NOVA SCOTIA COURT OF APPEAL

Citation: Ryan v. Sun Life Assurance Company, 2005 NSCA 12

Date: 20050127
Docket: CA 220129
Registry: Halifax

Between:

Leslie Susan Ryan

Appellant
Respondent by Cross-Appeal

v.

Sun Life Assurance Company of Canada

Respondent
Appellant by Cross-Appeal

Judges: Cromwell, Freeman and Oland, JJ.A.

Appeal Heard: November 17, 2004, in Halifax, Nova Scotia

Held: Appeal and cross-appeal dismissed per reasons for judgment of Cromwell, J.A.; Freeman and Oland, JJ.A. concurring.

Counsel: W. Augustus Richardson, for the appellant
Douglas Lutz, for the respondent

Reasons for judgment:

I. Introduction:

[1] This appeal requires us to interpret the subrogation provisions in a group disability insurance policy.

[2] The appellant, Ms. Ryan, was disabled as a result of a motor vehicle accident. She received income replacement benefits based on her loss of earnings under a group disability insurance policy and, as well, a lump sum settlement of her damages claim against the other driver.

[3] A dispute arose between Ms. Ryan and the respondent, Sun Life, the disability insurer. It concerned the insurer's right under a subrogation clause to be reimbursed out of Ms. Ryan's settlement proceeds for income replacement benefits that it had paid or might pay in the future. There are three main points in contention: whether the subrogation provisions apply to Ms. Ryan at all; if they do, what part of the settlement is available to the insurer for reimbursement; and does the right to reimbursement extend to benefits to be paid by the insurer in the future.

[4] The dispute was taken before a Chambers judge in the Supreme Court. He decided that the insurer could seek reimbursement only from settlement proceeds fairly attributable to damages for income loss, whether past or future. He did not decide whether the insurer could seek reimbursement of benefits which might be payable to Ms. Ryan in the future.

[5] Ms. Ryan appeals and the insurer cross-appeals.

[6] In my view, both appeals should be dismissed. The judge was correct to limit the insurer's right to reimbursement to the part of the settlement proceeds which Ms. Ryan could show was fairly attributable to damages for income loss, past or future. I also conclude that the insurer cannot seek reimbursement for benefits accruing to Ms. Ryan after she received her settlement proceeds.

II. Overview of Facts and Judicial History:

[7] Ms. Ryan joined the federal public service in September of 1980. She was enrolled in the compulsory group insurance plan which provided income

replacement benefits of 70% of her salary in the event she became disabled. The group policy was amended from time to time and the amendments included the addition of a subrogation clause.

[8] In March of 1994, Ms. Ryan was injured in a motor vehicle accident and could not work. Effective in October, 1995, she received income replacement benefits under the group policy based on 70% of her salary. She also sued the other driver, claiming general and special damages. In late 2001, she settled that litigation for an all-inclusive amount of $350,000 which was not apportioned among her various heads of damage.

[9] The group disability insurance contract was amended in May of 1994 (after Ms. Ryan's accident) to add a type of subrogation clause. It gave the insurer certain rights to be reimbursed out of the amount employees recovered from third parties and, as well, to set off against benefits, otherwise payable, amounts which the employee had received as a result of litigation or settlement with third parties. The contract provided that this amendment was to be effective from March 1, 1993.

[10] Ms. Ryan and the insurer could not agree about the impact of this new clause on the insurer's rights to reimbursement out of the settlement proceeds. Ms. Ryan's position was (and is) that the clause does not apply to her at all because it was not agreed upon until after the accident which gave rise to the settlement: remember that while the clause was back-dated, it was agreed upon in May of 1994 while the accident had occurred in March. If the clause does apply, Ms. Ryan says there are two limits on the right to reimbursement: it applies only to the part of her settlement that is reasonably attributable to past income loss and only with respect to benefits actually paid up to the time of the settlement. The insurer's position was (and is) that the subrogation clause applies and that it permits the insurer to recover against 75% of the entire settlement proceeds (less legal fees) for past benefits paid and with respect to benefits which might become payable in the future.

