SUPREME COURT OF NOVA SCOTIA

Citation: Inglis v. Nova Scotia Public Service Long Term Disability Trust Fund, 2011 NSSC 36

Date: 20110202
Docket: Hfx No. 203247
Registry: Halifax

Between:

Robert D. Inglis

Plaintiff

v.

Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund

Defendant

Judge: The Honourable Justice Glen G. McDougall

Heard: June 22, 23, 24, 25, 29, 30; August 17, 18, 19; September 14 and 15, 2009 in Halifax, Nova Scotia

Counsel: Bruce Evans, on behalf of the plaintiff
Colin Bryson, Q.C., on behalf of the defendant

By the Court:

INTRODUCTION

[1] The plaintiff, Robert D. Inglis, worked as a plumber for the Nova Scotia Department of Transportation until he was forced to stop working due to diabetes. He received long-term disability payments from the defendant LTD Plan Trust Fund (the Plan). The defendant later discontinued his benefits on the basis that he was no longer disabled within the meaning of the Plan. The plaintiff seeks a restoration of his LTD benefits and damages.

THE EVIDENCE

The LTD Plan

[2] The LTD Plan constitutes part of the employment compensation pursuant to collective agreements between the Nova Scotia Government Employees Union and the Province. It also forms part of the compensation for non-union provincial employees such as the plaintiff. Eight trustees, appointed by the NSGEU and the Province, administer the Nova Scotia Public Service Long Term Disability Plan Trust Fund. At the material time, Maritime Life Assurance administered the Plan on behalf of the Trust Fund.

[3] The LTD Plan defines "disability" and "disabled" in the following terms, at s. 1(c):

> "Disability"/ "disabled" means the complete inability, as defined from time to time in guidelines made pursuant to this Plan, of an employee, because of illness or injury, to perform the regular duties of his/her occupation during the applicable elimination period and the next 30 months of any period of disability. Thereafter, an employee remains disabled if he/she is unable to engage in any occupation for remuneration or profit for which the employee is or may become fit through education, training, experience or rehabilitation, which occupation pays not less than 80% of the current rate of the position, class and step he/she held prior to disability.

[4] The named defendant Robert Jack, whom the plaintiff identifies as Chairman of the Trustees of the LTD Plan Trust Fund, is, the Plan says, a trustee and does not have any personal liability.

The Plaintiff

[5] Mr. Inglis worked as a plumber for the Nova Scotia Department of Transportation between 1979 and 1996, starting as an apprentice and becoming a journeyman plumber. Prior to that time he attended school until about grade 10. He became a permanent employee in April 1986, after apprenticing and doing some casual employment, including some private sector work.

[6] Mr. Inglis described plumbing as physically demanding work. He was required to work alone at times, in various environmental conditions, including extremes of heat, cold and dirt. He worked at varying heights, in confined spaces, on his hands

and knees and on ladders and rooftops. He was required to handle hazardous materials. He drove around the province, worked 10-12 hour days on occasion, and was sometimes on call on evenings and weekends. He required training and certification on various types of plumbing systems and installations, such as water, ventilation and heating systems. He described the job as one requiring full mental alertness; in addition to being able to work with formulas in running pipe, a small mistake, such as leaving a pipe open, could cause serious damage.

[7] Mr. Inglis was diagnosed with Insulin Dependent Diabetes Mellitus (IDDM) in March 1986, at the age of 24. Since that time, he has required insulin injections in order to control his blood sugar levels, and has to monitor his levels closely. He testified that in 1986 he took two injections in the morning and one before bed. This quickly rose to four or five injections per day. By 2009 he took single injections before breakfast, lunch and supper, plus additional injections when his sugar level fluctuated. Mr. Inglis must control all aspects of his life that affect his blood sugar levels, including the timing and dosage of insulin injections, eating, exercise and other activities, as well as his stress levels. The need to tailor his daily activities to the requirements of a full-time job posed difficulties in managing his blood sugar levels. Mr. Inglis has been in consultation with endocrinologists since about 1990 in order to control his often widely fluctuating blood sugar levels. His family doctor, Dr. Susan Malloy, has carried out his diabetic care as directed by the endocrinologists.

[8] Mr. Inglis has experienced particular problems with hypoglycaemia, that is, low blood sugar, which can strike without warning. Additionally, he experiences hypoglycaemia unawareness, a reduced ability to notice his own hypoglycaemic symptoms. As a result, his symptoms can progress to the point of confusion without him being aware that his blood sugar is low. When he becomes confused, he may need to be reminded or encouraged to eat or drink in order to restore his blood sugar level. He said his blood sugar level fluctuates between 2 and 27. He described himself as experiencing extreme “highs” and “lows,” along with numbness, pins and needles and burning sensations. He said hypoglycaemia unawareness prevents him from feeling the “lows,” and he gets disoriented. These symptoms were confirmed by the evidence of his wife, Cathy Inglis, who described unfocused conversation, falling down, becoming angry, resisting offers of assistance, staggering or stumbling and losing alertness, as well as episodes of what she described as “silly” behaviour on an almost weekly basis. She also described a seizure Mr. Inglis experienced while asleep, which required her to call paramedics.

[9] Mr. Inglis passed out at work once in 1987, but worked full-time until 1996. On August 9, 1996, he passed out at work due to hypoglycaemia and was taken to the emergency room. Since then he has never returned to full-time or part-time work. He has done what might be called odd jobs, mainly assisting friends and relatives with small plumbing projects, on his own schedule. On one of these occasions, in 2005, he appears to have experienced an episode at his home, while on another occasion, in 2004, he became disoriented and rolled his car, apparently after becoming agitated when a friend told him she intended to have someone else do the work she initially engaged him to do.

Mr. Inglis's Condition and Maritime Life

[10] After Mr. Inglis stopped working in the summer of 1996, Dr. Malloy reported to Maritime Life in December 1996 that Mr. Inglis could not return to his job, as "due to the serious nature of hypoglycaemia and [possible] loss of consciousness it would be dangerous for Robert to work [with] machinery, at heights ... or work alone. Retraining for sedentary job the best option." Mr. Inglis applied for LTD benefits, which commenced after the elimination period, on January 8, 1997.

[11] On June 26, 1997, Dr. Malloy reported to the LTD Plan that she considered the plaintiff to be disabled from any occupation. He was suffering from diabetes, hypothyroidism (which was stable with medication), carpal tunnel syndrome in his right hand, chronic stress and anxiety (particularly in relation to his then 14-year-old daughter who was blind and suffering from autism; she was "combative and extremely violent"), as well as chronic fatigue and possible diabetic retinopathy. Dr. Malloy wrote that in her view the plaintiff suffered from "a disability which is severe and will be prolonged (life-long). His diabetes and complications will unfortunately worsen with time."

[12] The LTD rehabilitation coordinator, Shelley Gallant, discussed the safety concerns raised by Mr. Inglis's medical condition, and the possibility of re-employment, in an "Initial Rehabilitation Memorandum" dated November 25, 1997. She wrote that Dr. Malloy did not believe he would be able to return to his old job, "given the requirement to work alone, in extreme temperatures and awkward places/positions," but that consideration of alternate employment should be feasible "once he has become stabilized for an extended period of time (possibly 6 months to one year)…."

[13] In 1998 the plaintiff consulted a psychologist, Dr. Myles Genest, on a referral from Ms. Gallant. In a report to the defendant, dated February 9, 1998, Dr. Genest recommended against vocational rehabilitation and counselling for a return to work at that time, due to the plaintiff's emotional state, which arose from the uncertainties raised by his physical health, as well as from the stress of dealing with his 15-year old daughter, whose behaviour was "extremely disruptive and violent." Dr. Genest added that "Mr. Inglis is a highly motivated individual who will be eager to work on ways of returning to work when it becomes realistic for him." Dr. Genest added that the plaintiff needed psychological support, due to his difficulty with discussing his stress and emotional state with his wife. In a further report, dated June 4, 1998, Dr. Genest wrote:

> Mr. Inglis is suffering from an Adjustment Disorder with Anxiety (309.24). The primary stressors are his physical illnesses and the problems with his daughter's illness. Secondary to these are issues concerning career, finances, and ongoing negotiations and conflict with institutions such as provincial social services, Canada Pension and insurance carriers.
>
> In addition to the psychological condition noted above, Mr. Inglis has been diagnosed with insulin dependent diabetes mellitus, which remained unstable despite aggressive treatment and Mr. Inglis's good compliance; hypothyroidism; carpal tunnel syndrome in his right hand; frequent balanitis; frequent uri's; and diabetic retinopathy; which altogether are complete [*sic*] disabling for him.

[14] Dr. Genest went on to comment on the possibility of a return to work:

> ... [T]he data that are available to me suggest that Mr. Inglis should be considered permanently disabled. He may be able to return to work if and when his diabetes is stabilized, but during the time that I saw him and from the medical reports I reviewed, there was no indication that this was likely to happen at any time soon. As a result, it is not possible to anticipate any date when return to work is possible, and according to your criteria that would suggest a permanent disability.
>
> The stress Mr. Inglis experiences, from multiple causes, was sufficient to interfere significantly with his daily functioning. The sources of this stress include the chronic instability of his diabetes; the severe, aggressive and disruptive behaviours of his blind and autistic daughter, with which he and his wife [have] to cope daily; a high level of uncertainty concerning his future health; and multiple other physical problems, partly resulting from the diabetes. This ongoing, severe stress negatively affects his physical health, as well as resulting in considerable emotional turmoil,

> anxiety, and frequent discouragement and results in his being completely disabled from productive employment.
>
> You ask about treatment plans. I had recommended and would continue to recommend continued treatment, but your company had declined to provide funding, so that further treatment is not possible at this point.

[15] Despite Dr. Genest's recommendation, and Dr. Malloy's request, Maritime Life did not fund further psychological treatment.

[16] In July 1999 the plaintiff's status under the LTD Plan moved from "own occupation" to the more stringent "any occupation" category, 30 months having passed since his benefits commenced in January 1997. The Plan advised him that his claim would be reviewed by Maritime Life, the claims administrator, in accordance with the new definition. In the Autumn of 1999, Mr. Inglis and the Department of Transportation arranged an eight-week Trial Modified Return to Work Plan. Mr. Inglis's hypoglycaemia unawareness made it necessary to place various conditions on this trial return to work. He would not be permitted to work alone, at heights, in confined spaces or in very hot or cold conditions. He would monitor his blood sugar level while working, and would attempt to avoid emotional stress. He would be partnered with a "buddy" and the plan would be explained to his co-workers. However, Mr. Inglis had developed carpal tunnel syndrome around 1996 or 1997. He underwent right carpal tunnel release surgery on October 29, 1999, and the trial return was called off.

[17] The carpal tunnel release surgery of October 1999 improved the symptoms in Mr. Inglis's right hand, but did not eliminate them. He later underwent trigger finger release surgeries in the ring fingers of both hands in 2003 and 2004. The result of the hand syndromes is that the plaintiff experienced difficulty using tools, which would often lead to numbness in his hands, particularly when his hands were elevated.

[18] The plaintiff went back to Dr. Genest at his own expense in 2000. In a report to a medical advisor at Human Resources Development Canada, dated March 14, 2000, in relation to Mr. Inglis's application for CPP benefits, Dr. Genest wrote that Mr. Inglis's adjustment disorder had progressed to Dysthymic Disorder. He also wrote that Mr. Inglis's psychological condition had deteriorated "from an acute to a more chronic condition" since June 1998, and that he was "disabled for any type of work," in view of his unstabilized diabetes and the attendant blackouts, and a chronic mood

disorder, which he wrote was "associated with continued problems with concentration that disable him from both physical and cognitive work. I can see no occupational potential for him in the future, unless the diabetes were to experience a dramatic, and thus far elusive, turnaround."

[19] On May 4, 2000, Dr. Malloy wrote to the LTD Plan to pass on recent consultation reports in respect of Mr. Inglis's carpal tunnel syndrome and diabetes. She wrote that it was necessary to determine whether he required carpal tunnel surgery on his other hand, but that otherwise he appeared to be doing well, and she hoped to see him "return to work following the gradual to work program previously outlined." On May 20, however, after reviewing Dr. Genest's March 14 report, and after seeing Mr. Inglis on May 16, Dr. Molloy wrote that it "was apparent from Dr. Genest's letter as well as from my interview with Robert that he is suffering from a depressive illness," with symptoms of "low mood, sadness, anxiety, poor self-esteem, lethargy and decreased appetite." She concluded that he was "currently unemployable." She added that Maritime Life should inform her if a psychiatric opinion were to be required, since this could take several months to obtain.

