COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Sulz v. Minister of Public Safety and Solicitor General,*** 2006 BCCA 582

Date: 20061220
Docket: CA033769

Between:

Nancy Sulz a.k.a. Nancy Wilson

Respondent
(Plaintiff)

And

Minister of Public Safety and Solicitor General

Appellant
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Levine
The Honourable Mr. Justice Smith

H.J. Roberts	Counsel for the Appellant
J.B. Carter	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia 28 November 2006
Place and Date of Judgment:	Vancouver, British Columbia 20 December 2006

Written Reasons by:
The Honourable Madam Justice Levine

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Mr. Justice Smith

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] The respondent, Nancy Sulz, was awarded damages in B.C. Supreme Court for losses she suffered as a result of harassment by her superior officer in the Royal Canadian Mounted Police, Staff Sergeant Smith ("Smith"). Her action, alleging liability for tort, breaches of contract and fiduciary duty, was brought against Smith, the Attorney General for Canada (the "federal Crown") and Her Majesty the Queen in Right of the Province of British Columbia (the "Province"). The trial judge dismissed the claims against the federal Crown and Smith. He found the Province vicariously liable for the tort of negligent infliction of mental suffering committed by Smith. Damages were assessed at $950,000.

[2] The trial judge's reasons for judgment are reported at (2006), 54 B.C.L.R. (4th) 328, and are indexed as 2006 BCSC 99.

[3] The Province does not dispute the finding of negligence or the quantum of the award of damages (except that it claims that superannuation payments received by the respondent should be deducted). It appeals the judgment on the following grounds:

(a) The trial judge erred in accepting jurisdiction over the respondent's claims. The Province says that he should have deferred to tribunals specialized in resolving workplace issues under the ***Royal Canadian***

Mounted Police Act, R.S.C. 1985, c. R-10, or the ***Canadian Human Rights Act***, R.S.C. 1985, c. H-6.

(b) The trial judge erred in awarding damages against the Province when recovery against the federal Crown was barred by statute. The Province is indemnified by the federal Crown, under the *Provincial Police Services Agreement* between the two levels of government, for damages awarded in respect of torts committed by R.C.M.P. officers serving as "provincial constables" (within the meaning of s. 14 of the ***Police Act***, R.S.B.C. 1996, c. 367). The Province argues that the award has the effect of permitting the respondent to recover indirectly what she could not recover directly from the federal Crown, because of the federal statutory bars.

(c) The trial judge erred in finding the Province liable for the tort committed by Smith while carrying out his managerial duties as the commander of the Merritt detachment of the R.C.M.P. The Province argues that it is liable under the ***Police Act*** only for torts committed by police constables in the course of carrying out their operational duties, which include policing matters such as preserving the peace, preventing crime, apprehending criminals, executing warrants, and escorting prisoners.

(d) The trial judge erred in failing to deduct from the awards for past income loss and loss of future earning capacity benefits received by

the respondent under the ***Royal Canadian Mounted Police Superannuation Act***, R.S.C. 1985, c. R-11. The Province argues that not deducting those benefits is contrary to the provisions of that statute and the rule against double recovery of collateral benefits.

[4] For the reasons that follow, I would not accede to any of these grounds of appeal, and would dismiss the appeal.

[5] The Province also claims that the trial judge erred in finding the Province liable, when the person responsible for the actions of police constables under the ***Police Act*** is the Minister of Safety and Solicitor General. The relief the Province seeks for this error is an order substituting the Minister in place of the Province. I would make that order, effective with these reasons for judgment. For convenience, I will refer to the Minister in these reasons as the "Province".

Background

[6] In 1988, after completing three years of university, the respondent joined the R.C.M.P. Shortly thereafter, she was posted to the Merritt detachment, which consisted of 20 members, as a general duty police officer. The head of this detachment has the rank of staff sergeant and is primarily responsible for administration, while two corporals supervise the day-to-day activities of the other members.

[7] When the respondent joined the Merritt detachment, the commander was Staff Sergeant Stewart. He was succeeded by a temporary commanding officer,

Ken Porter. Under the supervision of both of these officers, the respondent received excellent evaluations. She was content with her progress and planned on a lengthy career with the R.C.M.P.

