SUPREME COURT OF NOVA SCOTIA
Citation: Walsh v. Unum Provident, 2012 NSSC 86

Date: 20120229
Docket: Hfx. No 202244
Registry: Halifax

Between:

Douglas Walsh

Plaintiff

v.

Unum Provident, a body corporate

Defendant

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	November 28th - December 8th, 2011 in Halifax, Nova Scotia
Counsel:	Kevin C. MacDonald, for the plaintiff Michelle Awad, Q.C., Jeff Aucoin and Christina Firmini (Articled Clerk), for the defendant

By the Court:

[1] In many ways this is a tragic case. In 1993 the plaintiff applied for and was issued a disability policy. At that time the plaintiff had an apparently successful business building residential properties for resale. Later he began the planning and development of a large project known as Stoneybrook, which included a multi-unit apartment complex. He was not successful. He claims his business losses were brought on by poor decisions caused by Bipolar disease.

[2] The defendant insurer says that the plaintiff's businesses failed because he was not a good businessman and made poor business decisions. In fact, the defendant says these decisions were made prior to any evidence of Bipolar disease.

[3] This action arises out of a claim for long term disability benefits brought by the plaintiff. On May 28, 1993 the plaintiff applied for a disability insurance policy with Paul Revere Life Insurance Company ("Paul Revere"). After completing the underwriting process Paul Revere issued a policy to the plaintiff on August 1, 1993.

[4] The plaintiff made a claim on October 11, 2000. After receipt of an application and medical information, his claim was paid. Paul Revere advised the plaintiff on July 11, 2002 that they were terminating his benefits but would continue payments on an extra contractual basis until July 31, 2002. The plaintiff brings this action against Unum Provident (RBC Life) as a result of this cancellation of benefits. The defendant, Unum Provident, is a business name used by Provident Life, an accident insurance company, which acquired all the assets of Paul Revere in the late 1990's. On May 1, 2004 RBC Life Insurance Company ("RBC Life") acquired all the assets of Unum Provident and is now the defendant in this action.

[5] The defendant insurer claims that the contract of insurance entered into in 1993 by the parties is void because the plaintiff did not disclose in his application several known illnesses. In the alternative, the defendant claims that the plaintiff was not totally disabled, but rather was engaged in his occupation as a real estate developer during the time he was receiving disability benefits.

Issues:

1) Should the insurance policy issued to the plaintiff by the defendant on August 1, 1993 be declared void *ab initio?*

2) Was the plaintiff totally disabled during the time he claimed and received benefits between October 2000 and July 2002?

3) Is the plaintiff entitled to mental distress damages and/or punitive damages?

Issue #1 - Should the policy issued to the plaintiff by the defendant on August 1, 1993 be declared void ab initio?

[6] Initially, the defendant claimed the plaintiff did not qualify under the disability policy because he was not totally disabled within the meaning of the insurance contract. However as the defendant received disclosure of the plaintiff's medical history during the disability period, it became apparent that a number of prior medical conditions had not been disclosed. As a result, the defendant alleges that the policy is void *ab initio.* The alleged undisclosed and misrepresented information concerned the plaintiff's chest pain, heart problems, headaches and migraines, epilepsy and seizures, anxiety, stress and back problems.

The duty to disclose

[7] It is not in dispute that an applicant for insurance has an obligation to disclose facts within his knowledge that are material to the insurance. Part IV of the *Insurance Act,* R.S.N.S. 1989, c. 231, governs accident and sickness insurance, including disability policies. The following provisions govern the plaintiff's duty to disclose material facts, and set out the consequences of a breach:

> Duty to Disclose
>
> 82 (1) An applicant for insurance on his own behalf and on behalf of each person to be insured, and each person to be insured, shall disclose to the insurer in any application, on a medical examination, if any, and in any written statements or answers furnished as evidence of insurability, every fact within his knowledge that is material to the insurance and is not so disclosed by the other.

> (2) Subject to Sections 83 and 86, a failure to disclose, or a misrepresentation of, such a fact renders a contract voidable by the insurer.

[8] I am satisfied that the plaintiff had a duty to disclose to the defendant all material facts within his knowledge when he applied for the policy on May 28, 1993.

Was this duty breached?

[9] Section 82(1) of the *Insurance Act* provides that there is duty on an applicant for insurance to disclose "every fact within his knowledge that is material to the insurance". The reason for this provision is to require an applicant for insurance to provide sufficient information to enable a proposed insurer to carry out an adequate underwriting process in order to determine whether to write a policy.

[10] In Schjerning and Norwood, *Disability Insurance Law in Canada* (Carswell, 2010), the duty to disclose is explained at p. 28:

> Because the insurer has no knowledge of an applicant's health, income or other required history when an application is made for a policy, insurance contracts are *uberrimae fidei*, imposing a duty on applicants to make full and true representations of facts which are material to the insurance risk ....

[11] What is a material fact? In *Henwood v. Prudential Insurance Company of America*, [1967] S.C.R. 720, at para. 19, the court determined that a fact is material if it had been truly disclosed it would have caused a reasonable insurer to decline the risk or to have stipulated a higher premium. Ritchie J. said, for the majority, at 727:

> ...The determination of this appeal is to be governed by what was said by Lord Salvesen in the *Mutual Life Insurance Company of New York v. Ontario Metal Products Company Ltd.*,[1925] A.C. 344 (J.C.P.C.)] at pp. 351-2 where he said:
>
> > ...it is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

[12] The concept of materiality was further discussed in *Maryn v. Unum Life Insurance Co. of America,* 1999 CarswellBC 781, [1999] B.C.J. No. 829, 1999 CanLII 6148 (B.C.S.C.), at paras. 22 and 23:

> 22 In *Kehoe v. British Columbia Insurance Co.* (1993), 15 C.C.L.I. (2d) 25 (B.C.C.A.) the court held that the trial judge correctly expressed the applicable law, at 30:
>
> > The question of materiality is a question of fact for the court.
> >
> > The burden of proof of materiality is on the insurer. It is a question of fact in each case whether, if the matters misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline a risk or to have stipulated for a higher premium.
>
> 23 In *Kruska v. Manufacturers Life Insurance Co.* (1984), 54 B.C.L.R. 343 (C.A.) the court held, at 350:
>
> > ...The test is objective in the sense that it refers to any prudent insurer in the normal practice of that sort of insurance business. The opinion or belief of the insured as to materiality is irrelevant. The reason for this is that if it were otherwise, material information could be suppressed and it would be very difficult to show that the insured thought the information to be material; whereas if the insured's belief is not relevant, it will be in his interest to disclose all information within his reach.

[13] The question of materiality is a question of fact for the court and the burden is on the insurer. It is also a question of fact for the court to determine whether, if the matters misrepresented had been truly disclosed, they would have influenced a reasonable insurer to decline a risk or to have stipulated for a higher premium.

[14] The burden on a defendant in determining whether material misrepresentations and/or omissions were made, is explained in Schjerning and Norwood, *Disability Insurance Law in Canada* at p. 31:

> It is important to point out that the test of materiality is an objective one, and not a subjective one peculiar to the insurer which is involved. Otherwise, this would leave it open to an insurer to assert, after the event, that it would not have

> accepted the risk. Accordingly, a particular insurer cannot repudiate the contract merely by claiming that the fact misrepresented would not have satisfied its own private internal underwriting considerations. The insurer's underwriting rules must be shown to be in reasonable conformity with the ordinary standards for measuring insurable risks applied by insurers in general. Materiality, therefore, must be tested in the context of a "reasonable" insurer.
>
> Whether or not the insurer's underwriting rules and standards will be considered to be those of a "reasonable" insurer will fall to be determined by the court. Evidence brought by the particular insurer involved of its own underwriting rules and practices is, of course, required and will be accorded some weight, but it is not conclusive**. Independent outside expert underwriters are of necessity called as expert witnesses by insurers to establish that their underwriting denial was reasonable.**
>
> Since, to be material, a fact must be one which would influence a reasonable insurer to decline the risk or set a higher premium, it follows that only significant matters will be considered to be material misrepresentations. Minor indispositions of health, or minor discrepancies in respect of the insured's family health history, or past occupation are examples of misrepresentations which are generally immaterial.
>
> The onus lies upon the insurer to demonstrate the undisclosed facts which were within the insured's knowledge, and certainly to prove materiality when it is advancing its case for material misrepresentation.
>
> [emphasis added]

[15] The defendant called Donna Taylor to explain the process carried out by an underwriter in evaluating an application for disability benefits. At the time of the application in 1993 Ms. Taylor has been an underwriter at Paul Revere for approximately 26 years and was involved in training other underwriters. She testified that an underwriter would review an application for insurance to determine insurability and described various actions that can be taken by an underwriter, such as reducing the amount applied for, extending the elimination period, shortening the benefit period, charging an extra premium, inserting exclusions for certain named conditions or declining to issue a policy.

[16] Ms. Taylor testified that underwriters often refer to employer provided manuals which provide guidance as to what actions should be taken if certain medical conditions are disclosed in an application for insurance. Paul Revere

provided their underwriters with such a manual. Ms. Taylor discussed the typical content of an underwriting manual. For example, under "back pain", the manual might describe the common types of back pain ailments and provide options to the underwriter. If a particular medical condition is disclosed, an underwriter could request a supplementary health statement to obtain additional information to better assess the risk or take another action, such as declining to issue a policy.

[17] It is apparent that the difficulty in underwriting is that misrepresentations in an applicant's medical history prevents informed underwriting decisions.

[18] The defendant called Robert Blake Tufford, to provide evidence of a reasonable insurer's response had the plaintiff disclosed an accurate medical history. Mr. Tufford was qualified as an expert in life and disability insurance underwriting, qualified to give opinion evidence in the area of life and disability insurance underwriting, including the assessment of risks, insurers' options when asked to underwrite risks and reasonable insurers' decisions with respect to specific underwriting risks. The materiality test refers to the objective standard of the "reasonable insurer". Mr. Tufford was of the opinion that a reasonable insurer would have declined the plaintiff's application had there been full disclosure of medical information.

[19] The plaintiff did not provide expert evidence on the issue of how a reasonable insurer would have handled the claim, but did challenge Mr. Tufford's testimony based on alleged material errors in his report, as well as alleged bias. The absence of an expert opinion from the plaintiff creates an evidentiary gap, as there is no opinion, other than Mr. Tufford's, as to what a reasonable insurer would have done in the circumstances. Likewise, there is no other expert opinion evidence as to whether or not the misrepresentations or omissions by the plaintiff were material. The plaintiff's failure to offer contrary opinion evidence means he cannot offer any evidence to displace the defendant's experts' views. As with any expert opinion, those witnesses must be scrutinized by the court; the court need not automatically accept that evidence. Moreover, the absence of any contrary expert evidence weakens any criticism the plaintiff might offer.