[20] Bonnie Phillips, then a disability case manager for Maritime Life, became involved with Mr. Inglis's file in the summer of 2000. She said at trial that she saw the file as a rehabilitation file, with the intention that Mr. Inglis would return to his own job.

[21] In a claimant questionnaire in June 2000, Mr. Inglis informed the defendant that he had been seeing Dr. Genest again. On August 31, 2000, Ms. Phillips requested a report from Dr. Genest on the plaintiff's "current (last 4 weeks) mental state including a description of mood symptoms, neurovegetative symptoms and cognitive function." According to the LTD Plan file, Dr. Genest left a voice mail message on September 18, 2000, indicating that he had not seen the plaintiff for some time due to his coverage for psychological treatment having run out, and suggesting that Dr. Shlossberg, his endocrinologist, provide an updated report, "since it is his diabetes that is the main factor in his disability, not his psych problem." Dr. Genest said at trial that Ms. Phillips's note of September 18, 2000, was a reasonable reflection of his view of Mr. Inglis's condition. The diabetes was a major factor, and he believed this should be established with the insurer. He added, however, that Mr. Inglis had serious psychological difficulties that would not allow him to work.

[22] In a subsequent file note dated October 17, 2000, Ms. Phillips wrote that she had reviewed the claim again in light of Dr. Genest's remarks, and said, "I cannot see why his diabetes is enough to disable him...." She wrote to Dr. Malloy, stating that Dr. Genest "informed us that he hasn't seen Mr. Inglis in awhile, and that he felt his disability was due to his diabetes, not his psychological condition." She added that Mr. Inglis had been "ready for a return to work earlier this year until he approached you about his psychological symptoms and was then referred for counselling. As we still have no documentation that Mr. Inglis is suffering from a disabling psychiatric illness, we have to assume that we are back to looking at a return to work for him in the near future."

[23] Dr. Genest said at trial that Ms. Phillips's note of October 17, 2000, indicating that Mr. Inglis's disability was "due to his diabetes, not his psychological condition," did not reflect his view. He said he had no recollection of providing a report that would lead to this conclusion. He said he regarded diabetes as a main factor, but not the only one, and added that it was not his view at any time that psychological factors did not play a role. He noted that Ms. Phillips's note to Dr. Malloy did not mention that funding for Mr. Inglis's psychological treatment had been terminated.

[24] Dr. Malloy responded, on October 26, 2000, that Mr. Inglis had "recently seen plastics regarding his right carpal tunnel syndrome. Depending on the treatment necessary and recovery time I feel he will be able to return to work. However, I am not sure if this is satisfactory to his employer?" In a file note dated October 31, Ms. Phillips referred to Dr. Malloy's letter and commented that "[s]he did not provide any info except that he was recently reviewed by plastics with regards to his CTS, but did not provide any further info on that. She questioned the employer's satisfaction in this. I'm not sure what she is implying, except whether or not he will have a job to return to since he's beyond his COD." There followed a notation saying, "1) Check with DOT to see if they are willing to take him back upon recovery from CTS. No med on file to indicate disability due to any other causes at this time. 2) Call claimant re: plan for Rt CTS surgery? Who did he see? Request report(s) from specialist. 3) Refer to rehab if not getting surgery, or recovered enough from surgery to participate."

[25] According to Ms. Phillips's notes of a phone conversation with the plaintiff on November 1, 2000, he told her that the source of his disability was diabetes, not carpal tunnel syndrome. She noted that "Mr. Inglis doesn't feel he can work because of the time constraints for treating his diabetes, and he has passed out a couple of times, he wanted to know what employer would hire him and allow him to miss time for many

medical [appointments]. He said DOT didn't want him back for this reason." She noted that there was no "recent" information on the plaintiff's diabetes from Dr. Shlossberg, his endocrinologist, whom she wrote to that day. In the letter to Dr. Shlossberg, she wrote that Mr. Inglis's claim was "being reviewed to determine if he meets the definition of disability from any occupation, not just his occupation as a plumber." (Emphasis in original). She added that he was "very young at 39 and has been off work for four years now. We are ready to proceed with Rehabilitation towards other work that Mr. Inglis would be capable of performing." Noting that Mr. Inglis attributed his disability to diabetes, she asked for a description of "any complications resulting from Mr. Inglis's diabetes currently, if any, and the related treatment and prognosis." Ms. Phillips requested Dr. Shlossberg's view of "any complications resulting from Mr. Inglis' diabetes currently, if any, and the related treatment and prognosis," as well as "any medical contraindications" for his participation in a rehabilitation program, including vocational training. She also inquired about any medical restrictions on his ability to work generally, including particular occupations that his illness might exclude. Dr. Shlossberg answered, on November 15, 2000:

> His current diabetic complications are those of background retinopathy and hypoglycemia unawareness. The retinopathy may progress gradually over a number of years, but this can be usually well-controlled with laser therapy....
>
> The hypoglycemia unawareness is more problematic. He has had severe reactions in the past for which he required assistance to recover. He has been working diligently at his diabetes control, with a significant improvement in this over the past year. When I last saw him in August, he had not had any recurrence of severe hypoglycemic reactions since the spring. Although these reactions certainly do not preclude him from working, he should probably not work in situations where such reactions would put him or his co-workers at serious risk. It is difficult to specify these situations and particular occupations that should be avoided. These would have to be considered on a case by case basis and with regard to his ongoing diabetes control.
>
> There are no medical contraindications to Mr. Inglis participating in a rehabilitation program.

[26] According to the file notes, Ms. Phillips wrote to the Department of Transportation, the plaintiff's employer, on November 16, 2000, stating, "I got the green light from his specialist to start rehab," and inquiring about job availability. In a referral to Shelley Gallant, the rehabilitation specialist, on November 30, Ms.

Phillips wrote that the plaintiff's file had been "referred once again based on recent medical information supporting his return to work.... Should re-employment not be possible with his previous Employer, alternate employment within or outside government will need to be explored."

[27] Mr. Inglis met with Ms. Gallant on January 23, 2001. A note dated February 22, 2001, indicated that Ms. Gallant's impression from this discussion was that the plaintiff remained "focused on his disability" and that he questioned his employability on that basis. The note continued:

> Given the length of time this claimant has been off as well as the reported unpredictability of his illness, it is felt a very gradual program will be necessary to ensure he is assessed appropriately in terms of his disability to actively pursue a rehabilitation program.
>
> At this time, medical information supports rehabilitative efforts and therefore, it is felt it is very worthwhile to commence the assessment phase of the process.

[28] The note indicated that Ms. Gallant had referred Mr. Inglis to Career Discovery, a career consulting company, for a vocational assessment and transferable skills analysis. She had "reassured Mr. Inglis that this is assessment only and that the process would move gradually to allow him time to adjust to any changes which would be necessary." It also indicated that Mr. Inglis had agreed to complete a home-based GED program. After the vocational assessment, Ms. Gallant would meet with Mr. Inglis again in order to develop a strategy for return-to-work. The note concluded, "[i]t should be clear, however, that, given the time off work, the reported unpredictability of his illness, as well as his fears around his disability, this will be a very gradual process."

[29] The plaintiff participated in a Vocational Assessment and Transferable Skills Analysis. According to a note on April 11, 2001, Mr. Inglis's "very specific working experiences", along with "limiting criteria in terms of the physical nature of positions, as well as the fact that he does not have a Grade 12 equivalence," indicated that his "current skill set would allow for an easy transfer to alternate occupations. A suggestion of "Supervisor of Plumbers" was made as an option; however, once again completion of his GED was strongly recommended and considered critical. Other suggestions were made; however, many required physical stamina and endurance which may be difficult for Mr. Inglis." A note to the LTD Plan file, dated April 24,

2001, indicated that after Mr. Inglis wrote the exam in June, it would be necessary to explore training options. He never wrote the GED exam.

[30] Dr. Shlossberg, Mr. Inglis's endocrinologist at the time, reported to Dr. Malloy on May 17, 2001, that Mr. Inglis was experiencing "a few low blood glucose levels, but he has hypoglycemia unawareness and his lows are usually unaccompanied by symptoms.... Mr. Inglis saw Dr. Shlossberg again on August 22. Dr. Shlossberg reported that he had "occasional mild symptoms of hypoglycaemia and he seems to recognize these better than in the past...." Noting that he was closing his own office practice, Dr. Shlossberg stated that the plaintiff should see a diabetes specialist at least once annually.

[31] In 2001 Mr. Inglis again attempted to arrange a trial return to work. Dr. Malloy provided a note dated October 9, stating, "I feel Robert would be capable of returning to his work as a plumber with his previous employer. However, he is aware that he cannot and should not work alone." He also consulted legal counsel for assistance in arranging a trial work period with the Province. According to the LTD Plan file, Mr. Inglis met with Ms. Gallant, the rehabilitation specialist, and made reference to the 1999 return to work plan that had not gone forward. Ms. Gallant reported to Ms. Phillips on November 22, 2001, making the following remarks:

> ... I explained that it was our understanding from the medical that he was unable to return there [to his previous employment] but his argument is that no-one ever gave him a chance. After this noted meeting, he had carpal tunnel surgery and he says he has never heard from his ER again or since then.
>
> He still wants to try and that is why he hired a lawyer – to determine his rights to accommodation and them taking him back. I suggested a couple of things to him. Firstly, he is calling Dr. Shlossberg to obtain medical supporting him in a trial of work as a plumber.... I have [agreed] to arranging a meeting ... to discuss the potential for a placement. If the answer is no, then Robert plans to take action further with his lawyer. I explained that if that happens – worst case scenario – he would still be required by the contract to actively participate in a rehabilitation program. He understood this.
>
> Robert continues to have significant fluctuations with his sugars. This may be a situation where we need to look at assisting him in attaining even part time work in some capacity – to mitigate his LTD and offset his benefits. However, given his tolerance for activity is unclear, this will need to be confirmed either way....

> I believe that Robert is fearful of loss of benefits and the financial stress this will have on his family. Once consideration was given to alternate employers, etc, he started thinking about his options and he believes that returning to government is his best one, given the benefits, his pension etc. and that is why he is willing to try a return....

[32] The plaintiff sought approval for a return to work trial from Dr. Shlossberg. In a letter dated November 27, 2001, Dr. Shlossberg referred to his last meeting with Mr. Inglis, on August 22, and stated that "I gather he has continued to do quite well since then with no severe episodes of hypoglycaemia." He expressed the view that it was "quite reasonable for him to try to resume work again. He has been very attentive to his health care and he understands well how to make adjustments in his insulin schedule to avoid both hyper and hypoglycaemia."

[33] In January 2002 Bonnie Phillips noted to the LTD Plan file a conversation with Dale Rushton Gouthro of the Department of Transportation Human Resources division, who had (she wrote) stated that a letter from the plaintiff's lawyer, dated November 6, 2001, indicated that the plaintiff "is capable of returning to work in his own job.... She said that they will be responding and informing the lawyer that his 30 [months] have gone by long ago, and he has no job to return to.... I'm not sure that the lawyer realizes what he is saying (ie. claimant is not disabled)."

[34] On receiving a copy of the letter from the Department, Ms. Phillips discussed it with Ms. Gallant. Ms. Phillips noted in the file that they agreed that the plaintiff "does not need to pursue alternate occ's if he's been cleared to work as a plumber. The only restriction was working alone, so I would have to find out if there are plumber jobs where he would not be working alone." After noting her intention to seek medical reports from Dr. Malloy and to discuss the claim with a team leader, Ms. Phillips concluded, "[m]y feeling is, as he is cleared for his own occ, he will not be on LTD much longer."

[35] On February 6, 2002, Ms. Phillips e-mailed Marilyn Robinson of Occupational Health at the Department of Transportation, who had inquired as to whether the plaintiff could return to work. Ms. Phillips indicated that such advice could only come from a doctor, but that the question of whether he met the definition of disability and qualified for benefits was under consideration. She stated that she was requesting the family doctor's report and the specialist's report referred to by the plaintiff's lawyer in his letter of November 1, 2001. This letter was, she said, "the first we heard about

him being cleared for his own occ again. Once we have the actual medical reports on file clearing him to return to his occupation as a plumber, he will likely be closed fairly soon." She requested from Dr. Malloy – and received – copies of the August 23, 2001, report from Dr. Shlossberg and the October 9, 2001, note from Dr. Malloy, there being the two documents referred to in Mr. Inglis's lawyer's letter of November 6. She did not mention Dr. Shlossberg's report of May 17, 2001.

[36] On seeing Ms. Phillips's message of February 6, 2002, Dale Rushton e-mailed Marilyn Robinson, expressing concern "over this entire event. It would seem to me that it would be the responsibility of the insurance company to be the first, and only, to advise an employer that he/she is able to return to work – whether it is with limitations or not. And if I was Bonnie, I would be a little more concerned over this event. Why should we be seeking his lawyer out to ask for the reports that his insurance company – who is paying him – should have." She suggested doing nothing until they heard from Ms. Phillips again. Ms. Robinson responded with her agreement.