[8] In the early part of 1994, Smith became the Merritt detachment commander. At this time, the two corporals responsible for day-to-day activities were Corporals Taylor and Angell.

[9] The respondent was married in May 1991, and her first child was born on April 16, 1993. Following maternity leave she returned to full duty in late October 1993. In late May or early April of 1994, the respondent learned that she was pregnant with her second child. She continued with her regular duties until July 1994, at which point she was placed on light office duties. On October 26, 1994, she went on medical leave because of complications with her pregnancy. Following the birth of her second child on December 12, 1994, the respondent took six months maternity leave and returned to work on June 15, 1995.

[10] The difficulties began when the respondent was placed on light office duties. From the time when she was assigned to these duties, to the time when she returned from maternity leave, the respondent was involved in at least three incidents with Smith. The first incident involved the completion of an administrative assignment, the second involved an alleged breach of R.C.M.P. policy by travelling to Bellingham without obtaining permission, and the third incident involved her completion of forms transferring her from medical leave to maternity leave.

[11] While on maternity leave, the respondent began to hear rumours that Smith and Angell had made numerous derogatory remarks about her in the presence of other detachment staff members. According to the respondent, the derogatory comments continued even after she returned to work. As a consequence, the respondent believed she was losing the trust of her fellow officers.

[12] On June 16, 1995, the respondent contacted her divisional representative, Staff Sergeant Humphries, and provided him with a written description of these events. Following a discussion with Staff Sergeant Humphries, the respondent decided it was best to deal with the matter informally. She wanted to resolve the issue so that she could continue her career with the R.C.M.P. Staff Sergeant Humphries viewed the matter as a serious one, and arranged to meet with Smith and Angell.

[13] During this time, the respondent's physical and mental health had deteriorated badly. She was 20 pounds underweight, unable to sleep properly and was often on the verge of tears. On June 27, 1995, she met with her family doctor who advised her to go on sick leave. On the same day, she received a telephone call from an inspector involved in the meeting with Smith and Angell, who advised her that the matter had been resolved, and she need not worry. Nonetheless, the next day Taylor told her to stay away from the detachment because Smith was in an irate state of mind. The respondent decided to take sick leave.

[14] In July 1995, the respondent consulted with Dr. Carmichael, a psychologist under contract with the R.C.M.P. He suggested that she should return to work on a

part-time basis. The respondent decided to return full-time because she wanted to try to normalize her work situation. However, the feelings of ostracism continued, and Smith avoided contact with her. The respondent also believed that her relationships with Taylor and Angell had deteriorated. In particular, the respondent and Taylor were involved in multiple disputes relating to her conduct in investigations.

[15] On February 4, 1996, Dr. Carmichael diagnosed the respondent as having a major depressive disorder. He prescribed anti-depressants. The doctor advised her to take sick leave, and he called the detachment directly to notify her superiors that she was on sick leave. Smith telephoned Dr. Carmichael, and questioned the diagnosis. He also suggested that Dr. Carmichael may have been manipulated by the respondent.

[16] Following the diagnosis of depression, the respondent underwent a pregnancy test that is routinely ordered before anti-depressant drugs are taken. She was surprised to learn that, despite her husband's vasectomy, she was pregnant for the third time. Because of this pregnancy, she was not able to take the anti-depressant medications. She remained under the care of Dr. Carmichael. While pregnant, the respondent remained on sick leave. In September 1996, after the birth of her third child, she went on maternity leave for six months, after which she returned to sick leave.

[17] Thus, the respondent was on active duty with the R.C.M.P. from 1989 to April 1993, October 1993 to October 1994, and from July 1995 to January 1996. The respondent did not return to active duty after January 1996.

[18] In May 1997, the R.C.M.P. sent the respondent to Kelowna to be examined by Dr. Semrau, a psychiatrist. He corroborated the opinions and diagnoses of Dr. Carmichael.

[19] Following the examination, the new divisional representative, Staff Sergeant Howarth, investigated the matter and reported some concern about the conduct and history of Smith. Staff Sergeant Howarth's report led to a formal investigation which was conducted in late 1997 and early 1998. The internal investigation culminated in a finding that discrimination had been substantiated, but that disciplinary measures could not be taken because in the meantime Smith had retired. The respondent was notified of the conclusion of the investigation in September 1998. Smith retired in April 1998.

