Date: 19991102
Docket: CA 156218

# NOVA SCOTIA COURT OF APPEAL

[Cite as: Nova Scotia Public Service Long Term Disability Plan Trust Fund v. McNally, 1999 NSCA 129]

**Chipman, Roscoe and Pugsley, JJ.A.**

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| **BETWEEN:** | ) | |
| | ) | |
| CHARLES MCNALLY | ) | John T. Rafferty, Q.C. |
| | ) | for the Appellant |
| Appellant | ) | |
| | ) | |
| **- and -** | ) | |
| | ) | |
| THE TRUSTEES OF THE NOVA SCOTIA PUBLIC SERVICE LONG TERM DISABILITY PLAN TRUST FUND | ) | Colin D. Bryson |
| | ) | for the Respondent |
| | ) | |
| Respondent | ) | |
| | ) | |
| | ) | |
| | ) | Appeal Heard: |
| | ) | October 5, 1999 |
| | ) | |
| | ) | |
| | ) | Judgment Delivered: |
| | ) | November 2, 1999 |

**THE COURT:** The appeal is dismissed with costs as per reasons for judgment of Chipman, J.A.; Roscoe and Pugsley, JJ.A., concurring.

**CHIPMAN, J.A.:**

[1] This is an appeal from a decision of Stewart, J. in Chambers ordering the appellant to make payment from the proceeds of a personal injury settlement to the respondent Trustees pursuant to a subrogation provision in a long term disability Plan administered by the Trustees and from which the appellant received benefits. The decision of Stewart, J. is reported in (1999), 176 N.S.R. (2d) 16.

[2] The Chambers application was heard by way of an agreed statement of facts.

[3] The appellant was, at all material times, employed by the Province of Nova Scotia as a plasterer. He was a non-union employee, but was covered under the Plan which had been negotiated between the Province and N.S.G.E.U. The Trustees were appointed by the Province and N.S.G.E.U. to administer the Plan.

[4] The Plan provides for salary continuation in cases of long term disability, following a period of elimination, on the basis of 70% of the employee's salary, to age 65, death or return to work. This is a maximum payment, and provision is made in the Plan for reduction of benefits to the extent of other benefits received by the employee during the period of disability. By amendments effective October 6, 1992, and ratified by statute, the Plan was altered from a non-indemnity to an indemnity program. The subrogation provision to which I shall refer was added. For the background on this, see **N.S.P.S. Long Term Disability Plan (Trustees)** v. **MacDonald** (1997), 164 N.S.R. (2d)

246 (N.S.C.A.).

[5] On April 1, 1991, the appellant suffered a whiplash type of neck and shoulder injury when his car was struck from behind by a vehicle operated by T. Scott Lynds. The appellant's immediate symptoms included neck and shoulder pain and stiffness, headaches, pain radiating down his arms with tingling, numbness and weakness. About one year after the accident, the appellant began to experience back pain. He had had a couple of episodes of left arm and back pain prior to the accident.

[6] In 1992 the appellant commenced action against Lynds, and his solicitors entered into extensive negotiations with Lynds' insurers.

[7] By February 28, 1995, the appellant was unable to work any longer and ceased working. His principal complaint at that time was low back pain. He received long term disability payments from the Plan commencing July 28, 1995. Up until January 2, 1998, the benefits totalled $45,435.97. The appellant agreed that he was obliged to reimburse the Trustees in the amount of $5,197.96, representing payment of Canada Pension Plan Disability Benefits, leaving a net total of $40,238.21 paid.

[8] In April, 1996, the appellant proposed settlement to the insurers of Lynds in the amount of $285,000. A breakdown of this claim included general damages of $40,000, wage losses to date of $43,375.20, and future wage losses of $187,932.34. The insurers counter-offered the sum of $34,500 all-inclusive, resisting the notion that the

appellant sustained any loss of earnings since he had worked for four years following the accident. This proposal was not accepted.