[37] Shelley Gallant filed a "closure report" in respect of the plaintiff's rehabilitation efforts on February 13, 2002, stating that the claimant was pursuing "legal issues with employer with respect to RTW," that medical reports supported "return to own occupation" but that "[r]eportedly he has restriction of an inability to work alone," and that "the CM" – that is, Bonnie Phillips – had "requested closure of the rehabilitation file at this time." Ms. Phillips noted in the file on February 15 that she intended to contact the plaintiff's lawyer "to explain the implications of this info on his LTD Claim. We will definitely be looking at closure of benefits. He is in his any occ period, and has been cleared to work as a plumber, an occupation he has done for years, so rehab is no longer needed." On February 18 she noted that she had informed the plaintiff's lawyer that "now we have medical clearance for Robert to return to work as a plumber, his claim will be coming to an end."

[38] Ms. Gallant sent Ms. Phillips an e-mail on February 19, 2002, after receiving a message from Mr. Inglis inquiring about the process for his termination, which "after our conversation in December" he understood "would be smooth." Requesting that Ms. Phillips speak to her before calling Mr. Inglis, Ms. Gallant went on:

> As you know, I advised him that I would call OHS to see if they would meet with us in order to determine their ability to accommodate a WORK TRIAL. I had recommended he obtain medical supporting a TRIAL as we did not have medical

> supporting him in doing this and that we would need this given the info had been contrary up to this point. (Which is when I called Marilyn and this all started with the lawyer becoming involved)
>
> I suggested that we would look at other options if this did not work – again indicating that the medical we had on file did not support him in a return to his plumbing position and therefore we would be looking at any occ ... and preparing him for that.
>
> It would seem he requested his physician provide medical information to allow him to return; however, he did not specify for a work trial....
>
> At any rate, even if he does have a "medical clearance" to return, given he has been off for several years (5.5), it would be strongly recommended, from a rehabilitation perspective that he return gradually and be provided a reasonable period of time in which to do this.

[39] On March 11, 2002, Ms. Phillips made notes of a March 8 meeting with the plaintiff, his lawyer and Ms. Gallant. She wrote that "We explained that we can assist him to some extent towards working with the employer to have him accommodated back to work with the [government]," but this assistance "would be time-limited because he is no longer considered totally disabled after receiving medical clearance to [return to work]." She went on:

> We need to clarify with Dr Malloy whether we are just looking at a RTW trial, to see if medically Mr. Inglis can tolerate the demands of his own occ, and also clarify why she noted that he should not work alone. Mr. Inglis agreed that he is alone at home, so his understanding was that because of the conditions of his employment, eg. heights and high temperatures, etc, that Dr. Malloy felt during the ease back program, he should have someone around. However, he did point out that he did not think it would be a problem, as he has worked for many years in these conditions with his diabetes without any problems.
>
> The plan is to refer the file back to rehab, and Shelley Gallant will arrange a meeting with the claimant and Dr Malloy to discuss any medical restrictions for RTW.

[40] The plaintiff met with Dr. Shirl Gee, his new endocrinologist after the retirement of Dr. Shlossberg, on March 6, 2002. Dr. Gee reported to Dr. Malloy that the plaintiff "states that he generally has an episode of hypoglycaemia every second day. It also sounds like he may be developing some hypoglycaemia unawareness. He states once a month he has a hypoglycaemic episode where he may need help from

others around him," usually when he had not eaten. He also reported difficulty regulating his sugars after exercise. Dr. Gee never received a request from the defendant to comment on Mr. Inglis's condition. She agreed that she did not inform Maritime Life that she was treating him. Bonnie Phillips indicated at trial that she had not been aware that Dr. Gee was Mr. Inglis's new endocrinologist. She also confirmed, however, that there was never a request from Maritime Life for a report from Dr. Schlossberg as to whether it would be prudent for Mr. Inglis to return to work as a plumber, and no requests for a report from Dr. Genest in 2002, because she did not believe the depressive illness was an issue at that time.

[41] Shelley Gallant met with Dr. Malloy on April 11, 2002, although the plaintiff was not present, apparently due to a confusion of the dates. Ms. Gallant wrote to Dr. Malloy on May 23, recounting the meeting, which had the purpose of reviewing Mr. Inglis's "medical status in relation to his ability to participate in a rehabilitation program focused on a return to work in his occupation as Plumber," in view of Dr. Malloy's note of October 9, 2001. Ms. Gallant wrote:

> ... You once again confirmed Robert's ability to return to his occupation as a Plumber and suggested your concern regarding him being alone was related to the need for him to be alone for "hours", which may put him at risk if he were to experience an episode while working. I explained that Robert had confirmed the employees rarely work alone and when they do it is for short durations. You were pleased with this. You indicated you do not feel Robert requires constant monitoring.
>
> We also discussed the climbing requirement of the position and suggested that Robert check his blood prior to climbing and once again if he has to be on a ladder for an extended period of time. You suggested safety harnesses would be an asset and I confirmed this may requirement under Occupational Health and Safety, but that I could certainly explore this further.
>
> You concurred that an 8-week gradual return to work program would be appropriate.

[42] On June 20, 2002, the plaintiff's solicitor wrote to Ms. Phillips and suggested a meeting with the employer to discuss a return to work. He noted Dr. Malloy's comments, as set out in Ms. Gallant's May 23 letter, approving an eight-week gradual return to work program. On June 27, Ms. Phillips noted this request in the LTD Plan file, and wrote that, on the basis of the medical information available since Ms. Gallant's meeting with Dr. Malloy, and information on accommodation procedures obtained from Dale Rushton, she intended to give Mr. Inglis "a time frame for claim

closure," and to refrain from involvement in any discussions regarding accommodation with the employer. She wrote that, based on the information on file, Mr. Inglis could return to work in his own occupation, "even though he is in the any occ phase. Therefore, there is no further rehab necessary, it is now an issue of job availability, which the LTD Plan does not insure against."

[43] Maritime Life notified Mr. Inglis of the termination of his LTD benefits by letter dated July 5, 2002. In the letter, Ms. Phillips wrote:

> ... Based on the medical evidence on file at this time, there is no evidence to support that you are totally disabled from your own or any occupation. We understand that diagnoses of Depression and Carpal Tunnel Syndrome (CTS) had arisen during your LTD claim. However, the medical evidence supports that your depressive episode has resolved, and there is no evidence on file to support that your CTS would totally disable you from working in any occupation. The most recent evidence regarding your diabetes indicates that your illness is now stable and that it would not prevent you from returning to work at this time.
>
> Based on the current information on file, there is no medical evidence to support that you meet the definition of disability under the LTD Plan document as defined above, therefore, you are no longer entitled to receive LTD benefits. Your rehabilitation program has been completed as you elected not to pursue your GED, and instead chose to pursue accommodation with your previous employer with a goal of returning to your own occupation. As you are medically able to return to your own occupation, further rehabilitation services are not necessary.

[44] Ms. Phillips added, "[s]hould you feel you are disabled due to a psychiatric illness, you must provide us with a report from the psychiatrist who will be treating you."

[45] On August 19, 2002, Dr. Malloy wrote a letter "to whom it may concern" stating that the plaintiff "is capable of returning to work immediately to any job that is available. I feel he requires an eight week trial of employment to determine whether or not he will be able to return to full duties on a permanent basis. If not he may require a return to LTD." In response, in a letter to the plaintiff on September 13, Ms. Phillips indicated that both Dr. Malloy and Dr. Shlossberg had cleared him to return to work "and did not cite any medical contraindications for doing so. The only issue Dr. Malloy indicated previously was your ability to work alone. After Ms. Gallant's meeting with Dr Malloy, this issue was resolved." She continued, "[i]n reviewing this most recent medical report in light of the previous medical reports on file from both

Dr Malloy and Dr Shlossberg [sic], it is noted that there are no medical restrictions provided that support that an eight week trial of return to work is medically necessary. While we respect your doctor's opinion, we still need to be able to justify that the medical evidence supports the necessity of this recommendation."

EXPERT EVIDENCE

Dr. Shirl Gee

[46] Dr. Shirl Gee, the plaintiff's present endocrinologist, is on the staff of the Department of Endocrinology and Metabolism at the Queen Elizabeth II Health Sciences Centre in Halifax. In an expert's report dated April 12, 2006, Dr. Gee described Mr. Inglis as a "brittle diabetic," with "overall control" that was "good to excellent," but experiencing "wide excursions of his glucose." She stated at trial that Mr. Inglis's sugars would vary from 2 to 20, while a normal non-diabetic variation would be from 4 to 6. She went on:

> He has episodes of significant hypoglycemia (readings less than 3.0) two to four times a week, which could be considered moderate in frequency. He has some hypoglycaemia unawareness. This is the loss of early symptoms of hypoglycemia (e.g. sweating and palpitations). If patients develop this they are at risk of progressing to more serious hypoglycemia and becoming confused and unable to properly treat the hypoglycemia.... Serious hypoglycemia is a medical emergency that if left untreated can result in serious morbidity (e.g. seizure, coma) or even death. Mr. Inglis has stated in his visits that he has not experienced episodes of confusion related to serious hypoglycemia. Nevertheless he has had an episode of serious hypoglycemia in December 2004 where he suffered a seizure that was related to hypoglycemia. His wife called the paramedics for assistance.

[47] Noting that fluctuating sugars require "brittle diabetics" to maintain a regular schedule of meals and activity levels, Dr. Gee offered the opinion that work entailing "heavy physical labour, frequent changes in activity levels, and work with emotional stress" would make it more difficult for the plaintiff to control his blood sugar and would "result in greater fluctuations in sugars (both high and low)." She expressed the concern that the plaintiff's hypoglycaemia unawareness raised the risk of "an episode of serious hypoglycaemia" in his line of work. Such an event, she wrote, "would represent a significant hazard to himself and possibly to his co-workers if he were to become significantly confused."

[48] At counsel's request, Dr. Gee made certain clarifications in a further letter dated April 10, 2007, shortly after meeting with Mr. Inglis and his wife on April 3. Commenting on whether the required treatment for significant hypoglycaemia involved limitations on activity or limitations on capacity for activity, Dr. Gee wrote:

> ... In essence the goal is to obtain good glycemic control while avoiding significant hypoglycaemia (moderate to severe hypoglycaemia). Physical exertion or stress (e.g. running, climbing, heavy lifting) can precipitate hypoglycemia. Frequent changes in activity levels are especially difficult for diabetics as they can result in fluctuations in sugars that cannot be managed very well with dietary nor insulin manipulation. Decreasing the amount of physical exertion or stress can help decrease the risk of developing hypoglycaemia. If [Mr. Inglis] were to be involved in physical labour it would be prudent for him not to work alone.

[49] In a further update, dated October 13, 2008, Dr. Gee confirmed that in her view it was probably reasonably prudent for Mr. Inglis to comply with the following limitations: not working alone; not working in locations or conditions where confusion would be dangerous to him or others, such as heights, ladders, scaffolding, confined spaces and driving a vehicle or heavy equipment; not working in conditions where his physical activity and physical stresses "will vary from hour to hour and from day to day, often unpredictably;" and not working in conditions involving significant emotional stress. Based on her treatment of Mr. Inglis since March 6, 2002, and on a review of his prior medical records, she also took the view that it had probably been reasonably prudent for him to comply with these limitations since August 9, 1996.

[50] At trial, Dr. Gee repeated that variability in sugar levels could be caused by biological or physical stress, such as heat in a boiler room, as well as emotional stress. It could also be caused by significant exercise or variable activity through the day without having regular breaks to eat. She said a sugar level below 3 constitutes significant hypogylcemia. Blood sugar at that level can cause confusion, irritability, garbled speech, loss of vision, balance and awareness, as well as possible unconsciousness and, in extreme cases, can lead to death. There are functional and behavioural problems associated with hypoglycaemia, and particularly where the person has hypoglycaemia unawareness and cannot recognize the symptoms of low blood sugar. Those symptoms include sweating, shaking, hunger and anxiety. After these early warning symptoms, advanced symptoms will appear, such as confusion, loss of balance and loss of consciousness.

[51] Dr. Gee said Mr. Inglis was taking a “short-acting” insulin, which acts fast, within about 10-15 minutes. He took the short-acting insulin before meals, adjusting the dose based on his blood sugar reading and on his planned activities. Its effect would dissipate after about four hours. He also took a long-acting insulin to deal with longer-term blood sugar patterns. It takes about 90 minutes to take effect. He took the long-acting insulin twice a day, before breakfast and before going to bed.