[20] While the formal investigation was ongoing, the respondent commenced proceedings by filing a writ of summons on July 3, 1997. She did not file a statement of claim until April 2001.

[21] The respondent remained on sick leave until March 8, 2000, when she agreed to a medical discharge from the R.C.M.P. She received full salary up to the date of her discharge. Upon discharge, the respondent was paid a disability pension reflecting 100% disability under s. 32 of the ***R.C.M.P. Superannuation Act*** (this pension is administered by Veterans Affairs Canada and was referred to by the trial

judge and the parties as the “Veterans Affairs pension”); a superannuation pension under s. 4(1) of the ***R.C.M.P. Superannuation Act***; long-term disability benefits for two years up to 75% of wages, minus pension paid; vacation pay; severance pay; and banked overtime.

[22] At the time of trial, the respondent continued to suffer from depression and remained unable to cope with any form of regular employment.

[23] The trial judge found that Smith had committed the tort of negligently inflicting mental suffering on the respondent. Smith’s harassing conduct, including “angry outbursts” and “intemperate, and at times, unreasonable behaviour” caused “serious emotional problems” and created “the troubled work environment that the plaintiff experienced” (reasons for judgment, paras. 147-148). The trial judge found (at para. 159) that “the harassment which she experienced in 1994 and 1995 was the proximate cause of her depression, which in turn, ended her career in the R.C.M.P.” He assessed damages (at para. 187) as follows:

General damages	$125,000
Past wage loss	225,000
Future wage loss	600,000
Total	$950,000

Jurisdiction

[24] The first ground of appeal, whether the court should have taken jurisdiction over this workplace dispute, raises the issues identified by the Supreme Court of

Canada in ***Weber v. Ontario Hydro***, [1995] 2 S.C.R. 929, and considered in numerous subsequent cases. In ***Weber***, the Supreme Court held that courts should take a deferential approach to expert tribunals, including arbitrators, established under labour relations legislation and collective agreements. The Court adopted the "exclusive jurisdiction" model for labour disputes, establishing the principle that where a dispute in its "essential character" arises from the interpretation, application, administration, or violation of a collective agreement, it is to be determined by an arbitrator appointed in accordance with the collective agreement, and not by the courts.

[25] The Province relies on the recent judgment of the Supreme Court in ***Vaughan v. Canada***, [2005] 1 S.C.R. 146, 2005 SCC 11, where Binnie J., for the majority, held that the court should decline jurisdiction in a dispute between an employee and his employer, the federal government, concerning employment benefits. ***Vaughan*** was cited to and argued before the trial judge, but he did not cite it in his reasons for judgment. The Province argues that ***Vaughan*** is the latest word from the Supreme Court of Canada on the considerations to be applied in determining whether a court has jurisdiction over a dispute involving workplace matters where there is a statutory grievance scheme in place.

[26] ***Vaughan*** concerned an action brought by a federal government employee alleging negligence by his employer in denying him early retirement benefits. The denial of early retirement benefits was subject to the grievance process under the ***Public Service Staff Relations Act***, R.S.C. 1985, c. P-35 ("***PSSRA***"), but third party adjudication was not available. Mr. Justice Binnie found that the legislation did not

oust the court's jurisdiction, but held that the court should not exercise its "residual jurisdiction", giving deference to the statutory scheme. He determined that the absence of third party adjudication was not a sufficient reason for the court to involve itself in the dispute, which he described (at para. 23) as a "garden variety employment benefit case", and the action in tort as having "a degree of artificiality" (at para. 11).

[27] The respondent relies on ***Pleau (Litigation Guardian of) v. Canada (Attorney General)*** (1999), 182 D.L.R. (4th) 373, 1999 NSCA 159, (leave to appeal to the Supreme Court of Canada dismissed [2000] S.C.C.A. No. 83) (applied by the trial judge), and ***Phillips v. Harrison*** (2000), 196 D.L.R. (4th) 69, 2000 MBCA 150. In both of those cases, the courts found they had jurisdiction in actions taken by employees against their employers despite the availability of a statutory dispute resolution scheme.

