IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Hillyer v. Tilley*, 2024 NLCA 35
Date: October 28, 2024
Docket Number: 202201H0038, 202201H0039, 202201H0040, and 202201H0041

BETWEEN:

VICTOR J. HILLYER — FIRST APPELLANT

AND:

PARSONS AND SONS TRANSPORTATION LIMITED — SECOND APPELLANT

AND:

BRENDA TILLEY, in her own right — FIRST RESPONDENT

AND:

BRITTANY TILLEY, an infant, by her Guardian Ad Litem, Brenda Tilley — SECOND RESPONDENT

AND:

L'UNION CANADIENNE, COMPAGNIE D'ASSURANCES/ THE CANADIAN UNION INSURANCE COMPANY — THIRD RESPONDENT

AND

BETWEEN:

VICTOR J. HILLYER — FIRST APPELLANT

AND:

PARSONS AND SONS
TRANSPORTATION LIMITED — SECOND APPELLANT

AND:

SHARON STANLEY, in her own right
FIRST RESPONDENT

AND:

AMANDA STANLEY, in her own right
SECOND RESPONDENT

AND:

STEPHANIE STANLEY, an infant, by her
Guardian Ad Litem, Sharon Stanley
THIRD RESPONDENT

AND:

AXA GENERAL INSURANCE
AXA ASSURANCE GENERALES
FOURTH RESPONDENT

AND

BETWEEN:

VICTOR J. HILLYER — FIRST APPELLANT

AND:

PARSONS AND SONS
TRANSPORTATION LIMITED — SECOND APPELLANT

AND:

JAMES BUTLER — RESPONDENT

AND

BETWEEN:

VICTOR J. HILLYER — FIRST APPELLANT

AND:

PARSONS AND SONS TRANSPORTATION LIMITED — SECOND APPELLANT

AND:

CHELSEA HARRIS, a minor by her father and Guardian Ad Litem, Stephen Harris — RESPONDENT

Coram: L.R. Hoegg, F.P. O'Brien and K.J. O'Brien JJ.A.

Court Appealed From:	Supreme Court of Newfoundland and Labrador, General Division 200601T3132, 200701T1157, 200701T1158 and 200701T1159 (2022 NLSC 53)
Appeal Heard:	March 13, 2024
Judgment Rendered:	October 28, 2024
Reasons for Judgment by:	L.R. Hoegg J.A.
Concurred in by:	F.P. O'Brien and K.J. O'Brien JJ.A.
Counsel for the Appellant:	Joseph J. Thorne
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Counsel for the Fourth Respondent in Appeal 202201H0039:	No appearance

Authorities Cited:

CASES CITED: *Harris v. Hillyer*, 2022 NLSC 53; *Somers v. Fournier*, 2002 CanLII 45001 (ONCA); *Stevens v. Head*, 1993 HCA 19; *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022; *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1 (Ex. Ch.); *Livesley v. Horst Co.*, [1924] S.C.R. 605; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *Uber Technologies Inc. v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118; *Traders Finance Corp. v. Casselman*, [1960] S.C.R. 242; *Vogler v. Szendroi*, 2008 NSCA 18, leave to appeal to SCC refused, 32585 (31 July 2008); *Dingwall v. Foster*, 2013 ABQB 424, (aff'd *Dingwall v. Dornan*, 2014 ABCA 89; *Sutt v. Sutt*, 1968 CanLII 221 (ONCA); *Henry v. Henry Estate et al.*, 2014 MBCA 84; *R. v. Gowenlock*, 2019 MBCA 5; *John Pfeiffer Property Limited v. Rogerson*, [2000] HCA 36; *Arnold v. Teno*, [1978] 2 S.C.R. 287; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267.

RULES CITED: *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, rule 38.01.

REGULATIONS CITED: *Automobile Accident Minor Injury Regulations*, NS Reg 94/2010, section 5; *Insurance Act*, RSNS 1989, c. 231, section 113B(4)

TEXTS CONSIDERED: Janet Walker, *Castel and Walker*: *Canadian Conflict of Laws*, 6th ed (Markham, ON: LexisNexis Canada, 2005) (looseleaf updated 2020), ch 3 at 20, ch 3 at 73; Stephen G.A. Pitel & Nicholas Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law, 2016).

