IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Ryan v. Sun Life Assurance, 2003NSSC247

Date: 20031217
Docket: S.H. 184667
Registry: Halifax

Between:

Leslie Susan Ryan

Applicant

v.

Sun Life Assurance Company of Canada

Respondent

D E C I S I O N

Judge:	The Honourable Justice John M. Davison
Heard:	October 23rd, 2003, in Halifax, Nova Scotia
Decision:	December 17th, 2003
Counsel:	W. Augustus Richardson, Esq., for the Applicant Douglas W. Lutz, Esq. and Lindsay Hawker, Articled Clerk, for the Respondent

Davison, J.:

INTRODUCTION

[1] The Applicant became an employee of the Federal Government in September 1980. In the month of May 1981, she became enrolled in a compulsory insurance plan which provided benefits, including benefits in the event of disablement.

[2] The Application before the Court is described as a request for "an order determining the applicability and, if applicable, the meaning and scope of a "subrogation" clause in a group disability insurance plan (the DI Plan) administered by the Respondent, Sun Life Assurance Company of Canada ("Sun Life")".

FACTS

[3] The evidence before the Court was in the affidavit of the Applicant who was cross-examined on a portion of the affidavit and in the affidavit of Isabelle Desjeans, who was a Senior Disability Claims Analyst for the Respondent.

[4] The group term Insurance Policy 12500-G (the "Policy") was issued to Her Majesty the Queen in Right of Canada as represented by the President of the Treasury Board. The Policy provided for long-term disability insurance coverage to employees of the Federal Government.

[5] The Applicant, Leslie Susan Ryan, was employed by the Canada Customs and Revenue Agency. As a Federal Government employee, the Applicant was required to join the DI Plan underwritten and administered by Sun Life pursuant to the Policy.

[6] On March 24th, 1994, the Applicant was involved in a motor vehicle accident and suffered significant injuries resulting in chronic pain syndrome. By February 16th, 1996, the Applicant's claim for long-term disability benefits under the DI Plan was approved. Her effective date of disability and the starting point for calculation in payment of benefits was October 20th, 1995.

[7] The DI Plan contained a provision entitled “subrogation”. That provision reads as follows:

> Where benefits under this policy have been paid or may be payable to an employee and the employee has a right of action against a Third Party for recovery of loss of income which otherwise would have been earned by the Employee during the whole or any part of the period that benefits are paid, or may be payable, to the Employee under this policy,
>
> (1) Any amount recovered by the Employee from the Third Party (including general damages, damages for loss of income, interest and legal costs), whether recovered through settlement or trial, less the Employee’s legal costs expended for such recovery, shall be deemed to be the Employee’s net recovery from the Third Party;
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> (2) The Employee shall pay to Sun Life an amount equal to 75% of his/her net recovery from the Third Party (to a maximum of the amounts paid to the Employee under this policy), such percentage of his/her net recovery to be held in trust by the Employee for Sun Life until payment is made to Sun Life;
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> (3) In the event that any benefits not paid to the Employee under this policy are subsequently determined to have been payable, Sun Life shall be entitled to set off against its liability for such benefits, the amount the Employee would have been obliged to pay pursuant to sub-paragraph 2 hereof if such benefits had been paid to the Employee before the Employee obtained his/her recovery from the Third Party; and
>
> (4) ... Sun Life may require the Employee to sign an acknowledgment that he/she is bound by this provision. Sun Life may withhold or discontinue benefits upon any refusal by the Employee to honor any terms of this provision.

[8] The parties to the DI Plan are the Treasury Board, the employer of Public Service Employees and Sun Life. Ms. Ryan is not a party to the Policy or the Plan. In many cases the employee of an employer who is a party to a group disability insurance plan, is referred to as a beneficiary, but is described under this Plan as an “employee.” All the negotiations concerning the terms of the Plan took place between the Treasury Board and Sun Life. The DI plan was designed in 1970 and has been the subject of review and revisions over the years.

[9] On March 21st, 1996, an action was commenced in the Supreme Court of Nova Scotia by Ms. Ryan against the other motorist involved in the accident. The

action was settled and Ms. Ryan received an all-inclusive settlement of $350,000.00. It was understood part of this settlement involved recovery from the tortfeasor of a claim for loss of wages but there was no allocation of the settlement figure into various heads of damage.

[10] By reason of the issues raised by the parties and with a view to determining the intent of the parties as to the meaning and scope of the subrogation clause, the history of the revisions to the DI Plan is important.

[11] One of the periodic reviews of the Plan resulted in a report in 1992 in which one of the amendments involved Sun Life's ability to offset benefits payable to an employee against a settlement received from a court action. The report made the following observations concerning subrogation:

> **h) Offset of Legal Entitlement Related To same Disability**
>
> **Current Practice**
>
> Where a DI claimant becomes entitled to a settlement through a court action, and such settlement is in respect of a disability for which DI benefits are also payable, the settlement is offset from the DI benefits. Sun Life advises that while they have this authority at law, and therefore do in fact offset such entitlements, because it is not specifically provided for in the DI Policy it has resulted in misinterpretation and confusion for some claimants.
>
> **Proposal**
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> Therefore, in order to avoid such problems, the DI Policy will be amended to specifically set out this offset provision.

[12] After the 1992 report, the Treasury Board and Sun Life continued negotiations for changes in the DI Plan. There was acceptance of the Plan by the President of the Treasury Board on May 9th, 1994 and forwarded to Sun Life on May 11th, 1994. The agreement between the parties to the Policy set March 1st, 1993 as the effective date of the changes to the Policy which included the subrogation clause set out in paragraph [7] of these reasons.

