tort law that a plaintiff is to be fully compensated, but not overcompensated, for his or her loss. However, there is an exception to the collateral benefits rule, or the rule against double recovery, for private insurance. That exception allows a plaintiff to recover losses from a tortfeasor, even if the plaintiff had been compensated for that loss by insurance. CPP payments were found to be a form of insurance and therefore included in the insurance exception to the collateral benefits rule. They were not deducted from an award for loss of income. See *Canadian Pacific Ltd. v. Gill,*

[1973] S.C.R. 654 at ¶31, *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359 at ¶82-84, and *Fraser v. Hunter Estate*, 2000 NSCA 63 at ¶25 and 27.

[24] In 2003, the Legislature passed the *Automobile Insurance Reform Act*, colloquially known as Bill 1. Its amendments to the *Insurance Act* led to s. 113A reading:

> **Effect of income-continuation benefit plan**
> **113A** In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, **the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by all payments in respect of the incident** that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income-continuation benefit plan if, under the law or the plan, the provider of the benefit retains no right of subrogation.
>
> [Emphasis added]

Bill 1 changed the collateral benefits rule by reducing damages for loss of income or earning capacity by "all payments in respect of the incident."

[25] Thus, the issue before the trial judge distilled to whether CPP disability payments were "payments in respect of the incident" which should be deducted from an award for loss of earning capacity.

[26] In their arguments at trial and on appeal, the parties focused on three decisions which considered CPP disability payments:

(a) *McKeough v. Miller*, 2009 NSSC 394;

(b) *Demers v. B.R. Davidson Mining & Development Ltd.*, 2012 ONCA 384; and

(c) *Hollett v. Yeager*, 2014 NSSC 207.

[27] In *McKeough*, the first Nova Scotia decision to consider s. 113A, Scaravelli J. concluded that CPP disability benefits **should** be deducted from awards for past and future income loss. He followed the reasoning in *Meloche v. McKenzie* (2005), 27 C.C.L.I. (4th) 134 (O.N.S.J.) where Patterson J. considered s. 267.8 of Ontario's *Insurance Act*, R.S.O. 1990, c. I.8. Scaravelli J. described that provision as having essential elements "substantially identical" to our s. 113A.

[28] A few years later, in *Demers*, the Ontario Court of Appeal revisited s. 267.8. Laskin J.A., writing for the Court, recounted the collateral benefits rule, and how that provision further modified that rule. He found that CPP disability payments should **not** be deducted from an award for loss of earning capacity. Later in my analysis, I will refer to his reasons in greater detail.

[29] Whether CPP benefits were deductible arose again in Nova Scotia in *Hollett*. Among other things, Coady J. considered *McKeough* and *Demers*. He felt bound by the Ontario Court of Appeal decision in *Demers*, and decided that CPP benefits should **not** be deducted from the award for lost past earnings.

[30] The trial judge in the decision under appeal considered the statutory language and reasons in the conflicting Nova Scotia Supreme Court decisions in *McKeough* and *Hollett*, and the Ontario Court of Appeal decision in *Demers*. Unlike *Demers* and *Hollett*, he determined that CPP disability payments **should** be deducted from the award of lost past earnings:

> [84] I conclude that the CPP Disability payments were received "in respect of the incident", as contemplated by s. 113A of the *Insurance Act*.
>
> [85] I am satisfied that the CPP Disability payments are on account of lost earning capacity. Nothing on the CPP Disability questionnaire filled out by the plaintiff touches on lost future income *per se*, and the calculation provisions of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, indicate that the quantum is based partly on a fixed amount and partly on the applicant's earnings history: see, e.g., s. 56. The plaintiff's injuries are inseparable from the incident, that being the collision. …

[31] Statutory interpretation is a contextual enterprise. In *Keizer v. Slauenwhite*, 2012 NSCA 20, this Court at ¶7 again approved the "modern principle" of statutory interpretation which provides that "…the words of an *Act* are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament." It also stated that:

> Under the modern principle, an interpreter who wants to determine whether a provision applies to particular facts must address the following questions:
>
> · what is the meaning of the legislative text?
>
> · what did the legislature intend? That is, when the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?