[9] In August, 1997, the insurers proposed a settlement of $85,000 made up of $30,000 general damages, $45,000 past and future wages and $10,000 for pre-judgment interest and costs. The insurers expressed skepticism of the contention that the injuries sustained in the motor vehicle accident were exclusively responsible for the inability to continue working. The appellant rejected this proposal.

[10] Discovery examinations of doctors suggested that it was unlikely that the appellant's low back pain could be related to the accident. Reference was made to the two pre-accident episodes of tingling and numbness in the left arm and leg.

[11] Further negotiations between the appellant's solicitor and the insurers resulted in a tentative settlement on October 8, 1998, subject to the approval of the Trustees. The settlement was a global settlement of $155,000 with no breakdown of the various components stated. Consent of the Trustees to this settlement was given on the understanding that they claimed reimbursement to the Plan by way of subrogation in the amount of $47,500 and that this amount would be set aside pending resolution of the subrogation claim.

[12] An application was made by the Trustees to Stewart, J. in Chambers to resolve the issue of entitlement to the monies set aside from the settlement.

[13] In her decision allowing the claim of the Trustees for $42,183 inclusive of interest, Stewart, J. set out the following relevant sections of the Plan:

> 9. The benefit to which an employee is entitled under this section shall be reduced by:
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> . . .
>
> (8) the amount of earnings recovered through a legally enforceable cause of action against some other person or corporation (April 6, 1992)
>
> . . .
>
> 18 Subrogation
>
> (1) Where a long-term disability benefit is payable for an injury or illness for which any third party is, or may be, legally liable, the Trustees will be subrogated to all rights and remedies of the employee against the third party, to recover damages in respect of the injury or death, and may maintain an action in the name of such employee against any person against whom such action lies, and any amount recovered by the Trustees shall be applied to
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> (a) payment of the costs actually incurred in respect of the action, and
>
> (b) reimbursement to the Trustees of any disability benefits paid,
>
> and the balance, if any, shall be paid to the employee whose rights were subrogated (April 6, 1992)
>
> (2) Any settlement or release does not bar the rights of the Trustees under subsection (1) unless the Trustees have concurred therein. (April 6, 1992)
>
> (3) An employee will fully cooperate with the Trustees in order to allow the Trustees to do what is reasonably necessary to assert the Trustees' rights to subrogation. (April 6, 1992)

[14] Stewart, J. set out the position of the Trustees on the effect of s. 18 of the Plan. There was no ambiguity in this provision, and it was clear that of the global settlement of $155,000, about $107,620 represented income loss. The Trustees further took the position that due to the nature of his job, the appellant would probably not have worked

to his normal retirement date at age 65 (November 17, 2001). They were of the view that the income loss should be considered as spread out, not from the date of the accident to the retirement date, but from February 27, 1995 to December 31, 1997, the date of cessation of work to the approximate date of the settlement. This was based on the appellant's regular monthly income of $3,031.60, including pre-judgment interest at 4%.

[15] In the submission of the Trustees, any income loss recovered was to be deducted dollar for dollar from any benefits without regard to who initiated the third party proceeding. In the opinion of the Trustees, s. 9(8) applied to future income losses and thus ss. 9(8) and 18 applied together to produce the same result no matter when settlement was reached.

[16] Although a global settlement was reached without a breakdown, the Trustees took the position that it was not impossible to determine with reasonable certainty what portion thereof represented wage loss. The sum of $107,620 could reasonably be said to be the wage loss component in the global settlement of $155,000. This was the recovery made by the appellant respecting the period in which he was paid $40,258.21 in benefits. Thus, s. 18 alone and not s. 9 was to be applied to compel the appellant to reimburse the Plan in this amount, plus interest.

[17] The appellant advanced two points:

(a) Section 18 of the Plan only applies in the limited circumstances where the

Trustee actually makes the recovery from the third party, not where the employee does. At most, subrogation here is limited to that arising under the ordinary principles of equity. The Trustees must show that the employee has been fully indemnified before the subrogation process operates.

(b) In any event, s. 18 is only applicable where it is shown that the LTD benefits were payable for the specific disability for which the third party was liable and for which it settled. Causation was not shown in the instant case.