[11] Ms. Ryan brought an application before Davison, J. in Supreme Court Chambers for an interpretation of the subrogation clause. The clause provides:

> Where benefits under this policy have been paid or may be payable to an Employee and the Employee has a right of action against a Third Party for

> recovery of loss of income which otherwise would have been earned by the Employee during the whole or any part of the period that benefits are paid, or may be payable, to the Employee under this policy,
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> 1. any amount recovered by the Employee from the Third Party (including general damages, damages for loss of income, interest and legal costs, whether recovered through settlement or trial), less the Employee's legal costs expended for such recovery, shall be deemed to be the Employee's Net Recovery from the Third Party;
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> 2. the Employee shall pay to Sun Life an amount equal to 75% of his/her Net Recovery from the Third Party (to a maximum of the amounts paid to the Employee under this policy), such percentage of his/her Net Recovery to be held in trust by the Employee for Sun Life until payment is made to Sun Life;
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> 3. in the event that any benefits not paid to the Employee under this policy are subsequently determined to have been payable, Sun Life shall be entitled to set off against its liability for such benefits the amount the Employee would have been obliged to pay pursuant to subparagraph 2. hereof if such benefits had been paid to the Employee before the Employee obtained his/her recovery from the Third Party; ...

[12] The Chambers judge held that (decision reported at (2003), 219 N.S.R. (2d) 329):

1. The subrogation clause was not ambiguous (Reasons, paras. [36] and [52]);
2. It applies to that part of a settlement or judgment which can reasonably be attributed to a past or future income loss caused by the accident (Reasons, paras. [52] and [58]);
3. The burden of establishing which part of a settlement or judgment can reasonably be attributed to a past or future loss of income lies on the insured. (Reasons, para. [53]);
4. If the insured cannot discharge that burden, the insurer is entitled to set off the amount of its benefits against "a reasonable amount for loss of earnings" (Reasons, para. [58]) or "against the whole or part of the amount of settlement or judgment." (Order, para. (3)).

[13] Ms. Ryan appeals, submitting that the judge erred in finding that the clause applies to her claim. Alternatively, she says that he erred in finding that the insurer could claim against the portion of her settlement relating to future income loss. The insurer cross-appeals, submitting that the clause permits subrogation against 75% of the total settlement proceeds (less costs) and with respect to benefits actually paid or payable under the policy.

III. Issues:

[14] The issues to be decided are these:

1. What is the applicable standard of review?
2. Does the right of subrogation apply to Ms. Ryan's claim?
3. If so, how should the subrogation clause be interpreted:

    (a) Does the right of subrogation apply to the whole of the settlement proceeds?
    (b) Does the right of subrogation relate to benefits paid to the date of settlement or also to future benefits to which Ms. Ryan becomes entitled?

IV. Analysis:

1. Standard of Review:

[15] The appeal relates to the judge's interpretation of a contract of insurance which is a question of law. The standard of review on that question is correctness: **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235 at paras. 8 - 9.

2. Does the subrogation clause apply to Ms. Ryan?

[16] Ms. Ryan submits that the subrogation clause does not apply to her claim because it was negotiated and agreed to after the date of her accident. The insurer responds that the parties to the contract can, by agreement, stipulate its effective date and they did so, making the clause effective from March 1, 1993. The Chambers judge accepted the insurer's argument on this point and Ms. Ryan says he erred in doing so.

[17] In my respectful view, the Chambers judge was right. The policy provides that it may be modified by the mutual agreement of the policy holder (who is Her Majesty the Queen in Right of Canada represented by the President of the Treasury Board) and the insurer. The changes and their effective date were so mutually agreed. Moreover, as the chambers judge stated, relying on J.A. Appleman and J. Appleman, **Insurance Law and Practice** (revised vol I, 1981) at section 44, page 119, the terms of the policy govern the effective date of coverage. Ms. Ryan has not advanced any authority to the contrary.

3. How should the subrogation clause be interpreted?

[18] It is common ground that, if the subrogation clause applies, it at least permits reimbursement to the insurer of benefits it has paid to Ms. Ryan out of the portion of the settlement relating to past income loss. Ms. Ryan says that is the extent of the right, if it exists. The insurer claims that the right is much broader: it is entitled to reimbursement of all benefits paid or payable out of 75% of the net settlement.

[19] The Chambers judge's interpretation resulted in a middle ground. As noted, he held that the insurer could claim against the settlement proceeds that relate to either past or future income loss. Although he adverted to the issue of whether the insurer's right was with respect to benefits actually paid or extended to benefits that would become payable, he did not resolve it.