[52] Dr. Gee said an insulin-dependent diabetic should attempt to control his blood sugar levels by avoiding large amounts of food at one time, testing sugar levels and adjusting insulin doses through the day. Hypoglycemia can occur quickly and without warning, and a diabetic should respond as quickly as possible to symptoms.

[53] Dr. Gee agreed that diabetes is not usually disabling, and that managing diabetes can permit a person to live a relatively normal life. In Mr. Inglis’s case, she agreed that frequent blood sugar testing at work could tell the plaintiff if his level was low, but added that it could not prevent it from becoming low, which could happen quickly. She added that he would be in greater danger working on a ladder. If he became confused by hypoglycaemia, he would need assistance. By contrast, at home he was in a more controlled setting, although she was concerned about him being alone for hours at a time, even at home. Dr. Gee confirmed that nothing had come to her attention to change her opinion as expressed in her reports.

Dr. Valerie Boswell

[54] Dr. Boswell was qualified as an expert in family medicine, qualified to provide opinion evidence on diabetes, the treatment of diabetes, the medical medical management of diabetes and the risks of diabetes.

[55] Maritime Life provided a report by Dr. Valerie Boswell, who was the insurer's medical consultant in 2002. She was asked at that time whether the medical information on file supported the conclusion that Mr. Inglis was capable of returning to his previous position as a plumber for the Department of Transportation. The materials available to her were a 1999 job site analysis and the medical reports in Mr. Inglis's Maritime Life file in August 2002, when she provided an opinion to the company. Specifically, she wrote, the material available to her was Dr. Shlossberg's letters of August 23 and November 27, 2001, and Dr. Malloy's note of August 19, 2002. Based on these materials, she formed the opinion (affirmed in her April 2009 report) that Mr. Inglis "was cleared by his health care providers to return to his previous place of employment as a plumber.... There was no occupation restriction being recommended for Mr. Inglis on the Maritime Life file at that time."

[56] In her 2009 report, Dr. Boswell addressed Dr. Gee's opinion in her letter of October 13, 2008, and specifically her opinion about Mr. Inglis's vocational limitations and the date that they would reasonably have arisen. Dr. Boswell noted Dr. Rowe's apparent scepticism about whether Mr. Inglis was disabled by diabetes in 1996 and 1997, and several remarks by Dr. Shlossberg in 1998 and 1999 that suggested that Mr. Inglis was under stress due to his daughter's problems, but that he appeared to effectively monitoring his hyopoglycemia. She noted the attempted return to work trial in 1999, and Dr. Malloy's agreement in 1999, 2001 and 2002 that Mr. Inglis could return to work, possibly with restrictions.

[57] On the basis of the file materials, Dr. Boswell took the view that the medical evidence did not suggest that Mr. Inglis required all of the vocational restrictions addressed by Dr. Gee since August 1996. After October 9, 2001, she wrote,

> The only restriction in place and supported by medical evidence is that of the issue of Mr. Inglis not working alone on a work site. It was not clear that this limitation was necessary by August 2002. <u>The limitations of working, between October 9, 2001, and August 29, 2002, in locations or conditions where confusion would be dangerous, in conditions where physical activity and stresses vary and in conditions</u>

> involving significant emotional stress is just not supported in medical reports from Drs. Malloy, Rowe or Shlossberg.
>
> With respect to Dr. Gee's report of March 11, 2002, she indicated that Mr. Inglis had poor glycemic control, was not following dietary restrictions and was developing hypoglycaemic unawareness. Mr. Inglis reported to her that this occurred approximately once per month, precipitated by exercise while performing and teaching the [martial] arts. On this occasion, Dr. Gee reported that his haemoglobin AIC (an indicator or long-term glycemic control) was optimal and she made no changes to his diabetic treatment regimen. Had I had the opportunity to review this report, it is more than likely that my opinion would have remained as stated in my August 29, 2002 'Medical Consultant's review' as Dr. Gee did not address Mr. Inglis' work status nor did she state that there should be any occupational restrictions placed on Mr. Inglis. There were letters on file, from Mr. Inglis' family physican and his endocrinologist (Dr. Shlossberg) which addressed return-to-work for Mr. Inglis and neither recommended vocational limitations at that time. These are what formed the basis of my opinion. [Emphasis in original.]

[58] Dr. Boswell confirmed on cross-examination that she received the file from Maritime Life on August 29, 2002, and dictated a report the same day. Her job was simply to assist the insurer in analyzing medical reports. She did not meet with Mr. Inglis. Her report was based on what was in the file provided by Maritime Life. She did not review reports by Shelley Gallant. She also did not see any reports by Dr. Gee or Dr. Genest when she prepared her report in 2002. She was not aware of the psychological consultations until she received materials to prepare for trial, nor was she aware that Dr. Genest had considered Mr. Inglis to be permanently disabled in 1998. She could not say whether she knew that he was suffering from a major depressive illness. She did not recall seeing the November 2000 correspondence between Bonnie Phillips and Dr. Schlossberg in which Dr. Schlossberg expressed concern about hypoglycaemia unawareness. She agreed that Dr. Gee, as an endocrinologist, would have more expertise than herself with diabetes, and would know more about Mr. Inglis, due to the doctor-patient relationship. Dr. Boswell's report did not address the question of whether reasonable prudence and care should have caused Mr. Inglis to desist from working as a plumber.

Dr. Myles Genest

[59] Dr. Myles Genest, the psychologist whom the plaintiff saw previously, assessed him in June 2007 and provided a report dated July 30, 2007. He was qualified as an expert in psychology, vocational aptitudes, interests and intelligence. Dr. Genest

concluded in his report that, while he had diagnosed Mr. Inglis in 2000 with Dysthymic Disorder – a mood disorder – his mood had "improved somewhat" since then, partly due to the reduction in stress when his autistic daughter entered a small options home. He concluded that "although Mr. Inglis suffers from moderate symptoms of depression, the particular symptoms and persistence of these are not sufficiently severe to meet criteria for Dysthymic Disorder. Nevertheless, his mood is frequently low and he does have some thoughts of suicide, among other depressive characteristics." He did, however, meet the criteria for Generalized Anxiety Disorder, that is, "excessive anxiety and worry on most days, for at least six months' duration." Most of his functioning appeared to be "greatly affected negatively by his anxiety," and his distress was "clinically significant." His anxiety was associated with Posttraumatic Stress Disorder, but did not "occur solely in the context of that disorder;" similarly, Dr. Genest concluded, "although some of his symptoms may be related to his diabetes, there is also independence from the physiological impact of his diabetic dysregulation."

[60] Dr. Genest also diagnosed Mr. Inglis with Posttraumatic Stress Disorder arising from a car accident in February 2004, when he apparently went off the road due to a diabetic blackout. His symptoms were "moderate to severe" and his functioning was "moderately to severely impaired as a result.

[61] The result of an examination of the plaintiff's educational record and tests of intelligence and vocational aptitude suggested that that his strengths lay in "hands-on, visual-motor tasks." He went on to say:

> In sum, these data suggest a relatively narrow range of vocational options. Practical, hands-on activities, involving visual-motor skills are the most likely possibilities, with plumbing being a clear direction suggested.... He is most likely to succeed in areas that involve minimal demands beyond the skills he already has, because his current psychological status is so impaired by his emotional problems that he would have difficulty learning new things, even if he had an interest in them.

As to the range of "reasonably viable vocational rehabilitation options," Dr. Genest said:

> Without a consideration of any of the medical problems that Mr. Inglis has, the current psychological limitations are sufficient to recommend against any vocational rehabilitation efforts at this time. They would tax him severely and are unlikely to be successful. Because he has difficulty focussing, suffers from considerable anxiety

> and agitation, is quite distractible and often confused, and becomes quite despondent at times, he is unlikely to be able to complete significant training.
>
> When one takes into account the medical limitations in Schedule D, it would appear that there are few vocational options or vocational-rehabilitation options open to him because he is unable to work in most work environments that involve construction and the hazards of a construction site, is unable to work in conditions where physical activity and stressors will vary within or between days, and should not work in conditions involving repeated hand-movements.

[62] Upon a review of the work demands for Mr. Inglis's "own occupation as a plumber," Dr. Genest's opinion was that Mr. Inglis "is unable and has been unable for several years and to a substantial degree to perform the major functions of his own occupation as a plumber...." As to the duration of Mr. Inglis's disability, he noted that he had formed the same opinion in 1998 and again in 2000, and had not expected Mr. Inglis to recover quickly from his depressive and anxiety symptoms. He believed it was likely "that he has remained sufficiently impaired that [he] was unable to a substantial degree to perform the major functions of his own occupation throughout this period." He noted that the PTSD arising from the car accident had caused further impairment, but it was likely that he would recover from the PTSD with appropriate psychological treatment. However, "even if the PTSD were to be completely ameliorated, the anxiety and discouragement that have been partly associated with the diabetic problems have been with him long enough that they are unlikely to resolve sufficiently for him to return to work." It was "not probable" that Mr. Inglis would "recover sufficiently that the psychological limitations to his vocational and rehabilitation options will disappear."

[63] Dr. Genest also considered whether Mr. Inglis was unable to a substantial degree to perform the major functions of all other occupations reasonable comparable to his own in terms of income and reasonable suitable in work activities in terms of his education, training and work experience (either existing or obtainable by reasonably viable vocational rehabilitation). He observed:

> ... Mr. Inglis is most suited to practical, hands-on activities, practical problem-solving, working with things more than people, and ... his ability to learn new skills is currently severely limited by his psychological state. I find it hard to imagine that any vocational options satisfying these requirements would be accessible to Mr. Inglis, because the same difficulties would apply to his work in other areas as apply to his work in plumbing. That is low mood, agitation, difficulty focusing, anxiety,

> distractibility and confusion would likely also interfere with occupations other than plumbing.
>
> ....
>
> It is difficult, therefore, to conceive of any occupational possibilities that would be open to him, given his functional limitations. Most occupations, whether they involve primarily physical or mental work, require focus, attention, generally clear-headedness and relative calm, whereas, as I have observed, Mr. Inglis's mood fluctuations, agitation, difficulty focussing, anxiety, distractibility and confusion do not provide these conditions.

[64] Dr. Genest concluded that the limitations had existed since at least 1998, when he first saw Mr. Inglis, and may have existed before that. He took the view that Mr. Inglis's anxiety "is strongly exacerbated by his concern about the safety of himself and others," and that reasonable prudence and care demanded that he "desist from his own occupation as a plumber in order to control the symptoms of, or to avoid aggravating, his psychological or mental conditions." The same considerations, he opined, required the plaintiff to "desist from all other occupations...." His emotional state was "influenced by the degree of stress that he experiences," and to add "additional demands for work or vocational rehabilitation" would likely aggravate the emotional problems. Further, he wrote, "[c]hronic diseases, such as diabetes, are also known to be influenced by emotional well-being, so additional stress and anxiety could exacerbate his diabetes, which is already brittle."

THE LAW

[65] In *Fraser v. Maritime Life Assurance Co.* (1974), 52 D.L.R. (3d) 204, 19 N.S.R. (2d) 412, [1974] N.S.J. No. 35 (S.C.T.D.), the plaintiff insured sought payment of benefits from the defendant insurer under a group insurance policy. The insurer had accepted that the plaintiff was totally disabled. The plaintiff subsequently took on some employment, and the insurer adjusted his payments. Subsequently, on an application to train for the ministry, he indicated that he was in good health. The insurer later decided that he was no longer totally disabled and discontinued his benefits. The policy required, *inter alia*, that "[w]ritten proof of the continuance of such disability must be furnished the Insurer at such intervals as it may reasonably require." Dubinsky J. said, at para. 11:

> The plaintiff having established that he was entitled to total disability benefits under the policy and the defendant having recognized this by having made payments to him, I hold that the onus is upon the insurance company to show that he has ceased to be entitled thereto. I feel that I am safe in this view and, indeed, it has been acknowledged by counsel for the defendant. I might, however, make reference to *Blackstone v. Mutual Life Insurance Co. of New York*, [1945] 1 D.L.R. 165, where Hogg, J., said at p. 171:
>
> > I have therefore concluded that the onus rests upon the defendant to show that the plaintiff in so far as any right he may have under the first six policies, is not suffering from any impairment of mind or body which continuously renders it impossible for him to follow a gainful occupation, and with respect to the last three policies that the plaintiff is not totally disabled as a result of disease or bodily injury so as to be incapable of engaging in any occupation for remuneration or profit.

[66] At trial, the plaintiff was supported by medical witnesses, and the defendant was not. Dubinsky J. held that the insurer must restore the plaintiff's benefits until he was no longer totally disabled.