> · what are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislature is presumed to respect?

[32] Statutory interpretation also requires a consideration of s. 9(5) of the *Interpretation Act*:

> 9(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
> (b) the circumstances existing at the time it was passed;
> (c) the mischief to be remedied;
> (d) the object to be attained;
> (e) the former law, including other enactments upon the same or similar subjects;
> (f) the consequences of a particular interpretation; and
> (g) the history of legislation on the subject.

[33] Ms. Tibbetts submits that for legislation to change the law, it must clearly and unambiguously do so: *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] S.C.J. No. 64 at pp. 404-5. She maintains that there is no reading of s. 113A that clearly changes the common law on the deductibility of CPP disability payments, so the judge's interpretation was an error in law. She places heavy reliance on *Demers*. According to Ms. Tibbetts, in every aspect material to this appeal, s. 113A is identical to s. 267.8(1) of the Ontario legislation reviewed in *Demers*, suffers from the same ambiguity and lack of clarity as that legislation, and this Court should follow the reasoning of the Ontario Court of Appeal in that decision.

[34] Mr. Murphy argues that the appellant's arguments are flawed because they do not address the broader context of the intention of the legislation. He says that an examination of the provisions of Bill 1 shows that, as part of a wide-reaching statutory scheme to reduce automobile insurance premiums, the Legislature clearly and unambiguously intended to change the collateral benefits rule. He also says that *Demers* is not persuasive in Nova Scotia. Mr. Joyce joins Mr. Murphy in submitting that this Court should not follow *Demers* and that the trial judge correctly interpreted s. 113A and deducted CPP disability benefits from the appellant's award for loss of earning capacity.

[35] My analysis of s. 113A will track the three questions set out in *Keizer*, beginning with the second.

(a) The Intention of the Legislature

[36] In *Hartling*, this Court considered the Legislature's intention in enacting Bill 1, which included s. 113A. MacDonald C.J.N.S. for the Court wrote:

> [74] Following this guidance, I ask what is this legislation's overall purpose… . In my view, there can be little dispute that the purpose of this legislation is to control sky-rocketing insurance premiums. The legislative debates make this clear… . Further, while the legislation featured the mandatory 20% premium reduction financed by the impugned cap, there were other measures ancillary to this goal. Goodfellow, J. succinctly identified them in his decision … [*Hartling v. Nova Scotia (Attorney General)*, 2009 NSSC 38]:
>
> > ¶ 104 There is no doubt that there has been considerable benefit to the citizens of Nova Scotia in the passing of this legislation … they include the overall purpose of the legislation was to reduce automobile insurance rates … A number of measures provided benefit including … (3) eliminating double claims for injuries that are compensated by an accident victim's own insurance; … .

[37] Those determinations in *Hartling* are substantiated by an examination of Bill 1. It legislated a 20% reduction in automobile insurance premiums, created the Nova Scotia Insurance Review Board, and authorized it to reject unreasonable or unjust risk classification systems. Among other things, it changed the common law by limiting general damages for minor injuries.

[38] Section 9(5) of the *Interpretation Act*, which I set out earlier, states that every enactment shall be deemed remedial and interpreted to ensure the attainment of its objects by considering certain matters. The occasion and necessity for Bill 1 were those sky-rocketing automobile insurance premiums, and the cost of those premiums was the mischief to be remedied. The objective of Bill 1 was to reduce those premiums, and to reduce damage awards. Eliminating double recovery by "all payments in respect of the incident" as set out in s. 113A would reduce the amount of damages, and those amounts are linked to the cost of insurance premiums.

[39] I agree with the respondents that the Legislature intended to change the collateral benefits rule as part of a wide-reaching statutory scheme to reduce insurance premiums, and that deducting those payments achieves that intent.