[20] Before turning to an analysis of the language of the policy, it will be helpful to set out the principles of interpretation relating to contracts of insurance. As McLachlin, J. (as she then was) said on behalf of the Court in **Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.**, [1993] 1 S.C.R. 252 at pp. 268-269, these principles include, but are not limited to: (1) the *contra proferentum* rule; (2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and (3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

[21] The first of these principles, the *contra proferentum* rule, was described by Iacobucci, J. in **Eli Lilly & Co. v. Novopharm Ltd.**, [1998] 2 S.C.R. 129 at para. 53 as operating "to protect one party to a contract from deviously ambiguous or confusing drafting on the part of the other party, by interpreting any ambiguity

against the drafting party." Its operation depends, therefore, on a finding of ambiguity in the language to be interpreted. Ambiguity in this context means that a term in the contract is reasonably capable of more than one meaning: see for example **Chilton v. Co-operators General Insurance Co**. (1997), 143 D.L.R. (4th) 647 at 654 (Ont. C.A.). The third principle, that the interpretation should give effect to the parties' reasonable expectations, is also engaged when the contract language is ambiguous: **Non-Marine Underwriters, Lloyd's of London v. Scalera**, [2000] 1 S.C.R. 551 at para. 71. (Like McLachlin, J. in **Reid Crowther** at p. 27 and Laskin, J.A. in **Chilton** at 657, I do not think it necessary to decide whether the principle may also apply where the language is not ambiguous.)

[22] These principles, however, assume that the first step in any task of interpretation is to give effect to the parties' contractual intent determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time: **Eli Lilly**, **supra** at para 54. It is in this context that the often quoted words of Estey, J. in **Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co**. , [1980] 1 S.C.R. 888 at 901 should be understood:

> Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation ... which promotes a sensible commercial result.

[23] As Iacobucci, J. pointed out at para. 56 of **Eli Lilly**, where there is no ambiguity in the wording of the document, the **Consolidated-Bathurst** principle favouring the interpretation which produces a "fair result" or a "sensible commercial result" is not determinative. While it would be absurd to adopt an interpretation which is inconsistent with the commercial interests of the parties, it should be presumed that the parties intended the legal consequences of their words.

Evidence of their subjective intent should be resorted to only in cases of ambiguity: paras. 54 - 55.

[24] I mention this because the parties and the Chambers judge referred to evidence concerning the exchange of drafts and correspondence between the parties relating to this new subrogation clause. While there can be little doubt from a review of this material that the insurer's objective in advancing the language which was subsequently adopted was to give it the right to share in all types of damages, the issue is not what the insurer intended. Rather, as Iacobucci, J. emphasized in **Eli Lilly**, the question is what was the contractual intent of the parties. This is to be determined from the words they used in light of the surrounding circumstances. Evidence of the subjective intent of one of the parties has no independent place in this endeavour; it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous: **Eli Lilly** at paras. 54 - 55.

[25] While I have reviewed all of the evidence in relation to the various drafts and exchanges leading up to the adoption of the subrogation clause, I have not found it necessary to rely on it. In my view, the words agreed upon, read in context, are not ambiguous and evidence of the subjective intention of the insurer is not necessary for, or helpful to, the task of interpretation.

[26] It is also fundamental to the task of interpretation that the words must be understood in the context in which they are used. Saunders, J.A. in **Campbell-MacIsaac v. Deveaux** (2004), 224 N.S.R. (2d) 315; N.S.J. No. 250 (Q.L.)(C.A.) at paras. 60 - 62 stated that "... particular words and phrases should not be lifted from the context and considered in isolation ..." but must be considered in the "...context, scheme and objectives ..." of the entire contract. He referred to **Liability Insurance Law in Canada**, 3rd ed. (Toronto: Butterworths, 2001) where the author Gordon Hilliker states at pages 27-28:

> The requirement that words are to be construed in accordance with their plain, ordinary and popular sense does not mean that one ignores the context in which the words are found. Rather, it is a cardinal rule that a contract of insurance should be considered in its entirety and be constructed liberally so as to give effect to the purpose in which it was written.