[20] In general, Mr. Tufford concluded that the medical histories of heart, headache and anxiety, as evidenced in the plaintiff's medical records, would have caused a reasonable insurer to decline the plaintiff's application. Mr. Tufford testified that there were other parts of the plaintiff's medical history that would not

have resulted in a decline of the plaintiff's application had they been disclosed, but rather would have generated other underwriting responses. For example, the plaintiff's history of back troubles (in addition to what was disclosed) would have caused an exclusion rider to be added to the policy, and the information on seizures and epilepsy would have caused a reasonable insurer to charge a higher premium. Further, while the histories of heart, headache and/or anxiety on their own would have caused the insurer to decline the disability policy, the other non-disclosed medical conditions when viewed in their entirety would also have caused the defendant to decline to write a policy. Mr. Tufford stated at p. 16 of his report:

> 4. The ratings suggested for each impairment above are on a stand alone basis. It is my opinion that with the combination of conditions and histories a prudent underwriter at a reasonable insurer would have considered Mr. Walsh ineligible for disability coverage on any basis [in] 1993.

[21] I will now review the alleged material misrepresentations and omissions by the plaintiff.

Epilepsy/Seizure

[22] The plaintiff testified that he was diagnosed with epilepsy by an emergency room physician after a 1983 incident which led to him being hospitalized for several days. There was also some reference in the medical evidence to further seizures suffered by the plaintiff after that time. The relevant application question asked of the plaintiff was:

> 2. Have **You** ever had any known indication of or been treated for:
>
> ...
>
> e. Headaches, fainting spells, epilepsy, paralysis or other disease of the brain or nervous system?

[23] The "no" box was checked for this question.

[24] Despite being told by the emergency physician that he had epilepsy, the plaintiff testified that he was subsequently seen by a specialist, Dr. David King, who told him he was not an epileptic. Therefore, he answered "no" to this

question. The defendant's position is that even if the plaintiff's recollection of Dr. King's opinion was correct, it still would not justify the "no" answer on the application.

[25] In Schjerning and Norwood, *Disability Insurance Law in Canada*, the authors make the following remarks at p. 29:

> 29 The insured may not know exactly what their symptoms indicate, but, if aware of certain symptoms and if asked for on the application, the insured must disclose them. The insured may genuinely feel that their surgical operation was successful, that a diagnostic prognosis was reassuring, or be quite unaware of or troubled by the results, but the insured certainly knows they had surgery and that they undertook the diagnostic test. While the insured may not know what their doctor knows, and it may be that the doctor chose not to disclose fully the state of health to the insured, this does not alter the fact that the insured *did* consult a doctor or was treated by a doctor. Essentially, therefore, the insured's duty is to disclose to the insurer the *fact* of all other symptoms, consultations, and medical treatments or tests, regardless of the insured's own belief as to their importance or significance or that they feel they are free of health problems.

[26] The fact the question was asked and the wording of the question required disclosure by the plaintiff; by his own admission the plaintiff had been told by an emergency room physician that he had epilepsy.

Headache

[27] Question 2e of the medical questionnaire referred to headaches. The plaintiff indicated that he had never been treated for headaches, nor had there been any known indication of headaches by checking "no" to this box. On direct examination the plaintiff testified that he had only had a few migraines, but on cross-examination confirmed that he had been having migraines for years, including when he lived in Cape Breton and worked on oil rigs. He confirmed that Dr. Wu, his general practitioner in Sydney prior to 1990, had prescribed a migraine medication, Ergomar. Later, the plaintiff was seen in Halifax by Dr. Fraser, his family physician, who referred him to Dr. Stephen Bedwell, a neurologist. Dr. Fraser described the plaintiff's headache history in his December 5, 1991 referral letter to Dr. Bedwell:

> Over the past five years Mr. Walsh has had rather frequent headaches involving the frontal and parietal areas of the skull ... The headache is much more common in the early morning and is beginning to cause him some concern.
>
> He also gives a history of some form of migraine headaches, his vision problems and for this he takes Ergomar, with effect.

[28] Although the plaintiff answered "no" to question 2e, the evidence is that less than two years before his May 28, 1993 application, his family doctor was describing a five year history of headaches. This information likely came from the self-reporting of the plaintiff to Dr. Fraser. After reviewing this information, Mr. Tufford concluded at p. 15 of his report that "a prudent underwriter at a reasonable insurer would consider the history and treatment as now known necessitated declining in 1993."

[29] When he was asked why he answered "no" to this question, the plaintiff said that he had not been asked the question and if he had been he would have answered "yes". With respect, I accept the evidence of Ted Fraser, the insurance agent who filled out the application that he asked this question of the plaintiff.

[30] The plaintiff gave no other credible explanation for answering "no". He did suggest that if the question was structured differently he would have answered differently. Generally, the plaintiff suggests that the questions posed on the application were vague, yet offered no evidence to support this position. The suggestion that if the question respecting headaches had been structured differently, the plaintiff would have answered differently, implies very specific comprehension, understanding and listening to the question as asked by Mr. Fraser in 1993. This position is at odds with the plaintiff's allegation that Mr. Fraser read the questions quickly and with the suggestion that the questions were vague and that he may not have understood them. The plaintiff's history of headaches was recent. His reasons for not disclosing this information are not credible.

Back Problems

[31] The application question concerning back problems was found at 2n:

> 2. Have **You** ever had any known indication of or been treated for:

...

n. Any type of back or spinal trouble including sprain, strain, or disc disease?

[32] The plaintiff checked the "yes" box and, as a result, was asked to complete a back pain questionnaire. On this questionnaire he disclosed an incident in 1984 when he was working on an oil rig where he slipped and fell while lifting a pump. Mr. Tufford testified there are a number of other references in Dr. Ashton's file (including Dr. Fraser's files that Dr. Ashton was in possession of) as to ongoing back problems. A report of March 3, 1987 by an orthopaedic surgeon, Dr. A.M. Mirza, referred to back pain problems after the 1984 incident on the oil rig, including a reference to further back pain caused by driving long distances while working for Shell. Mr. Tufford's conclusion as to these omissions was as follows:

> The history as now known was chronic and recurrent over a number of years. Even though the last known history was in 1987, I feel a prudent underwriter at a reasonable insurer would feel that an exclusion rider involving the lumbar spine and spina bifida occulta was indicated in 1993.

[33] Mr. Tufford testified that this particular withholding of information would not have resulted in the policy being declined but was another example of misrepresentation or omission, which, when considered with other examples of non-disclosure, would result in an insurer declining to issue a policy.

[34] While the incident on the oil rig was approximately 9 years before the signing of the application, the reference to the back problems suffered while he was a Shell employee would have been more recent, and would be material and should have been disclosed.

Chest Pain

[35] In addition to the 1983 indication of epilepsy, the emergency room doctor at that time also told the plaintiff that he had "a hole in his heart". The relevant application question is 2c and is as follows:

2. Have **You** ever had any known indication of or been treated for:

...

> c. Chest pain, heart murmur, high blood pressure, or any disease of the heart, blood vessels, or blood?

[36] The plaintiff checked "no" in the relevant box. I am satisfied that although the plaintiff had received information from his doctor that he did not have heart problems, he was required to disclose this information. An insured is obliged to disclose to the insurer the fact of all of their symptoms, consultations and medical treatments or tests, regardless of their own belief as to the state of their health.

[37] More significantly, the plaintiff had EKG tests in September 1990 and February 1991, close to the time he completed the 1993 application for insurance. The first EKG/ECG Report Form indicated the following under interpretation:

> Abnormal sinus bradycardia at 55 per minute. There are ST segment changes in 2, 3 and AVF with ST segment depression, particularly in 3 and AVF - compatible with inferior wall aschemia.

[38] The second EKG dated February 12, 1991 stated as follows under "interpretation":

> Sinus bradycardia at 55 per minute, intraventricular conduction delay. The ST segment and T-WAVE changes in 11, 111 and AVF noted on the previous tracing are still present and unchanged.

[39] Mr. Tufford made the following comments about this information at p. 14 of his report:

> The finding of left ventricular hypertrophy in 1983, chest pain in 1985, further chest pain in 1990 (age 32) and 1991 when ECG changes were noted as indicative of inferior wall ischemia would be of concern to any underwriter, and would require referral to the Medical Director.
>
> Without a more extensive cardiovascular work-up I feel a prudent underwriter at a reasonable insurer would have declined in 1993.

[40] As well, question 4c is relevant:

> 4. Within the past 5 years, other than the preceding have **You:**
>
> **...**

c. Had an X-ray, ECG, blood or urine test, or other lab tests?

[41] The plaintiff answered “no”. I am satisfied that the plaintiff should have answered “yes” to both question 2c and question 4c.

[42] At trial the plaintiff said that he did not recall undergoing these EKGs. Forgetting about two EKG tests completed within six months of one another and within three years of the application date is not reasonable nor credible. The plaintiff also suggested that his chest pain related to periodic indigestion. If that were the case, question 2p is relevant which is as follows:

2. Have **You** ever had any known indication ofor being treated for:

...

p. Any type of peptic ulcer, indigestion, or any disease of the stomach, intestines, gall bladder or liver?

[43] The plaintiff answered “no”. The plaintiff did not disclose this relevant material medical information to the defendant.

Anxiety and Stress

[44] The relevant question regarding anxiety and stress was 2f:

2. Have **You** ever had any known indication of or been treated for:

...

f. Anxiety, depression, nervousness, stress, burnout, or other emotional disorder?

[45] The “no” box was checked. The defendant alleges that the plaintiff failed to disclose a history of anxiety and stress. Mr. Tufford testified that Lectopam is a sedative for anxiety disorders and it had been prescribed to the plaintiff in 1983.

[46] Closer to the date of the application was a reference in a letter of December 12, 1991 to Dr. Fraser from Dr. Bedwell, that the plaintiff admitted that he was

"under considerable stress". Further, Dr. Bedwell in a February 20, 1992 letter to Dr. Fraser indicated "all this is in fact secondary to stress and I think a mild relaxant would be reasonable". After reviewing this information, and noting the "recurring episodes", Mr. Tufford concluded at p. 15 of his report, that "a prudent underwriter at a reasonable insurer would have declined in 1993." I am satisfied that the plaintiff's treatment for stress was recent and should have been disclosed.

Comment on the expert evidence

[47] In summary, Mr. Tufford concluded that the non-disclosure regarding the plaintiff's medical history of headaches, diseases of the heart and anxiety and stress, would each, on their own, have caused a reasonable insurer to decline. I accept Mr. Tufford's opinion in this regard.