(b) What is the Meaning of the Legislative Text?

[40] Section 113A of the *Insurance Act* provides that the damages to which a plaintiff is entitled for "loss of earning capacity" shall be reduced by "all payments in respect of the incident" that the plaintiff has received or that were available before the trial of the action for loss of earning capacity under the laws of any jurisdiction if the provider of the benefit retains no right of subrogation.

[41] I will begin by determining whether CPP disability payments are payments: (a) for a loss of earning capacity; (b) pursuant to the laws of any jurisdiction; and (c) without any right of subrogation.

[42] Section 42(2) of the *Canada Pension Plan*, R.S.C., 1985, c. C-8 (the "CPP Act") provides, among other things, that a person shall be considered disabled only if determined to have a severe and prolonged mental or physical disability. According to s. 42(2)(a)(i), a disability is only severe if the person is "incapable regularly of pursuing any substantially gainful occupation." Applicants must show that they cannot work; that is, that they have a loss of earning capacity. This means that CPP disability payments are for loss of earning capacity. Further, those payments are pursuant to the CPP Act, a law of Canada and thus pursuant to "the laws of any jurisdiction." The CPP Act does not provide for any right of subrogation. Therefore, if they are "in respect of the incident," CPP disability payments would be deducted from tort awards under s. 113A.

[43] I turn then to *Demers*, the foundation of the appellant's argument that the trial judge's interpretation of s. 113A was an error in law. Among other things, it considered the phrase "in respect of the incident."

[44] In *Demers*, Bill 59 amended Ontario's existing legislation so that s. 267.8(1) read:

> 267.8 (1) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, **the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by the following amounts**:
>
> > 1. **All payments in respect of the incident** that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of the income loss and loss of earning capacity.

> 2. **All payments in respect of the incident** that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan.
>
> 3. **All payments in respect of the incident** that the plaintiff has received before the trial of the action under a sick leave plan arising by reason of the plaintiff's occupation or employment.
>
> [Emphasis added]

[45] Prior to Bill 59, the legislation had allowed deduction of payments for "loss of income." The Bill 59 amendments added deduction of payments for "loss of earning capacity." The Ontario Court of Appeal held that the additional wording was not sufficiently clear to include CPP benefits:

> 29 … I would answer no to the question whether CPP disability benefits should be deducted from payments for loss of earning capacity for either of two reasons. The first reason rests on the principle that clear and unambiguous legislative language is required to change common law rights. The addition of the term "loss of earning capacity" in the Bill 59 regime does not clearly and unambiguously change the non-deductibility of CPP benefits at common law.
>
> 30 The second reason I would answer no is that CPP disability benefits are not paid "in respect of the incident"; they are paid in respect of Ms. Demers' disability. Thus, on the wording of s. 267.8(1)2 no deduction is required.
>
> …
>
> 33 … If the legislature intended to change the non-deductibility of certain benefits, such as CPP disability benefits, it did not make that intention clear. **The addition of "loss of earning capacity" does not demonstrate a clear intention to change to the common law because the jurisprudence has not treated the phrase in a consistent way.** Some cases have differentiated loss of earning capacity from loss of income; but others have treated the terms interchangeably.
>
> …
>
> 36 However, this view is not uniformly held. This court treated loss of income and loss of earning capacity interchangeably in *Walker v. Ritchie* (2005), 25 C.C.L.I. (4th) 60. So too did the British Columbia Supreme Court in *MacKenzie v. Rogalasky*, 2011 BCSC 54.
>
> …
>
> 41 My point here is not to come down on one side or the other of this debate. **What the debate shows is that the addition of the term "loss of earning capacity" in s. 267.8(1)2 did not clearly and unambiguously change the**

> **common law. Non-indemnity payments such as CPP disability benefits, therefore remain non-deductible under Bill 59.**
>
> [Emphasis added]

[46] *Demers* rested on two lines of reasoning. I will examine each in turn.