[27] This is an especially important principle to bear in mind in this case. The clause uses two terms, “loss of income” and “general damages” which give rise to much of the interpretative difficulty. Both have a strict legal meaning, but are also used more loosely to describe different things in their “ordinary and popular sense.” Their intended meaning may only be understood in light of the legal context from which the terms are adopted and the particular context in which they are used. Before turning to a detailed review of the text of the clause, it will be helpful to set out briefly the legal context of these two critical and, in this case, problematic terms.

[28] We are concerned here with reimbursement out of a judgment or settlement of the employee’s personal injury action. The disabled employee will often have a claim for both pecuniary and non-pecuniary losses. The pecuniary losses include those actually experienced to the date of trial or settlement, such as lost earnings, expenses for care and out of pocket expenses. The pecuniary losses also include losses which will likely be suffered after the date of settlement or trial into the future, such as earnings that will not be obtained because of the disability and the cost of care required in the future. The non-pecuniary losses relate primarily to pain and suffering and the loss of amenities and expectation of life, both up to the date of trial or settlement and into the future.

[29] In strict legal language in the context of personal injury cases, pecuniary losses suffered to the date of trial or settlement are referred to as “special damages”: see S. M. Waddams, **The Law of Damages**, looseleaf (Toronto, Canada Law Book Ltd., 1991) at para. 3.340. Losses likely to be suffered after that date are referred to as “general damages.”

[30] Technically, therefore, the term “general damages” refers to compensation for two types of losses: future pecuniary loss – such as the cost of future care and the loss of earning capacity – as well as all non-pecuniary loss: see K. Cooper-Stevenson and Iwan Saunders, **Personal Injury Damages in Canada** ((Toronto: Carswell, 1996) at 93. That this is the correct legal meaning of the term general damages in the personal injury context is confirmed by leading cases both here and in England: **Andrews v. Grand & Toy Alberta Ltd**, [1978] 2 S.C.R. 229 *per* Dickson, J. (as he then was) at 235-236; **British Transport Commission v. Gourley**, [1956] A.C. 185 (H.L.(E.)) *per* Lord Goddard at 206.

[31] However, lawyers and others knowledgeable about personal injury claims do not always use the term general damages in its strict, legal meaning. The sense of the term depends on the context in which it is used. For example, in everyday conversation among lawyers about personal injury cases, the term "general damages" (or "generals") is often used to refer only to damages for non-pecuniary loss, that is for pain and suffering and the loss of amenities and expectation of life. However, that is not a precise use of the term or the only use of it in common parlance among lawyers. The other common use of the term occurs where it is necessary to differentiate claims for loss of earnings up to the date of trial and claims for earnings to be lost in the future.

[32] In personal injury damage assessment, income loss to the point of trial or settlement is conceptually distinct from the anticipated loss of income to occur in the future. The former, as noted, is an item of special damages while the latter is an item of general damages. But the anticipated loss of income in the future is viewed as the loss of a capital asset – the present loss of the capacity to earn income in the future: see e.g., **Andrews** at page 251; Waddams at para. 3.710. However, in common parlance among lawyers, the term loss of income may be used somewhat loosely to refer to both past and future losses. In a discussion of a loss of income claim, it would be quite usual for lawyers to differentiate between the special damages - that is the past loss of income to the date of judgment or settlement and the general damages – that is the loss of earning capacity into the future.

[33] So, while the term general damages has a strict legal meaning which includes damages for future pecuniary losses as well as all non-pecuniary losses, lawyers often use the term somewhat loosely to refer only to one or the other of these types of damages depending on the context. Similarly, the term loss of earnings strictly means the special damages claimed for income lost up to the date of trial or settlement. But in common parlance among lawyers, the term may be used, depending on the context, to refer to both past and future claims. Therefore, in interpreting the terms "general damages" and "loss of income", one must pay close attention to the context in which the terms are used.

[34] I turn then to the text of the clause. There are two main issues of interpretation in this case: what goes into the "reimbursement pot" and what may be included in the reimbursement claim. The first concerns how much of the

settlement is potentially available to the insurer for reimbursement. The second concerns what benefits may be the subject of the insurer's claim for reimbursement out of the settlement proceeds. I will address each in turn.

(a) Does the right of subrogation apply to the whole of the settlement proceeds?

[35] I would first note that the subrogation clause here is limited to reimbursement. Unlike many other subrogation clauses, this one does not give the insurer a right to bring an action in the name of the insured. It is, as counsel for the insurer submitted in Chambers, in the nature of a reimbursement clause rather than a traditional subrogation clause.