[18] Throughout, in the interpretation of s. 18, the appellant took the position that the principle of **contra proferentum** applied.

[19] Stewart, J. reached the following conclusions:

(1) The Plan was one of indemnity. Section 18(1) was unambiguous. It constituted a contractual subrogation. All of the insured employees' rights and remedies against the third party were subrogated to the Trustees. As between the Trustees and the appellant, only the former had the right of recovery. In pursuing the action the appellant acted in effect as the agent of the Trustees. The words "amount recovered by the Trustees" was not of interpretative significance.

(2) There was a nexus between the injuries from the accident and the disability benefits which, on the evidence, "remained alive and well and reflected" in the settlement.

(3) As to the allocation of the recovery, when the settlement was negotiated by the appellant rather than the Trustees the latter needed only to prove that the insured received a settlement from a third party. Then the onus shifted to the appellant to account for the apportionment of the lump sum amount over the various heads of damages and to establish that no portion of the recovered amount fell within the deduction provisions of s. 9(8) and s. 18.

(4) The loss of income aspect was calculable with sufficient certainty that the obligation to account may be effected pursuant to s. 9(8) and/or s. 18. The income portion of the settlement was to be attributed to past loss of income in this case. The Trustees were therefore entitled to recover $40,238.21, plus interest at 4% from July 28, 1995 to December 31, 1997, for a total of $42,183, plus interest, together with costs of $700.00.

**ISSUES ON APPEAL**

[20] The broad issue raised by the appellant in this Court is how, if at all, s. 18 of the Plan is applicable to the circumstances of this case.

[21] The respondent raises the issue of the applicability of s. 9(8) of the Plan to this case. Although no notice of contention was filed, counsel are agreed that this issue is properly before us.

[22] In equity, the right of subrogation accrues to an insurer only in cases where the insurance is a contract of indemnity. Subrogation is the right of the insurer to stand in place of the insured and recover from any party liable for the insured's loss. The right only arises after the insured has been fully indemnified by the insurer. In the event of partial indemnity, the insured retains the right to recover from the third party.

[23] Subrogation has two aspects: the right to pursue the insured's rights against a third party, and the right to recover any benefits received by the insured with respect to the loss for which he has been indemnified.

[24] Unlike an assignment, the right of subrogation vests by operation of law rather than by an express agreement. The assignee may sue in its own name in pursuing its assigned rights, to the extent provided in the **Judicature Act**, R.S.N.S. 1989, c. 240, s. 43(5). The subrogated insurer must sue in the name of the insured in pursuing the subrogated rights.

[25] The doctrine of subrogation was discussed by Freeman, J.A. of this Court in **Mutual Life v. Tucker** (1993), 119 N.S.R. (2d) 417, esp. at p. 426.

[26] Apart from the operation of equity, subrogation may arise by statute or by contract. Examples of the former are s. 149 (automobile) and s. 172 (fire) of the **Insurance Act**, R.S.N.S. 1989, c. 231. An example of the latter is a provision just such

as that contained in s. 18 of the Plan.

[27] The appellant refers to the following comment in Brown and Menezes **Insurance Law in Canada**, 2nd Edition, at p. 332.

> An insured may agree in the policy to allow the insurer to assume rights of subrogation including the right of recovery and the right of control of proceedings against the third party before there has been full (or any) indemnity paid. A typical example provides as follows:
>
> > The insurer, upon making any payment or assuming liability therefor under this policy, shall be subrogated to all rights of recovery of the Insured against any person, and may bring action in the name of the Insured to enforce such rights. Where the net amount recovered after deducting the costs of recovery is not sufficient to provide a complete indemnity for the loss or damage suffered, that amount shall be divided between the Insurer and the Insured in the proportions in which the loss or damages has been borne by them respectively.
>
> This wording is almost identical to that used in the uniform statutes for fire and automobile insurance. The fact that it allows the insurer to recover by way of subrogation before paying out a full indemnity is clear. There is, however, still the problem of control of the proceedings against a third party. It is submitted that as with the provisions in the statute relating to fire insurance, the language is not sufficiently clear to remove the common law right of control except in cases where there has been full indemnity. Therefore, while the clause gives the insurer the right to bring an action against a third party, in the event of a dispute between the insurer and insured as to the conduct of those proceedings, the view of the insured must prevail subject to the duty of good faith and subject to his holding any excess for the insurer.

