CITATION: Martin v. Hurst, 2023 ONSC 2606
DIVISIONAL COURT FILE NO.: 403/22
CORRECTED RELEASE DATE: 20230428

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Ellies R.S.J., Backhouse and Lederer JJ.

BETWEEN:	)	
	)	
Linda Martin	)	*Ilya Kirtsman and Nicole Taylor* for Linda Martin
	)	
Appellant	)	
	)	
– **and** –	)	
	)	
Kathleen Desiree Hurst	)	No one appearing for Kathleen Desiree Hurst
	)	
Respondent	)	
	)	
	)	**HEARD at Toronto (by videoconference):**
	)	March 22, 2023

CORRECTED REASONS FOR DECISION

Released Date Amended to April 28, 2023

M.G. ELLIES R.S.J.

OVERVIEW

[1] The appellant sued the respondent for damages after she was seriously injured by the respondent's dog in a leash-free dog park. In her statement of claim, she pleaded that she was attacked by the dog and relied upon s. 2 of the *Dog Owner's Liability Act*, R.S.O. 1990, c. D.16

("the Act"), which makes dog owners strictly liable for damages resulting from a bite or attack by their dog.

[2] The respondent failed to defend the action and the appellant moved for default judgment under r. 19.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("the Rules").

[3] Notwithstanding the fact that the respondent was deemed by the Rules to have admitted the appellant's allegations, the motion judge held that liability had not been established.

[4] The motion judge went on to hold that, had liability been established, the appellant's non-pecuniary damages were limited by the fact that her injuries were caused by a dog, rather than by some other means, and that her pecuniary losses were to be reduced because she had private insurance to cover some of those losses.

[5] At the conclusion of the hearing of the appeal, we allowed the appeal and remitted the matter to be dealt with by another motion judge for reasons to follow. These are those reasons.

BACKGROUND

The Injuries

[6] In June 2017, the appellant took her dog to a dog park in the City of Toronto. Just after she entered the off-leash area, she was knocked to the ground by a large German Shepherd mixed-breed dog weighing about 60 pounds. The appellant lost consciousness briefly. When she regained consciousness, she could see that her right leg had been badly injured. She had to be taken by ambulance from the park to a hospital, where she was diagnosed with a tibial plateau fracture of her right knee. The next day, she underwent surgery during which metal hardware was fastened into her leg.

[7] As a result of the injury, the appellant was confined to a wheelchair for a number of months.[1] She was unable to walk for about three months and was unable to drive for about nine months. She was also unable to work for 21 weeks.

[8] Fortunately for the appellant, she was insured under a policy of insurance offered through her employer and received both short-term and long-term income replacement benefits under the policy. She also received extended health care benefits, although she was not completely reimbursed for these expenses.

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[1] There is a discrepancy in the evidence. In her first affidavit (sworn on May 16, 2019), the appellant stated that she was confined to a wheelchair from the date of her surgery in June until September 2017, a period of two-to-three months. In her second affidavit (sworn on October 4, 2021), the appellant stated that she was confined to a wheelchair for five months.

[9] Four years after being injured, the appellant continued to suffer from pain in her right leg. As a result of the injury to her right leg, the appellant's pre-existing osteoarthritis began to cause her more pain in her left leg, as well. These conditions prevented the appellant from resuming all of her pre-accident activities and required that she obtain help with her housekeeping chores.

[10] In addition to the physical effects of the incident in the dog park, the appellant also suffered psychological injuries, including a fear of large dogs and generalized anxiety.

The Action

[11] The appellant commenced an action for damages in the year in which she was injured. She originally named the dog owner as "Jane Doe", because the respondent was unknown to the appellant at the time. However, the appellant did know someone who was with the respondent when the injuries occurred. The appellant's lawyer managed to obtain a court order requiring this individual to identify the dog owner, whose identity the lawyer was able to confirm after finding a photo of the dog in question on the respondent's Facebook account.

[12] Once the identity of the dog owner was known, the appellant discontinued the first action and commenced a second action in which she named the respondent as the defendant.

[13] Although the respondent was served with the statement of claim and later with the appellant's materials on the motion for default judgment, she never responded to either.