[67] In *Sucharov v. Paul Revere Life Insurance Co.* (1981), 131 D.L.R. (3d) 379, 1981 CarswellMan 368 (Man. C.A.), Hall J.A. said, for the majority, at paras. 35-36:

> The main thrust of the argument advanced by counsel for the insurer is that the sickness of the insured did not completely prevent him from engaging in his insurance business. He could sell insurance, make phone calls and attend to bookkeeping. Therefore, he was not totally disabled. In my opinion, that argument fails for the simple reason that it is a reasonable interpretation of the insuring agreement that total disability coverage is provided when, as here, the insured is completely unable to engage in his regular business as an owner-manager of an insurance brokerage business. That he may be able to carry on some of the tasks of running that business in no way detracts from the essential point that for the period in question, he was completely unable to perform the whole of his regular occupation.
>
> Here as in so many other cases a line must be drawn, with the right to recover if the facts put the insured on one side of the line, and non-recovery if they place him on the other side of it. Where does one draw that line? I would answer that question on the basis of the insured's ability to perform his duties as owner-manager to a "substantial" degree. Not total ability but substantial ability is the test. And applying that test, and knowing that the insured's attempts to carry on as owner-manager have

> always brought on attacks of stress and nervousness bordering on hysteria, I would say that he is unable, to a substantial degree, to carry on his duties as owner-manager of his insurance business. He is entitled to recover under the policy.

The majority of the Supreme Court of Canada, *per* Laskin C.J.C., dismissed the appeal.

[68] In *Porter v. Metropolitan Life Insurance Co.* (1985), 70 N.S.R. (2d) 248, 1985 CarswellNS 115 (S.C.A.D.), the respondent insurer paid benefits to the appellant insured under a group policy and two personal policies, but stopped payment at the end of the initial disability periods, which were governed by "own occupation" provisions. At the end of that period, the insured was required to provide proof that the disability "continued until the expiration of the Initial Benefit Period and that at the expiration of the Initial Benefit Period the Employee shall have been totally disabled so as to be wholly prevented from engaging in any and every gainful occupation for which the Employee is reasonably fitted by education, training, or experience" in order to continue to receive benefits under the group policy (there was similar language in the personal policies). The trial judge held that the appellant was not disabled under the "any occupation" provisions and dismissed the appellant's claim for breach of contract.

[69] On appeal, Mathews J.A. (for the court) said it was necessary to examine the language of the contracts in order to determine whether the appellant met the burden of proof. The plaintiff argued that, having accepted that he was disabled, the burden was on the respondent to demonstrate on a balance of probabilities that he had ceased to be disabled. The court took the view that more proof would be required to meet establish total disability under the "any occupation" clause than under the "own occupation" clause. (paras. 11-13). On the basis of the wording of the policy, Mathews J.A. held that "the burden is on the insured to prove that he was disabled both under the employee's occupation and the total disability portions of the policy. There was here no shifting burden caused by the insured making payments under the policy or for any other reason" (para. 29). He emphasized that this conclusion depended on the policy wording, distinguishing cases such as Blackstone, where the policy contained a presumption that the disability was permanent, upon the relevant facts being established (paras. 15-24).

[70] It will, of course, always be the plaintiff's burden at trial to establish a breach of the policy. The plaintiff does not dispute this. As Rogers J. said in *MacEachern v.*

Co-operative Fire & Casualty Co. (1986), 75 N.S.R. (2d) 271, 1986 CarswellNS 99 (S.C.T.D.), citing *Porter*: "[t]here is no question now that the burden of proof on an insured under a disability policy rests upon the insured..." (para. 51). He also noted that definitions of such terms as "disability" and "total disability … may and often do vary from policy to policy. Therefore, it is important, particularly when reviewing the authorities, to look at the exact wording in the particular policy under review" (para. 53). The policy language "must be interpreted reasonably and not necessarily literally" (para. 54). Rogers J.A. added that "the same principles of liberal construction apply to the 'any occupation' cases as they do the 'own occupation' cases" (para. 60).

[71] In *Campbell v. Canada Life Assurance Co.* (1990), 65 Man. R. (2d) 95, 1990 CarswellMan 87 (Man. C.A.), leave to appeal refused, [1990] S.C.C.A. No. 309, Helper J.A., for the court,stated that "the onus rests upon the plaintiff to establish that the defendant is in breach of his contract of insurance by its failure since March 1986 to pay disability payments." He added, however, that "the ultimate onus rests upon the plaintiff to prove the disability but the evidentiary onus shifts after a *prima facie* case is established by the plaintiff" (para. 8). In dealing with a definition by which the insured was disabled if there was "complete inability … to engage in any and every gainful occupation for which he is reasonably fitted by education, training or experience," (para. 4) the plaintiff was "not required to prove every possible negative – that is, that he is unable to perform any and every conceivable job" (para. 9). The test to be applied "is a subjective one related to the background and condition of the insured person in question. If he is healthy enough to take up an occupation for which his background reasonably suits him, he is deemed not to be disabled" (para. 11). In *Campbell*, the plaintiff had been a manual labourer, but attempted to establish a jewellery business after he became disabled. The defendant relied on this as evidence that he could engage in "gainful employment." The court said, at paras. 13-14:

> Such an argument … fails to address the reasonable interpretation of cl. (b). "Gainful employment" cannot be read in isolation, but must be read in conjunction with the words "for which he is reasonably fitted by education, training or experience." The test is not whether it is a job within his capability, but whether it is one for which he is reasonably fitted by what he has done before. This is to be contrasted with the situation which arises if the insured were actually to become gainfully employed. Then, under the proviso, it matters not whether the occupation is one for which his background suits him.
>
> …. The insurance policy would provide meaningless coverage for any labourer in the position of the plaintiff, if it were interpreted to mean that such an insured could not

> be considered disabled because even with his limited skills, education, and training, he could perform some job unrelated to his background.

[72] The defendant cites *Conte v. Canada Life Assurance Co.*, 2005 CarswellOnt 3640, [2005] O.J. No. 3451 (Ont. Sup. Ct. J.), for the proposition that the plaintiff has the burden of proving that he is entitled to LTD benefits, on a balance of probabilities. The trial judge in *Conte* adopted the reasoning in *Porter*. Accepting that "the defendant, having paid benefits, may have an evidentiary burden to explain why benefits were terminated," the court added that "there is no presumption of continuing disability. It is the plaintiff who alleges breach of contract and it is she who has the ultimate or legal burden to prove that she is disabled from regular or modified work as described and defined in the Plan" (para. 5).

[73] In *Johnston v. Alberta School Employee Benefit Plan (Trustee of)*(1995), 172 A.R. 123, 1995 CarswellAlta 231, [1995] A.J. No. 605 (Alta. Q.B.), the plaintiff suffered from type 1 diabetes and experienced hypoglycaemia which was related to anxiety and stress. She took up part-time employment, with the insurer's approval, but her benefits were subsequently cut off and restored several times, before she was diagnosed with hypoglycaemic unawareness. Even with the resulting adjustment to her treatment, she was hospitalized at least once per year as a result of hypoglycaemia, and experienced other less serious episodes. Her physicians took the view that she could only work under strict conditions. She was able to work part-time for her husband's business. The LTD Plan required the plaintiff to prove that she was "unable to perform the duties of any occupation for which [she] is or may become suited by reason of education, training or experience" (para. 41). Mason J. said, at para. 43:

> "Total disability" defined in terms of "any occupation" or even "any reasonable occupation" interpreted literally or in the strict sense leads to an absurdity. Such interpretation effectively nullifies coverage under the policy unless an insured establishes he or she has been rendered almost helpless. The rules of interpretation and construction of contracts in insurance law require the definition of "total disability" be interpreted within the context of the coverage provided by the insurance plan. Contracts of insurance are contracts of utmost good faith on the part of both parties. This imports principles of fairness for both the insured and the insurer when interpreting disputed provisions in an insurance policy by having regard to the nature, extent and purpose of the insurance coverage provided….

Mason J. concluded, at paras. 46-49:

> I am satisfied that Mrs. Johnston has established that she was totally disabled from any occupation as defined by the policy at the time her benefits were terminated. Her testimony alone establishes she suffers from severe hypoglycemic unawareness and that despite the fact that she is exactingly committed to maintaining a proper regimen of exercise, diet and intensive testing each day, she still suffers hypoglycemic attacks without warning. Although these attacks do not occur often they are a constant threat. Nothing in Mrs. Johnston's work history since she went on the disability plan establishes a capacity on her part to work in a full-time productive occupation broadly commensurate with her position as a teacher or in any other area of commensurate endeavour.
>
> The evidence of Dr. Mehta and the assessment of Dr. Ross both establish that Mrs. Johnston is one of those unfortunate diabetics who suffers hypoglycemic unawareness which cannot be remedied by current medical knowledge. Dr. Ross described the problem as akin to a person having to walk along a very narrow cliff edge without making a mis-step. She was treated by Dr. Mehta in the very way both Dr. Ross and Dr. Ryan recommended: a relaxing of the control of her blood sugar levels to discover if she would regain some of the neurogenic symptoms of awareness and obtain improvement of her hormonal responses to hypoglycemia. Dr. Mehta found that she was one of those people discovered in the DCCT trial group that did not respond to that adjustment of treatment. Dr. Ryan's position that she permit her blood sugars to rise even further to reduce the risk of hypoglycemia does not seem warranted in my opinion. The result could be a loss of her ability to control her blood sugar levels, thereby exposing her to the more severe complications of hyperglycemia.
>
> As to her employability, I see no substantive difference between the opinions of Messrs. Schaeffer and Conway. What is obvious from the opinions of both these experts is that Mrs. Johnston is in a most difficult predicament. She is not endeavouring to hold onto a job, but rather is a person seeking to re-enter the work place in a new role. She is handicapped by restricted opportunities as to occupations and availability and even narrower personal limitations.
>
> Based on the whole of the evidence, I find Mrs. Johnston has established, on a balance of probabilities, that she is totally disabled as defined by the policy. There being no satisfactory proof to the contrary offered by the Defendants that there is a commensurate occupation she is capable of substantially performing, I declare she is entitled to the full benefits of the plan to date.

[74] In *Materi v. Confederation Life Insurance Co.*, 2001 ABCA 33, 2001 CarswellAlta 114 (Alta. C.A.), the appellant stopped working due to irritable bowel syndrome. After paying benefits for more than four years, the insurer terminated the plaintiff’s benefits on ground that there was no physical diagnosis to support her

claim. The policy wording was “unable to perform the duties of any occupation for which he is or may become suited by reason of education, training or experience.” The plaintiff claimed she was totally disabled as contemplated by the disability plan, and succeeded at trial. The Alberta Court of Appeal affirmed the decision, holding that there was an evidentiary basis upon which to find that the plaintiff was totally disabled, there being no basis upon which to displace the trial judge’s conclusion that the plaintiff’s symptoms as she reported them were real, even in the absence of objective medical tests for her condition. As to expert evidence on the respondent’s ability to work, the Court of Appeal said, at paras. 17-18:

> Only one expert testified on the respondent's ability to work, a vocational rehabilitation consultant called by the appellants. She concluded that the respondent could fill any of a number of occupations. The trial Reasons do not accept that evidence. There being no other evidence favouring the appellant on this point, the Reasons found total disability.
>
> Why did the Reasons reject the vocational consultant's evidence? Aside from some hints, these are the express reasons. The expert:
>
> 1. did not ask the right question, whether there are jobs the respondent could do despite the symptoms found in the trial Reasons (para. 61);
>
> 2. disregarded, assumed away, or reduced, the actual symptoms or disability (para. 62);
>
> 3. tried to identify the cause or suggested how to eliminate it, outside her expertise (para. 63);
>
> 4. thought employability would rely on the willingness of an employer to accommodate the disability, which is irrelevant absent evidence of an employer willing to do so (para. 64);
>
> 5. concluded that eliminating contact with the public would eliminate serious embarrassment (para. 65);
>
> 6. assumed there was a market in the respondent's town for part time bookkeeping services, without evidence (para. 66);
>
> 7. assumed part time bookkeeping would pay as much as the respondent's former job (para. 66).

[75] While not endorsing all of the trial judge's reasons for rejecting the appellant's expert, the Court of Appeal observed that the expert had been forced to make concessions on cross-examination, and found that "the core of this expert's evidence was rather abstract or theoretical. That could legitimately reduce its weight" (paras. 19-24). The trial judge was entitled to reject the evidence of the insurer's expert witness and to conclude that insured was totally disabled, principally on the strength of the evidence of "the respondent and her family physician. They say that she cannot hold any job. Furthermore, the findings of the respondent's condition permitted some legitimate inferences as to her ability or inability to carry out certain duties (in the absence of express weighty evidence to the contrary). The Reasons indicate that the trial judge drew such inferences" (para. 27).