[28] In ***Pleau***, the plaintiff's action was against the Attorney General of Canada and nine federal public servants for conspiracy to cause injury to him and his family in the context of his dismissal and subsequent reinstatement in the federal public service. His complaints included harassment by superiors and co-employees. As in ***Vaughan***, s. 91 of the ***PSSRA*** provided grievance procedures, but the claims could not be referred to third party adjudication under s. 92. The grievance procedure provided that the final decision lay in the hands of the Deputy Minister, who was responsible for the department in which the persons whose conduct Mr. Pleau complained of were employed. In ***Vaughan***, Binnie J. described these

circumstances as “whistle-blower cases” (at paras. 18-24) which “raised serious questions of conflicted interests within the employer department …” (at para. 23).

[29] In ***Pleau*** (at 381-82), Cromwell J.A. for the Court summarized the principles derived from Supreme Court of Canada decisions in ***St. Anne Nackowic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219***, [1986] 1 S.C.R. 704, ***Gendron v. Supply and Services Union of the Public Service Alliance of Canada***, [1990] 1 S.C.R. 1298, ***Weber***, and ***New Brunswick v. O’Leary***, [1995] 2 S.C.R. 967. He found that there were three interrelated considerations underpinning the Supreme Court’s decisions concerning whether courts should exercise jurisdiction in labour disputes: deference to statutory or contractual preference for a particular dispute resolution process; whether the substance, or “essential character” of the dispute, falls within the statutory or contractual process; and whether the process provides effective redress for the alleged breach of duty. The Court of Appeal found that the statute did not oust the jurisdiction of the court, the substance of the dispute was not addressed by the collective agreement, and, most important in the circumstances in ***Pleau***, the absence of third party adjudication for the dispute denied the plaintiff effective redress (at 404). The court thus had jurisdiction to hear the action.

[30] In ***Phillips***, the plaintiff, a civilian employee of the R.C.M.P., brought an action for defamation against her immediate supervisor. The complaint was investigated internally, and found not to constitute harassment. The plaintiff had the option to grieve the decision under the ***R.C.M.P. Act***, but instead she resigned and started the action. Madam Justice Steel, writing for the Manitoba Court of Appeal, found, after

considering the principles in ***Weber***, that the court had jurisdiction over the claim. As in ***Pleau***, which considered the ***PSSRA***, the statutory scheme under the ***R.C.M.P. Act*** did not provide for independent third party adjudication. The grievance procedure led to a final decision, subject to judicial review, by the Commissioner, an employee of the R.C.M.P. The Court held this procedure did not provide effective redress. It also found that the grievance procedure in the statute did not oust the jurisdiction of the court, and the dispute was not covered by a collective agreement.

[31] In ***Vaughan***, Binnie J. did not criticize Cromwell J.A.'s analysis in ***Pleau*** of the factors the court considers in determining whether it should exercise jurisdiction in a workplace dispute. He found them inapplicable to the ***PSSRA***, on the facts in ***Vaughan***. Mr. Justice Binnie was explicit in his reasons for judgment that he was considering the scheme of the ***PSSRA*** as it applied to employment benefits provided to federal government employees by regulation. He expressly excluded "whistle-blower" cases from his conclusion that the lack of independent adjudication did not justify court intervention. ***Vaughan*** did not consider jurisdiction in the context of the tort of negligent infliction of mental distress by a superior officer in the R.C.M.P., not governed by the ***PSSRA*** but the ***R.C.M.P. Act***.

[32] This case is more like ***Pleau*** and ***Phillipps*** than ***Vaughan***. The obvious difference from ***Vaughan*** is the factual difference: it does not involve a dispute over employment benefits, but a real tort claim for injuries suffered as a result of the conduct of a manager. Furthermore, most of the respondent's loss for which she was compensated in damages, her past and future loss of income, was not suffered

during the course of the respondent's employment. Her income loss occurred after she was discharged, when she was no longer governed by, or could claim any benefit from, the grievance process under the ***R.C.M.P. Act***. The respondent's formal complaint resulted in a determination that Smith had harassed her. The internal process was then spent: there was nothing more to grieve. Nor could the internal process provide compensation for her loss. In that respect, the statutory scheme did not provide effective redress.