The Motion

[14] The appellant moved in writing for default judgment in December 2021. In her motion, she sought non-pecuniary damages for pain and suffering in the amount of $120,000. She also sought pecuniary damages for lost income, lost RRSP contributions (by her employer), treatment costs not covered by her insurance, and future medical, rehabilitation, and housekeeping costs. In addition, the appellant sought to recover OHIP's subrogated costs of treatment, as well as pre-judgment interest on all past losses. In total, she sought approximately $205,000. The motion judge awarded none of it.

[15] For reasons released in June 2022, reported at *Martin v. Hurst*, 2022 ONSC 3877 (the "Decision"), the motion judge dismissed the plaintiff's claim entirely. She found as a fact that the dog in question had merely run into the appellant, which was insufficient in her view to attract the strict liability otherwise imposed on dog owners under the Act. In her analysis dealing with liability, the motion judge wrote, at para. 23:

> The very feature of off leash dog parks is that dogs run free. It is reasonable to expect there may be rambunctious large dogs running free in a dog park that may accidentally run into someone. That would not in my view, without more, be an attack and would not engage the liability of the owner under the legislation. That would be a risk one assumes when taking his or her dog into the dog park.

[16] With respect to liability, the motion judge concluded, at para. 27:

> Based upon the evidence before me, I am not satisfied on a balance of probabilities that this incident as described by the Plaintiff was an "attack" within the meaning of the Act. If the Plaintiff has further evidence to add and if she wishes to pursue the matter further, she may do so in an uncontested trial on liability only.

[17] The motion judge then went on to assess non-pecuniary damages for pain and suffering. She determined that cases decided in the motor vehicle context were not applicable to cases involving attacks by dogs. The motion judge held, at para. 35, that "there is a separate regime for assessing damages caused by a dog". Based on this premise, she assessed the appellant's general damages at "the high end of the range", in the amount of $35,000.

[18] The motion judge next considered the appellant's claim for pecuniary losses. She denied the appellant's claim for lost earnings on the basis that the appellant had been fully reimbursed by her disability insurer and denied both the appellant's claim for lost earnings and the claim for the costs of treatment brought on behalf of the Ontario Health Insurance Plan ("OHIP") on the basis the neither insurer was a party to the action.

[19] Finally, the motion judge dismissed the appellant's claim for the cost of having to repaint her house due to the damage caused by her wheelchair. The motion judge would have allowed the remaining losses for out-of-pocket expenses, lost RRSP contributions, and the costs of future care in the total amount of $11,507.38 and awarded the appellant her partial indemnity costs of $6,000, inclusive of disbursements, but exclusive of HST.

[20] The motion judge dismissed the appellant's application subject to the appellant setting the matter down within 30 days for a "brief undefended trial based upon [further] affidavit evidence on liability only": Decision, at para. 51. The appellant did not take the motion judge up on her offer, choosing instead to pursue this appeal.

ISSUES

[21] The appellant raises four issues, which I would frame as follows:

(1) Did the motion judge err in law by finding that the appellant was not attacked by the dog?

(2) Did the motion judge err in law in her approach to the assessment of the appellant's non-pecuniary damages?

(3) Did the motion judge err in law by deducting the amount the appellant received for lost income from her disability insurer?

(4) Did the motion judge err in law by denying the amount of the OHIP claim?

[22] It is not necessary to deal with the fourth issue because OHIP withdrew its claim before the appeal was argued.

[23] For the reasons that follow, I would answer all three of the remaining questions in the affirmative.

STANDARD OF REVIEW

[24] This appeal comes to us under s. 19(1.2)(d) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The standard of review on an appeal is set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 262. Errors of law are reviewable on the standard of correctness: *Housen*, at para. 8. Errors of fact are reviewable on the more deferential standard of palpable and overriding error: *Housen*, at para. 10. Questions of mixed fact and law lie on a spectrum. If the factual and legal aspects cannot be separated, the palpable and overriding error standard applies. If a question of law can be extricated, the correctness standard is applied: *Housen*, at para. 36.

ANALYSIS

Did the motion judge err in law by finding that the appellant was not attacked by the dog?

[25] In my respectful view, the motion judge made three errors of law in reaching her conclusion on liability.

Misinterpreting the Meaning of the Word "Attack"

[26] The first error relates to the motion judge's interpretation of the word "attack" used in the Act. Section 2(1) of the Act provides:

> The owner of a dog is liable for damages resulting from a bite or attack by the dog on another person or domestic animal.