[48] Although the plaintiff did not provide expert evidence on this issue, he did argue that there were discrepancies in Mr. Tufford's report, as well as alleging bias. As to the allegation of bias, he referred to Mr. Tufford's professional qualifications (as described in his report), and specifically the fact that he provided "expert witness services to the majority of Canadian Life and Disability Insurers". The plaintiff suggests that this is evidence of bias on the part of Mr. Tufford and that his report, therefore, should be given no weight. With respect, the plaintiff neglects to mention that Mr. Tufford's report also indicates that he has worked with Canadian law firms on behalf of plaintiffs. I am not convinced that having provided services to insurers is evidence of bias.

[49] The plaintiff refers to Mr. Tufford's testimony that he knew Donna Taylor and that he had worked with her in the past as evidence of bias. Mr. Tufford on cross-examination readily admitted that he knew Ms. Taylor, but testified that he had no contact with her relative to this case. The fact that Mr. Tufford knew Ms. Taylor would not be surprising, given that he has testified previously for insurers, including Paul Revere. I am not satisfied the fact that Mr. Tufford knew Ms. Taylor is sufficient proof of bias.

[50] As further evidence of bias, the plaintiff referred to the words "need 10.1 from Donna" on p. 1 of Mr. Tufford's notes (Exhibit 30). While Mr. Tufford was unable to say whether "Donna", was Donna Taylor, both he and Ms. Taylor denied consulting one another in relation to this file. I accept their evidence.

[51] The plaintiff also urges that no weight be given to Mr. Tufford's testimony because of material errors contained in his report. In the plaintiff's post-trial submission, there is a listing of discrepancies in Mr. Tufford's report, which the plaintiff says establishes that Mr. Tufford "did not present a fair picture of Mr. Walsh's medical history". I am not satisfied that this is the case and I am satisfied that these minor errors, once corrected, had no impact on Mr. Tufford's opinion. Generally I found his evidence to be professional and his conclusions to be clear and unchallenged.

Does the plaintiff have a valid defence for his failure to disclose material facts?

[52] The plaintiff made a number of allegations about the circumstances surrounding the signing of the application for insurance. The plaintiff alleges that the questions posed were confusing and/or vague, and that there was information inserted in the application after it was completed and signed.

[53] The circumstances surrounding the signing of the application for insurance were described in the evidence of the plaintiff, Ted Fraser and Greg Flack. There is no dispute that the application was completed on May 28, 1993, nor is it disputed that the application was signed by the plaintiff in the presence of Mr. Fraser. Mr. Fraser could only recall part of his dealings with the plaintiff on that day, but did testify as to his general practice when completing a disability insurance application. His practice was to read each question to the applicant and to record the answers. He said he typically advised applicants to provide accurate and complete answers to the application questions. He recalled that the plaintiff made no comment which would lead him to believe that he did not understand the questions he was being asked.

[54] The plaintiff testified that Mr. Fraser told him that it was not necessary to review the completed application. Under cross-examination, Mr. Fraser said he passed the completed application to the plaintiff and asked him to review it before signing. He denied advising the plaintiff that the application need not be reviewed. I accept the evidence of Mr. Fraser in this regard.

[55] Mr. Fraser said his memory of the events surrounding the signing of the application was not very sharp, as the event was 18 years ago. While he did not recall asking specific questions, he testified that he would have asked the questions

and written down the answers provided by the plaintiff. I accept the evidence of Mr. Fraser on this issue.

[56] Generally the plaintiff questions Mr. Fraser's evidence because during cross-examination it became apparent that Mr. Fraser had made some errors in his direct evidence as to what portion of the application was in his handwriting. While I am satisfied his evidence on direct examination was incorrect in part, I am not satisfied that this would be sufficient reason to consider Mr. Fraser's testimony not credible or to excuse the plaintiff from his non-disclosure of his prior medical history.

[57] A good deal of cross-examination of the defendant's witnesses was directed at the circumstances of the application and, in particular, who had completed the various sections. Ted Fraser identified his handwriting and Greg Flack, who worked in the Halifax brokerage office of Paul Revere in 1993, identified his handwriting.

[58] While there were inconsistencies in the evidence as to who wrote what, I am satisfied that between those two individuals virtually all of the entries were identified. Mr. Flack testified that it was not uncommon for him to fill in the income portion of the application either through information gathered from Mr. Fraser or other external sources such as an accountant.

[59] I am satisfied on the evidence that the section dealing with the plaintiff's health related information was completed by Mr. Fraser. I accept the evidence of Mr. Fraser as to the circumstances surrounding the signing of the application of May 28, 1993. I am satisfied that he read over the questions to Mr. Walsh (other than for question 2g) and recorded the plaintiff's response. I also accept his testimony that the plaintiff appeared to understand the questions. As to question 2g, Mr. Fraser testified that he had no explanation for that question not being answered, other than to say that he must have neglected to ask this question. I accept his evidence on that point.

[60] Mr. Fraser presented as helpful and forthright, both on direct and cross-examination. He answered questions posed by both counsel earnestly and seriously.

[61] There was also some question by the plaintiff about who filled in some financial information in the application. I am not satisfied that this is relevant to

my determination as it does not concern the medical evidence that allegedly had not been disclosed. In any event, among the four men involved in the application process, namely Charles Nauss, Ted Fraser, Greg Flack and the plaintiff, only Charles Nauss and the plaintiff would know the net annual income amounts which were required to complete section 1d. In other words, whether it was Ted Fraser or Mr. Flack who wrote in the income figures, the information would have had to come from the plaintiff or Mr. Nauss.

[62] The plaintiff also highlighted the speed at which Mr. Fraser read a question from the application on direct examination. The plaintiff suggests that this is indicative of the speed at which Mr. Fraser would have read the questions to the plaintiff at the time he signed the application, the implication being that this led to the plaintiff's confusion and is somehow a reason for not having disclosed his past medical history.

[63] Mr. Fraser explained on cross-examination that the speed of his reading during his trial evidence could be contrasted with the circumstances of his meeting with the plaintiff to complete the application. It must be remembered that Mr. Fraser testified that the plaintiff appeared to understand the questions. In response to the questions about back pain, the plaintiff related the incident where he hurt his back when he worked on an oil rig in the early 1980's. It can be inferred from this that the plaintiff understood the question. I am not satisfied that the speed at which Mr. Fraser read a question in direct examination was indicative, in any way, of how he would have asked the questions at the time the application was completed.

[64] The plaintiff suggested that the questions asked on the application were ambiguous. No evidence was provided that this was the case. Moreover, the application contained what I would consider a catch-all question, namely question 4 which asked:

> 4. Within the past 5 years, other than the preceding have **You:**
>
> a. Been examined by or consulted a physician, chiropractor, psychologist, physiotherapist or other practitioner?
>
> b. Been under observation, or treatment in any hospital, sanitarium, or institution?

> c. Had an X-ray, ECG, blood or urine test, or other lab tests?
>
> d. Had any surgical operation, treatment, special diet, or any illness, ailment, abnormality or injury?
>
> e. Been advised to have any diagnostic test, hospitalization, or surgery which was not completed?

[65] The plaintiff answered "no" to each of these questions. Even if he did not understand the preceding questions, he should have answered "yes" to c, at least, because of the EKG tests, and to 4a and b based on the medical evidence.

[66] I am satisfied that none of the issues raised by the plaintiff surrounding the signing of the application explain the reason for, or excuse, the non-disclosure or misrepresentation of his medical history as required by the *Insurance Act*. Nor am I satisfied that the circumstances surrounding the signing of the application are such that Mr. Fraser's evidence should be considered "with a great deal of caution" as suggested by the plaintiff.

Did the plaintiff commit fraud?

[67] The plaintiff was under a duty to disclose to the defendant all material facts within his knowledge at the time he applied for the policy. I have found that there were material non-disclosures. If the material non-disclosures were made fraudulently, the plaintiff's claim must fail and the defendant's counterclaim must succeed. The onus is on the defendant to establish on a balance of probabilities that the non-disclosures were made fraudulently.

[68] The relevant provision of Part IV of the *Insurance Act* provides as follows:

> 83(1) Subject to Section 86 and except as provided in subsection (2),
>
> (a) where a contract, including renewals thereof, except a contract of group insurance, has been in effect continuously for two years with respect to a person insured, a failure to disclose or a misrepresentation of a fact with respect to that person required by Section 82 to be disclosed does not, except in the case of fraud, render the contract voidable;

[69] On the issue of incontestibility the plaintiff suggests that the threshold for enforceability under the policy is higher than the threshold of the *Act*. I am not satisfied that this is the case. On a review of s. 9.2(a) of the policy and s. 83(1) of the *Insurance Act, supra*, I see no substantive difference between the two.

[70] The defendant does not dispute that the incontestibility provisions apply and that it has the burden of proving fraud. I am satisfied actual fraud must be established. That is, the defendant must establish something more than an innocent or negligent material misrepresentation.

[71] The test for fraud was considered in *Kruska v. Manufacturers Life Insurance Company* (1984), 54 B.C.L.R. 343, 1984 CanLII 888 (B.C. S.C.) affirmed at 1985 CanLII 464 (B.C.C.A.)), at paras. 37 and 38:

> 37. The accepted test of actual fraud in a civil case derives from *Derry v. Peek* (1889), 14 A.C. 337 (H.L.). There must be a false representation, made knowingly, without belief in its truth, or recklessly, without care whether it is true or false. Nothing less than this will suffice for the defendant to succeed in this case. Conduct without fraudulent intent which, before the statute, might have been characterized as fraud will no longer so qualify. The effect of the statute is that the insured is still bound by her duty of utmost good faith until the incontestability clause takes effect. After that time she will be held covered if her material misrepresentation or non-disclosures were made innocently, or negligently. The incontestability clause protects her from false representations of that kind. But it will not protect her if she has the fraudulent mind described in *Derry v. Peek*. Then the law will deprive her, or her beneficiaries, of the proceeds of the contract.
>
> [emphasis added]
>
> 38. Fraud, as defined for these purposes, must be proven by the defendant insurer on the balance of probabilities, the ordinary civil standard of proof: *Hanes v. Wawanesa Mut. Ins. Co.*, [1963] S.C.R. 154. However, the seriousness of the conduct alleged is a circumstance to be considered in determining whether the matter has been sufficiently proven: *Smith v. Smith*, [1952] 2 S.C.R. 312 at 331.