L.R. Hoegg J.A.:

INTRODUCTION

[1] This case concerns a conflict of laws between two Canadian provinces, Newfoundland and Labrador and Nova Scotia. The conflict relates to the amount of non-pecuniary damages available to the Respondents in this jurisdiction for minor injuries sustained in an automobile accident in Nova Scotia in 2005.

BACKGROUND

[2] The Respondents, all residents of Newfoundland and Labrador, were passengers in a bus driven by the First Appellant and owned by the Second Appellant, which collided with a bridge near Antigonish, Nova Scotia on March 13, 2005. The Respondents say that they sustained injuries as a result of the bus driver's negligence.

[3] The First Appellant, the driver of the bus, is a resident of Newfoundland and Labrador. The Second Appellant, the owner of the bus, is a Newfoundland and Labrador company. The bus was insured and licensed in Newfoundland and Labrador.

[4] Nova Scotia legislation provides that non-pecuniary damages for persons sustaining minor injuries in automobile accidents before 2010 are capped at $2,500.00 (*Automobile Accident Minor Injury Regulations*, NS Reg 94/2010, s. 5, the "Nova Scotia cap"). In Newfoundland and Labrador at that time, there was no legislated cap on non-pecuniary damages for minor injuries. Neither was there a legislated definition of minor injuries. Rather, non-pecuniary damages for all injuries sustained in automobile accidents were awarded in accordance with the local jurisprudence, having regard to the nature and level of injuries established.

[5] The Respondents (as Plaintiffs) filed suits in Newfoundland and Labrador. The parties agree that Newfoundland and Labrador is an appropriate *forum coveniens* for the litigation. Liability has not been determined, although it does not appear to be contested. What is contested is the amount of non-pecuniary damages available to the Respondents should they succeed in their actions.

The Applications Court Decision

[6] In the course of defending the Respondents' claims, the Appellants, as Defendants, applied under rule 38.01 of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, for rulings that the substantive law of Nova Scotia, where the accident took place (the *lex loci delicti*), applied to the Respondents' claims for non-pecuniary damages, and that the Nova Scotia cap was substantive Nova Scotia law.

[7] In response, the Respondents, as Plaintiffs, agreed that the substantive law of Nova Scotia applied to the availability of their claims for non-pecuniary damages.

However, they argued that the Nova Scotia cap was Nova Scotia procedural law, and as such, it was not applicable to the conduct of their litigation in Newfoundland and Labrador. Consequently, they argued, the law of Newfoundland and Labrador, the forum where the litigation was taking place (the *lex fori*), applied to calculation of the amounts of their non-pecuniary damages.

[8] In short, if the Plaintiffs' position prevailed, the amounts of their non-pecuniary claims would be determined in accordance with Newfoundland and Labrador damages jurisprudence. If the Defendants' position prevailed, Nova Scotia law would apply, and the non-pecuniary damages of the plaintiffs who suffered minor injuries would be capped at $2,500.00.

[9] The Judge appreciated that there was a distinction between substantive and procedural law in Canadian conflicts law, and how it could affect the instant case. He considered the issue, and concluded that while entitlement to non-pecuniary damages as a head of damages was substantive law, the calculation of those non-pecuniary damages was procedural law (*Harris v. Hillyer*, 2022 NLSC 53, the "Decision").

[10] In so deciding, the Judge considered the case law that was put before him. He relied principally on the decisions of the Ontario Court of Appeal in *Somers v. Fournier*, 2002 CanLII 45001 (ONCA) and the High Court of Australia in *Stevens v. Head*, [1993] HCA 19, saying:

> [23] While I am not bound by dicta from the Ontario Court of Appeal or the High Court of Australia, I find their logic compelling. In broad strokes the jurisprudence where the tort occurred determines whether damages are available and, if so, under what heads. This is substantive. It is the definition of a right. The forum, on the other hand, determines how to assess the damages under the heads that are available. This is procedural. It is the awarding, through calculation, of a remedy.