[47] First, the Ontario Court of Appeal held that the legislation there under review did not unambiguously change the common law rule prohibiting the deduction of CPP benefits. It reasoned that, because in Ontario, loss of income and loss of earning capacity were not distinct; the addition of "loss of earning capacity" to "loss of income" to the existing legislation did not change the collateral benefits rule in that Province. This reasoning is not persuasive in Nova Scotia.

[48] In Nova Scotia, loss of income and loss of earning capacity are separate and distinct heads of damages, and have been established as such for a long time. This Court stated in *Newman (Guardian ad litem of) v. LaMarche* (1994), 134 N.S.R. (2d) 127:

> 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. All that need be established is that the earning capacity be diminished so that there is a chance that at some time in the future the victim will actually suffer pecuniary loss.

See also *Exide Electronics Ltd. v. Webb*, 1999 NSCA 102 at ¶44, *Leddicote v. Nova Scotia (Attorney General)*, 2002 NSCA 47 at ¶53-58 and 68, and *Abbott v. Sharpe*, 2007 NSCA 6 at ¶156.

[49] Although the wording of our s. 113A and Ontario's s. 267.8(1) both refer to "income loss and loss of earning capacity," this distinction is critical. Indeed, the Ontario Court of Appeal in *Demers* suggested that, if the two had been differentiated in that Province as they are in Nova Scotia, then CPP disability payments should be deductible for damages for lost earning capacity:

> 34 An example of a case where the two phrases have been distinguished is the decision of the Nova Scotia Court of Appeal in *M.(L.M.) v. Nova Scotia (A.G.)*, 2011 NSCA 48, 303 N.S.R. (2d) 243, at para. 63. There, the court endorsed the following excerpt from the trial judge's reasons, [2010] N.S.J. No. 42:

> There is, it should be noted, a distinction between "loss of earning capacity" and "lost future income." This point was discussed in *Exide Electronics Ltd. v. Webb* (1999), 177 N.S.R. (2d) 147., where Freeman J.A., for the court, wrote, at para. 44, that "Loss of earning capacity is loss of a capital asset; it can be compensated for even when it is not accompanied by a reduction in income," as in a situation where a plaintiff can return to work, but with "a disability that restricts the scope of other employment that might become available in the future." By contrast, "The simplest illustration for an award to replace future income is total permanent disability, which requires an assessment based on earning expectations over the plaintiff's working lifetime." Similarly, in *Abbott v. Sharpe*, 2007 NSCA 6, Saunders J.A. said, at para. 156: "... this award was intended to compensate for diminished earning capacity which is seen as a loss to a capital asset, as opposed to a mathematical calculation of projected future lost income." In my view "loss of earning capacity" is the relevant approach in the present case.
>
> 35 On this view, damages for loss of earning capacity compensate for the loss of a capital asset. They do not depend on proving a pecuniary loss. Instead, they are triggered by a particular disability, which impairs the ability to work. In this sense, CPP disability benefits tend to duplicate damages for loss of earning capacity. Neither requires proving a pecuniary loss; both depend on proving a disability. As the one tends to duplicate the other, the one should be deductible from the other.

[50] I move to the second line of reasoning in *Demers*. The Ontario Court of Appeal held that the CPP benefits were not “in respect of” the motor vehicle accident for which the plaintiff claimed damages for personal injury, but payments in respect of her disability. In doing so, it relied on the reasons in *Sarvanis v. Canada*, 2002 SCC 28.

[51] There, the Supreme Court of Canada held that s. 9 of the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50 operates so as to immunize the Crown from tort liability where the claimant received CPP disability benefits from the Crown. Section 9 reads:

> 9 No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

[52] The issue was whether the claim was barred because the CPP benefits were paid “in respect of the death, injury, damage or loss in respect of the claim made.”