[33] Similarly, a complaint to the Canadian Human Rights Tribunal would not have provided the respondent an effective remedy. Assuming she could have brought such a complaint, as her counsel points out, her harassment complaint was only partly based on her gender. Only to that extent would the Human Rights Tribunal have had jurisdiction to determine if the respondent had suffered discrimination within the meaning of the ***Canadian Human Rights Act***.

[34] Further, the one-year limitation period in s. 41(1)(e) of the ***Canadian Human Rights Act*** had expired by the time the internal procedures taken under the ***R.C.M.P. Act*** were completed and the respondent was medically discharged. Section 41(1) of the ***Canadian Human Rights Act*** provides that

> the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that
>
> …
>
> (e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

The harassment of the respondent occurred in 1994 and 1995. The internal investigation under the ***R.C.M.P. Act*** concluded in 1998.

[35] The trial judge considered the relevant legal principles and factual context in concluding, correctly, that the court had jurisdiction in this case.

[36] I would not accede to this ground of appeal.

Liability of the Province

[37] Smith was found to have committed a tort against the respondent. Her action against him, however, was dismissed under ss. 21(1) and (2) of the ***Police Act***:

> **Personal liability**
>
> 21 (1) In this section, "police officer" means a person holding an appointment as a constable under this Act.
>
> (2) No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.

[38] The Province's liability to the respondent arises under ss. 11(1)(a) and 21(4)(c) of the ***Police Act***. Under s. 11(1)(a), the Province is jointly and severally liable for torts committed by "provincial constables …, if the tort is committed in the performance of their duties". Under s. 21(4)(c), the Province is vicariously liable for a tort committed by a "police officer" against whom an action for damages does not

lie under s. 21(2), where the Province would be jointly and severally liable under s. 11.

[39] Smith was a “provincial constable” and a “police officer” within the meaning of those sections of the ***Police Act***.

[40] Section 14 of the ***Police Act*** authorizes the Province to enter into an agreement with Canada, authorizing the R.C.M.P. to carry out the powers and duties of the provincial police force specified in the agreement. The federal Crown and the Province entered into the *Provincial Police Services Agreement* (the “Policing Agreement”) for the period of April 1, 1992 to March 31, 2012. Section 10.7(a) of the Policing Agreement provides that the federal Crown will indemnify the Province for the costs of any civil action, compensation claim, *ex gratia* payment or claim for legal fees for which the Province becomes liable in respect of any claim or action against an R.C.M.P. member employed in the provincial police service. The federal Crown agreed to assume the conduct of any proceeding against the Province relating to such a claim. (Thus, the Province was represented on this appeal by counsel from the federal Department of Justice.)

[41] The respondent’s action was brought directly against the federal Crown, but was dismissed because of the statutory bars in s. 9 of the ***Crown Liability and Proceedings Act***, R.S.C. 1985, c. C-50, and s. 111 of the ***Pension Act***, R.S.C. 1985, c. P-6. The statutory bars precluded her from bringing an action against the federal Crown because she received the Veterans Affairs pension on her medical discharge from the R.C.M.P.

[42] The Province argues that in imposing liability on it for the respondent's damages, which the federal Crown must pay under the Policing Agreement, the trial judge permitted the respondent to recover indirectly from the federal Crown what she was barred from recovering directly. Counsel argues that the statutory bars should be given a broad interpretation to avoid thwarting the intention of the federal legislation.

[43] This argument cannot succeed. The two parties to the Policing Agreement, the Province and the federal Crown, presumably sought and obtained rights and obligations that reflected their separate and mutual intentions, in accordance with the normal creation of contractual relations. Had they wished to limit the application of the provisions of the ***Police Act*** as suggested by the Province, both of them had the power to do so by legislative means. It stretches the principles of statutory interpretation beyond logic to suggest that the effect of federal legislation is to limit the rights, under provincial legislation, of the victim of a tort committed by a provincial police constable, because of an agreement entered into between the two levels of government for reasons that have no apparent connection to the circumstances in issue here. It may be that the Province and the federal Crown did not contemplate these circumstances when they entered into the Policing Agreement, or when either of them enacted their relevant legislation. That does not provide a basis for the Court to interpret either the legislation or the Policing Agreement as the Province suggests.

[44] I would not accede to this ground of appeal.