[27] The motion judge held that the caselaw indicated that the word "attack" required "unprovoked biting and other clear acts of aggression": Decision, at para. 17. However, the motion judge cited only one case in support of her conclusion and, with respect, that case does not support the conclusion she reached.

[28] In *Kurshid v. Richards and Lefcoe*, 2021 ONSC 3830, the court denied the plaintiff's motion for summary judgment in a case, like this one, in which a dog had run towards the plaintiff, causing her to fall and become injured. As the motion judge recognized, however, the judge in *Kurshid* made no finding about whether this constituted an "attack", finding instead that the motion could not be determined because of inconsistencies in the evidence.

[29] The motion judge's finding that an attack under the Act requires proof of aggression is contradicted by at least two other cases. *Miller v. Devenz*, 2001 CarswellOnt 3690, was also a case involving a dog and a motion for default judgment. In *Miller*, the court accepted that the plaintiff had been attacked by a dog in circumstances where the evidence indicated only that she had been

"pushed to the ground by a large dog owned by the defendants which was running free": at para. 1.

[30] In another case, *Rai v. Flowers*, 2014 ONSC 3792, the plaintiff was injured when a dog jumped on her from behind, although she was not knocked down. In *Rai*, the plaintiff suffered puncture wounds on her back. The motion judge was not satisfied that the puncture wounds were caused by a bite rather than by the dog's paws or claws, but awarded the plaintiff damages under the Act, nonetheless.

[31] Clearly, therefore, it was not correct for the motion judge to conclude that the caselaw requires proof of aggression. It does not.

[32] After discussing the decision in *Kurshid*, the motion judge in this case then proceeded to consider two dictionary definitions of the word "attack", both of which incorporated the notion of an intent to injure: Decision, at para. 21. She then went on to conclude, at para. 22:

> In my view in the context of an off leash [*sic*] dog park, the fact that "a large german sheppard [*sic*] mix dog weighing approximately 60 pounds ran into me, causing me to fall on the ground", without more, does not support the finding of an "attack" by a dog contemplated by the Act.

[33] Respectfully, the motion judge erred in law by requiring proof of an intent to injure on the part of the dog in order to attract strict liability on the part of the owner under the Act. Nothing in the jurisprudence supported this conclusion and there is no principle of statutory interpretation that requires it. Had the Legislature wanted to provide for proof of intent, it would have been an easy matter to add words to that effect. There are no such words.

[34] However, the statute *does* contain words that militate *against* reading intention on the part of the dog into s. 2(1). Section 2(3) provides:

> The liability of the owner does not depend upon knowledge of the propensity of the dog or fault or negligence on the part of the owner, but the court shall reduce the damages awarded in proportion to the degree, if any, to which the fault or negligence of the plaintiff caused or contributed to the damages.

[35] This section makes knowledge of the dog's propensity irrelevant. A dog owner is liable for the injuries caused by an attack even if the dog has never sought to injure anyone. In my view, it makes no sense to require an injured party to prove that the dog intended to hurt her at the time of the attack when it is irrelevant whether the dog ever intended to hurt anyone in the past.

[36] The modern principle of statutory interpretation requires that the words of an Act 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: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. To require a plaintiff to prove a dog's intent would re-introduce the question

of the dog's character into the issue of liability under s. 2(1); a question that has been removed from consideration by s. 2(3). In my view, this would be contrary to the scheme and purpose of the Act.

[37] The motion judge's interpretation of the word "attack", therefore, constituted an error of law.

Improperly Applying Rule 19

[38] The second error made by the motion judge relates to her application of the Rules. The appellant's motion was brought under r. 19. The relevant parts of the rule read as follows:

> 19.01 (1) Where a defendant fails to deliver a statement of defence within the prescribed time, the plaintiff may, on filing proof of service of the statement of claim, or of deemed service under subrule 16.01 (2), require the registrar to note the defendant in default. [. . .]
>
> 19.02 (1) A defendant who has been noted in default,
>
> > (a) is deemed to admit the truth of all allegations of fact made in the statement of claim; and [. . .]
>
> 19.05 (1) Where a defendant has been noted in default, the plaintiff may move before a judge for judgment against the defendant on the statement of claim in respect of any claim for which default judgment has not been signed.
>
> (2) A motion for judgment under subrule (1) shall be supported by evidence given by affidavit if the claim is for unliquidated damages.
>
> (3) On a motion for judgment under subrule (1), the judge may grant judgment, dismiss the action or order that the action proceed to trial and that oral evidence be presented.
>
> (4) Where an action proceeds to trial, a motion for judgment on the statement of claim against a defendant noted in default may be made at the trial.
>
> 19.06 A plaintiff is not entitled to judgment on a motion for judgment or at trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment.