Iacobucci J., writing for the Court, described the phrase "in respect of" as a broad one (¶20) which "signals an intent to convey a broad set of connections," yet is not a phrase "of infinite reach" (¶22). He reiterated that the proper approach to statutory interpretation required a careful examination of the wider context of s. 9, and then held that "the key is to recognize that the loss, the recovery of which is barred by statute, must be the same loss that creates an entitlement to the relevant pension or compensation" (¶27). In that context, he concluded that CPP disability payments were not "in respect of" the negligence claim.

[53] The wording and context of s. 9 of the *Crown Liability and Proceedings Act* and s. 113A of our *Insurance Act* are different. The federal statute is narrower. It refers to a single claim against the Crown and compensation paid by the Crown in respect of that same claim. There is a single source of funds—the federal Crown.

[54] Section 113A is broader. It refers to "an action for loss or damage from bodily injury or death arising … from the use or operation of an automobile" and damages in that action being reduced "by all payments in respect of the incident." The wording shows that s. 113A contemplated a single incident which gave rise to an action for damages and the deduction from certain damages of several types of payments from sources not involved in the action.

[55] It is my view both lines of reasoning in *Demers* are not persuasive with regard to the interpretation of s. 113A. The trial judge did not err in law in not following that decision of the Ontario Court of Appeal.

[56] In the context of s. 113A, the words "in respect of the incident" raise a question of fact. The trial judge held that the appellant's injuries are "inseparable from the incident, that being the collision" (¶85). The evidence showed that, were it not for the collision with the truck, Ms. Tibbetts would not have applied for and received CPP disability benefits. The trial judge determined that factual question, and I see no palpable and overriding error in his finding that the appellant's injuries are "inseparable from the incident, that being the collision."

(c) The Consequences of Interpretation

[57] Deducting CPP disability benefits under s. 113A would accord with the legislative intention to reduce automobile insurance premiums. It would result in an injured person being fully compensated, but not overcompensated, for her loss of income or earning capacity. Deducting CPP disability benefits would change

the collateral benefits rule by reducing tort awards to facilitate the reduction of automobile insurance premiums.

[58] This analysis of s. 113A following the three questions in *Keizer* which guide statutory interpretation brings me to this conclusion. The Legislature's intention to reduce automobile insurance premiums led to s. 113A which changed the collateral benefits rule and the treatment of CPP disability benefits. Those benefits are for loss of earning capacity and are deducted from awards under that head of damages. The trial judge correctly interpreted s. 113A and deducted CPP disability benefits from the award assessed for the appellant's loss of earning capacity.

General Damages

[59] In awarding general damages, the judge wrote:

> [89] As to general damages, I am satisfied that the plaintiff underwent significant pain and suffering in the aftermath of the collision. I am also satisfied that she continues to experience a degree of ongoing pain and discomfort which, while not disabling, is "persistently troubling" in the manner contemplated by *Smith v. Stubbert* (1992), 117 N.S.R. (2d) 118 (C.A.). I would place her damages near the lower end (approximately $27,000 in present day funds). I fix her general damages at $30,000.

[60] Unless the judge applied a wrong principle of law, or the damages awarded are so inordinately low or high as to constitute a wholly erroneous assessment, an appellate court will not intervene. It should consider whether the findings that led to the award are reasonable and supported by the evidence and within the range of acceptable awards: *Abbott v. Sharpe*, *supra*, at ¶109.