[36] The clause opens with a statement of two conditions. In order for the insurer to seek reimbursement, these two conditions must be present. They are:

1. Benefits under the policy "have been paid or may be payable to an Employee". There is no doubt this condition is satisfied.
2. The employee "has a right of action against a Third Party <u>for recovery of loss of income which otherwise would have been earned by the Employee during the whole or any part of the period that benefits are paid, or may be payable</u>, to the Employee under this policy." (Emphasis added)

[37] Critical aspects of context are found in the second condition, one relating to the nature of the employee's right of action and the second helping to explain the meaning of the term "loss of income".

[38] The condition does not refer to an employee's right to claim damages in general. Instead, it refers specifically to the employee's right of action "for recovery of loss of income ." This is important because, in subsequent paragraphs, the clause defines the fund available to the insurer for reimbursement of benefits in terms of the employee's "recovery" in relation to his or her right of action. But the right of action described in this condition is expressly stated to be a right of action for recovery of loss of income. This suggests that the fund available to the insured for reimbursement does not include all the damages recovered by the employee from the third party, but rather only the damages received on account of loss of

income. That is the "right of action" which gives rise to the "recovery" and the fund is later defined in terms of that recovery.

[39] A second important contextual consideration helps explain the meaning of the term "loss of income" as it is used in this condition. As noted earlier, this term technically refers to income lost to the point of trial or settlement, but is also sometimes used more loosely to refer to all kinds of loss of income, past and future. The context here makes it clear that this looser meaning is the one intended in this condition. The full phrase in which the term appears is: "recovery of loss of income which otherwise would have been earned by the Employee during the whole or any part of the period that benefits are paid. ..." (Emphasis added) Benefits will be paid into the future so long as the disability lasts. It follows that the "income which otherwise would have been earned" during that period obviously includes income that would have been earned in the future but for the continuing disability. This, in my view, makes it clear that the words "loss of income" in the second condition refer not only to wages actually lost up to the time of settlement, but also to recovery on account of any loss of income during any period for which benefits are paid, a period which could well extend into the future. In other words, read in the context of the entire phrase, the term "loss of income" must be understood here as referring to recovery on account of both past and future income loss.

[40] After setting out these two conditions, the clause goes on to do three more things: to set out a definition of the employee's "net recovery", to establish the insurer's rights of reimbursement from that net recovery; and, to address the situation in which benefits that were not paid initially are subsequently found to have been payable. The first two of these elements are most relevant to the task at hand.

[41] The language defining net recovery is this:

> any amount recovered by the employee from the Third Party (including general damages, damages for loss for income, interest and legal costs, whether recovered through settlement or trial), less the Employee's legal costs expended for such recovery, shall be deemed to be the Employee's Net Recovery from the Third Party;

[41] The question is this: what damages recovered from the third party are included in the definition of the employee's net recovery. The insurer's position is that it includes all damages recovered, including damages for pain and suffering and loss of enjoyment of life and potentially even special damages unrelated to income loss. The insurer points to the expansive language of the definition. The words used are "any amount recovered." This is followed by a non-exhaustive list of inclusions – general damages, damages for loss of income, interest and legal costs – which tends to reinforce the breadth of the intention. The use of the term "general damages" is relied on as evidencing a clear intention not to limit the fund to damages on account of income loss.

[42] Ms. Ryan says that the definition includes only the recovery in relation to past income loss to the time of settlement or judgment. She says that the clause is ambiguous and that the interpretation advanced by the insurer leads to absurd results: it permits the insurer to be reimbursed out of settlement proceeds that have nothing to do with the payments made by the insurer. As Mr. Richardson put it on behalf of Ms. Ryan, she has to pay the insurer out of her own pocket. This, he submits, cannot have been the parties' intention and that we should apply the principle that where there are two possible constructions, the one which promotes their true intention should be adopted.

[43] The Chamber's judge did not accept the interpretation advanced by either party. As noted, he found that the recovery included only the amounts which could be reasonably attributed to loss of past and future income.