[11] In the result, the Judge ruled that the Nova Scotia cap did not apply to this litigation, and that "the laws of the Province of Newfoundland and Labrador apply, without restriction, to the calculation of the general non-pecuniary damages" of the Plaintiffs' claims (Decision, at para. 24).

[12] The Appellants appeal the Judge's ruling, arguing that he erred in deciding that the cap was procedural law and that Newfoundland and Labrador damages law applied to calculating the amounts of the Respondents' claims for non-pecuniary

damages. The Appellants maintain that the Nova Scotia cap is substantive law, and that it applies to the Respondents' claims.

ISSUE

[13] The issue is whether the Judge erred in ruling that Newfoundland and Labrador law applies when calculating the amounts of the Plaintiffs' claims for non-pecuniary damages.

[14] Resolution of the issue depends on whether the Nova Scotia cap is a substantive law or a procedural law. This is because Canadian conflicts law dictates that the substantive law of the place where a wrong occurs governs litigation arising from that wrong regardless of where the litigation takes place. By contrast, procedural laws are rules, directions, or other laws that facilitate a forum court's conduct of litigation.

[15] If the cap is determined to be a procedural law that facilitates conduct of Nova Scotia court proceedings, it would have no application to the conduct of proceedings in this jurisdiction and the non-pecuniary claims of the Respondents who suffered minor injuries will not be limited to the cap amount. Rather, the amounts of those claims would be determined in accordance with Newfoundland and Labrador non-pecuniary damages law.

[16] If the cap is determined to be a substantive law of Nova Scotia, the cap will apply to the Respondents' claims, in which case the non-pecuniary damages of each of the Respondents who suffered minor injuries will be capped at $2,500.00.

THE LAW

The Legislation

[17] The Nova Scotia legislation in issue is:

> *Automobile Accident Minor Injury Regulations*, NS Reg 94/2010, s. 5
>
> Total amount recoverable for non-monetary losses

> 5 For the purpose of subsection 113B(4) of the Act, the total amount recoverable as damages for non-monetary losses of a plaintiff for all minor injuries suffered by the plaintiff as a result of an incident must not exceed $2,500.

Insurance Act, RSNS 1989, c. 231, s. 113B(4)

> Limitation on liability
>
> 113B(4) Notwithstanding any enactment or any rule of law, but subject to subsection (6), the owner, operator or occupants of an automobile, any person present at the incident and any person who is or may be vicariously liable with respect to any of them, are only liable in an action in the Province for damages for any award for pain and suffering or any other non-monetary loss from bodily injury or death arising directly or indirectly from the use or operation of the automobile for a minor injury to the amount prescribed in the regulations.

The Conflict of Laws Jurisprudence

[18] The law which governs a wrong that occurs in one province but is litigated in a different province was decided by the Supreme Court of Canada in *Tolofson v. Jensen*; *Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022. The conflict of laws in *Tolofson* was between the law of Saskatchewan and the law of British Columbia.

[19] *Tolofson* involved a child from British Columbia who was injured in a car accident in Saskatchewan. Eight years later, the child brought an action in British Columbia against his father, a resident of British Columbia and the driver of the vehicle in which the child was a passenger, and the driver of another vehicle, who was resident in Saskatchewan. The issue was whether British Columbia law or Saskatchewan law applied to the child's claim. If Saskatchewan law applied, the child's claim would not succeed for two reasons. First, Saskatchewan limitations law barred all actions taken after a one-year limitation period; second, Saskatchewan law did not permit a gratuitous passenger such as the child to recover, unless there was willful or wanton misconduct on the part of the defendant driver, which was the father. It does not appear that the father's driving was alleged to be willful or wanton misconduct.

[20] The Supreme Court of Canada decided that the law to be applied to the child's case was Saskatchewan law, where the accident had occurred. In so deciding, the Court drew on principles of international conflicts law, which had established that

the law that governs an action is the law of the place where the actionable wrong occurs. The Court explained the general rule that a state has exclusive jurisdiction within its own territories, and quoted Willes J. in *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1 (Ex. Ch.), saying:

> … the civil liability arising out of a wrong derives its birth from the law of the place [where it occurred], and its character is determined by that law; and going on to say, in short, the wrong is governed by that law. It is in that law that we must seek its defining character; it is that law, too, that defines its legal consequences.