[72] The insurance agent Ted Fraser met with the plaintiff, read the questions to him and recorded his responses. Other than an indication of previous back pain in 1983 all of the other questions were answered in the negative. Contrary to the arguments of the plaintiff, I do not find the questions confusing. Each of the

questions asked whether the plaintiff had "any known indication of or been treated for" the listed conditions. There is no indication that the plaintiff did not understand the questions. At the time he filled out the questionnaire he was a busy contractor with a successful company. There was no indication in 1993 that he was suffering from any condition that would affect his comprehension of the questions and his answers. On p. 6 of the application, above his signature was the following:

> **It is understood and agreed as follows:**
>
> (1) I have read the statements and answers recorded in Parts 1, 2 and 3. They are, to the best of my knowledge and belief, true and complete and correctly recorded. They will become part of this Application and any policy(ies) issued on it.

[73] Also, the following caution was in bold letters immediately above the signature space:

> **This application will form part of any insurance contract issued. The contract will be of utmost good faith, based upon the statements contained in this application. You are responsible for the accuracy of the statements. Before signing, please verify that all answers are correct and complete and that you have initialled any changes to those answers. Inaccurate answers to any questions may affect your eligibility for coverage and/or benefits.**

[74] Ted Fraser was also required to sign the application. Immediately above the signature space for his name was the following caution:

> **I certify that I have truly and accurately recorded on this Application the information supplied by the Applicant in my presence.**

[75] An insured is bound by their signature on an application for insurance. They are especially so bound where the document they sign has a clear caution that the insured applicant is responsible for the accuracy of the statements and should inaccurate answers be provided to any questions, it may affect eligibility for coverage and/or benefits. In *Disability Insurance Law in Canada*, the learned authors state at p. 32:

> Because alleged cases of misrepresentation often turn into a contest of he said/she said where an insured claims to have told the agent of their health

> condition but the agent advised that it was not serious enough to disclose or that the agent forgot to record the insured's answer, the law has developed that an insured is bound by their signature to any false declaration contained in an application.

[76] The defendant says that given the extent of the plaintiff's misrepresentations and omissions, it is open for this court to conclude they were fraudulent; either deliberately misleading or because the plaintiff was so reckless as to the truth of his answers and, the consequences of his giving them, that his actions were dishonest. The plaintiff says that the defendant has not met its burden of proving fraud.

[77] While it is understandable that an individual may forget medical complaints and conditions identified many years previously, in this instance it stretches credibility to suggest the plaintiff would not at least have disclosed some of the many conditions that the medical evidence reveals he was treated for. I accept the evidence of Mr. Tufford, which is uncontradicted, that these misrepresentations or omissions were material and, as a result, a reasonable insurer would have declined to issue a policy had they been aware of the many medical conditions subsequently disclosed. I am satisfied there is ample factual basis to support Mr. Tufford's opinion.

[78] It is not believable that the plaintiff in 1993 (who was only in his early 30's) forgot all of the medical history that was missing from his application. The reason he most often gave is that he forgot, and his counsel argues that the plaintiff could not be expected to provide information which he could not recall. With respect, this is not credible and I can come to no other conclusion than that the plaintiff consciously withheld the medical information called for on the application. This was a false representation made and knowingly without belief in its truth. Alternatively, I conclude that he was reckless, as it stretches the imagination to believe that he would not recall these numerous medical conditions, tests and attendance at specialists. There was no evidence as to why this information would not have been disclosed other than that the plaintiff had forgotten. It would be understandable if there were one or two isolated omissions of information from many years previously, however, here the evidence shows a signficant number of omissions, many of them recent.

[79] There will be a declaration that the insurance policy in question is void *ab initio* and the plaintiff's action is, therefore, dismissed.

[80] The parties have agreed that the plaintiff has been paid benefits in the amount of $125,119.20. The plaintiff shall reimburse the defendant in the amount $125,119.20, plus pre-judgment interest. I will leave it to the parties to calculate the total amount repayable by the plaintiff and submit it in a draft order to the court.

[81] Having so found, there is no need to decide the second issue. However, in the event that I am wrong on this first issue, I will go on to determine whether the plaintiff was totally disabled during the time he claimed and received disability benefits between October 2000 and July 2002. For the reasons which follow, I am not satisfied that he has met his burden.

2. Was the plaintiff totally disabled during the time he claimed and received disability benefits between October 2000 and July 2002?

[82] The plaintiff claims he was totally disabled from October 2000 to the present. The defendant says that the medical evidence presented by the plaintiff does not support the plaintiff's contention that he was totally disabled for the relevant period and tendered evidence to the contrary, including evidence of the plaintiff's activities during the time disability benefits were paid. This issue will be determined under the following headings: (i) the onus of proof, (ii) the test for disability and the standard of proof, (iii) the plaintiff's employment status prior to and during the disability period, (iv) the medical evidence and (v) conclusion**.**

i) ***The onus of proof***

[83] It is not in dispute that the plaintiff has the burden of proving on a balance of probabilities that he is totally disabled as defined in the policy.

ii) The test for disability and the standard of proof

[84] The plaintiff paid the premiums under the policy, up to and including October 11, 2000 when he signed a "claimant statement" in support of his claim for policy benefits. His stated sickness was "major depression disorder" with the symptoms allegedly first appearing on February 15, 2000. His last day of work was said to be August 1, 2000. The plaintiff indicated that the important duties of his occupation were daily meetings, administration, management, sales meetings,

negotiations and land development. On the "claimant statement" and across from each of these listed duties of his occupation, he was asked to answer the question: " Are you currently able to perform this activity?" He checked the "no" box for each of these identified duties of his occupation.

[85] Additionally, two attending physician statements were provided as part of the plaintiff's claim for disability benefits. The first was from his family doctor, Dr. Brian Ashton. The second attending physician's statement was completed by the plaintiff's psychologist, Michael Ross, Ph.D. Dr. Ross stated that the primary diagnosis was major depressive disorder.

[86] The plaintiff's claim was reviewed and he was paid monthly benefits from September 28, 2000 until July 31, 2002. The total paid was $125,119.20, with all payments being issued under reservation of rights. Reservation of rights appears to mean that the defendant, while paying the benefits under the policy, would continue to investigate the plaintiff's eligibility.

[87] The essence of the policy is that the defendant would pay to the plaintiff a monthly benefit provided the plaintiff met the applicable policy definition of disability. Total disability is defined in s. 1.8 of the policy

> 1.8 "**Total Disability**" means that **because of Injury or Sickness:**
>
> a. **You are unable to perform the important duties of Your regular occupation;** and
>
> b. You are not engaged in any other gainful employment; and
>
> c. You are under the regular and personal care of a Physician.
>
> [emphasis added]

[88] It is not disputed that an insured is totally disabled when a reasonable person would recognize that he should refrain from certain activities, such as when medical advice or common prudence require him to desist from any occupation for which he is reasonably fitted in order to effect a cure or prolong his life: *Paul Revere Life Insurance Company v. Sucharov*, [1983] 2 S.C.R. 541. The test is objective and objective medical evidence of disability will usually be required.

[89] The policy insures the plaintiff against an inability to work resulting from sickness or injury. Thus, one can be diagnosed with "injury or sickness", but the disability policy is not triggered unless this "injury or sickness" is such that the insured is unable to perform "the important duties" of his regular occupation. In order for the plaintiff to succeed with his claim, he must prove that Bipolar II, his diagnosed sickness, is such that he is unable to perform the important duties of his regular occupation.

[90] The defendant's position is that the plaintiff's inability to work did not result from sickness, but rather from the decline of his business reputation, so that lenders and people in the construction industry would not deal with him. The defendant says this led to the plaintiff's bankruptcy and loss of his business, not his health condition. Moreover, the defendant says that during the disability period the plaintiff was, in any event, carrying out the ordinary duties of his regular occupation and would not qualify under the policy terms.

[91] To determine whether the plaintiff meets the definition of "total disability", under the insurance policy, it is necessary to review the medical evidence at trial, and the plaintiff's activities prior to and during the disability period.

iii) The plaintiff's employment status prior to and during the disability period.

[92] The plaintiff filed various claim documents during the disability period, some of which are summarized as follows:

a) a notice of disability/claimant's statement dated October 11, 2000 claiming that he was totally disabled on August 1, 2000 and that his symptoms first appeared on February 15, 2000;

b) progress reports submitted by the plaintiff in 2001indicating for the specified period in each report, that he was unable to work; and

c) in 2002, five claimant supplementary statements in the months of January, February, March, April and May, stating he was unable to work.

[93] Each of these statements inquired whether the defendant had returned to work for the named period and in each instance his answer was in the negative.

[94] On March 21, 2001 the plaintiff completed a “lifestyle questionnaire”. The questionnaire asked a number of questions regarding recreational and social activities and included the following questions with the plaintiff’s answers:

> 10. Have you been involved in any non-remunerative activities since you became disabled, such as volunteer work, family business etc?
>
> No
>
> ...
>
> 13. Has there been any improvement in your condition and/or have you been advised by your physicians about future return-to-work possibilities on a part-time basis?
>
> - I do feel moments of improvement but it seems to fluctuate.
>
> - No discussions about resuming my business activities.
>
> 14. List any significant plans you have relating to the next year (i.e. education, rehabilitation, expanding or changing business, or any other).
>
> Nil. Focussing all my efforts on improving my health physically and mentally.
>
> 15. How do you feel about returning to work from both the part-time and full-time perspective?
>
> I have visions of hope to someday being the “on top of the world” businessman I once was.

[95] In addition to filing these documents, the plaintiff testified that from the time he filed the claim in 2000, he and his family’s life “has been nothing short of hell,” or words to like effect. His financial situation had an impact on his children and wife. He testified that he did things he is embarrassed about and that he became impetuous and irrational during that period. Because of his illness (he contends) he began to make rash business decisions, leading to the bankruptcy and loss of his businesses. He testified that he irritated people he was dealing with, including sub-contractors, lenders, and municipal officials.

[96] The plaintiff described how he developed his business. He started by building one house, then several at a time, and eventually entered into a partnership with Mike Fox and set up Walfox Developments. Walfox was involved in the development of multiple single family homes. On cross-examination he said his business relationship with Mr. Fox ended around 1996.

[97] When the plaintiff made his claim for benefits he described himself as a land developer. He said this would typically involve a search for properties, negotiating a purchase or right to purchase, obtaining agreement from the municipality to develop the properties, and, once these development rights were secured, either selling the land and development agreement with the municipality as a package to another developer, which he called a “flip”, or undertaking a development of the property himself. The plaintiff also testified that the breakdown of his job duties as described in 1993 varied from project to project, and from day-to-day and week-to-week.

[98] The documents submitted by the plaintiff all indicate that he was not working during the claimed disability period. Consistent with the documents, his testimony was that he was not engaged in any business activities during that time. The defendant introduced a number of exhibits, however, which it says suggest otherwise. These documents indicate that the plaintiff was working as construction manager for the Stoneybrook development between July and October 1999; that he incorporated 3034812 Nova Scotia Ltd. in October 1999, and caused it to secure an option in land in Sackville in April 2000; and that the company entered agreements with Legacy Home Builders in December 2000 and January 2001, leading to a flip of the Sackville project to Legacy.