[39] Under r. 19.02(1)(a), where a defendant is noted in default, the defendant is deemed to admit the truth of the allegations of fact in the statement of claim. Rule 19.06 provides that the

plaintiff will not be entitled to judgment merely because the facts alleged in the statement of claim are deemed to be admitted unless the facts entitle the plaintiff to judgment.

[40] Where the pleaded facts are not sufficient to establish liability, the court may consider the affidavit evidence filed on the motion to supplement the pleadings for that purpose: *Englefield v. Wolf*, 2005 CarswellOnt 6609 (S.C.), at paras. 20-21; *Salimijazi v. Pakjou*, 2009 CarswellOnt 2013 (S.C.), at para. 23. Where the affidavit evidence *conflicts* with the pleadings regarding liability, however, the court may also consider whether the sworn evidence *disentitles* the plaintiff to judgment: *Salimijazi*, at paras. 34-35. In doing so, the court may make findings of credibility, weigh evidence, and make findings of fact, regardless of whether the motion proceeds as a motion only, or as a trial under r. 19.05(5): *Plouffe v. Roy*, 2007 CarswellOnt 5739 (Ont. S.C.), at paras. 52-53; *Fuda v. Conn*, 2009 CanLII 1140 (Ont. S.C.), at paras. 15-16; *Salimijazi*, at para. 28.

[41] The appellant's motion was supported by affidavits sworn by the appellant, the individual who identified the dog owner, and a member of the law firm representing the appellant. The appellant's affidavits dealt with both liability and damages.

[42] With respect to liability, the motion judge focused on para. 11 of the appellant's May 16, 2019, affidavit (referred to above) in which she deposed:

> I entered the off leash [*sic*] dog area. Suddenly, a large german sheppard [*sic*] mix dog weighing approximately 60 lbs ran into me. I was knocked to the ground.

[43] The motion judge focused on the evidence that the dog in question "ran into" the appellant. She concluded that, based on this paragraph and without more evidence, it was inaccurate for the appellant to characterize what happened as "an attack" throughout the rest of her evidence.

[44] Based on the law that I have reviewed above, the motion judge was entitled to have regard both to the appellant's sworn evidence and to her pleadings and to resolve any conflict between them. What she was not entitled to do, however, was to ignore the pleadings altogether. As I will explain, I believe that is what happened here.

[45] As I indicated earlier, the appellant pleaded that she was "attacked" by the dog. At para. 5 of the statement of claim, she pleaded:

> On or about June 24, 2017, Linda was walking her dog in Thompson Park in Scarborough, Ontario. Suddenly and without warning, and without provocation, Linda *was attacked* by the Dog, knocking her down and shattering her right leg (the "Attack"). [Emphasis added.]

[46] The only possible reference I can find in the Decision to the appellant's statement of claim is a reference at para. 2, where the motion judge wrote:

> The Plaintiff alleges that on the morning of June 24, 2017 the 60-pound German Shepherd mix dog owned by the defendant Kathleen Desiree Hurst attacked her.

[47] While this could be a reference to the allegations contained in para. 5 of the statement of claim, I have concluded that it is not. If the motion judge had considered the deemed admissions in the statement of claim, she would have had to grapple somewhere in her reasons with the law as it existed at the time, which interpreted the deemed admissions in r. 19.01(1)(a) to include conclusions of law. This was the ruling in *Umlauf v. Umlauf* (2001), 53 O.R. (3d) 355 (C.A.). However, a little more than a month after the motion judge released her reasons, the Court of Appeal released its decision in *Paul's Transportation Inc. v. Immediate Logistics Limited*, 2022 ONCA 573. In *Paul's Transportation Inc.*, a five-member panel of the court overruled its decision in *Umlauf* and held that the deemed admissions in r. 19.01(1)(a) were restricted to admissions of fact, and do not include conclusions of law or of mixed fact and law: see *Paul's Transportations Inc.*, at para. 77.

