C.A. No. 129386

NOVA SCOTIA COURT OF APPEAL
Cite as: Nova Scotia (Public Service Long Term Disability Plan) v. Flemming, 1996 NSCA 195

Roscoe, Hart and Jones, JJ.A.

BETWEEN:

TRUSTEES OF THE NOVA SCOTIA PUBLIC SERVICE LONG TERM DISABILITY PLAN	)	Dennis James for the Appellants
Appellants	)	
- and -	)	
	)	W. Augustus Richardson for the Respondent
SYLVIA FLEMMING	)	
Respondent	)	Appeal Heard: October 11, 1996
	)	Judgment Delivered: October 24, 1996

THE COURT: Appeal dismissed per reasons for judgment of Hart J.A.; Roscoe and Jones, JJ.A. concurring.

HART, J.A.:

The respondent was injured in two car accidents, one in 1985 and one in 1987, while employed with the Department of Health. She received weekly payments amounting to $44,254.47 from the government sponsored Long Term Disability Plan while she was unable to work. She later recovered $140,975.00 in a legal settlement arising out of the accidents and the appellants have sued to recover $26,000.00 of the amount paid out from the plan as a subrogated claimant.

To be entitled to subrogation the appellants would have to have a relationship with the respondent that entitled them to be indemnified for their advances if the employee should recover funds from a third party as a result of her injuries. Such a relationship would normally be found in a contract of indemnity of the type used in the insurance industry or a legislated right to indemnity as was later introduced to the Long Term Disability Plan in 1992. There was no such right here. The scheme was rather an agreement negotiated between the government and the union representing its employees to pay a fixed percentage of salary to an employee who was unable to work. The benefits and obligations under the agreement were extended to non-unionized employees by legislation but there was nothing in the legislation to grant a right of subrogation to the appellants at the time the respondent received benefits under the Plan.

In my opinion the trial judge was correct in refusing to follow the decision of **Hines v. Englund** (1991), 108 N.S.R. (2d) 401 where Richards J. allowed the Trustees of the Nova Scotia Public Service Long Term Disability Plan to be subrogated to the claim of the employee against a defendant under a common law right of indemnification. In reaching this conclusion, Scanlan J. followed the reasoning in the subsequent decision of this Court in **Maritime Life Assurance Co.**

v. Tucker (1993), 119 N.S.R. (2d) 417 (C.A.) where the Court considered whether or not a certain sickness and accident insurance policy was a policy of indemnity giving rise to a right to subrogation. Freeman J.A., speaking for the Court in that case, said at p. 424:

> "I have set the policy provisions out at some length because seen as a whole they leave no doubt that the scheme of the policy is to pay a weekly benefit without proof of actual loss. Nowhere is there mention of a requirement for proof of actual loss. The amount to be paid each individual employee is calculated by a formula related to his or her rate of earned income. The formula is a matter of contract, agreed to in advance of any loss by the parties, as are the deductions of income from other sources including another group policy, an automobile insurance policy, a retirement income plan or a government disability plan. The formula and the deductions may leave the insured with a weekly income equal to what he or she had enjoyed prior to the disability, but it is immaterial whether or not they do so. An employee who enjoyed frequent overtime might be left with substantially less than he or she was earning; an employee with an individual income policy might enjoy substantially more income during the period of disability. There is nothing to suggest the contract formula was intended to generate a figure equal to lost income, only that the weekly benefit would not be less than unemployment insurance. In the present case the respondent received two-thirds of his employment earnings from the appellant during his period of disability. Because the weekly benefit is a creation of a contractual formula, independent of the actual amount of the loss suffered by the insured, the policy cannot be considered one of indemnity: it is not intended to make the insured whole, merely to provide him with a predetermined weekly income during disability. Therefore subrogation does not arise."

The terms of the Long Term Disability Plan under which the appellants' claim grant the employee the right to payment of benefits without any proof of actual loss and in my opinion the Plan cannot be considered to be a contract of indemnity from which any right to subrogation can flow. Since there was no legislation or other basis for such a right at the time, the appeal from the decision of Justice Scanlan must fail.

I would therefore dismiss the appeal with costs in the amount of $750.00 including disbursements.

Hart J.A.

Concurred in:

Jones J.A.

Roscoe J.A.

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BETWEEN:

TRUSTEES OF THE NOVA SCOTIA PUBLIC SERVICE LONG TERM DISABILITY PLAN	Appellants	
- and -		REASONS FOR JUDGMENT BY:
SYLVIA FLEMMING	Respondent	HART J.A.