[21] The Court applied this international conflicts law to conflicts between Canadian jurisdictions on the basis that individual Canadian provinces and territories have constitutional jurisdiction over wrongs committed within their respective territories. The Court reasoned that Canada, a single country with different provinces and territories exercising territorial legislative jurisdiction, ought "to support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country" (*Tolofson*, at p. 1064) and "has the advantage of unquestionable conformity with the Constitution".

[22] The Court further explained that in addition to respecting a state's exercise of jurisdiction within its own territory, application of the *lex loci delicti* (the law where the wrong occurs) to torts that occur within a territorial state makes practical sense. The Court stated that the rule provides certainty, ease of application, predictability, and meets the expectations of people living in or visiting a particular jurisdiction, reasoning that to do otherwise would fly in the face of the territoriality principle (p. 1050-1051).

[23] The Court also addressed arguments against application of the *lex loci delicti* when litigation occurs in a jurisdiction other than the one where the wrong occurred. The Court concluded that public policy exceptions and perceived difficulties of lawyers and judges applying law with which they are not completely familiar do not outweigh the certainty which the *lex loci delicti* rule provides (p. 1064).

[24] The Court added, "In short, the wrong is governed by that [substantive] law. It is from that law that we must seek its defining character; <u>it is that law, too, that defines its legal consequences.</u>" (Emphasis added.)

[25] The *Tolofson* decision also stated that the conduct of ensuing litigation would be governed by the procedural law of the jurisdiction where litigation takes place (the *lex fori*).

[26] At pages 1071-1072, Justice LaForest explained the important distinction between substantive and procedural law, saying:

> The purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties.

[27] Further in *Tolofson*, the Court endorsed the idea that legislation should be categorized as procedural only if the question is beyond any doubt. If there is any doubt, the doubt should be resolved by holding that the impugned legislation is substantive law that defines the character and the consequences of the wrong (p. 1068-1069).

[28] Several decades before *Tolofson*, the Supreme Court of Canada addressed the distinction between substantive law and procedural law in international conflict of law.

[29] *Livesley v. Horst Co.*, [1924] S.C.R. 605, involved a claim for damages for breach of a contract made in California but litigated in British Columbia. The Court ruled that the right to damages was not governed by the law of British Columbia, the *lex fori*, saying at page 607:

> In principle, it is difficult to discover a solid ground for refusing to classify the right to damages for breach of contract with other rights arising under the proper law of the contract [not the *lexi fori*] and recognizable and enforceable as such.
>
> (Emphasis added.)

[30] The Court added at page 608:

> … The concept of procedure, too, is, in this connection, a comprehensive one, including process and evidence, methods of execution, rules of limitation affecting the remedy and the course of the court with regard to the kind of relief that can be granted to a suitor. But it does not, of course, extend to substantive rights; and here questions as to substantive rights include all questions as to the "nature and extent of the

> obligation" under the foreign contract.
>
> (Emphasis added.)

[31] The substantive and procedural distinctions stated in *Livesley* are equally applicable to conflicts within Canada, as *Tolofson* confirms (see p. 1047-1048).

[32] Other Supreme Court of Canada jurisprudence also explains the difference between substantive and procedural law.

[33] In *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, the Court described procedural enactments as dealing "with the procedures used to assert a right, and with the rules for conduct of the hearing" (para. 158), while substantive matters included those affecting the rights of the parties (para. 160).

[34] In the context of unconscionability in contract formation, *Uber Technologies Inc. v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118, at paragraph 151, notes "substantive" concerns trigger relief where the *result* of a transaction is intolerable, whereas "procedural" concerns trigger relief on the basis of the intolerable manner of the transaction.

[35] In *Traders Finance Corp. v. Casselman*, [1960] S.C.R. 242, at pages 245-248, the Supreme Court of Canada described procedural rules as those used to enforce a right (p. 247).

[36] Canadian appellate courts have also addressed the difference between substantive and procedural law.