[61] According to Ms. Tibbetts, the judge erred by relying solely on *Smith v. Stubbert* and making an award of damages that was inordinately low for the injuries she suffered. She submits that her hip, tibia, and fibula fractures were different from the cervical neck sprain and bruising on the spine in that case. In her factum, she set out a number of cases from Nova Scotia and from other jurisdictions where the plaintiff had suffered one or more factures and the general damage awards ranged from some $70,000 to over $145,000 today. These included: *Gaum v. D.G. Wolfe Enterprises Ltd*., [1998] N.S.J. No. 464; *Baker v. O'Hanley*, 2001 NSSC 38; *Rhyno v. MacFarlane*, 2004 NSSC 123; *French v. Hodge*, 2005 NSSC 44; *McKeough v. Miller*, 2009 NSSC 394; *Melanson v. Robbins*, 2009 NSSC 31; *Leslie v. S & B Apartment Holding Ltd*., 2011 NSSC 48; *Cleghorn v. Dunbar*, 2005 NBQB 247; *Melanson v. Steen*, 2009 NBQB 176;

Rizzolo v. Brett, 2009 BCSC 732; *Gravelle (Litigation guardian of) v. Seargeant*, 2013 BCSC 536; *Falati v. Smith*, 2010 BCSC 465; and *Hildebrand v. Musseau*, 2010 BCSC 1022.

[62] Mr. Murphy points out that this Court has applied *Smith v. Stubbert* outside of the whiplash context of that case. In *LeBlanc v. Marson Canada Inc.*, [1995] N.S.J. No. 509 (C.A.), aff'ing [1995] N.S.J. No. 140 (S.C.), this Court upheld the trial judge's award of $30,000 in general damages to a plaintiff who suffered an eye injury when chemical splashed onto her face. In doing so, the Court referred to *Smith v. Stubbert* at ¶10.

[63] Mr. Murphy also brought forward case law from Nova Scotia in which the awards for general damages where fractures were involved overlapped the range set out in *Smith v. Stubbert*. These included: *MacDonald v. Johnson*, 2006 NSSC 60; *Matheson v. Bartlett*, [1993] N.S.J. No. 198; *Ouderkirk v. Clarry*, 2010 ONCA 388; *Milligan v. Latter*, [1992] N.S.J. No. 12; *Smith v. Atlantic Shopping Centres Ltd.*, 2006 NSSC 133; *Marshall v. Langthorn*, 1998 NSCA 43, aff'ing *Langthorn v. Marshall*, [1997] N.S.J. No. 415 (S.C.); *Yajnik v. Yajnik*, [1991] N.S.J. No. 69 (S.C.), aff'ing [1992] N.S.J. No. 61 (C.A.), and *Davis v. Halifax (Regional Municipality)*, [1998] N.S.J. No. 388. In these cases, the awards ranged from approximately $30,000 to $50,000 updated for inflation to 2015.

[64] Ms. Tibbetts had sought general damages of $150,000. The judge's award of $30,000 shows that he did not accept much of the evidence the appellant presented. She did not suggest that his assessment was not supported by the evidence and only relied on his reference to *Smith* and the case law she presented. A view of the case law presented by the parties shows that the judge's assessment was not a wholly erroneous amount, and within the range of acceptable awards. I see no basis to intervene.

Calling Witnesses

[65] Prior to the trial, Mr. Murphy had filed a list of witnesses which included the names of investigating RCMP officers. He did not call those officers to testify. As a result, says Ms. Tibbetts, she was not able to cross-examine them on the key issue of whether her motorcycle had been moved. She submits that, had she been notified as required by Rule 4.18(5), she would have called them. Ms. Tibbetts submits that the judge erred by failing to direct Mr. Murphy to call the RCMP

officers, and suggests that he could have drawn a negative inference from his not doing so.

[66] The appellant did not make any mention in this regard to the trial judge. Consequently, he made no ruling which this Court can review. Any such ruling would have been directed to the management of the case, and such discretionary rulings by trial judges are to be exercised judicially and not lead to a manifest injustice: *Abbott* at ¶83-85.

[67] The record shows that Ms. Tibbetts closed her case in the afternoon of the sixth day of trial. Mr. Murphy testified all the next day. When his evidence concluded, the judge and counsel conferred about the following day. The appellant's counsel asked who would be called next. Counsel for Mr. Murphy indicated that that would be discussed with his co-counsel and they did not want to undertake to call anybody. The judge asked that Ms. Tibbetts' counsel be advised when a final decision was made so that they could prepare.