[99] It is apparent from this evidence that while the plaintiff was receiving disability benefits he was engaged in his regular occupation as a real estate developer. For example, in February 2001 during the claim disability period, the plaintiff and Legacy Builders entered into an agreement to be equal partners in the development of the Sackville lands. The plaintiff was to provide consulting services. In May 2001 within the claim disability period, the plaintiff negotiated a three-way partnership with the two principles of Legacy Home Builders. These arrangements were later dissolved in July 2001, but the evidence is that the plaintiff then commenced construction of a home on a lot secured in the course of the Legacy dealings. His family moved into the house and it was subsequently

foreclosed upon. These activities were being carried on by the plaintiff at the same time he was submitting statements to the defendant indicating that he was unable to work.

[100] The plaintiff testified that the deal with Legacy was "mixed up" because he was suffering from Bipolar II and made a bad business judgment. With respect, I have reviewed the Legacy documents and, taken as a whole, the documents clearly show the intention of the plaintiff to enter into an agreement with Legacy regarding land development and related business at the same time as he was alleging total disability. While the plaintiff described the deal as "mixed up", Charles Nauss also described the documents as "crazy" or words to like effect. With respect, the documents are clear and set out the rights of each party. I am not satisfied that if the plaintiff had proceeded under the Legacy agreement, the deal would have been "mixed up".

[101] During cross-examination on these documents the plaintiff appeared to have a good understanding of their nature and effect. He did not deny that he executed the documents, nor did he generally disagree with their purpose. He did not deny that he was engaged in the activities which the documents appear to suggest.

[102] It is apparent that throughout the time the plaintiff said he was entitled to benefits, there was continuous business activity entirely consistent with the type of work the plaintiff did before his alleged disability.

[103] There were inconsistencies in the plaintiff's trial evidence, and between his discovery and trial evidence. The plaintiff's counsel suggests that it must be remembered that the plaintiff, when he gave his testimony at trial, was a "heavily medicated man". While the plaintiff may have been heavily medicated, he appeared to understand the issues and the nature of the documents tendered by the defendant.

[104] The plaintiff testified that he alone developed the Stoneybrook development after his relationship with Mike Fox broke down. The Stoneybrook development was a larger scale project than those the plaintiff had previously been engaged in. It consisted of multi-unit apartment buildings. Previously the plaintiff had built single family residential properties for resale. He was also engaged in this type of activity with Mr. Fox. Both the plaintiff and Mrs. Walsh testified that the plaintiff had irritated and mistreated Mr. Fox, so much so that the two partners had gone

their separate ways before Stoneybrook began. According to the plaintiff this occurred around 1996. The implication from the plaintiff's testimony is that the problems with Stoneybrook were a function of his undiagnosed Bipolar disorder and that he made poor decisions on his own and did not have the benefit of his partner, Mike Fox, with whom he had achieved past business successes.

[105] The documentary evidence contradicts the plaintiff's testimony that, he alone, was involved in the Stoneybrook project. Mortgage documents relating to the Stoneybrook project show that Mr. Fox and his wife, Denise Fox, had significant financial involvement with Stoneybrook before the 1996 breakup of the partnership, including mortgage financing. Moreover, Mr. Fox guaranteed company loans from third parties. Mr. Fox was a guarantor on a mortgage dated September 19, 1997, along with Douglas and Mary-Lee Walsh (Walfox Developments Limited and D.G. Walsh Investments Limited), valued at $1,320,000. He also guaranteed a mortgage dated September 24, 1998 in an amount over $5,000,000. Mr. Fox was not called to explain his continued involvement in Stoneybrook, and the plaintiff provided no explanation for these guarantees. This evidence clearly contradicts the plaintiff's claim that Mr. Fox had no involvement in Stoneybrook.

[106] Charles Nauss testified that the plaintiff was audited by the Canada Revenue Agency because he and his family lived in the 96 Lake Mist Drive home, while it was owned by a numbered company owned by the plaintiff. Among other issues with CRA, there was a list of business expenses including more than 100 restaurant and bar charges, which CRA disallowed because no business purpose was identified.

[107] The defendant suggests two conclusions to be drawn from this evidence. One is that there was no business purpose in respect of these restaurant and bar expenses and that they were fraudulently claimed or, more likely, the plaintiff was doing a significant amount of business entertaining during the 2001 - 2003 audit period. The latter is more consistent with the defendant's position, and with the other documentary evidence brought forth by the defendant which suggests that the plaintiff was working during the disability period.

[108] While the medical evidence is persuasive that the plaintiff suffered from Bipolar II disorder during the disability period, this does not prove that he was totally disabled pursuant to the policy definition. The evidence that the plaintiff

was working during that period calls into question some of the medical evidence that was called to prove his inability to work. The defendant says the plaintiff's claim that he was totally disabled pursuant to the policy definition is supported by the opinions of doctors who do not appear to have been told that the plaintiff was working throughout that period.

iv) The medical evidence

[109] The plaintiff tendered evidence from his family physician, Dr. Brian Ashton; Dr. Michael Ross, a psychologist; and a psychiatrist, Dr. Sreenibasa Bhaskara. The plaintiff was also examined by Dr. Juan Negrete at the request of the defendant. Subsequent to the disability period (2003 and later), the plaintiff was seen by psychiatrists, Dr. Martin Alda and Dr. Risk Kronfli and by neuropsychologist, Dr. Wayne MacDonald. The plaintiff was re-examined by Dr. Negrete in 2009.

Dr. Brian Douglas Ashton:

[110] Dr. Ashton is a family physician practising in Dartmouth, Nova Scotia. He was qualified as an "expert in the field of family medicine opining on the subject of general medicine".

[111] Dr. Ashton first saw the plaintiff on August 12, 1997 and then again on August 29, 2000 when the plaintiff complained about business related stress. He was not sleeping and had periods of anxiety. Based on these reports Dr. Ashton diagnosed him with depression. A chart note on October 12, 2000 indicates that the plaintiff decided to take time off work. On October 18, 2000 he was put on medication for depression. On December 8, 2000 he was referred to a psychiatrist, Dr. Bhaskara.

[112] On cross-examination, Dr. Ashton indicated that his role throughout his treatment of the plaintiff was like a "quarterback" in that he would support the other professionals by prescribing medications as suggested and arranging for referrals. He did not diagnose the plaintiff's psychiatric illness. Like the other medical professionals, Dr. Ashton stated that when he provided an opinion on whether the plaintiff could work, this was based on what the plaintiff told him. In a reporting letter of August 22, 2002 to the plaintiff's then solicitor, Dr Ashton summarized his role as follows:

> Mr. Walsh's affect in my office is usually calm and even. He is always well groomed and never overly agitated nor withdrawn. I am only his general practitioner and not specially trained in counselling or psych-pharmacotherapy. I do not consider myself as treating Mr. Walsh as much as coordinating his care. Dr. Ross, the psychologist, is the professional giving Mr. Walsh the most care. Mr. Walsh expressed reservations initially about the utility of these session(sic), but has recently stated that he feels that this relationship with Dr. Ross is paying dividends. Dr. Bhaskara, the psychiatrist, is unfortunately too busy to provide regular, frequent visits, but his recommendations have been well noted with respect to medication and diagnosis. His latest report is enclosed.

[113] Dr. Ashton confirmed that it was the plaintiff's decision to leave work. He testified that he did not observe the plaintiff in a hypo-manic or manic state. He said that when he first saw the plaintiff in 1997 he appeared normal and fit, but when he came in August 2000 he looked preoccupied, and quieter, and subdued. He testified that the plaintiff was always polite, composed and never broke down in front of him. He confirmed he never spoke with Ms. Walsh or other family members about the plaintiff.

Dr. Michael L. Ross:

[114] Dr. Ross was qualified as an "expert in clinical psychology opining on the diagnosis and treatment of mental illness". He has been a clinical psychologist with Capital Health since 1994, as well as operating a private practice. Dr. Ross first saw the plaintiff September 14, 2000 and made a diagnosis of major depression disorder. He recommended psychotherapy as treatment. When the plaintiff filed his disability claim, Dr. Ross completed an attending physician's statement dated October 16, 2000 in which he stated that the primary diagnosis was "major depressive disorder" with "additional condition/complications which may prolong disability, behavioural psychotherapy for depression". Dr. Ross did not give an expected return to work date, but indicated he would "reassess in six months".

[115] In his attending physician's supplementary statement of January 9, 2001 Dr. Ross changed his primary diagnosis to Bipolar disorder. He testified that he arrived at this new diagnosis by reinterpreting and reviewing information he already had. He felt that the plaintiff would benefit from psychiatric consultation.

[116] In correspondence with John Biondic of Paul Revere in January 2001, Dr. Ross wrote about his change in diagnosis and the need for psychiatric consultation. He commented:

> As a result of his report, I went back over the historical data I had obtained with him and re-interpreted the information as indicating what appear(sic) to be a series of hypomanic episodes since adolescence. When he first reported the information during our initial sessions I interpreted them as indications of his rather driven "type A" behaviour combined with an entrepreneurial element of risk taking. On re-interpretation they may be indicative of hypomania. He described several occurrences of decreased need for sleep, reckless and high risk behaviours (such as driving a motorcycle at speeds in excess of all his friends who were driving at excessively high speeds), feelings of invincibility and grandiosity, poor and risky business decisions, excessive involvement in pleasurable activities that have a high probability of adverse consequence, and increased driven goal-directed behaviour alternating with periods of increased irritability.
>
> At present, his presentation is that his mood is significantly depressed, with poor energy particularly upon awakening and he is unable to "get going" prior to noon. He is increasingly irritable, has suicidal thoughts, has decreased appetite, low sex drive, impaired concentration and is self-reproachful. Over the Christmas holidays he reported that his drinking of alcohol increased significantly from his usual 2-4 drinks per night.

[117] Dr. Ross prepared a report for Dr. Ashton on June 30, 2002 to support the plaintiff's appeal to Paul Revere regarding their decision to terminate his benefits. He stated:

> First, my impression, based on the many individual sessions I have had with him is that he is not currently capable of performing in his career. Indeed, I think it is potentially very harmful to him should he attempt to do so. His judgement, reasoning and organizational abilities appear to be quite impaired. Should he endeavour to attempt to make business decisions and should they be again bad decisions the effect on his mood, functionality, and suicidality could be profound. He has recounted to me numerous "errors" in judgment he has made and later regretted. For instance, over the recent past he has purchased a number of new, expensive vehicles only to re-sell them shortly thereafter for a considerable loss as he realized he could not afford them.