[48] Had the reference in the motion judge's reasons to the appellant's allegations been a reference to the statement of claim and not to her affidavit evidence, the motion judge ought to have dealt with the possibility that, in failing to defend against the claim, the defendant admitted that what happened constituted an "attack" within the meaning of s. 2 of the Act. She did not do that. For that reason, I conclude that the motion judge failed to consider the statement of claim.

[49] The motion judge's failure to consider *both* the affidavit evidence and the deemed admissions from the statement of claim constituted an error of law.

Failing to Consider All of the Evidence

[50] The third and final error relates to the evidence. It is clear that the motion judge failed to consider all of it.

[51] The appellant swore *two* affidavits in support of her motion. In addition to the affidavit sworn on May 16, 2019, the appellant swore one on October 4, 2021. In para. 3 of the October 4, 2021, affidavit, the appellant deposed:

> I entered the off leash dog area. A large german sheppard [*sic*] mix dog (the "dog") weighing approximately 60 lbs *charged at me* hitting me on my right side. [Emphasis added.]

[52] The motion judge made no reference whatsoever to this evidence in her reasons.

[53] Even if it was necessary for the appellant to prove aggression, and even if it was necessary to prove an intention on the part of the dog to injure the appellant, this evidence was sufficient to prove there was an attack, in my respectful opinion. By failing to consider this evidence, the motion judge erred in law and made a palpable and overriding error of fact: *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48, at para. 162; *Housen*, at para. 6.

Did the motion judge err in law in her approach to the assessment of the appellant's non-pecuniary damages?

[54] Counsel for the appellant on the motion filed cases to assist the motion judge regarding the issue of damages. However, the motion judge considered these cases to be unsuitable because they arose "in a motor vehicle regime, where parties have insurance to protect them when they are at fault": Decision, at para. 30. Therefore, she requested that counsel file additional cases dealing with "damages caused by an injury of a dog upon a person" and not "personal injury caselaw": Decision, at para. 32.

[55] In her reasons, the motion judge dealt with three such cases. She relied, in particular, on the decision in *Chatterton v. Cowan*, 2010 ONSC 4314. In *Chatterton*, Lauwers J. (as he then was), canvassed awards in a number of other cases before awarding the plaintiff in *Chatterton* the sum of $8,500 for non-pecuniary damages. As mentioned above, the motion judge held that the cases canvassed in *Chatterton* established that there was a "separate regime for assessing damages caused by a dog" and that, based on the caselaw, the damages awarded in such cases do not exceed $35,000: Decision, at para. 35.

[56] In my respectful view, the motion judge erred in law in reaching this conclusion. The cases she relied upon do not support it. Indeed, they support the opposite conclusion.

[57] All of the cases relied upon by the motion judge were cases involving dog bites. Similarly, all of the cases canvassed by Lauwers J. in *Chatterton* were dog bite cases. None of the cases he reviewed involved injuries like those suffered by the plaintiff in this case, who was not bitten at all. For this reason, *Chatterton* does not stand for the proposition that a separate regime applies to all injuries inflicted by a dog. It is restricted to cases involving dog bites.

[58] Nor does *Chatterton* stand for the proposition that damages in cases involving injuries inflicted by dogs are capped at $35,000, even where the method of attack is a bite. In the second case considered by the motion judge, *Moretto v. Nicolini-Femia*, 2017 ONSC 3945, the plaintiff had also been bitten. However, whereas the plaintiff in *Chatterton* was a woman in her 40s, the plaintiff in *Moretto* was 15 years old at the time of the attack. Whereas the plaintiff in *Chatterton* had been bitten on the hip, the plaintiff in *Moretto* had been bitten on the face. And whereas the plaintiff in *Chatterton* had suffered two puncture wounds to a part of her body that was not usually visible, the young plaintiff in *Moretto* suffered facial scars that actually became worse over time and could not be mitigated with surgery. The trial judge awarded the plaintiff in *Moretto* the sum of $45,000 for non-pecuniary losses, a sum roughly one-third more than the cap imposed by the

motion judge in this case. The motion judge did not address this higher award nor how it affected her conclusion about the range of damages.[2]