[37] In *Vogler v. Szendroi*, 2008 NSCA 18, leave to appeal to the Supreme Court of Canada refused, 32585 (31 July 2008), the Court addressed the distinction between substantive and procedural law in the context of a conflict of laws case concerning the service of documents. In so doing, the Court described procedural law as rules that prescribe the steps for having a right or duty judicially enforced, as opposed to [substantive] law that defines specific rights or obligations, or creates, defines and regulates the rights, duties and powers of parties (paras. 17-19).

[38] In *Dingwall v. Foster*, 2013 ABQB 424, (aff'd *Dingwall v. Dornan*, 2014 ABCA 89), the Court dealt with an action to enforce a judgment in Alberta that had been granted in Nevada. The Court held that the measure of the debt from the foreign

judgment included post-judgment interest until the date of the domestic judgment, citing *Livesley* for the principle that "the measure of damages" is governed by the substantive law being applied, while procedural law is governed by the domestic law, where the action is taking place (para. 24).

[39] An early Ontario Court of Appeal decision, *Sutt v. Sutt*, 1968 CanLII 221 (ONCA), at page 175, described the difference between substantive and procedural law in the context of service of divorce documents:

> It is vitally important to keep in mind the essential distinction between substantive and procedural law. Substantive law creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain, whereas procedural law is the vehicle providing the means and instruments by which those ends are attained. It regulates the conduct of Courts and litigants in respect of the litigation itself whereas substantive law determines their conduct and relations in respect of the matters litigated. …
>
> (Emphasis added.)

[40] See also *Henry v. Henry Estate et al.*, 2014 MBCA 84, at paragraph 32; and *R. v. Gowenlock*, 2019 MBCA 5, at paragraphs 40-41 and 48-49, wherein the respective courts emphasized that procedural law is focused on the "machinery" of the courts, while substantive rules are focused on the "product".

[41] Despite long-standing Supreme Court of Canada law and appellate jurisprudence clearly distinguishing between substantive and procedural law, the distinction has not always been observed. In particular, the Ontario Court of Appeal in *Somers* concluded that while the availability of non-pecuniary damages was a matter of substantive law, calculation of the amount of non-pecuniary damages was a matter of procedural law. The court justified this characterization as public policy to enable it to apply Ontario damages law so as to prevent the Ontario court from awarding substantial damages like those awarded in New York state, where the vehicle at fault was insured in the knowledge of potentially substantial damages awards. *Somers* is unclear as to how the calculation of injury damages pursuant to New York state law would affect policy informing Ontario or other Canadian damages law.

[42] The *Somers* case also relied on the *Stevens* decision of the High Court of Australia. *Stevens* concerned a conflict of laws between two Australian states – akin in constitutional status to Canadian provinces. By a narrow margin, *Stevens* held

that while the availability of non-pecuniary damages was substantive law, the calculation of such was a matter of procedural law. *Stevens* was unanimously overruled by the Australian High Court seven years later. In *John Pfeiffer Property Limited v. Rogerson*, [2000] HCA 36, the Court held that both the availability and calculation of the amount of damages were matters of substantive law. There is no indication that the *Somers* Court, or the Judge in the instant case, was aware of *Pfeiffer*.

[43] In any event, characterizing the calculation of non-pecuniary damages as procedural law in *Somers* has been called into question as being out of step with Supreme Court of Canada authority and other relevant Canadian jurisprudence (see Janet Walker, *Castel and Walker*: *Canadian Conflict of Laws*, 6th ed (Markham, ON: LexisNexis Canada, 2005) (looseleaf updated 2020), ch 3 at 20 and ch 3 at 73; and Stephen G.A. Pitel & Nicholas Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law, 2016) at 239-240).

[44] Accordingly, it is well-established that the rights of litigating parties are matters of substantive law, and a damages award is a substantive right. It is also well-established that procedural law is law that applies to the conduct of litigation in a forum court, for the purpose of making the machinery of the forum court run smoothly respecting the assertion and enforcement of the litigating parties' substantive rights.