Is the Plaintiff Disabled Under the LTD Plan?

[76] The issue in this case is whether Mr. Inglis meets the definition of disabled under the policy. The burden of proof is on the plaintiff to prove that he is disabled. That being established, he submits, the evidentiary burden rests on the defendant to establish that on September 11, 2002, the date his benefits were terminated, he could do an actual job that would pay 80 per cent of the current rate of his plumbing job. In other words, it is submitted that there is an evidentiary burden to prove that he no longer met the definition of "disabled" under the LTD Plan as of that date. Upon establishing that the defendant agreed that he was disabled under the "any occupation" provision of the LTD Plan – and paid him benefits under that provision for some three years – the plaintiff maintains that the defendant must then meet the evidentiary burden. The plaintiff's position is that it has been reasonably prudent for him to desist from working in any occupation since (and before) September 11, 2002, and that he has been unable to perform substantially all of the duties of any occupation contemplated by the LTD Plan, that is, one paying 80 per cent of what he would earn as a plumber. The principal basis for this position is the plaintiff's inability to commit to regular and continuous hours of employment.

[77] Applying the two tests for "disability" described in *Sucharov* – "reasonably prudent to desist" and "unable to perform substantially all duties" – the plaintiff submits that the "reasonably prudent" test addresses whether he should perform the duties of the occupation, in view of the requirements of reasonable prudence and care for the prolongation of life and the control of the disease. The second test, he says, addresses the question of whether he can actually do substantially all of the duties of

the occupation. He agrees that he can physically do many of the duties of a plumber some of the time; however, he submits, he cannot do substantially all of the duties of a plumber, on account of hypoglycaemia and hypoglycaemia awareness. Based on the "reasonably prudent to desist" analysis, the plaintiff submits, he could not perform the duties of a plumber or other regular full- or part-time employment, due to the constant risk of severe hypoglycaemia resulting from wide fluctuations in his blood sugar levels, combined with hypoglycaemia unawareness. The hypoglycaemia is dangerous in itself; in addition, if Mr. Inglis experiences confusion or loss of consciousness on the job, this creates further risks of injury. A further risk arises from the requirement for Mr. Inglis to control his activity and stress levels in order to control his blood sugar levels as much as possible, which can be difficult or impossible in the course of regular employment.

[78] Among the evidence supporting the conclusion that he has been disabled since September 11, 2002, the plaintiff points out that he has not worked as a plumber or in any other regular employment since 1996; that he has been receiving CPP benefits on the basis that he is "incapable regularly of pursuing any substantially gainful occupation" since 1998; that his type 1 diabetes is a progressive disease that will not resolve; that Dr. Gee took the view that his condition of hypoglycaemia unawareness has likely been permanent and irreversible since 1997; that hypoglycaemia unawareness is dangerous in itself, leading to confusion, loss of consciousness and other dangers; and that working as a plumber, or in a similar environment, creates additional risks to the plaintiff and to his co-workers, as well as interfering with his ability to control his diabetes. That control is more effective if he is not working at regular full- or part-time employment. It is fair to say that a good deal of Mr. Inglis's time is spent monitoring and attempting to control his blood sugar levels. The plaintiff's condition, and the measures required to deal with it, make it impossible to commit to regular working hours.

[79] The plaintiff argues that Dr. Gee's opinion – which is uncontradicted by the opinion of another endocrinologist – is that the following limitations have existed since 1996: he should not work alone; he should not work in places or conditions where confusion would create a danger to himself or others; he should not work in situations requiring varying or unpredictable levels of physical activity and stress, or in conditions involving significant emotional stress. While Dr. Gee did specify that Mr. Inglis should not work alone "for hours," she also made it clear that confusion or loss of consciousness can happen quickly and without warning. The plaintiff submits

that it is not realistic to suggest that an actual employer will constantly monitor how much time Mr. Inglis works alone.

[80] In addition to Dr. Gee's opinion the plaintiff points to Dr. Genest's opinion, likewise uncontradicted by psychological evidence, that reasonable prudence and care require the plaintiff to desist from working as a plumber or in any other occupation in order to avoid aggravating his psychological symptoms.

[81] The defendant denies that the Plan Administrator had a duty to arrange or to cooperate in arranging a trial or gradual return to work, as the plaintiff alleges. The defendant disputes the plaintiff's claim that he required an eight-week trial return to work in order to determine whether he remained disabled. Moreover, the defendant says, this would be a medical issue, to be resolved through the appeal procedure under s. 6(1) of the LTD Plan, which the plaintiff did not pursue. Further, because the LTD Plan permits a consensual appeal hearing to determine whether an insured is disabled, the court lacks jurisdiction.

[82] The defendant says the medical evidence – including the records of Dr. Schlossberg and Dr. Malloy – indicates that Mr. Inglis could have returned to work, and that his condition improved after 1999. It says Mr. Inglis made no attempt to go back to work with the Province or to find work in the private sector, even after return to work plans were discussed and formulated. After the delay for carpal tunnel surgery, Mr. Inglis did not contact the Province to arrange to try again. He explained that he was waiting for someone to contact him. The defendant says the correspondence suggested that Mr. Inglis would contact the Province after the surgery. He was cleared to return to work in 2002 and did not do so. Mr. Inglis did not apply for an advertised plumbing job with the Province in 2004.

[83] The defendant points to the correspondence between Mr. Inglis's counsel and the Province, as well as the records of Ms. Phillips, in 2001, as support for the submission that Mr. Inglis had clearance to return to work between 1998 and 2001. The defendant also says the need for a trial period was not supported by Dr. Malloy's letter of July 12, 2002, which did not refer to such a trial period. She was not called to testify in order to clarify her subsequent hand-written letter indicating that an eight-week work trial was necessary. The Fund contrasts this evidence to Dr. Boswell's view that no work trial was necessary. In addition, Mr. Inglis stated on discovery that he thought a return to work would have been successful and that his safety concerns had been addressed. The plaintiff submits that obtaining clearance for a work trial and

for a complete return to work are entirely different things. Dr. Boswell's opinion was that the evidence on file did not support the requirement for a return-to-work trial. She did not say that such a trial was not necessary. In the plaintiff's submission, she should have suggested that the experts (Dr. Gee and Dr. Genest) be asked for opinions.

[84] The defendant says Dr. Boswell's opinion should be preferred to that of Dr. Gee. Dr. Gee, it is alleged, provided a general opinion about why she believed Mr. Inglis could not return to his old job, but she was not asked about other plumbing work. The plaintiff points out that Dr. Boswell never met Mr. Inglis. She received his medical record, but was not aware of any psychologist's report. Nor did Dr. Boswell have the anecdotal evidence from family and friends that was available to Dr. Gee. Dr. Boswell was not as qualified as Dr. Gee to give opinion evidence on diabetes. Dr. Gee's uncontradicted opinion was that reasonable prudence and care has required Mr. Inglis to desist from his work as a plumber since August 1996.

[85] The defendant says Dr. Genest expressed opinions beyond his competence by commenting on Mr. Inglis's diabetes, as in his report to Maritime Life on June 4, 1998, that Mr. Inglis should be considered permanently disabled. It also suggests that Dr. Genest made incorrect assumptions. There was, for instance, no indication in his March 2000 report that he was aware of any improvement in Mr. Inglis's diabetes, back-to-work efforts or removal of stressors (such as the move of his daughter into a group home). Dr. Malloy's discovery, the Plan submits, undermines the assumptions on which Dr. Genest's report rests. Mr. Inglis saw Dr. Malloy six or more times per year. She was not aware that Mr. Inglis was telling Dr. Genest that he was depressed. The defendant says Dr. Genest's statement that Mr. Inglis had experienced a major depressive episode was based on "shaky" information. In Dr. Malloy's opinion, Mr. Inglis did not need to see a psychologist in 1999. The Fund says there was no evidence of Mr. Inglis receiving psychological treatment after 2000 up to the time of Dr. Malloy's discovery in 2008. Dr. Malloy was not prompted to treat Mr. Inglis for depression after receiving Dr. Genest's report. Further, the Plan says, Dr. Genest did not give a diagnosis at the relevant time, but in 2004, after Mr. Inglis was in a car accident. There was no diagnosis from 2002.

[86] The defendant says there was no evidence of psychological barriers to Mr. Inglis's back-to-work efforts in 1999 or 2002, and no basis to find that he was disabled for psychological reasons between 1998 and 2007. Dr. Genest was not asked

whether depressive illness would have prevented Mr. Inglis from returning to work in 1999 or 2002.

[87] The defendant denies that the Plan Administrator had a duty to arrange or to cooperate in arranging a trial or gradual return to work, as the plaintiff alleges. The defendant disputes the plaintiff's claim that he required an eight-week trial return to work in order to determine whether he remained disabled. Moreover, the defendant says, this would be a medical issue, to be resolved through the appeal procedure under s. 6(1) of the LTD Plan, which the plaintiff did not pursue. Further, because the LTD Plan permits a consensual appeal hearing to determine whether an insured is disabled, the court lacks jurisdiction.

The Effect of the Plaintiff's Trial Return-to-work

[88] The plaintiff now submits that he was imprudent and unrealistic in seeking to return to work as a plumber in 2001 and 2002, but submits that claimants who attempt to return to work should not be faulted for trying. He cites *Foden v. Co-Operators Insurance Association (Guelph)* (1978), 88 D.L.R. (3d) 750, [1978] O.J. No. 3487 (Ont. H. Ct. J.), where Reid J. took the view that "[n]o one … should be discouraged from attempting to take up their former work, or any work, out of fear that the attempt might be held against him" (para. 49). He points to *Campbell*, *supra*, where the plaintiff's unsuccessful attempt to work in a new trade did not prevent the court from awarding LTD benefits. He says a trial return to work should have been assessed as to whether it constituted "appropriate vocational rehabilitation" under guideline 2 of the LTD Plan, rather than being used as a reason to terminate his benefits.

Adverse Inference

[89] The defendant seeks an adverse inference arising from the plaintiff's failure to call Dr. Malloy to testify, arguing that her evidence was not redundant, but that it would have hurt the plaintiff's case. In particular, the defendant says, Dr. Malloy's evidence would have countered the evidence of Dr. Genest.

[90] The plaintiff submits that not every family doctor or attending physician need be called, considering economies of time and money. He says the court has not been deprived of relevant evidence, as Dr. Malloy's charts and records were in evidence by agreement. Dr. Gee was the suitable medical expert on the issue of diabetes, and Dr.

Genest was the best medical witness on the plaintiff's psychological condition and his vocational limitations.

[91] The drawing of an adverse inference is a matter of discretion. Cromwell J.A. (as he then was) described the general principles governing adverse inferences in *Davison v. N.S.G.E.U.*, 2005 NSCA 51, [2005] N.S.J. No. 110 (C.A.), at paras. 73-75:

> In civil cases, "... an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away": see J. Sopinka, S. Lederman and A. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto and Vancouver: Butterworths, 1999) at para. 6.321. The rationale of this rule is that the failure to call the evidence in these circumstances is an implied admission by the party "... that the evidence of the absent witness would be contrary to the party's case, or at least would not support it": *Ibid*. But, as with all implied admissions, one must remember that conduct may be equivocal. It follows that the failure to call evidence may reasonably be open to different interpretations. An adverse inference should only be drawn when it is warranted in all of the surrounding circumstances….
>
> The appellants submit, relying on *Levesque v. Comeau*, [1970] S.C.R. 1010 and *Johnston v. Murchison* (1995), 127 Nfld. & P.E.I.R. 1; [1995] P.E.I.J. No. 23 (Q.L.) (P.E.I.S.C.A.D.) that it is an error of law not to draw an inference from the unexplained failure of a party to call material witnesses over which the party has control. However, I do not agree that the principle is that broad. I respectfully agree with E. Macdonald, J. in *MacMaster (Litigation guardian of) v. York (Regional Municipality)*, [1997] O.J. No. 3928 (Q.L.) (Gen. Div.) at paras. 25-26 that the inference is permissive, not mandatory. As she said at para. 28:
>
> > 28 An adverse inference with varying weight attached to it may occur in circumstances where a party fails to call a material witness, and it is apparent from all of the other evidence in the case that the witness, who was particularly and uniquely available to that party, would have been able to help the court by giving evidence on a material issue.
>
> There are circumstances, such as those in *Levesque* and *Johnston*, in which the failure to draw an adverse inference is a reviewable error. However, in light of [*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235], unless the judge misstates the relevant legal principle, the refusal to draw the inference is reviewed on the palpable and overriding standard.