Managerial and Operational Police Duties

[45] The Province argues that its liability under s. 11(1)(a) of the ***Police Act*** is limited to torts committed by provincial constables in the performance of their operational duties as police officers. It says that the tort here was committed by Smith in the course of carrying out his managerial duties as the officer in charge of the detachment, and the statutory scheme for dealing with complaints about the conduct of R.C.M.P. managers is more appropriate than an action for damages.

[46] The Province says that at common law, the duties of a police officer are "to ensure that the public peace would be kept and to prevent crime and to detect crime and bring offenders to justice and generally to protect property from criminal injury": see ***R. v. Noel*** (1995), 101 C.C.C. (3d) 183 at paras. 12, 14-17 (B.C.C.A.). Those duties are reflected in s. 18 of the ***R.C.M.P. Act***, which charges members who are peace officers with preserving the peace, preventing crime, apprehending criminals, executing warrants, and escorting prisoners. Peace officers are also charged with performing "such other duties and functions prescribed by the Governor in Council or the Commissioner". The Province also cites the oath of office taken by provincial police officers under s. 70 of the ***Police Act***. The oath is found in ***Police Act, Police Oath/Solemn Affirmation Regulation***, B.C. Reg. 136/2002. Police officers swear to "cause the peace to be kept and prevent all offences against the persons and properties of Her Majesty's subjects", and to "faithfully, honestly and impartially perform my duties as … [office] …." R.C.M.P. members are required to swear an

oath of office under s. 14 of the ***R.C.M.P. Act***. The oath, found in the ***Schedule*** to the ***R.C.M.P. Act***, is:

> I, ……, solemnly swear that I will faithfully, diligently and impartially execute and perform the duties required of me as a member of the Royal Canadian Mounted Police, and will well and truly obey and perform all lawful orders and instructions that I receive as such, without fear, favour or affection of or toward any person. So help me God.

[47] The respondent objects to this argument on the ground that it was not raised at trial, and on its merits. Counsel points out that the ***Police Act*** does not distinguish between managerial and operational duties; police officers are charged with the duty, and swear an oath, to follow all orders and instructions given by their superiors (through the chain of command within the R.C.M.P. flowing from the Commissioner); and the jurisdictional argument is misplaced in this context.

[48] A legal argument may be raised and considered for the first time on appeal, if no new evidence is necessary to properly consider it; considering it would not result in procedural prejudice to the other party; and not considering it would result in an injustice: see ***R. v. Vidulich*** (1989), 37 B.C.L.R. (2d) 391 at 398-399 (C.A.); ***Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.***, [2002] 1 S.C.R. 678 at paras. 32-33.

[49] In light of these factors, the Province's argument may be considered, but I would reject it on its merits, for the reasons suggested in the submissions of respondent's counsel.

[50] The Province seeks to limit the interpretation of the clear words of the ***Police Act***, though there is nothing in those words or their context that suggests such a limitation. The descriptions of the duties of police officers do not limit their duties to their "operational" work. Police officers are also charged with carrying out all duties, functions, and instructions that are imposed on them by their office and the organization of which they are members. The ***Police Act*** contemplates that police officers may commit torts in carrying out their duties – operational or managerial, and does not limit the Province's liability for torts committed by police officers to those committed only by inferior officers.

[51] I would not accede to this ground of appeal.

Deduction of Superannuation Pension from Damages

[52] The respondent received, on her medical discharge from the R.C.M.P., two kinds of pensions under the ***R.C.M.P. Superannuation Act***. She received a disability pension under s. 32 of the ***Act*** (the Veterans Affairs pension) and a superannuation pension under s. 4(1) of the ***Act***.

[53] The trial judge awarded damages to the respondent for past wage loss ($225,000) and loss of earning capacity ($600,000). He deducted the Veterans Affairs pension from the award of damages for past wage loss, but did not deduct the superannuation pension. The trial judge said (at para. 172):

> The Superannuation pension is a pension that the plaintiff contributed to and is entitled to as a result of her years of service with the RCMP.