[118] Dr. Ross testified that he had never personally witnessed the plaintiff in a hypomanic state. The instances that he referred to in his reports were described to him by the plaintiff.

[119] One of the concerns with Dr. Ross's opinion is that although he opines that the plaintiff is "not currently capable of performing in his career", he obviously was not aware of the various business activities which the plaintiff had been engaged in prior to that time. I am satisfied that Dr. Ross correctly diagnosed the plaintiff with Bipolar II disorder at an early date. His evidence is consistent with that of the other medical practitioners who testified. However, he made no reference to the plaintiff's work activities during the relevant time. In his report of January 30, 2002, he stated that the plaintiff's "judgment, reasoning and organizational abilities appear to be quite impaired". Yet, the evidence before the court is that the plaintiff had been entering into complex business transactions, such as the partnership between the plaintiff and Legacy to carry on real estate development. The evidence leads to the conclusion that the plaintiff was able to negotiate complex agreements during that same time period, unbeknownst to Dr. Ross.

Dr. Sreenibasa M. Bhaskara:

[120] Dr. Bhaskara was qualified as "an expert in psychiatry opining on the diagnosis, treatment and prognosis of mental illness". At the time of his testimony he was a staff psychiatrist with Mental Health Services in Bedford/Sackville, operated by Capital Health. He saw the plaintiff in early 2001 on referral from Dr. Ashton, then discharged him back into Dr. Ashton's care on November 1, 2001. Dr. Bhaskara wrote a discharge letter to Dr. Ashton indicating that he believed the plaintiff suffered from a Bipolar Mood Disorder Type II. However, he also indicated that:

> In addition, it became evident that he has been consuming in excess of 50-60 units of alcohol each week, mostly in the form of whiskey and wine over the last 2 years. He drinks more when under stress and during the weekends. He is also under multiple psychosocial and financial stresses and has had to declare bankruptcy. All of these issues confound and complicate his presentation.
>
> After discussing and debating the pros and cons of starting him on a mood stabilizer, I stressed the need for him to cut down on his alcohol before we could proceed further. He agreed that he would cut down the alcohol gradually and he

> has managed to reduce this to 20 units per week now, which is a significant improvement. This has been achieved with the help of Diazepam 10mg twice daily. Doug prefers to remain a social drinker and total abstinence is not his goal.
>
> He has been commenced on Valproate and currently takes Epival 1000mg at HS. He describes that his "highs" and "lows" are not evident and the only side effects he notices are some postural dizziness and mild tremor. His LFTs have, despite heavy alcohol consumption been normal.
>
> Since the diagnosis has been clarified and he is on medication, I feel it would be appropriate to discharge him back to your care.

[121] Dr. Bhaskara prepared an attending physician supplementary statement dated November 27, 2001 wherein he rated the plaintiff's prognosis of recovery without impairment (loss of function) as being six to eight weeks.

[122] The plaintiff was referred back to Dr. Bhaskara on March 30, 2002. Dr. Bhaskara wrote Dr. Ashton on March 30, 2002 and indicated that the medication the plaintiff was taking had the effect of keeping his mood symptoms under reasonably good control. Dr. Bhaskara thought the plaintiff's alcohol intake was steady, but down to about 15-20 units a week. He also questioned whether the plaintiff was compliant with his medication after having blood tests that indicated the Valproate level was sub-therapeutic.

[123] Dr. Bhaskara received another referral from Dr. Ashton and prepared a further report dated August 14, 2002. In that report Dr. Bhaskara concluded the following:

> In conclusion, Mr. Walsh's presentation is not entirely consistent or classical and most of the evidence for a Bipolar disorder-II comes from his historical perspective. Nonetheless, I would give him the benefit of the doubt as he comes across as genuinely distressed and human psychopathology is far from an exact science. He should continue with Valproate as he might very well have a bipolar spectrum variant form of the disorder. I would also recommend total abstinence from alcohol as partial abstinence is not working in his case.
>
> Currently though, his main issues are related to acute on chronic stress and would be close to an Adjustment Disorder, in my opinion.
>
> Diagnosis: Adjustment Disorder secondary to multiple stressors

Bipolar Disorder II, in remission

Alcohol Dependence in partial remission

[124] It is noteworthy that in this report and in his earlier report of March 7, 2001, Dr. Bhaskara noted that the plaintiff had been off work since January 2000. Obviously, Dr. Bhaskara came to this conclusion on the basis of the plaintiff's self-reporting, yet the evidence of the plaintiff's business activities prior to that time would suggest otherwise.

[125] As noted above, Dr. Bhaskara wrote in his August 14, 2002 report, that "Mr. Walsh's presentation is not entirely consistent or classical and most of the evidence for a Bipolar disorder II comes from his historical perspective". Part of the historical perspective relied on by Dr. Bhaskara (and Dr. Ross) was the hypomanic episodes reported by the plaintiff. There was no evidence led at trial by the plaintiff to prove that any of the so-called "hypomanic episodes" occurred.

[126] On cross-examination Dr. Bhaskara, like the other medical witnesses, testified that Bipolar II is not disabling in every case and that the goal of treating Bipolar is to eliminate the highs and lows.

[127] Dr. Bhaskara's opinion that the plaintiff suffered from Bipolar II disorder was consistent with those of all the other medical practitioners. However, it is troubling that Dr. Bhaskara's opinion, like Dr. Ross's, was apparently based on self-reporting by the plaintiff that he was not working during the relevant time.

[128] Apparently, the plaintiff was unhappy with Dr. Bhaskara. Dr. Ashton wrote Dr. Bhaskara December 2, 2002 indicating that the plaintiff wished to receive a second opinion and that he had asked Dr. Risk Kronfli to see the plaintiff. The plaintiff was examined by Drs. Kronfli, Alda and MacDonald, after the disability payments had been terminated, and after the proceeding was commenced by the plaintiff.

Dr. Risk Kronfli:

[129] Dr. Kronfli was qualified as "an expert in psychiatry opining on the diagnosis, treatment and prognosis of mental illness". He is the psychiatrist-in-

chief at the Mentally Ill Offender Assessment Unit at the East Coast Forensic Hospital in Dartmouth and also the psychiatrist-in-chief of the Mental Health Program Provincial Offender Health Services. He has held these positions since 2003. At the time he assessed the plaintiff he was also carrying on a private practice which he has since discontinued.

[130] Dr. Kronfli prepared two reports for the plaintiff's solicitor, dated September 29, 2003 and May 1, 2006, as well as a September 29, 2003 report to Dr. Brian Ashton.

[131] Consistent with the other psychiatric testimony, Dr. Kronfli confirmed the diagnosis of Bipolar II. He was firm in his testimony that the plaintiff was not capable of returning to work, and indeed testified that he discouraged the plaintiff from trying to work when the plaintiff suggested it.

[132] With respect to the September 29, 2003 report, Dr. Kronfli's evidence is that the plaintiff had been in distress for many years. His conclusion was that the plaintiff "...suffers from clear symptoms of Bipolar mood disorder that would make it impossible for him at this time to engage in any gainful employment as a real estate developer or otherwise."

[133] Also on September 29, 2003 Dr. Kronfli wrote Dr. Ashton and provided the following prognosis:

> Long term prognosis in [the] case of Mr. Walsh is difficult. He suffered from his symptoms for a long time prior to his diagnosis being established. There is also genetic loading because of his family's history of Mood Disorders. However, a positive aspect in his case is the level of pre-morbid functioning. Mr. Walsh was functioning at a high level for a prolonged period of time despite the presence of symptoms. His ability to adapt is good and the proper control of his illness should provide him with a good chance at functional improvement.

[134] In his report of May 1, 2006 Dr. Kronfli provided an updated report regarding the plaintiff's condition and progress:

> It is my opinion at this point that Mr. Walsh will not be able to return to the work environment in any near future. He is maximized on the two mood stabilizers and anti-psychotic medications. He cannot tolerate any level of stress and his ability

> to assimilate or structure his thought process is quite limited. Any disruption in his environment leads to a frank psychotic episode that takes time to control.

[135] Dr. Kronfli testified that Bipolar Type II is a life long illness and he hoped with treatment that the plaintiff would get back to normal. He testified that as the years passed it became apparent that this was not the case and he had to take an aggressive line to treat the symptoms. To do so he gave the upper limits of available medication. Contrasting with this evidence is that of Dr. Juan Negrete who suggested that the doses being provided by Dr. Kronfli to the plaintiff were within the normal range.

[136] Dr. Kronfli was very definitive, if not somewhat aggressive, as to the plaintiff's condition. The defendant submits that the evidence of Dr. Kronfli can best be characterized as advocacy for the plaintiff. I am satisfied that there is some foundation for the defendant's characterization of Dr. Kronfli as an advocate. For example, in an effort to discredit Dr. Negrete's opinion, Dr. Kronfli readily criticized Dr. Negrete and at one point referred to his report and comments therein as "mickey mouse". Dr. Kronfli seemed to suggest that Dr. Negrete was somehow unprofessional in reaching the conclusion he did. Dr. Kronfli testified that he had completed numerous reports for insurance companies and felt that based on his experience, Dr. Negrete's report fell far short of the standard for medical evaluation.

[137] Dr. Kronfli's third report dated June 22, 2009 contained a critique of Dr. Negrete's March 9, 2009 report. Dr. Kronfli's comments were pointed and seemed to have no other purpose than to discredit Dr. Negrete. For example, he comments that Dr. Negrete put a lot of weight on the fact that he did not see any manic symptoms during his appointment with the plaintiff. Dr. Kronfli went on to state that "Any clinician, actually treating patients with Bipolar Mood Disorder, could easily identify the level of severity of the disorder in the case of Mr. Walsh."

[138] In his August 14, 2002 report, Dr. Bhaskara opined that the evidence of Bipolar disorder came from the history provided by the plaintiff and that "Mr. Walsh's presentation is not entirely consistent or classical". Dr. Bhaskara's evidence is consistent with Dr. Negrete in that he did not identify any objective evidence of the plaintiff's disorder and episodes when he met with him.

[139] Dr. Kronfli's first report of September 29, 2003 was not delivered to plaintiff's counsel until October 14, 2003. There is an indication in Dr. Kronfli's notes that this report was reviewed with the plaintiff on October 8, 2003. Dr. Kronfli denied on cross-examination that he reviewed the report with the plaintiff prior to sending it to his legal counsel. The following exchange took place on cross-examination in relation to this report:

> Ms. Awad: So if you reviewed the report with Mr. Walsh, is it possible then you sent it to Ms. MacKay after that, two days later?
>
> Dr. Kronfli: No, absolutely not.
>
> Ms. Awad: No? So what do you think your reviewing of the report was?
>
> Dr. Kronfli: I am reviewing the report that I sent to Ms. MacKay.
>
> Ms. Awad: So your evidence is that you sent before October 10, 2008?
>
> Dr. Kronfli: Oh yeah, I sent the report immediately the day I finish it. The minute I sign it, it goes.
>
> Ms. Awad: Okay, so you still went over it with Mr. Walsh, but your evidence is that it had already been sent?
>
> Dr. Kronfli: Oh absolutely.