[28] The authors' submission with respect to the right of control is just that. No authority is cited there for it.

[29] The appellant refers to the following words in s. 18 of the Plan:

> . . . the Trustees will be subrogated to all rights and remedies of the employee against the third party, to recover damages in respect of the injury or death . . .

[30] The appellant says that the Trustees are thereby expressly subrogated and given the right to recover in the same manner and to the same extent as would be the case in equity. Where, as here, the insured actually pursued the third party, s. 18 does not apply so as to give the Trustees the priority on recovery that it purports to do.

[31] The appellant further says that if the provisions of s. 18 are in any way ambiguous, they should be construed against the Trustees on the basis of the **contra proferentum** rule.

[32] In **Mutual Life v. Tucker, supra**, Freeman, J.A., after discussing the principle of subrogation in equity, said at para. 28:

> . . . If the parties to an insurance policy intend for the insurer to be compensated for partially indemnifying the insured, that can be provided for by contract . . .

[33] Thus the requirement that an insured be fully indemnified before the insurer obtains subrogation can be avoided in cases of partial insurance (such as the 70% of earnings provided by the Trustees) by so providing in the insurance contract. In my opinion, this is exactly what s. 9(8) and s. 18 of the Plan do.

[34] Assuming at this point that the benefits paid to the appellant by the Plan were for an illness or injury for which Lynds was liable, I am of the opinion that the contractual provisions for subrogation apply to the case notwithstanding that the actual proceedings

were commenced against Lynds by, and settled with, his insurers by the appellant (with the consent of the Trustees). The Plan is one of indemnity. The extent of the right of subrogation can be determined upon a proper interpretation of s. 18 thereof.

[35] In the first place, the provisions of s. 18 of the Plan are clear with respect to who has the right of subrogation.

> . . . the Trustees will be subrogated to all rights and remedies of the employee against the third party . . .

[36] The Trustees may maintain an action in the name of the employee (s. 18(1)).

[37] No settlement or release bars the right of the Trustees unless the Trustees have concurred therein (s. 18(2)).

[38] An employee will fully cooperate with the Trustees in order to allow the Trustees to do what is reasonably necessary to assert their right to subrogation (s. 18(3)).

[39] Case law in Canada to which our attention has been drawn is unsettled respecting who has the right of controlling an action brought after the insurer has been subrogated by statute, where no express provision is made regarding control. See **Farrell Estates Ltd. v. Canadian Indemnity Co.** (1990), 69 D.L.R. (4th) 735 (B.C.C.A.); **Royal Insurance Co. v. Bishoff** (1968), 68 D.L.R. (2d) 263 (Alta. S.C.);

**Sheridan v. Tynes** (1971), 4 N.S.R. (2d) 143 (N.S.S.C.); **Lawson v. Dartmouth Moving and Storage Ltd.** (1975), 64 D.L.R. (3d) 326 (N.S.S.C.); **Ritter and Ritter v. Naugle** (1975), 20 N.S.R. (2d) 207 (N.S.S.C.).

[40] It is not necessary to resolve the position with respect to statutory subrogation. I am satisfied that on the plain meaning of the words in s. 18 of the Plan, the Trustees, overall, have the right of control. Specifically, the wording I have referred to in paragraphs 35 to 38 above support this conclusion. Here, although the appellant commenced the proceedings against the third party, he secured the consent of the Trustees to the settlement. Moreover, even if the appellant in fact exercised full control, this does not, in my opinion, diminish the right of the Trustees to do so. In view of the unambiguous language respecting the transfer of the rights of subrogation to the Trustees, and the giving of priority in the recovery to the Trustees, any **de facto** control exercised by the appellant over the recovery proceedings must be regarded as being exercised on behalf of the Trustees. I agree with Stewart, J. when she said:

> Section 18(1) is unambiguous. The wording is clear. Long term disability is payable for an injury for which a third party tortfeasor is liable. All of the insured employee's rights and remedies against a third party are subrogated to the Trustees for damages for the injury. No rights are reserved to the employee. The Trustees may maintain an action in the name of the employee against such third party with any amount recovered being applied to legal costs of the action, reimbursement of paid benefits to the Trustees and the balance, if any, to the employee, in that specific order. The reimbursement provision is not limited to the contractual circumstances of the amount being recovered by the Trustees. The assignment of rights and remedies is not stated to be conditional. The assignment of rights is absolute. One cannot isolate the provisions in s. 18(1). The section must be read as a whole. Since rights are subrogated absolutely to the Trustees obviously only Trustees can recover. Settlement payments to any other party by the third party is in effect a payment in trust for the Trustees. The employee has contracted his rights and absent any re-assignment he has no right between himself and the Trustees to sue. Pursuant to s. 18(2), if an employee attempts to settle or release,

> this does not bar the rights of the Trustees for the obvious reason that the rights were conclusively assigned to the Trustees, with the only exception being the Trustees' consent or concurrence to its rights being barred. An employee in pursuing an action is in effect the Trustees' agent and pursuant to s. 18(3) must fully cooperate with the Trustees in order to allow the Trustees to do what is reasonably necessary to assert the Trustees' rights to subrogation.
>
> (emphasis added)

[41] I do not accept the appellant's submission that, by the use of the word "assignment", Stewart, J. regarded s. 18 of the Plan as an assignment and not as a subrogation provision. She was not speaking of an assignment in the technical sense, but used the word to describe a transfer of the rights which was accomplished by the operation of s. 18 of the Plan.

[42] There being no ambiguity, it is not necessary to consider the **contra proferentum** principle. As has been said, the doctrine was intended to resolve ambiguity, not to create it.

[43] Thus, I am of the view that the mere fact that the appellant rather than the Trustees actually brought the action against the third party does not make the recovery any less an "amount recovered by the Trustees".

[44] By way of comparison with the contractual subrogation provisions of s. 18 of the Plan, I set out ss. 149 (automobile) and 172 (fire) of the **Insurance Act**:

> 149 (1) An insurer who makes any payment or assumes liability therefor under a contract is subrogated to all rights of recovery of the insured against any person and may

> bring action in the name of the insured to enforce those rights.
>
> (2) Where the net amount recovered whether by action or on settlement is, after deduction of the costs of the recovery, not sufficient to provide complete indemnity for the loss or damage suffered, the amount remaining shall be divided between the insurer and the insured in the proportion in which the loss or damage has been borne by them.
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> (3) Where the interest of an insured in any recovery is limited to the amount provided under a clause in the contract to which Section 137 applies, the insurer shall have control of the action.
>
> . . .
>
> 172 (1) The insurer, upon making any payment or assuming liability therefor under a contract of fire insurance, shall be subrogated to all rights of recovery of the insured against any person, and may bring action in the name of the insured to enforce such rights.
>
> (2) Where the net amount recovered after deducting the costs of recovery is not sufficient to provide a complete indemnity for the loss or damage suffered, that amount shall be divided between the insurer and the insured in the proportions in which the loss or damage has been borne by them respectively.

[45] It will be seen that in the case of automobile insurance, the Legislature took pains to specify that, once subrogation arose, the insurer had control of the action.

[46] These subrogation provisions contemplate deducting first the costs of recovery and then a division between the insured and the insurer in the proportion in which the loss has been borne. By contrast, s. 18 of the Plan is less favourable to the insured. The costs of recovery are deducted first, but then the Trustee takes priority with respect to the balance, leaving the insured employee to claim what is left over.