[59] That there is no separate regime for assessing injuries inflicted by a dog and no unique cap on the damages that can be awarded in such cases was clearly demonstrated in the third case considered and distinguished by the motion judge. In *Constantiou v. Stannard*, 2021 ONSC 5585, the plaintiff, a woman in her 60s, had been attacked by a dog weighing over 100 pounds. The dog first bit her hand before letting go and then biting her elbow. Like the plaintiffs in the other cases considered by the motion judge, the plaintiff in *Constantiou* suffered puncture wounds as a result of the bites. However, in *Constantiou*, the most significant injury sustained by the plaintiff was not scarring. Rather, it was a partial tear of the supraspinatus tendon in her shoulder and a partial tear of the long head of her bicep, which the trial judge found was caused by her efforts to free her elbow from the dog's mouth.

[60] The plaintiff in *Constantiou* was a personal support worker. As a result of the attack, she was unable to work for 10 days and her capacity to resume work was permanently diminished. She was also no longer able to engage in leisure activities after the attack to the same extent as she could before it. The trial judge in *Constantiou* awarded the plaintiff $100,000 in non-pecuniary damages.

[61] The motion judge distinguished the decision in *Constantiou* on the basis that it "came after seven days of trial", that the plaintiff's injuries in the case "rendered one of her arms unusable for a period of time", and that the trial judge in *Constantiou* had found that the plaintiff suffered permanent limitations resulting from the attack: Decision, at para. 37. With respect, there was far more reason to distinguish the decisions in *Chatterton* and *Morretto*, which involved scaring, than there was to distinguish the decision in *Constantiou*, which involved the permanent impairment of a limb, as the appellant has suffered here.

[62] The motion judge was also wrong to reject the caselaw provided by counsel for the appellant on the basis that it arose within the compulsory insurance context of motor vehicle accidents. The existence of insurance to cover third party loses is an irrelevant consideration. In the past, the mere mention of insurance was considered to be prejudicial to a fair trial: *Bowhey v. Theakston*, [1951] S.C.R. 678. While that may no longer be true today, the assessment of damages in motor vehicle cases is still required to be conducted without regard to the existence of insurance. The results in those cases cannot, therefore, be distinguished on that basis.

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[2] There are other cases demonstrating that there is no such cap when it comes to injuries caused by bites. In *Zantingh v. Jerry*, [2013] O.J. No. 6226 (S.C.), for example, the trial judge awarded non-pecuniary damages in the amount of $60,000 to a young boy who suffered facial scarring.

[63] I would add that, even if the existence of insurance was a relevant consideration, many defendants have tenant's or homeowner's insurance which covers third party liability with respect to incidents occurring outside of the motor vehicle context.

[64] For these reasons, the motion judge's approach to the assessment of the appellant's non-pecuniary damages constituted an error of law.

Did the motion judge err in law by deducting the amount the appellant received for income replacement from her disability insurer?

[65] As a result of her injuries, the appellant was off work for 21 weeks, during which she would have earned $32,310.60. During those 21 weeks, however, the appellant received short-term disability ("STD") benefits in the amount of $1,000 per week for 17 weeks and thereafter received long-term disability ("LTD") benefits in the amount of $2,250 per week for a further four weeks. Because she was insured, the appellant suffered no actual income loss. Nonetheless, she sought to recover the full amount she would have earned but for the attack.

[66] The motion judge denied the claim for lost income on the basis that neither the employer nor the insurer was a party to the proceeding and "taking into account the tax situation": Decision, at para. 43. I interpret this last comment as a reference to the fact that the appellant received the income replacement benefits tax-free. Once again, with respect, this constituted an error of law.

[67] As a rule, injured parties are precluded from recovering more than the amount lost. However, this is not the case where an injured party has been compensated for a loss by a policy of insurance paid for by the injured party. This is known as the "private insurance exception" to the rule against double recovery and has been the law in Canada since the decision in *Bradburn v. Great Western Rail Co.* (1874), L.R. 10 Ex. 1., [1874-80] All E.R. Re. 195.