[44] It is true that broad words – "any amount recovered by the Employee from the Third Party" – are used to define the fund from which the insurer may seek reimbursement. However, these words must be read in the context of the clause as a whole and particularly the earlier stated conditions which give rise to the right to reimbursement. As discussed earlier, those conditions refer to the employee having a right of action against a Third Party "... for recovery of loss of income ...". Thus, the words "any amount recovered" following on from that statement of entitlement to reimbursement must be understood as relating back to a recovery with respect to that "right of action ... for recovery of loss of income... ." In other words, the recovery on the employee's right of action relates to the right of action which gives rise to that recovery. The right of action, and therefore the recovery, are defined as relating to "loss of income."

[45] The reference to general damages in the list of inclusions in the net recovery could be taken, as the insurer suggests, as a reference to damages for pain and suffering and loss of enjoyment of life. However, read in the context of the clause as a whole, I do not find that interpretation to be the most plausible.

[46] The term general damages is used in this clause which is triggered where an employee has "... a right of action ... for recovery for loss of income ...". As noted, the clause then defines the fund – the "amount recovered" – out of which the insurer may seek reimbursement. This definition of the "amount recovered" refers back to the first condition for reimbursement – that the employee have a right of action for recovery of loss of income. The amount recovered must be understood in the context of the right of action – that is, a right of action for loss of income – which gives rise to the recovery. That context strongly suggests that the term general damages, which is used to clarify the amount of the recovery, should be understood as referring to the right of action for loss of income which gives rise to the recovery. This, in turn, strongly suggests that the term "general damages" is used to refer to general damages relating to loss of income, that is to future pecuniary loss. That is one of the types of compensation included in the strict meaning of the broad term "general damages" and an appropriate term to use in order to differentiate between damages for past income loss and loss of future earning capacity.

[47] The rest of the clause confirms this interpretation. The next item after "general damages" in the list of inclusions within the term "amount recovered" is " damages for loss of income." This appears to be a reference to compensation for past loss of income, as compensation for the loss of future income would better be described as relating to loss of earning capacity. The other inclusions are interest and costs. Thus, consistent with the condition that the employee have a right of action for recovery of loss of income, the inclusions make it clear that both past income loss ("damages for loss of income") and loss of future earning capacity ("general damages") are included.

[48] The term "loss of income" in this clause is not modified or explained as it is in the condition discussed earlier. It is sensible that in this clause defining the employee's net recovery, the term loss of income would be used more strictly to

refer to past loss of income and in order to contrast those losses with the general damages for loss of earning capacity.

[49] In summary, the clause, while not a model of precision, makes it clear that the net recovery consists of damages fairly attributable to income loss. However, and contrary to Ms. Ryan's position, the clause also makes it clear that damages for both past lost earnings and loss of earning capacity into the future are included. This interpretation in my view makes sense of all of the words used by the parties in the context in which they are used. It makes the definition of net recovery consistent with the condition triggering the right to reimbursement – the right of action for recovery of loss of income. It also avoids the harsh result of permitting the insurer to be reimbursed for payment of income replacement benefits out of damages which the employee recovered from a third party to compensate him or her for pain and suffering or to provide for the cost of future care.

[50] Consistent with the conclusions of the Chambers judge, I would hold that the employee's net recovery under this clause consists of the portion of the settlement or award which the employee can show is fairly attributable to past income loss and loss of future earning capacity, interest and costs.

(b) Does the right of subrogation relate to benefits paid to the date of settlement or also to future benefits to which Ms. Ryan becomes entitled?

[51] This issue is concerned primarily with paragraphs 2 and 3 in the clause. They read:

> 2. the Employee shall pay to Sun Life an amount equal to 75% of his/her Net Recovery from the Third Party (to a maximum of the amounts paid to the Employee under this policy), such percentage of his/her Net Recovery to be held in trust by the Employee for Sun Life until payment is made to Sun Life;
>
> 3. in the event that any benefits not paid to the Employee under this policy are subsequently determined to have been payable, Sun Life shall be entitled to set off against its liability for such benefits the amount the Employee would have been obliged to pay pursuant to subparagraph 2 hereof if such benefits had been paid to the Employee before the Employee obtained his/her recovery from the Third Party; ...

[52] Paragraph 2 imposes an obligation on the employee to pay an amount from his or her recovery to the insurer. Paragraph 3 concerns the insurer's right to reduce its liability to pay benefits on account of the recovery received by the employee. The questions are what amounts does paragraph 2 require the employee to pay and what amounts does paragraph 3 entitle the insurer to set off against benefit payments?