[47] It might be said - as the appellant in effect submits - that the subrogation provisions in s. 18 of the Plan are harsh. They are, however, clear. I do point out that counsel agree, and it is obvious, that it is not necessary on the facts of this case to

decide whether the right of subrogation of the Trustee extends to any part of the recovery which is not related to the income loss. **Obiter**, I would think that the true intent of the parties leads to a construction of the language in s. 18 of the Plan that would not permit subrogation respecting recovery that the insured can show does not relate to his income loss. The justice of such a result is particularly plain where, for example, an insured was contributorily negligent and received but a small percentage of his various losses. If, for example, he received only 10% of his total claim fairly assessed, a court should not favour an interpretation which would require him to pay to the Trustees more than what was recovered for loss of earnings. Such a result would take away some or perhaps even all of the other components of the settlement such as pain and suffering, loss of amenities, disability, special damages and so forth. See **Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.** (1979), 112 D.L.R. (3d) 49 (S.C.C.) at p. 58 per Estey, J.

[48] On the facts of this case, however, it is clear that the loss of earnings component of the settlement have been clearly identified, and the Trustees have sought recovery of what they paid out during the period to which they allocate the loss of income recovery. This produced the result that the Trustees did not claim all of what was recovered in the settlement for loss of income.

[49] The foregoing discussion is, as I have said, based on the assumption that Stewart, J. was correct in concluding that the benefits in question paid from the Plan

were for an injury or illness for which Lynds was liable.

[50] The appellant submits that the benefits paid to him by the Plan were not shown by the Trustees to be for an injury or illness for which Lynds was liable. The appellant points out that he did not cease working until long after the accident. At the time he was forced to stop work, his principal complaint was low back pain. The doctors thought it unlikely that this was related to the accident. His foot and knee pain were not related to the accident. The neck and shoulder pain was clearly accident related, but the tingling and numbness in the left arm may or may not have been. In short, while the appellant suffered from a number of maladies which, in sum, rendered him unable to work, the accident related injuries were only a part of this picture. The benefits received from the Plan were not proven to be “payable for” injuries for which the third party was liable.

[51] Stewart, J. was satisfied that the nexus between the injuries from the accident and the disability benefits, on the evidence, remained alive and well and reflected in the settlement figure which the third party paid. In my opinion, this is a finding which was not shown to be wrong. Indeed, it finds support in the evidence. The negotiations between the appellant’s counsel and the insurers of Lynds make clear that loss of earnings was the major element in the settlement. From their correspondence, it is clear that general damages were considered by them to be somewhere between $30,000 and $40,000, and that with other items not related to loss of earnings, totalled approximately $50,000. It is, in my opinion, beyond dispute that the insurers of Lynds in fact assigned a value of approximately $100,000 to the claim for loss of earnings and

paid that amount to the appellant. The evidence establishes that benefits paid by the Plan were payable for an injury for which the insurers of Lynds accepted liability.

[52] Cases suggesting that the task of isolating specific heads of damages when a global settlement is reached is a daunting one include **Tucker, supra**, and the decision of Rogers, J. in **Maritime Life v. Mullinex** (1987), 76 N.S.R. (2d) 118 at p. 130 where he said:

> With a global settlement, any amount attributed to loss of income would become buried and unidentifiable in any event and be incapable of attracting subrogation rights.

[53] These cases dealt with subrogation in equity, not a contractual provision such as s. 18 of the Plan. Here, the Trustees had the right to control the litigation, even if they did not commence and maintain it. The Trustees are, after deducting recovery costs, given priority to reimbursement of disability payments paid. The balance only is then left to the insured. In fact, the Trustees were consulted respecting, and consented to, the final settlement. The entire right of subrogation under the provisions of s. 18 of the Plan is given to the Trustees. Here, as is apparently the practice, the Trustees permitted the appellant to actually pursue the recovery. I agree with Stewart, J. when she said:

> . . . With a settlement award negotiated by the insured as opposed to a settlement award negotiated by the Trustees or a court award, the Trustees need only prove that the insured received a settlement from a third party and the onus shifts to the insured to account for the proportioning of the lump sum amount over the various heads of damages and to establish no portion of the recovered amount falls within the deduction provisions

of s. 9(8) and/or s. 18(1).