> The fact is that if she had worked for thirty-five years she would have contributed more to her pension, and it would have been much larger. She also contributed to the Great West Life insurance disability plan. Payments received from those sources are collateral benefits that should not be taken into account when calculating her past and future wage losses. A tortfeasor should not receive the benefit of the plaintiff's foresight in contributing to insurance and pension plans. Thus, the monies paid and payable under the Veteran's Affairs pension are the only monies that should be deducted from the plaintiff's wage loss claim.

[54] The Province says that the trial judge erred in failing to deduct the superannuation pension "from the respondent's income loss awards to prevent double recovery." It acknowledges that the respondent made contributions to the pension, but says that the trial judge did not cite any authorities for his conclusion that the pension was not deductible from the damages award.

[55] The Province cites, in support of its argument that the pension should be deducted, ***Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*** (2003), 238 F.T.R. 203 at paras. 15-16 (F.C.A.), where Rothstein J.A. (as he then was), for the Court, said that an individual could either be a contributor to the superannuation plan or a recipient of a pension, but not both. The Province also cites the seminal cases on double recovery, ***Ratych v. Bloomer***, [1990] 1 S.C.R. 940, and ***Cunningham v. Wheeler***, [1994] 1 S.C.R. 359.

[56] ***Canada (Canadian Human Rights Commission)*** is clearly distinguishable, and does not add anything to the question of how the principle of the avoidance of double recovery should apply in this case. In that case, the appellant was forced to retire early. The Commission found the mandatory retirement requirement was discriminatory, and awarded the appellant the salary he would have earned had he

not been forced to retire. The Commission did not deduct the pension the appellant had received during that time. The Commission argued that the "insurance exception" to the rule against double recovery applied because the appellant had contributed to his pension. The Court of Appeal held that the appellant was not entitled to both his salary and his pension for the same period of time, and in that context, could not be both a contributor and a recipient under the applicable statute, the ***Canadian Forces Superannuation Act***, R.S.C. 1985, c. C-17 (s. 4(1) of which is similar in all relevant respects to s. 4(1) of the ***R.C.M.P. Superannuation Act***). The insurance exception had no application.

[57] The facts of this case are different. Until the respondent was discharged from the R.C.M.P., she received her full salary and continued to make contributions to the superannuation pension. She suffered no loss during that time. After her discharge, she could no longer make contributions to her pension, and became a pension recipient. There is no overlap as in the ***Canada (Canadian Human Rights Commission)*** case. I do not read Rothstein J.A.'s reasons as excluding the application of the "insurance exception" to a superannuation pension received under either the ***Canadian Forces*** (or ***R.C.M.P.***) ***Superannuation Act*** in all cases. Mr. Justice Rothstein made it clear, in fact (at para. 20), that he was considering the effect of the ***Act*** in that case.

[58] The question remains whether, in this case, the rule against double recovery applies, or there is an applicable exception to that rule.

[59] My reading of the cases is that a disability pension awarded under the ***R.C.M.P. Superannuation Act*** falls within the "insurance exception", which still applies in Canada: see ***Cunningham***, at para. 8. Mr. Justice Cory, for the majority in ***Cunningham***, reviewed the British and Canadian authorities, noting that two reasons have been given for not deducting proceeds of private insurance plans from tort damages awards. First, in ***Bradburn v. Great Western Railway Co.*** (1874), [1874-80] All E.R. Rep. 195 (Ex. Div.), the rationale was "that the accident was not the *causa causans* of the receipt of the insurance benefits, but merely a *causa sine qua non*" (***Cunningham***, at 397). Later, as explained by Cory J. (at 397-398), citing ***Shearman v. Folland***, [1950] 1 All E.R. 976 and ***Parry v. Cleaver***, [1969] 1 All E.R. 555 (H.L.):

> … the basis for the exemption was shifted from the causal reason set out in *Bradburn* to one based on the fact that the plaintiff had paid for the insurance benefit ...

[60] The policy of non-deductibility of the proceeds of private insurance was affirmed by the Supreme Court of Canada, and applied to pension receipts, in ***Canadian Pacific Ltd. v. Gill***, [1973] S.C.R. 654, and ***Guy v. Trizec Equities Ltd.***, [1979] 2 S.C.R. 756.