[92] In *C.R. Falkenham Backhoe Services Ltd. v. Nova Scotia (Board of Inquiry)*, 2008 NSCA 38, Saunders J.A. said, for the court, "the decision to draw an adverse

inference and the weight to be attached to it is discretionary. Whether or not to invoke such judicial license will depend on the specific circumstances of the case. It is permissive and not mandatory" (para. 48).

[93] While adverse inferences may be drawn where a party has not called a treating physician, a plaintiff is not required to call every physician who ever treated him. Saunders J. (as he then was) made the following remarks in *Greenfield v. Rhyno* (1994), 129 N.S.R. (2d) 253, [1994] N.S.J. No. 131 (S.C.), at paras. 82-83:

> Mr. Ritcey has invited me to draw an adverse inference against the plaintiff on account of his failure to call three treating physicians: Drs. MacKenzie, Reardon and Dhawan. I agree with Mr. Ritcey that Dr. MacKenzie might well be the person most familiar with the plaintiff's health as she has acted as his family doctor for 10 years or more. A similar familiarity might be attributed to Drs. Reardon and Dhawan, two other specialists who treated him before (and in the case of Dr. Dhawan, after) the collision. But that is not to say that a decision not to subpoena either or all of them should lead me to draw a negative inference against the plaintiff. Economic factors weigh heavily on every advocate in any trial. Economies of time and money are a very real consideration. It was not incumbent on Mr. Haynes to call every physician who ever treated Mr. Greenfield.
>
> ….
>
> It seems to me that the cases referred to by Mr. Ritcey where negative inferences were drawn, are clearly distinguishable. They speak of situations where, for example, a real issue of credibility divides the parties and a material witness likely to corroborate one version, isn't called. That has no application to the present case. I am also satisfied that the plaintiff's entire medical history was furnished to the defence. Much of it was helpful to the defendant's theory. Dr. Yabsley was able to assess the findings and correspondence of Drs. Canham, MacKenzie, Dhawan and Reardon. It was open to Mr. Haynes to rely, as he did, upon Dr. Canham, the orthopaedic surgeon who had treated the plaintiff since the mid-1980's, had performed four separate surgeries, and was therefore uniquely qualified to describe Mr. Greenfield's health and the likely prognosis for his future. I am satisfied I had sufficient medical evidence to fairly and completely assess the merits of the plaintiff's claim.

[94] The plaintiff submits that the circumstances do not call for an adverse inference due to his not calling Dr. Malloy. Dr. Malloy's file and reports were admitted by agreement. The plaintiff argues that the court has therefore not been deprived of significant evidence by the lack of oral evidence from Dr. Malloy. However, the plaintiff submits, the lack of opinion – rather than factual and documentary – evidence

from Dr. Malloy does not call for an adverse inference, since the most suitable opinion witnesses on Mr. Inglis's diabetes and psychological health were Dr. Gee and Dr. Genest, respectively.

[95] I do not propose to draw an adverse inference as requested by the defence. As the plaintiff points out, Dr. Malloy's record was admitted on consent. The crucial opinion evidence came from the specialists, Dr. Gee and Dr. Genest, and the defence opted not to provide equivalent specialist evidence. I am not satisfied that the court has been deprived of relevant evidence such that an adverse inference is called for.

Conclusion on Disability Under the Plan.

[96] I am satisfied that as a matter of "real world" employability, as discussed, for instance, in *Johnston* and *Materi*, the plaintiff has established that he was totally disabled within the meaning of the LTD Plan as of the date his benefits were terminated in September 2002, and that he remains disabled by the same standard. This conclusion rests both on the evidence relating to the plaintiff's diabetes and on the evidence of depressive illness.

Bad Faith

[97] The Supreme Court of Canada considered the duty of good faith by an insurer in *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] S.C.J. No. 30, in the course of a consideration of a claim for punitive damages. The court, per McLachlin C.J.C. and Abella J., said, at para. 63:

> In [*Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18], this Court set out the principles that govern the award of punitive damages and affirmed that in breach of contract cases, in addition to the requirement that the conduct constitute a marked departure from ordinary standards of decency, it must be independently actionable. Where the breach in question is a denial of insurance benefits, a breach by the insurer of the contractual duty to act in good faith will meet this requirement. The threshold issue that arises, therefore, is whether the appellant breached not only its contractual obligation to pay the long-term disability benefit, but also the independent contractual obligation to deal with the respondent's claim in good faith. On this threshold issue, the legal standard to which Sun Life and other insurers are held is correctly described by O'Connor J.A. in *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at para. 29:

> The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.

[98] In *Asselstine v. Manufacturers Life Insurance Co.*, 2005 BCCA 292, [2005] B.C.J. No. 1152, 2005 CarswellBC 1226 (B.C.C.A.), the insurer rejected a claim for long-term disability on account of multiple sclerosis, relying on the opinion of the plaintiff's original treating physician that the plaintiff remained able to work at a reduced level. The insurer maintained this position in the face of several internal appeals, despite additional medical evidence being adduced by the plaintiff. The Court of Appeal summarized the trial judge's reasoning on the issue of bad faith, at paras. 9-10:

> The judge then proceeded to discuss the way the claim was investigated and assessed by Manulife. She was highly critical of the adjudicator's reliance on Dr. Bratty's opinion over the other medical evidence that was available, although she did not undertake any analysis of why the other medical evidence was to be preferred. She saw in the assessment an unjustified disregard for the opinions of Dr. Hooge and Dr. Hashimoto attributable to a "steadfast" refusal to consider evidence after July 1997 which was "unfair and inappropriate". The judge was equally critical of the failure to obtain proper information from Ms. Asselstine and of selective information the adjudicator sent to an occupational therapist to obtain an opinion on the kind of employment available to a person who was disabled to the extent Dr. Bratty said Ms. Asselstine was at the material time. The judge was critical of the reliance the adjudicator then placed on what the judge viewed as a flawed occupational report in order to reject the claim.
>
> Finally, the judge found that the adjudicator and her immediate superior, with whom she had consulted on the claim, failed to apply the correct legal test for total

> disability, although the judge did not say what test had been applied nor did she explain how, given the medical opinion the adjudicator relied upon, a different legal test would have led to the claim being accepted. In broad terms, the judge considered that Ms. Asselstine had been viewed with suspicion, her self-reporting had been deemed suspect, information that tended to support her claim had been ignored, and her claim had been wrongly rejected throughout despite what the judge viewed as compelling medical evidence regarding her condition. The judge concluded:
>
> > [207] I find there has been a clear breach of good faith. The defendants clearly failed to assess the plaintiff's claim in a balanced and reasonable manner and failed to act fairly in dealing with it. Consequently, an award of aggravated as well as punitive damages must be considered.

[99] The British Columbia Court of Appeal held that the trial judge correctly found that there was a serious lack of good faith in the assessment of the application and did not err in awarding punitive damages. The trial judge correctly found that there was a serious lack of good faith in the assessment of her application.

[100] According to Gordon G. Hilliker, in *Insurance Bad Faith*, 2d edn. (Lexis Nexis, 2009), disability insurance policies are in the category of "first party" insurance policies, providing "for the payment of a specified benefit upon the happening of the insured event," as opposed to indemnity for an insured loss. The author continues:

> When a claim is made under a first party policy, the insurer must deal fairly and in good faith with the insured. This requires the insurer to make an objective analysis of the claim and to pay the claim, promptly and in full, when the criteria for payment have been met. It bears emphasis, for the point is often overlooked, that this aspect of the insurance relationship is not adversarial in nature. When assessing a claim a first party insurer must not take its own financial interests into account….
>
> ….
>
> One corollary of treating the first party insurance relationship as non-adversarial in this fashion is that it focuses attention on the evaluative role required of the insurer. Instead of seeking to obtain a settlement of the insurance claim for the lowest possible sum, the insurer is required to objectively evaluate the claim on its merits and pay the insured in accordance with the evaluation…. [pp. 31 and 33.]

[101] If there are no genuine issues of fact or law to be resolved by a court or tribunal, Hilliker writes, "the insurer must pay what is objectively owing under the contract of

insurance…. [T]he insurer cannot be liable for a breach of the duty of good faith and fair dealing provided that there is a reasonable basis upon which coverage could be denied or the payment of benefits delayed" (p. 33).

[102] The plaintiff says the defendant placed undue emphasis on unreliable, incomplete and flawed evidence, as when it relied upon the handwritten "to whom it may concern" notes by Dr. Schlossberg and Dr. Malloy, without requesting reports from Dr. Gee and Dr. Genest, in circumstances where the defendant should have known that specialists' reports relating to his limitations and restrictions were called for. The plaintiff also submits that the defendant disregarded opinions that did not align with its own interests, such as Dr. Genest's opinion that the plaintiff was permanently disabled, and Dr. Schlossberg's 2000 report indicating that he would need to know the particulars of an occupation before giving an opinion as to whether it should be avoided. Further, the plaintiff says, the defendant assessed the claim on the basis of "snapshots" in time without considering the overall information respecting his disability. For example, the defendant interpreted Dr. Schlossberg's comment of August 23, 2001, that Mr. Inglis "seems to be getting along well now" as if his diabetes-related disability had disappeared. Further, when Bonnie Phillips received Dr. Malloy's note of October 26, 2000, stating that there was not much to be added to the information on file, other than that Mr. Inglis had seen plastics regarding carpal tunnel syndrome, Ms. Phillips noted that "the only condition that may be disabling him at present is the carpal tunnel syndrome." In the plaintiff's submission, this was to ignore all of the information the defendant had on file respecting his disability due to diabetes and psychological problems.

[103] The plaintiff also says the Maritime Life investigation of his claim was flawed by the failure to seek full reports from the relevant specialists in order to determine his actual condition in February 2002, rather than (as was done) relying only on the reports he obtained in order to obtain a work trial. Maritime Life, it is alleged, disregarded Dr. Malloy's June 1997 opinion that the plaintiff was permanently disabled and Dr. Genest's opinion of permanent disability in June 1998. The plaintiff also claims that Maritime Life ignored the opinion of its own Disability Management Consultant, Shelley Gallant, that the medical information available did not support a return to work, but only a work trial and possible rehabilitation.

[104] More generally, the plaintiff alleges that Maritime Life avoided asking for reports from the treating medical professionals. For instance, the plaintiff says Bonnie Phillips "misrepresented" Dr. Genest's September 2000 phone message so as to

suggest that his psychological condition was not a factor in his disability, and then did not get a report from Dr. Genest. The plaintiff also says Maritime Life misinterpreted Dr. Malloy's report of October 26, 2000, in which she wrote "I really don't have much to add…," to mean that his depression was resolved and that Carpal Tunnel Syndome was the only remaining disability issue. The plaintiff also submits that Maritime Life conducted itself in an adversarial manner by requiring him to prove his entitlement to LTD benefits while not seeking reports from the relevant medical advisors. The plaintiff cites *Clarfield v. Crown Life Insurance Co.* (2000), 50 O.R. (3d) 696, 2000 CarswellOnt 3822 (Ont. Sup. Ct. J.) for the proposition that "the fact an insured is making good progress does not preclude payment of benefits" (para. 67).

[105] On the question of Maritime Life's failure to consult his doctors, the plaintiff cites *Evans v. Crown Life Insurance Co.*, [1996] B.C.J. No. 1347, 1996 CarswellBC 1400 (B.C.S.C.), where the plaintiff's benefits were terminated without consultation with her treating physicians and without a request for an independent medical examination by the insurer, conduct which contributed to the finding that the insurer failed in its duty of good faith (paras. 44-47).

[106] The defendant says there is no evidence of bad faith. Between 2000 and 2002, it submits, there was nothing in Dr. Malloy's letters or other patient records to suggest any psychological impairment. As such, there was no reason for Maritime Life to go back to ask for earlier correspondence. The defendant says that in 2002, it was not aware of Dr. Gee's involvement, and there was no suggestion by Mr. Inglis or Dr. Malloy that the concerns raised by Dr. Genest were still an issue. If the family physician was not concerned about depression, Maritime Life should not be faulted for not investigating further. Dr. Shlossberg's letter to Bonnie Phillips of 15 November 2000 said there were no medical contraindications to Mr. Inglis participating in a rehabilitation program. Dr. Malloy wrote to Phillips on 26 October 2000 flagging carpal tunnel and saying she felt he would be able to return to work. According to the defendant, bad faith arises from ignoring the available information. It does not arise from mistakes. There was no hint from Dr. Malloy of problems with depression and no reason for Maritime Life to investigate. There was no ignoring or over-ruling of medical information. There were meetings with Mr. Inglis's lawyer and with Dr. Malloy. Difference of medical opinion is not bad faith.