[140] By consent October 14, 2003 was agreed as the date that the report was delivered to the then solicitors for the plaintiff. This date of receipt came from the plaintiff's then solicitors and was agreed to by the plaintiff.

[141] Despite Dr. Kronfli's vehement denial, I am satisfied that he reviewed his report with the plaintiff prior to sending it to his legal counsel. This would explain the reason his September 29, 2003 report was not delivered until October 14, 2003. Even more troubling is a running note in Dr. Kronfli's file dated April 25, 2006 which states "Met with lawyer April 3rd, 2006. Clarified my opinion." It is unusual, to say the least, that an expert medical witness would meet with a plaintiff's lawyer. The reason for the meeting is unclear, but one could speculate that Dr. Kronfli was seeking input from the plaintiff's legal counsel as to the content of his opinion. No satisfactory explanation was provided by Dr. Kronfli

other than to suggest that this note may have meant the plaintiff told him he met with his lawyer and that Dr. Kronfli clarified his opinion to the plaintiff, not his legal counsel. With respect, the running note is clear and unambiguous. Dr. Kronfli did not provide a credible reason explaining this note and I can come to no other conclusion that he met with plaintiff's counsel to "clarify his opinion".

[142] The comments directed at Dr. Negrete, coupled with Dr. Kronfli's meetings with the plaintiff's lawyer on April 3, 2006 to "clarify his opinion", and his meeting with the plaintiff prior to issuing his September 29, 2003 report, all support the defendant's position that very little weight should be given to Dr. Kronfli's opinion.

[143] Dr. Kronfli presented as an articulate and experienced psychiatrist. Unfortunately in this instance, he appears to have stepped into the role of advocate, rather than that of an independent practitioner providing an impartial opinion. I place limited weight on his opinion that the plaintiff was unable to work during the relevant period due to Bipolar II disorder.

Dr. Martin Alda:

[144] Dr. Alda is a psychiatrist who was qualified as "an expert in psychiatry opining on the diagnosis, treatment and prognosis of mental illness". Dr. Alda is a highly regarded expert in the treatment of Bipolar disorder as reflected by comments from the other medical witnesses. Dr. Alda saw the plaintiff on March 18th, 25th and April 8th , 2003. Dr. Alda confirmed that the plaintiff suffered from Bipolar disorder and his focus appeared to be on medications. His impression and recommendation contained in his July 15, 2003 report is as follows:

> **Impression and Recommendation:**
>
> This patient appears to be suffering from Bipolar Disorder. At present his (sic) treated with valproate on which he stabilized incompletely, therefore I would recommend a gradual switch to lithium and I have taken the liberty of initiating the treatment changes in Dr. McCormick's absence. The patient is currently stabilizing better with lithium, with mild residual symptoms that seem to be gradually milder and less interfering with the patient's life. He will need to be monitored and should he continue improving, his sodium divalproex can also [be] gradually decreased and discontinued and the patient will also need significant psychotherapy to deal with the losses incurred during the episodes of the illness.

[145] Dr. Alda said the goal in the treatment of Bioplar disorder is long term treatment to stabilize the patient's mood and to prevent episodes of depression and mania. For many patients this is accomplished by medication. Consistent with the evidence of the other psychiatrists, he testified that some individuals who suffer from Bipolar disorder can work and otherwise carry on with their lives and that Bipolar is not always disabling. He agreed on cross-examination that depression symptoms are more severe in those who abuse alcohol, although he qualified that response by saying in some it is and not in others.

[146] In his July 15, 2003 report, Dr. Alda described his impressions of the plaintiff on that day as follows:

> This is a man looking his stated age. He is somewhat dysphoric, tense, not suicidal with no evidence of psychosis but mild cognitive changes mainly slower memory recollection. He is not suicidal. He has good insight and judgment.

[147] His last visit with the plaintiff was August 19, 2003. He did not give any opinion in relation to the plaintiff's ability to work. It is noteworthy that Dr. Alda commented in his July 15, 2000 report that the plaintiff had "good insight and judgment", which would be consistent with the plaintiff's business activities before and after that time.

Dr. G. Wayne MacDonald:

[148] Dr. MacDonald was qualified as "an expert in the field of clinical neuropsychology opining on the subject of administering and interpreting neuropsychological tests". He has been a neuropsychologist in private practice since 1999. His report, while not dated, appears to have been done in early 2004 as the dates of testing were January 8, 2004. He described his assignment as doing objective testing on the plaintiff. He went through the various tests that he administered in his report. His conclusion in his report is as follows:

> Currently, I would agree with Dr. Ross that this man would be disadvantaged if he were to return to his former employment as a Real Estate Developer. The complex problem solving skills, financial analysis, attention to detail, and higher level reading comprehension ability required in this field, would greatly reduce his probability of success. In the event that his Bipolar Disorder comes under

> better control, he may be able to be employed in other occupations, requiring less demanding novel problem solving skills...

[149] On cross-examination Dr. MacDonald agreed that his examination of the plaintiff is a snapshot in time as of the date of the testing. He agreed that the plaintiff could have had these listed disadvantages since birth and that excessive alcohol consumption can have a neurological impact. He also agreed that the plaintiff's condition could result from cognitive defects rather than Bipolar disorder. That is, the cognitive defects could have been there from birth. He said cognitive defects could be caused by trauma, toxic exposure, or excessive alcohol use. He recommended an MRI and CT scan to Dr. Ross, to look for lesions or apathy in the brain to explain some other physical reason for the outcome of the tests performed. There is no evidence before me that these tests were carried out on the plaintiff.

[150] This evidence provides a snapshot of the plaintiff's cognitive function approximately 18 months after payment of the disability benefits stopped. Dr. MacDonald agreed that he could not say if the results of his testing showed the plaintiff's situation for his entire life or whether they were a recent development. Without knowing the answer to this question the evidence of Dr. MacDonald is of little weight.

Dr. Juan Negrete:

[151] Dr. Negrete was retained by the defendants to conduct an independent medical examination of the plaintiff. Dr. Negrete, unlike the other medical practitioners, had the advantage of reading the discovery evidence and the opinions of other medical practitioners when he prepared his initial reports in 2002. When he prepared a further report on March 9, 2009 he had all of the medical reports from the plaintiff's treatment advisors, including Drs. Ashton, Ross, Kronfli and Alda and the neuropsychological assessment performed by Dr. Wayne MacDonald. He also reviewed the plaintiff's discovery evidence and interviewed the plaintiff and his wife.

[152] Dr. Negrete was qualified to give opinion evidence "in relation to the diagnosis, treatment and prognosis of mental illnesses and the diagnosis, treatment and prognosis of substance abuse and addictive disorders". He is a certified specialist in psychiatry and since September 2009 has been Professor Emeritus of

Medicine (Psychiatry) at McGill University. He testified he has been diagnosing and working with Bipolar patients for over 50 years.

[153] Dr. Negrete examined the plaintiff twice. He provided three reports dated May 25, 2002, December 18, 2002 and March 9, 2009. The first report was prepared at the request of Mary Benson, R.N., an employee of the defendant. She had requested the answer to certain questions and Dr. Negrete's May 25, 2002 response is as follows:

> **Answers to your questions**
>
> *Does he suffer from a disabling psychiatric illness?*
>
> At this moment his mood disorder is largely in remission. It would not justify a total disability. However, he must devote enough effort and time to treat his alcohol-use disorder, and this should involve a few weeks of in-patient treatment.
>
> *Limitations preventing performance as real [estate developer?*
>
> He appears to be capable of exercising good judgement at this time, and although he does not have the drive and energy of his most active times, he should be able to handle the functions of the job.
>
> *Psychosocial stressors perpetuating the psychiatric condition?*
>
> The most significant risk factor, in my view, is not psychosocial but toxic; He must stop drinking. An additional stressor, of course, is the fact that he is unlikely to succeed in getting the financial support he needs to revive his company.
>
> *Motivation to resume working in his previous occupation*
>
> Very low, for the reasons mentioned above[.]
>
> *Estimated time to recovery?*
>
> The time that he will need to deal with his alcohol/benzodiazepine problem, from 4 to 6 weeks as in-patient.

[154] Dr. Negrete's May 2002 opinion that the plaintiff "appears to be capable of exercising good judgment at this time" is consistent with that of Dr. Alda, who reported on July 15, 2003, "he has good insight and judgment". Dr. Negrete concluded that the plaintiff should be able to "handle the functions of his job". In his report he described the plaintiff's self-reporting about his reputation:

> ...Mr. Walsh feels that he has ruined his reputation in the business environment; that investors or lenders will not trust his abilities and that he is unlikely to find employment that will pay him a salary that would match the level of income he currently derives from his disability benefits. Thus, a rather realistic appraisal of his present situation, not necessarily the expression of pathological thinking of a morbid nature.

[155] These comments were consistent with the plaintiff acknowledging on discovery that he made some bad decisions and lost credibility leading up to the loss of his business.

[156] In February 2009 the defendant arranged for a followup examination by Dr. Negrete. The resulting report is dated March 9, 2009. Dr. Negrete reached the following conclusion on diagnosis:

> In summary: Perhaps due to the efficacy of the treatment he is on, I did not observe the active symptoms of his illness on the two occasions I interviewed him. I must therefore rely on his self-report and the notes of his treating psychiatrists to conclude that Mr. Walsh does suffer from an affective disorder with intermittent episodes of manic symptoms and phases of depression. These disturbances have never been severe or long lasting enough to require in-patient treatment. The pharmacotherapy regime in place seems to be effective in that it has successfully controlled the symptoms for a long time, albeit with periodic adjustments. Mr. Walsh states to have been stable over the last year.

[157] As to whether the plaintiff was disabled, Dr. Negrete stated the following:

> Disability
>
> A Bipolar Mood Disorder can indeed affect the persons' ability to attend to and adequately perform the functions of a given occupation. On the other hand, many persons so affected are not totally or permanently disabled. As a matter of fact, Bipolar Disorder cases present comparatively higher rates of functional recovery among people with severe psychiatric illness. As with any other chronic and recurring illness (e.g. arthritis), what usually happens is that they would become

temporarily disabled during the relapses and be able to resume work when the symptoms remit.