ANALYSIS

[45] It is a given that the availability of an award of damages is the manifestation of a successful plaintiff's substantive right (*Tolofson*, at p. 1068-1069, 1071-1072; *Livesley*, at p. 607-608; *Dell*, at paras. 105-107; *Traders*, at p. 247-248; *Sutt*, at p. 175; and *Vogler*, at para. 17). *Somers* (at para. 51) and *Stevens* (at paras. 23, 26) also say this, and the Respondents do not dispute it. The instant question then, is whether legislating a maximum on the extent of the substantive right to damages somehow turns determining the amount of a plaintiff's award into a procedural exercise? Put another way, is calculating an award within a limited amount an application of procedural law? In my view, the answer to both of these questions is no.

[46] The availability of a damages award is the substantive right of an injured plaintiff. Limiting the availability of such an award to a certain amount affects the injured person's substantive right, but it does not affect how the amount is

calculated. Moreover, the Nova Scotia cap does not comport with the descriptions or applications of procedural law demonstrated in the jurisprudence.

The Nova Scotia Cap is a Substantive Law

[47] The legislation respecting the cap directs that each Respondent who suffered a minor injury in the instant bus accident has the substantive right to non-pecuniary damages not exceeding $2,500.00. Calculating the actual amount of each Respondent's damages involves determining relevant facts, such as causation, and whether a Respondent's injuries are minor, and if so, their degree, in order to determine a legally defensible award within the amount of the right. The calculation results from the reasoned application of Nova Scotia damages law to found facts, to determine an award amount that comports with the extent of each successful Respondent's substantive right. The amount of the award will be the manifestation, or logical result, of the successful Respondent's substantive right to damages for having suffered a wrong. The cap does not change the procedures respecting how the right will be determined; it simply informs, describes or regulates the right.

[48] In this regard, there is little, if any, difference between calculating damages pursuant to the Nova Scotia cap or calculating damages pursuant to 2005 Newfoundland and Labrador law. Both calculations involve the application of law to established facts. The only difference is that in Nova Scotia there is a legislated limit to the amount of non-pecuniary damages available to each Respondent who suffered minor injuries in the accident, whereas in Newfoundland and Labrador, there is no legislated limit. However, it is not as if Newfoundland and Labrador damages law is limitless; it is limited by the jurisprudence. As well, I note that there is no suggestion that determining a damages award in this jurisdiction involves the application of Newfoundland and Labrador procedural law, and no local procedural law has been identified to the Court. Yet, the logical inference from the Respondents' argument is that the procedural law of this jurisdiction must apply to the Respondents' claim.

[49] In the above regard, the Nova Scotia cap is akin to the limit on non-pecuniary damages established by the Supreme Court of Canada in the 1978 trilogy of cases *Arnold v. Teno*, [1978] 2 S.C.R. 287; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267. In the trilogy, the Court set the maximum recovery for an injured plaintiff's non-pecuniary damages at $100,000.00. Since then, a successful plaintiff's right to an award for non-pecuniary damages has been

limited to $100,000.00, adjusted for inflation. This "cap" is a limitation on the substantive right of a deserving plaintiff to non-pecuniary damages, the application of which is nation-wide. Further, it did not, and does not, involve procedural law.

[50] I see no meaningful difference between calculating an award of non-pecuniary damages according to a maximum amount set out in legislation and an amount established in jurisprudence. In Nova Scotia, the legislature set the maximum recovery of non-pecuniary damages for persons suffering minor injuries at $2,500.00. The cap did not change the character of a non-pecuniary damages award from a manifested right to something else, or remove the requirement for a court to apply law to facts to calculate the amount of a non-pecuniary damages award for a person suffering minor injuries in a Nova Scotia automobile accident. Neither does the cap set out a procedure or rules for how such an award is to be determined. The legislature simply limited the right to non-pecuniary damages for persons suffering minor injuries to a maximum amount.

[51] As noted in the above-referenced jurisprudence, calculating damages awards has been held to be a matter of substantive law by the Supreme Court of Canada and Canadian appellate courts in the context of conflict of laws. In *Tolofson*, the Court distinguished substantive laws from procedural laws by stating that substantive laws are those that are "determinative of the rights of both parties". In *Livesley*, the Court regarded the "nature and extent of the obligation" for a defendant (and by extension the extent of an award for a plaintiff) as substantive rights (p. 608). In *Uber* at paragraph 151, the Court described the result of the transaction as a "substantive" concern, as opposed to a procedural one. In *Dell*, the Court stated that matters affecting the rights of the parties are substantive (para. 160). In *Volger*, the Court held that rules which create, define, and regulate the rights, duties, and power of the parties are substantive (paras. 17-19). In *Sutt*, the Court described substantive law as law that creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain (paras. 175). In *Pfeiffer*, the High Court of Australia ruled that:

> ... all questions about damages can affect how much a plaintiff recovers and, thus, alter the rights of plaintiffs and, also, the obligations of defendants [at para. 98] and ... all questions about the … *amount of damages* that may be recovered, would likewise be treated as substantive issues governed by the *lex loci delicti* [at para. 100].
>
> (Emphasis added.)

[52] Accordingly, the amount of a non-pecuniary damages award, calculated in accordance with relevant damages law, is a substantive right which is the logical result of the application of substantive law to litigation. In other words, it is simply the vindication of a successful litigant's right, which is, as stated in *Sutt*, what the administration of justice seeks to attain.

[53] *Tolofson* makes clear that if there is any doubt about whether a law should be categorized as substantive or procedural, the doubt ought to be resolved in favour of categorizing it as substantive (see p. 1068-1072). While I am not in any doubt that calculating the amount of a non-pecuniary damages award is substantive law, this is confirmed by considering whether such a calculation involves an application of procedural law.

[54] The process of determining the amount of a non-pecuniary damages award in Nova Scotia is the same as it is in Newfoundland and Labrador: the difference is not in the procedure, it is in the extent of the amount that can be awarded. Whether the amount of a damages award is $2,500.00, $25,000.00, or $250,000.00, the determination still involves the application of law to established facts to determine the extent of an injured person's right in law.

[55] The Nova Scotia cap does not set out rules or methods to make the machinery of a court run smoothly. It does not direct *how* a court must calculate a damages award or direct *how* a court can conveniently assess non-pecuniary damages. Neither does the cap provide a mechanism for *how* the right to damages is to be enforced (*Traders*, at p. 247 and *Volger*, at paras. 19, 21), nor does it provide the "means and instruments" by which the right to damages is attained (*Sutt*, at p. 175). In short, the Nova Scotia cap does not align with how procedural law has been interpreted in the authoritative jurisprudence, or bear any of the hallmarks of a procedural law. Neither does the cap make the exercise of determining the amount of non-pecuniary damages in a Nova Scotia court easier or more convenient than the exercise of determining the amounts of damages in a Newfoundland and Labrador court.

DISPOSITION

[56] In this case, the Judge ruled that the forum court determines *how* to assess the Respondent's damages. This ruling implies that he regarded the Nova Scotia cap as a procedural rule respecting how damages would be assessed in Nova Scotia courts, and as such, it would have no application to litigation taking place in Newfoundland

and Labrador. This was an error. The Nova Scotia cap is a substantive law that focuses on the extent of the Respondents' rights to damages - the end result of the litigation.

[57] Every court must assess damages, and there is no material difference between courts in Newfoundland and Labrador and courts in Nova Scotia as to how the assessments will be conducted, it is simply that the extent of the substantive right in Nova Scotia is more limited than in Newfoundland and Labrador. The Judge failed to recognize that a limitation on the amount of a damages award is simply a limitation on a substantive right, and not a procedural law the application of which would assist the court in conducting the proceedings.

[58] In the result, the Judge erred in ruling that the cap was a procedural law, and that the damages of the Respondents would be assessed according to Newfoundland and Labrador law without limitation to the cap.

[59] Accordingly, I would allow the appeal, and order that the Nova Scotia cap on the amount of non-pecuniary damages available to persons suffering minor injury in automobile accidents at the time in question is a substantive law, which must be applied to the non-pecuniary damages claims of the Respondents who suffered minor injuries in the 2005 bus accident.

[60] The usual law respecting adjustment for inflation and applicable interest would also apply.

COSTS

[61] Given the Appellants' success in this Court, I would vacate the Judge's costs order in the court below. However, given the need for clarity on the narrow point at issue in this litigation, I would make no order as to costs in this Court.

_____
L.R. Hoegg J.A.

I concur:_____
F.P. O'Brien J.A.

I concur:_____
K.J. O'Brien J.A.