[54] In reaching this conclusion, Stewart, J. accepted the reasoning of Baynton, J. of the Saskatchewan Court of Queen's Bench in **Young v. Saskatchewan** (1992), 5 W.W.R. 49, which decision was affirmed by the Saskatchewan Court of Appeal substantially for the reasons given by Justice Baynton: (1994), 128 Sask. R. 106.

[55] In **Young, supra**, the insured was covered by a disability income plan. Monthly payments were to be reduced by the amount of other benefits received, including regular payments awarded as compensation for loss of earnings because of third party liability, lump sums to be actuarially prorated to a regular monthly benefit. The disability insurer relied on the reduction of benefits clause in the Plan at issue which was a provision corresponding to s. 9(8) of the Plan. The insured took the position that, having received a lump sum settlement which did not contain an allocation for wage losses, there should be no deduction. Baynton, J. took the following approach, [1992] 5 W.W.R. 49, at p. 53:

> This issue should be approached bearing the following principles in mind:
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> 1. The plan is designed to guarantee monthly compensation to the employee during his period of disability in an amount equivalent to 75 per cent of the wages he would have received if not disabled. It is not as such a pure or full disability plan in that the benefits it provides depend in part on what other disability or wage replacement benefits the employee receives.
>
> . . .
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> 3. The onus is on the defendant to establish that the plaintiff has received third party liability loss of earnings compensation from a source or in a manner that falls within the definitions of the policy. Once this has been done, especially where the particulars of the compensation are not available to the defendants, the burden shifts to the plaintiff to

> establish that the compensation does not fall within the deduction provisions of the policy. [This is analogous to the shifting of the burden of proof of disability for any reasonable occupation from the plaintiff to the defendant. Once the plaintiff has made out a prima facie case of disability, the burden shifts to the defendant to show that the plaintiff is capable of performing some other occupation.] In a settlement type of scenario, as opposed to a court award, the plan sponsor need only prove that the plaintiff received a settlement from a third party and the onus shifts to the plaintiff to establish the breakdown. But what about a settlement in which the plaintiff either deliberately or inadvertently did not break down the proceeds by category? Can he satisfy the onus of proving the nature and allocation of the settlement proceeds by simply relying on the fact that they were not specified? I think not. The plaintiff has sued the plan for benefits. Those benefits depend on what the plaintiff received for wage compensation. To get the benefits the plaintiff must establish what he received for wage compensation whether or not the allocation of the compensation was specified in the settlement itself. This requirement may be of no concern to the third party but it is of vital concern to the plan sponsor. It is untenable for a plaintiff to take the position that he can satisfy this onus of proof, (and thereby obtain additional disability benefits under the plan to which he is not entitled) by simply relying on the fact that the settlement itself did not expressly allocate the proceeds among the various heads of damages for which the plaintiff received compensation.
>
> 4. The fact that it may now be difficult to determine in retrospect the breakdown of the plaintiff's settlement does not relieve the plaintiff from doing so. Nor is there any term of the plan, express or implied, that waives the required deduction and increases the plaintiff's benefits payable under the plan because of such difficulty . . .

[56] I agree with this reasoning. I consider it applies equally to the somewhat different circumstances of this case.

[57] Further, whether or not the onus shifted to the appellant, there was ample material before Stewart, J. to enable her to conclude that the sum of $40,238.21, plus interest was in fact recovered as part of a settlement for loss of wages. Moreover she found, and I agree, that the income portion of the settlement is to be attributable to past loss of income. This is a position which favours the appellant in the circumstances because in this proceeding the Trustees claimed no more than what was awarded to them, and in particular, did not take the position that they were further entitled to deduct from future payments, any amount by virtue of s. 9(8) of the Plan.

[58] In my opinion, the result ordered by Stewart, J. should be affirmed. The argument of the Trustees supporting a claim to the monies set aside based on s. 9(8) of the Plan need not be explored.

[59] I would dismiss the appeal and award the respondent costs of $1,250.00, inclusive of disbursements.

Chipman, J.A.

Concurred in:

Roscoe, J.A.

Pugsley, J.A.