[107] As to Ms. Phillips's notes arising from her conversation with Dr. Genest, the plaintiff says she misstated it, not from malice, but so as to avoid getting anything other than what she was looking for. The Fund did not get a further report from Dr.

Genest and did not provide further funding so that Mr. Inglis could see him. The plaintiff suggests that the Fund was avoiding obtaining information that contradicted their intended course of action.

[108] The defendant says it was not contractually obligated to provide rehabilitation, and that Mr. Inglis did not need a work trial. The plaintiff says the LTD Plan had a mandatory rehabilitation requirement. Pursuant to the "Operational Guidelines," if the work trial was not "appropriate vocational rehabilitation," Mr. Inglis should have been told that this was the case. He was told by Shelley Gallant that if the work trial did not work out, he would have to go back into mandatory rehabilitation. This is what he was waiting for. Instead, Maritime Life told him he was cut off from benefits because he had been cleared to go back to work. According to the plaintiff, this was not a decision based on fair and balanced considerations, and the LTD Fund took advantage of the situation to terminate his benefits in bad faith. The award of damages should be designed to deter the LTD Fund from taking an adversarial position in such a situation. To simply require the Fund to pay what it should have been paying at the time would reward it for its conduct, the plaintiff argues.

[109] I am not satisfied that the requirements of bad faith have been established. While the defendant's handling of the file was characterized by mistakes, as reflected in the finding on the plaintiff's entitlement to LTD payments, I am not satisfied that this rises to the level of bad faith.

OTHER ISSUES

The Effect of the Settlement Between Mr. Inglis and the Province

[110] Mr. Inglis settled his claim against the Province. The written settlement is set out in an exchange of correspondence from December 2004. On December 14, 2004, counsel for Mr. Inglis wrote to Dale Darling of the Department of Justice, and stated that, "[b]ased on our various discussions and communications," Mr. Inglis was prepared to settle his action against the Province on terms that included the following:

> 1. The province shall pay Mr. Inglis $65,000.00 general damages without deduction for tax or any other reason. No T4 slip shall be issued for any portion of the general damage settlement amount….

[111] By letter of December 21, 2004, the Department accepted the terms as set out in the plaintiff's December 14 letter.

[112] Subsection 9(f) of the 1992 version of the LTD Plan provides that the benefit to which an employee is entitled shall be reduced by "the amount of earnings recovered through a legally enforceable cause of action against some other person or corporation." Identical language appears in s. 9(8) of the 2002 version of the Plan. The communications that led to Mr. Inglis's settlement with the Province are in evidence. The onus is on the plaintiff to establish that none of the settlement amount was in respect of earnings. The plaintiff submits that this requires the court to interpret the settlement agreement, but also argues that if extrinsic evidence is admitted (as an exception to the parol evidence rule), such evidence cannot be used to contradict, vary or add to the meaning of the written agreement. The plaintiff cites *Chase v. East Wind Construction Ltd.* (1987), 77 N.S.R. (2d) 274, 1987 CarswellNS 113 (S.C.A.D.), where MacDonald J.A. wrote, for the court, at para. 13:

> The rule with respect to admission of oral evidence in relation to written documents — the so called parol evidence rule — is that:
>
> > When a transaction has been reduced to, or recorded in, writing either by requirement of law, or agreement of the parties, extrinsic evidence is, in general, inadmissible to contradict, vary, add to or subtract from the terms of the document.
>
> ....

> The grounds of exclusion commonly given are: (1) that to admit inferior evidence when the law requires superior would be to nullify the law; and (2) that when the parties have deliberately put their agreement into writing, it is conclusively presumed between themselves and their privies that they intend the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith or treacherous memory. (*Phipson on Evidence* (13th ed., 1982), p. 934, paras. 3801-02.)

[113] The court noted that there are exceptions to the parol evidence rule, "[o]ne being that evidence is admissible to ascertain the intent of the parties where their written agreement is ambiguous so long as the evidence is not introduced to contradict, vary or add to the meaning of the written agreement…" (para. 14).

[114] The defendant says section 9 of the LTD Plan captures the amounts received by Mr. Inglis as a result of his settlement with the Province, in order to prevent a double-recovery of compensation for lost wages as well as LTD benefits. The defendant notes the comment of Robertson J., in requiring Mr. Inglis to disclose documents relating to the settlement, that he had a "good faith obligation in dealing with the LTD Fund, in circumstances where lost earnings may have been a significant factor in arriving at settlement": see 2007 NSSC 314, 2007 CarswellNS 501, at para. 36. According to the defendant, this good faith obligation is akin to that owed to Mr. Inglis by the LTD Fund in adjudicating his claim.

[115] The defendant points out that shortly before the settlement was finalized, Mr. Inglis offered to settle for $93,104, of which $74,604 was for wage loss, and $10,000 of which was for general damages. The actual settlement, however, was for $65,000, identified as general damages, rather than compensation for lost wages. The defendant argues that the actual settlement amount should be treated partially as compensation for wage loss, and offset against any LTD benefits payable accordingly. Applying the same proportions to the settlement amount that the plaintiff's offer had applied to the sum of $93,104, gives a proportionate wage loss recovery of $49,989.

[116] The plaintiff answers that the defendant cannot look behind the characterization of the settlement as agreed by himself and the Province. The plaintiff also says the LTD Plan does not create a right of subrogation.

[117] There is authority for the proposition that a plaintiff insured may be required to prove that a global settlement with a third party tortfeasor did not include a wage loss component. In *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. McNally* (1999), 179 N.S.R. (2d) 314, 1999 CarswellNS 334 (C.A.), the Court of Appeal, per Chipman J.A., cited *Young v. Saskatchewan*, [1992] 5 W.W.R. 49 (Sask. Q.B.), affirmed (1994), 128 Sask. R. 106 (Sask. C.A.), where a disability insurance plan included a provision similar to s. 9(8) of the LTD Plan. The insured argued that there should be no deduction from a lump sum settlement. At paras. 55-56, Chipman J.A. agreed with the following principles set out by the trial judge in *Young*:

> 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.
>
> ....
>
> 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 ...

[118] The defendant contends that the settlement constituted *prima facie* bad faith on the part of the plaintiff. The defendant says the negotiations involved the reasonable notice period, and only later got changed to general damages. There was no explanation for this change in the characterization of the settlement.

[119] The plaintiff says the court cannot look behind the agreement so as to interpret it as providing compensation for lost earnings. His position is that to interpret the settlement as pertaining to earnings on the basis that the subject of earnings was raised in the course of negotiations would be to vary the express provisions of the settlement. He says the settlement was properly classified as general damages on account of intangible losses particularly the lost chance to return to work on a trial basis. He argues that the Province's proposal of a monetary settlement in December 2004 was principally related to his demand for a work trial (which he now says was unreasonable and imprudent). The Province's first offer was calculated on the basis of one year's salary plus legal fees and expenses. The plaintiff says this was an illogical way to value his claim, since he would not likely have had any earnings during the period of notice, not having demonstrated that he was fit for work. He had, he insists, only requested a work trial. The plaintiff's offer of settlement of December 11, 2004, did make reference to the "unfair manner of dismissal involving failing to provide a work trial," but went on to seek a settlement based on the "pay and benefits that he would have received in the 21 months following September 12, 2002…." a reasonable notice period of 21 months. In addition, he sought "$10,000 discrimination damages for the violation of his human rights and inconvenience of having to face the difficult prospect of finding someone to provide the work trial, because the government would not accommodate his need for the trial."

[120] The response from Dale Darling on behalf of the Province, dated December 13, 2004, expressed concern about the possibility of settlement, as it appeared that Mr. Inglis's demand for settlement was linked to "an arrangement with the trustees of the LTD Plan of a 'work trial'. It is unclear to me how this trial would interact with the

LTD Plan, and what the purpose of it would be. If it relates to his employment with the Department, which we have been attempting to settle terms of his separation from, we are no further ahead." The Department offered a full settlement of $60,000. The next, the Province increased the offer to $65,000, which was described as representing a notice period of approximately 18 months. There followed the course of correspondence that led to the terms of acceptance described above.

[121] The plaintiff now argues that the December 11 "adopted in part" the calculation of damages based on earnings, but insists that this does not change his view that the settlement should reflect the intangible value of the lost work trial. The plaintiff also notes that Dale Darling's letter of December 16, 2004, indicated that the cheque issued to the plaintiff's counsel in trust was "issued as general damages and is not a salary payment." This, the plaintiff says, makes it clear that the payment did not constitute earnings.

[122] The plaintiff also submits that damages for lost earnings would be subject to income tax and since the parties agreed that the settlement was not taxable under the *Income Tax Act* any change to that would be contrary to the express terms of the agreement.

[123] I am satisfied that the plaintiff's settlement with the Province was substantially concerned with lost earnings. Mr. Inglis's claim against the province included allegations of termination without reasonable notice and a claim for lost earnings. Further, the course of correspondence between the Province and Mr. Inglis clearly implicated the question of lost earnings as a major or predominant aspect of the negotiations. In these circumstances, and in view of his duty of good faith to the defendant, I do not believe that Mr. Inglis can simply point to the words of the agreement and insist that the court cannot question the description of the settlement as one for "general damages." This is not a matter of varying the terms of the settlement as between Mr. Inglis and the Province; it is simply to recognize that a plaintiff in these circumstances cannot tie the court's hands by identifying a settlement as one for "general damages" when the substance of the settlement was significantly related to lost earnings. As such, the plaintiff's recovery from the defendant must be adjusted to reflect his settlement with the province.

[124] The defendant submits that the pro-rated sum of $49,989 (derived as described above from the $65,000 settlement) equates to 13.66 months of wage loss, based on the monthly income figure of $3,659.67 cited in the settlement correspondence (see

Mr. Evans's letter to Ms. Darling, December 11, 2004). Accordingly, the defendant seeks an offset equivalent to 13.66 months of LTD benefits. The plaintiff says the Plan's proposed apportionment of the settlement does not take into account the 21 months of pensionable earnings because there is no way of knowing what that is worth.

Pension Credits

[125] The plaintiff seeks an order requiring the defendant to pay any lost employer contributions and any lost benefits related to his superannuation benefits, Canada Pension Plan benefits and insurance coverage that would have been provided by the province as his employer. This order would pertain to benefits lost as a result of the termination of his LTD benefits. The Province terminated his benefits when the LTD was terminated. The plaintiff also asks the court to retain jurisdiction to determine the quantum of damages arising from lost pension and insurance benefits.

[126] The defendant says Mr. Inglis withdrew himself from the pension plan, and maintains that it was never required to pay the employee's contribution or the employer's portion. The practice was for the employee to pay his own share of the pension and for the Province to pay its share. While he was on disability, Mr. Inglis paid his own share. The defendant would deduct and remit the employee's share. If the court orders reinstatement of disability benefits, then Mr. Inglis has no recourse against the LTD Plan. He can try to go back to the Province. If the settlement precludes this, then he must bear it.

Pre-judgment Interest.

[127] The plaintiff seeks pre-judgment interest for the period from September 12, 2002 to the date of the judgment. The defendant says the proceeding should not have required more than four years to come to trial, and notes the caselaw limiting interest to four years where there has been undue delay: *Thomas-Canning v. Juteau* (1993), 122 N.S.R. (2d) 23, 1993 CarswellNS 567, [1993] N.S.J. No. 168 (S.C.), at paras. 95-98. According to the defendant, the case was not unduly complex and the facts were known and damages crystallized in September 2002.

[128] It submits that if the court awards benefits to Mr. Inglis, there should only be interest for a maximum of four years, unless the defendant's actions caused a delay. The defendant says it did not cause the delay from November 2008. This was caused

by a conflict recognized by the trial judge. The plaintiff contends that the delay was not solely his fault, and that the adjournment was by mutual consent, as set out in the letter to the court, and that the defendant needed an adjournment in order to file expert's report. Further, the plaintiff submits, the Plan has had the benefit of funds to which he was entitled. The Plan insists that the adjournment was prompted by a request from plaintiff's counsel.

[129] I am not satisfied that any delay in bringing the matter to trial can be attributed to the plaintiff so as to reduce his entitlement to pre-judgment interest. The plaintiff shall have pre-judgment interest for the period from September 12, 2002 to the date of judgment, at a rate of 3.5%.

CONCLUSION

[130] The plaintiff is entitled to a declaration that he has been disabled within the meaning of the LTD Plan since August 9, 1996, and remains so disabled, and is therefore entitled to LTD benefits under the Plan less any amount apportioned as income out of the settlement with the Province of Nova Scotia.

[131] I will leave it to counsel to try to agree on costs. If they cannot agree I will accept their written submissions within 45 days of the date of release of this decision.

McDougall, J.