[68] *Bradburn* was reconsidered and reaffirmed as being the law in Canada by the Supreme Court in *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359. In *Cunningham*, a majority of the Supreme Court held that the private insurance exception applied even where the premiums for an income replacement policy had been paid for by an employer, provided that the injured party could demonstrate that he or she had made a direct or indirect contribution to the policy premium, for example by deductions from pay or as part of a collective bargaining process: *Cunningham*, at p. 407-408. The majority further held that the fact that the insurer or the employer had a subrogated right to recover the proceeds paid under the policy was irrelevant, except where the injured employee could not demonstrate a contribution. Where there is a right of subrogation, the employee is entitled to recover the lost wages regardless of the question of contribution: *Cunningham*, at p. 415.

[69] In the present case, the appellant had sworn in her October 2021 affidavit that she was insured through her employer by the Manufacturer's Life Insurance Company ("Manulife") and included as exhibits to her affidavit copies of several documents from Manulife. One of them was a letter from Manulife dated October 20, 2017. In the letter, Manulife advised the appellant that she would receive income replacement benefits tax-free because she had paid 100 percent of the

premiums for LTD coverage. The appellant also attached a copy of a document entitled "Manulife Financial Reimbursement Agreement Re. Third Party Liability" to which she made specific reference in her affidavit. In the agreement, the appellant agreed to seek 100 percent of her lost income in any claim brought to recover damages and to reimburse Manulife if the amount recovered exceeded the amount of her loss after payment of the income replacement benefits, among other things.

[70] Thus, there was evidence that the appellant had contributed directly to the income replacement policy premiums, at least with respect to her LTD coverage. Further, even if the motion judge was not satisfied that the appellant had contributed anything towards the STD coverage, a question she did not address, the evidence was clear that the insurer had a right of subrogation with respect to the entire loss. In those circumstances, the motion judge ought not to have denied the appellant the right to recover the lost income simply on the basis that neither the insurer nor the employer was a party to the proceeding and that the appellant received the income replacement benefits tax-free. There is no authority of which I am aware, and none was cited by the motion judge, by virtue of which a party with a subrogated right to be reimbursed is required to participate as a party to a proceeding. By denying the appellant's claim for lost income, the motion judge committed an error of law and deprived the insurer of the contractual right to reimbursement.

[71] Nor should the motion judge have dismissed the appellant's claim for lost income on the basis of the tax treatment of her income replacement benefits. As the majority of the Supreme Court affirmed in *Cunningham*, at p. 417:

> In Canada, the cases have consistently held that damage awards should be calculated without taking into account taxes that would have been paid if the sum awarded had been received by the plaintiff in the form of income. [Citations omitted.]

[72] To the extent that the tax treatment of the appellant's income replacement benefits formed the basis for the motion judge's dismissal of her claim for lost income, it also constituted an error of law.

CONCLUSION

[73] For the foregoing reasons, the appeal is allowed.

[74] Although the appellant sought to have this court substitute its own assessment of her non-pecuniary damages for those of the motion judge, we declined to do so during the hearing of the appeal. As we advised counsel for the appellant, we are not in the best position to make such an assessment and counsel might wish to consider calling the appellant to give *viva voce* evidence relating to that issue.

[75] The matter is accordingly remitted to the civil trial office to be dealt with by a different judge under r. 19.05.

COSTS

[76] The appellant seeks costs in the amount of $19,671. 55 on a substantial indemnity basis or $27,707.22 on a full indemnity basis.

[77] While it is unfortunate that the appellant was required to appeal, I see no basis upon which to saddle the respondent with a costs order. She has done nothing to cause those costs to be incurred.

[78] I would therefore award no costs.

M.G. Ellies R.S.J.

I agree. _____
Backhouse J.

I agree. _____
Lederer J.

Corrected Date of Release: April 28, 2023

CITATION: Martin v. Hurst, 2023 ONSC
DIVISIONAL COURT FILE NO.: 403/22
CORRECTED RELEASE DATE: 20230428

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

R.S.J. Ellies, Backhouse and Lederer JJ.

BETWEEN:

Linda Martin

Appellant

– **and** –

Kathleen Desiree Hurst

Respondent

CORRECTED REASONS FOR DECISION

M.G. Ellies R.S.J.

Corrected Date of Release: April 28, 2023