[53] The insurer contends that these paragraphs create an ongoing obligation on the employee to pay benefits received after the recovery and an ongoing right on the part of the insurer to set off proceeds of the recovery against future benefit payments. As expressed in its factum, the insurer says that paragraphs 2 and 3 entitle the insurer to be reimbursed (or to set off against benefits payable) with respect to benefits to which the employee will become entitled under the terms of the policy after the settlement of her claim against the third party tort feasor.

[54] In my view, this is not an interpretation which the clause can reasonably bear.

[55] Paragraph 2 does not support the insurer's position. It contemplates one payment by the employee to the insurer out of the recovery of the amount paid to the employee under the policy. The use of the past tense – paid – to describe the amount of benefits to be repaid suggests that there is no obligation to reimburse the insurer for payments to be made in the future, that is, after the date of reimbursement.

[56] Nor does the right of set off in paragraph 3 support the insurer's position. The insurer's right of set off arises on the condition set out at the beginning of the paragraph: that "... any benefits not paid ... are subsequently determined to have been payable." The relevant time to judge whether the benefit was or was not paid is the time the employee receives the recovery. The paragraph requires that the amount of the set off is to be determined as if the benefits that were not paid, but are subsequently determined to have been payable, "... had been paid ... <u>before the Employee obtained his/her recovery</u> ... ." Therefore, paragraph 3 deals with the situation in which two things have occurred: first, benefits to which the employee was entitled had not been paid by the time of recovery; and second, after the employee has obtained his or her recovery, those benefits which ought to have

been, but were not paid before the employee received the recovery are determined after the recovery to have been payable.

[57] Thus, the paragraph cannot reasonably be interpreted as addressing benefits which relate to a time after the recovery or reimbursement. The use of the language of benefits "not paid ... but subsequently determined to have been payable" is inconsistent with any such intention. That language can only refer to benefits which accrued in the past but were not paid and which were subsequently determined to have been payable before the settlement or reimbursement.

[58] This interpretation is consistent with the paragraph's definition of the amount to which the right of set off applies. The paragraph provides that the amount which the insurer is entitled to set off is "... the amount the employee would have been obliged to pay [under paragraph 2] if such benefits [i.e., the benefits which had not been paid at the time of the employee's recovery but are thereafter determined to have been payable] had been paid to the employee before the employee obtained his/her recovery ... ." Thus, the focus of the clause is what benefits had been or ought to have been paid as of the date the employee received his or her recovery from the third party. The former amount -- benefits actually paid to the date of recovery -- is the subject of paragraph 2. The latter amount -- benefits not paid by that date, but subsequently determined to have been payable as of that date - is the subject of paragraph 3. Neither paragraph deals with benefits accruing in the future.

[59] The insurer relies on three cases, but none assists in my view. **Maritime Life Assurance Co. v. Mullenix** (1986), 76 N.S.R. (2d) 118; N.S.J. No. 479 (Q.L.) (T.D.) concerned the equitable right to subrogation, not the interpretation of contractual language. As the insurer in the present case has emphasized, the insurer's rights here are entirely contractual and must be determined from the language used in the relevant provisions of the policy. **Mullenix** does not assist in that task. **Nova Scotia Public Service Long Term Disability Plan v. MacDonald** (1996), 153 N.S.R. (2d) 321; N.S.J. 418 (Q.L.) (S.C.) turned on the particular contractual language in that plan which has virtually nothing in common with the language in the insurer's group disability policy in issue here. Similarly, **Melanson v. Co-Operators General Insurance Co**., [1996] N.B.J No 381 (Q.L.)(Q.B.); aff'd [1997] N.B.J. No 364 (Q.L.) (C.A.); application for leave

dismissed [1997] S.C.C.A. No. 555 turned on the language of an endorsement which is not at all like the contractual language in issue here.

[60] I would hold that the right to reimbursement or set off does not extend to benefits that accrue in the future, but only to benefits paid or found to have been payable as of the relevant time.

V. Disposition:

[61] I would dismiss the appeal and the cross-appeal. As success is divided, I would make no order as to costs.

Cromwell, J.A.

Concurred in:
Freeman, J.A.
Oland, J.A.