In Mr. Walsh's case it is rather difficult to ascertain when did he actually become totally unable to work, if he ever did; and to what extent has he remained disabled over the years. In part because it is also quite difficult to determine exactly what were the normal functions of his occupation, I have not seen any detailed job description that I could refer to in my assessment.

He states that he was self-employed, that his business was the planning and overseeing of real estate development projects; that his work involved dealing with money lenders and financial investors to secure funding; dealing with suppliers of building materials and dealing with contractors and tradesmen. Such a multiple occupation was not regular, he was called upon to do different things at different times, according to the circumstances.

When asked in what manner did his psychiatric condition interfere with his ability to perform those functions, he stresses two main points: poor mental concentration and, more importantly, poor judgement. He is convinced that many of his business failures are due to his inability to properly assess the feasibility and worthiness of the projects, as well as the risks he was incurring.

Judgement can indeed be impaired by the grandiosity, recklessness, and impulsiveness which are characteristic of a manic mental state; but poor judgement can also be exhibited by persons who are not competent, individuals who do not quite have the necessary ability to undertake complex projects.

Mr. Walsh's business had already folded long before his mental status was first clinically evaluated by his family physician. He had been forced to declare bankruptcy under the pressure of debts to Revenue Canada, and was being sued by several other creditors. The performance problems that resulted in such financial difficulties appear to date back several years. All through that time he never sought, nor was he seen in need of receiving, psychiatric care. And he had been seen by his family physician several times because of other problems. Dr. Ashton's original diagnosis was not bipolar, but depressive disorder, and that was also the impression of the Psychologist to whom he first referred Mr. Walsh. A subsequent psychiatric consultation identified the presence of a probably "type II" bipolar illness; this form of affective pathology does not severely impair judgement and is characterised by short bouts (up to 4 days) of elation and psychic hyperactivity. In other words, not a permanent state of mental dysfunction.

> Dr. Alda's psychiatric reassessment in March 2003 concluded that Mr. Walsh might have a cyclic mood disorder but found his judgement to be normal on examination: Further evidence that the functional impairment caused by his disorder, if it existed, was only intermittent.
>
> At the present interview, Mr. Walsh asserted that he had been totally and permanently unable to perform any gainful work for the last 9 years. However, this assertion does not imply that he was always mentally incapacitated to perform tasks related to his former occupation. In his deposition at discoveries he revealed that he has had to take care of many legal entanglements, both before and after he submitted his declaration of disability. And it appears that some of the litigation has continued to this date.
>
> ***In summary: Mr. Walsh is being treated for a psychiatric disorder that may potentially affect his ability to perform the functions of his declared occupation. But it is difficult to tease apart what should be seen as illness-induced disability from a simple lack of competence and business acumen. Particularly because his "judgement" difficulties seem to predate the diagnosis of the putative disabling condition. It is also a fact that a Bipolar disorder does not usually cause total and permanent functional limitations.***

[158] I am satisfied that there is an evidential foundation for Dr. Negrete's opinion that the plaintiff should be able to "handle the functions of his job". In direct examination Dr. Negrete testified that persons with Bipolar II are not necessarily disabled and sometimes perform better because of their level of energy and initiative. According to Dr. Negrete and, consistent with the testimony of the other psychiatric experts, the treatment goal for Bipolar II is to prevent episodes that are disabling. He testified that he agreed, for the most part, with Dr. Alda as to the contents of in his last report. He suggested, however, that Dr. Alda should have seen alcohol as a separate issue.

[159] The plaintiff argues that Dr. Negrete was an advocate for the defendant and his evidence should not be given any weight. The plaintiff asserts that Dr. Negrete has worked for insurance companies on more than 100 occasions since 1975 and "knew what was expected of him and he came through for his client". The plaintiff does not mention that Dr. Negrete on cross-examination testified that he had also been retained on behalf of plaintiffs. I am not satisfied that this is sufficient evidence upon which to find Dr. Negrete to be an advocate for the defendant and a reason to disregard his evidence.

[160] As further evidence of the alleged unfairness and bias of Dr. Negrete's assessment, the plaintiff says that he reached his opinion without asking the plaintiff to describe his job functions. Dr. Negrete seemed to acknowledge this assertion in his 2009 report when he says "it is also quite difficult to determine exactly what were the normal functions of his occupation". However, Dr. Negrete went on in his reporting letter to describe the plaintiff's duties as a real estate developer as the planning and overseeing of real estate development projects which involve dealing with money lenders and financial investors, suppliers, contractors and tradesmen. This description is consistent with the plaintiff's testimony as to the duties of a real estate developer.

[161] I find the evidence of Dr. Negrete to be persuasive. He had the advantage of reviewing the other medical reports and the discovery evidence.
He also had the advantage of seeing the plaintiff in 2002 and then again in 2009.

[162] Dr. Negrete was concerned about the plaintiff's alcohol consumption. There is evidence of the plaintiff's excessive alcohol consumption in the reports prepared by Dr. Bhaskara. Dr. Negrete was the only expert with a dual qualification in "the diagnosis, treatment and prognosis of substance abuse and addictive disorders." I accept the evidence of Dr. Negrete that one of the stressors that was perpetrating the psychiatric condition was the plaintiff's drinking. It must be remembered that the plaintiff was drinking excessively at times during the period he is alleging that he made poor business decisions.

[163] Dr. MacDonald also testified that the cognitive difficulties he identified could have been affected by alcohol consumption. He stated that cognitive defects could be caused by trauma, toxic exposure or excessive alcohol use.

[164] I also accept the evidence of Dr. Negrete that there were other factors which led to the failure of the plaintiff's business, such as loss of reputation and bad business judgment which predated his diagnosis of Bipolar II disorder.

Conclusion:

[165] The policy defines " total disability" as follows:

> The Policy provides as follows:

1.8 Total Disability" means that because of Injury or Sickness:

a. You are unable to perform the important duties of Your regular occupation; and

b. You are not engaged in any other gainful employment; and

c. You are under the regular and personal care of a Physician.

[166] The burden is on the plaintiff to show that because of Bipolar II he was unable to carry out the important duties of his regular occupation. The plaintiff has demonstrated by his own actions that he was not totally disabled during the time he was receiving benefits. His activities surrounding Stoneybrook, Legacy and others, are inconsistent with his assertion that he was unable to perform the important duties of his regular occupation as a real estate developer.

[167] Neither the medical evidence, nor the plaintiff's activities during the disability period support his contention that he was disabled at that time. The evidence of his alleged disability is inconsistent with the evidence of his activities during the relevant time.

[168] Dr. Ross, who was most familiar with the plaintiff's condition, does not discuss in any of his reports the various business activities which the plaintiff had been engaged in over the two to three years of their professional relationship. Either he was unaware of the plaintiff's activities or did not consider these activities in formulating his opinion on disability. In either event, I conclude that little weight should be given to his evidence. Like Dr. Ross, Dr. Bhaskara was unaware of the plaintiff's business activities during the relevant time. As well, Dr. Bhaskara's evidence must be assessed in the context of the evidentiary foundations for his opinion. No evidence was adduced at trial to prove any of the so-called hypomanic episodes occurred. Both the plaintiff and Ms. Walsh testified, but neither described the events which doctors indicated they relied on in making the Bipolar diagnosis. The only evidence of substance regarding hypomanic episodes had to do with the plaintiff's fast driving and the spontaneous purchase of two motor vehicles.

[169] The implication from the evidence of the plaintiff and Mrs. Walsh is that the plaintiff's problems leading to business and personal bankruptcy was caused by poor judgment brought on by Bipolar Type II Disorder.

[170] Dr. Negrete, in his most recent report, indicated that the plaintiff when asked in what manner his psychiatric condition interfered with his ability to perform his function as a real estate developer, responded that it caused poor concentration and poor judgment. Dr. Alda in his July 15, 2003 report gave evidence to the contrary, indicating that the plaintiff had good insight and judgment. There is also the effect of alcohol consumption which Dr. Bhaskara outlined.

[171] At discovery, the plaintiff acknowledged other reasons for the loss of his companies. He acknowledged that there were reputational problems, that he made some bad business decisions and lost credibility. He also indicated that 1996 was a bad time for builders. He testified that a new construction rebate program was cancelled and this had an affect on the real estate industry generally.

[172] The onus is on the plaintiff to prove he was totally disabled for the relevant period. Given his admission that there were external forces that may have affected the success of his business, it is difficult determine whether it is an illness induced disability or whether the other forces mentioned had caused his business losses and claimed misjudgments.

[173] When the plaintiff made his claim for benefits he described himself as a land developer. He and Charles Nauss testified that land developers typically search for properties, negotiate rights to buy the property, negotiate with the municipality for development rights, and once they have secured a development agreement, either flip the property to another developer to develop the land themselves.

[174] A review of the evidence submitted by the defendant as to the plaintiff's business activities during the period leading up and, during his disability, leads me to no other conclusion that he was engaged as a land developer at the time. Although the policy required that he be "unable to perform" the important duties of his regular occupation", he was doing exactly those duties. The answers to the lifestyle questionnaire to the effect that the was unable to work cannot be characterized as anything other than false. The plaintiff submitted several monthly

statements to the insurer during the time he was paid benefits, all of which indicated he had not returned to work, yet the evidence is to the contrary.

[175] In the face of this uncontradicted evidence of the plaintiff's business activities during the relevant period, it is difficult to accept that he was unable to work as a result of sickness or injury, as is required under the policy of insurance. It is more likely that the plaintiff lost his businesses because of his reputation and other business related reasons. There were a number of judgments recorded against the plaintiff in the years prior to his claim, and Charles Nauss testified that one or more of the plaintiff's companies were placed in bankruptcy or receivership.

[176] On the medical evidence alone, I am not satisfied that the plaintiff has met his burden. When the evidence of the plaintiff's activities are considered, it is evident that the plaintiff, by his own actions, was carrying on his profession as a real estate developer and not totally disabled.

[177] The onus is on the plaintiff and I am not satisfied that he has met his burden. For this reason I would dismiss the plaintiff's claim.

3. Is the plaintiff entitled to mental distress damages and/or punitive damages?

[178] The plaintiff claims mental distress, damages and/or punitive damages because of the way the defendant allegedly handled this claim. Having found that there is no breach of the policy by the defendant, this issue is moot.

[179] The policy between the plaintiff and the defendant is void *ab initio* and should I be in error on that issue, I also find the plaintiff was not totally disabled during the period he claimed and received benefits under the policy between the parties.

[180] The plaintiff should reimburse the defendant in the amount of $125,119.20 plus prejudgment interest.

[181] The defendant shall have its costs. If the parties cannot agree, I will hear them on costs.

Pickup, J.