[68] The appellant's submissions did not mention that that evening, Mr. Murphy's counsel sent a letter to all opposing counsel advising that they would not be calling the RCMP officers. The next day turned out to be the last day of the trial. Counsel for Mr. Murphy did not call any further witnesses before closing his case. Counsel for Mr. Joyce did not call any evidence and closed his case. Counsel for Ms. Tibbetts presented no rebuttal evidence. The judge then called for written submissions and closed court.

[69] Civil Procedure Rule 4.18 reads in part:

> (1) A party must, before the finish date, file a list of the witnesses the party intends to call at trial, except a witness the party will call only to impeach the credibility of another expected witness.
> …
> (5) A party is not required to call each person on the party's witness list, but a party who decides not to call a person on the list must immediately notify all other parties and the trial judge.

[70] Rule 4.18 does not oblige a party to call all the witnesses on his list of witnesses. It only requires that immediate notice be given when a party decides not to call a witness. The record shows that Mr. Murphy gave notice, and there is no basis for any suggestion that there was any deliberate delay in his doing so.

[71] What the appellant is really arguing appears in her factum:

> ¶66 A Plaintiff should know as early as possible who a Defendant is calling. **A Defendant should not be able to keep their witnesses secret until after the Plaintiff closes its case.**
>
> [Emphasis added]

and again later on:

> ¶71 … The Defendant should have told the Court and the Appellant that they were not calling the RCMP witnesses **prior to the close of the Plaintiff's case.**
>
> [Emphasis added]

[72] In my view, the appellant's position is untenable. Under our adversarial trial system, each party must call the evidence in support of his or her case. The plaintiff bears the burden of proof which, in this case, included the appellant's assertions that she had been in her lane when struck, and her motorcycle had been moved by the police officers and ambulance personnel. She was free to call any of them, and she made the strategic decision not to do so.

[73] Our *Civil Procedure Rules* also refute the appellant's position. Rule 51.05 states that a defendant does not open his or her case until the plaintiff has closed his case. Further, Rule 51.06 permits a defendant to make a motion for a non suit before electing to open his case. Rule 51.06(2) allows a defendant to elect whether to call evidence after an unsuccessful motion for non suit. The defendant is entitled to hear the entire case against him and then move for a non suit or to open his case and call evidence.

[74] The appellant's submission is inconsistent with our adversarial trial system and the *Civil Procedure Rules*. The trial judge made no error when he did not require Mr. Murphy to call the police officers.

Disposition

[75] I would dismiss the appeal. The appellant shall pay costs of $6,000 inclusive of disbursements to Mr. Murphy, and $2,000 inclusive of disbursements to Mr. Joyce.

Oland J.A.

Concurred in:

Fichaud J.A.

Bryson J.A.

NOVA SCOTIA COURT OF APPEAL
Citation: *Tibbetts v. Murphy*, 2017 NSCA 35

Date: 20170502
Docket: CA 451934
Registry: Halifax

Between:

Shirley Tibbetts

Appellant

v.

Reginald Greg Murphy and Joseph George Joyce

Respondents

Judges: Fichaud, Oland and Bryson, JJ.A.

Appeal Heard: January 24, 2017, in Halifax, Nova Scotia

Erratum Date: May 3, 2017

Held: Appeal dismissed with costs, per reasons for judgment of Oland, J.A.; Fichaud and Bryson, JJ.A. concurring

Counsel: Jamie MacGillivray and Chuck J. Ford, for the appellant
Christopher W. Madill and Tipper McEwan, for the respondent Mr. Murphy
Chad G. Horton and Joshua E. Martin, for the respondent Mr. Joyce

Erratum:

[1] In ¶11, the sentence "Mr. Murphy responded to all of these, and Mr. Joyce only to the third issue" should be replaced with "Mr. Murphy responded to all of these, and Mr. Joyce only to the second issue."