[61] In ***Cunningham***, Cory J. held that whether proceeds of insurance are deductible or not depends upon proof that the employee paid for the benefit. He provided examples of the sort of evidence that could be sufficient to establish payment by the employee, including (at 407-408):

> . . .
>
> (3) Evidence of a direct contribution by the employee, in a form such as payroll deductions, in return for the benefits. Such a contribution need not be 100 percent of the premium.

[62] In dissenting reasons in ***Cunningham***, McLachlin J. (as she then was) explained her view of the rationale for the "insurance exception" (at 371-372). She reasoned that an insurance policy triggered by a specific event, rather than a particular loss, is "non-indemnity insurance". It does not compensate the insured for a pecuniary loss, but pays a previously determined amount upon proof of a specified event, whether or not there has been a pecuniary loss. "Pensions are also considered to be non-indemnity payments: ***Gill*** [citation omitted] (Canada Pension benefits); ***Guy*** [citation omitted] (company pension plan benefits)." She summarized the distinction as follows:

> This distinction is critical to a discussion of collateral benefits. If the insurance money is not paid to indemnify the plaintiff for a pecuniary loss, but simply as a matter of contract on a contingency, then the plaintiff has not been compensated for any loss. He may claim his entire loss from the negligent defendant without violating the rule against double recovery. Viewed thus, *Bradburn* may not even represent a true exception to the compensatory principle of compensation.

[63] Madam Justice McLachlin disagreed with Cory J.'s interpretation and application of ***Ratych***, but stated, with reference to her analysis of the rationale of the "insurance exception" as derived from ***Bradburn*** (at 372): "This much appears uncontroversial".

[64] Madam Justice McLachlin's analysis of insurance and pension benefits as non-indemnity payments is reflected in the Supreme Court's decision in ***Sarvanis v. Canada***, [2002] 2 S.C.R. 921, 2002 SCC 28. The Court decided that a recipient of Canada Pension Plan disability benefits is not barred from bringing an action against the federal Crown under s. 9 of the ***Crown Liability and Proceedings Act***. Mr. Justice Iacobucci, for the Court, discussed the rationale for the non-deductibility of CPP disability benefits from tort damages (at para. 33):

> … it has already been held by this Court that CPP disability payments are not to be considered indemnity payments, and therefore that they are not to be deducted from tort damages compensating injuries that factually caused or contributed to the relevant disability. See *Canadian Pacific Ltd. v. Gill* [citation omitted]; *Cugliari*, supra [*Cugliari v. White* (1998), 159 D.L.R. (4th) 254 (Ont. C.A.)]. This rule is premised on the contractual or contributory nature of the CPP. Only contributors are eligible, at the outset, to receive benefits, provided that they then meet the requisite further conditions.

[65] The superannuation pension received by the respondent is of the same character as CPP disability benefits and other pension payments, which have consistently been held to be non-deductible from tort damages. The superannuation pension is payable because the respondent was discharged from the R.C.M.P., not because she was injured by a tort. Section 11(2) of the ***R.C.M.P. Superannuation Act*** provides:

> A contributor who is compulsorily retired from the Force by reason of having become disabled is entitled to a benefit determined as follows:
>
> . . .

[66] As explained in ***Sarvanis*** (at para. 31), receipt of a CPP disability benefit is contingent on "the present disabled condition of a qualified contributor". Similarly, receipt of a superannuation benefit under s. 11(2) is contingent on the compulsory retirement of a contributor by reason of having become disabled. It is not contingent on, or payable as compensation for, any injury or loss.

[67] The trial judge made no error in not deducting the respondent's superannuation benefit from the award of damages.

[68] I would not accede to this ground of appeal.

Conclusion

[69] The trial judge did not err:

(a) in taking jurisdiction in the respondent's action;

(b) in awarding damages against the Province when the respondent's action against the federal Crown was barred by statute;

(c) in finding the Province liable for the tort committed by the commander of the detachment in the course of carrying out his duties as a manager;

(d) in not deducting the respondent's superannuation benefits from the award of damages.

[70] I would order that the style of cause be amended to substitute the “Minister of Safety and Solicitor General” for “Her Majesty the Queen in Right of the Province of British Columbia”.

[71] I would dismiss the appeal.

“The Honourable Madam Justice Levine”

I AGREE:

“The Honourable Chief Justice Finch’

I AGREE:

“The Honourable Mr. Justice Smith”