[13] By letter dated September 3rd, 1993, Sun Life provided the Treasury Board with an explanation of the amendments being recommended in the Policy. The subrogation clause is mentioned as follows:

> **Subrogation**
>
> We have previously forwarded to you for your review and comment a draft subrogation provision. However, an alternate provision has been put forward at this time to give you an idea of the options available with this type of provision.
>
> The alternate provision gives Sun Life a right to share in all types of damages recovered by an employee from a third party (net of legal costs). The previous provision limited Sun Life's right of recovery to damages resulting from loss of income.
>
> The expanded right to share in recovery under the alternate draft provision is preferable to the previous draft in that the expanded right eliminates the problems arising from, (a) a settlement in which no specific amount is allocated to loss of income, or, (b) settlements where an unreasonably small amount is allocated to loss of income and an unreasonably large amount is allocated to general damages. As a result, litigation to determine the appropriate allocation of damages among the various types is avoided.
>
> Under the alternate draft clause, employees would always have an incentive to recover as much as possible from a third party for all types of damages. They will be able to keep at least some portion of every dollar recovered and they will also be able to keep the whole of every dollar recovered beyond what is required to repay benefits to Sun Life. Accordingly, under the alternate draft clause there will be much less need to argue over the reasonableness of a settlement or the conduct of litigation. This should result in less expense in administering claims. Please note that Sun Life's recovery would still be subject to a maximum of the amounts actually paid to the employee.
>
> If you prefer the original draft clause over the alternate draft clause, the Law Department will revise the original draft clause to reflect your comments regarding gender neutrality and some other minor points.

[14] This notation with reference to "an alternate provision" and "options available" confirm that which is obvious from other exhibits that the form of the clause resulted through the negotiations of the parties to the insuring contract.

[15] By letter dated October 13th, 1993, the Treasury Board Secretariat responded to Sun Life enclosing a copy of the draft Policy with suggested changes. With respect to the subrogation clause, there was an insertion of “50" as a percentage in paragraph 2 and no other changes in the wording.

[16] There was some correspondence before the acceptance of the Plan on May 9th, 1994 but nothing of significance to the issues in this hearing.

[17] In March 1996 a reimbursement questionnaire was sent to Ms. Ryan and a copy was returned to Sun Life signed by Ms. Ryan and witnessed by her counsel at that time. The questionnaire contained the following sentence:

> Under the terms of your group policy, any amounts Sun Life pays to you under the group policy, as a result of your injuries, are refundable out of any compensation you may have received from the party responsible for your injuries.

It is the position of counsel for Ms. Ryan that this was signed under duress.

ISSUES

[18] The Applicant raises, as her first issue, the subrogation clause does not apply to her. Secondly, if it does apply, can Sun Life recover out of the settlement of her claim against the tortfeasor regardless of the nature of the settlement proceeds all long-term disability payments before and after the settlement?

[19] It is the position of the Applicant that:

(1) Sun Life is not entitled to rely upon the contractual subrogation provisions of the clause because they were not in existence at the time of Ms. Ryan’s accident in March 1994;

(2) Sun Life has failed to establish any entitlement at law or in equity, in the circumstances of this case, to claim a right of subrogation absent an express contractual provision;

(3) If the subrogation clause can be relied upon, it is ambiguous and ought not to be interpreted in such a way as to give Sun Life the right to recover anything other than long-term disability benefit paid up to

> the date of settlement and then only out of that part of the settlement reasonably attributed to past income loss.

[20] In the argument presented by the Respondent in his written pre-hearing brief, the subrogation clause was termed a reimbursement clause which supported the argument full indemnity is not required for reimbursement. In counsel's oral submissions there was reference to the clause as a "broad" subrogation clause and the fact one can add to a contractual subrogation clause. In my view the latter approach is the accurate one. During the course of his argument, Mr. Lutz, counsel for the Respondent, made it clear that Sun Life does not advance an argument of a right of subrogation at common law or a right outside of the contractual provision of subrogation in the policy. The Respondent raises the nature of its right under the clause which includes the offset of benefits to be paid in the future. Also raised is the time the subrogation clause takes effect.

ANALYSIS

[21] The disability policy is Group Insurance. The parties are the Treasury Board and Sun Life. The Applicant is not a party to the contract but is entitled to benefits under the contract as an employee of the insured, the Treasury Board. The features of group insurance were described by Appleman's "Insurance Law and Practice", Vol. 1 at p. 83 as follows:

> ...we will retain the usage of "group insurance" for those situations where there is a close relationship between the certificate holder and the holder of the master policy—usually, but not always, that of employment. Group insurance may then be considered the coverage of a number of individual persons by one comprehensive policy, with certificates as evidences of such coverage, usually for the primary purpose of protecting and providing for employees. So far as the group feature is concerned, the persons insured may vary from time to time as the composition of the group is altered; but the fundamental feature, of group entity, never varies. Courts have emphasized the fact that low premium rates characterize these contracts, the employee being treated as a third party beneficiary.

[22] Our courts have set out the principles of common law subrogation in clear terms. The right of subrogation arises to an insurer only if benefits were paid under a policy of indemnity and the rights arise when the insured was indemnified in full for a loss. (See *Nova Scotia Public Plan Trust Fund v. McNally* (1999), 179 N.S.R. (2d) 314 (NSCA) and *Mutual Life Assurance Co. v. Tucker* (1993), 119

N.S.R. (2d) 417). The principles of common law subrogation or equitable subrogation can be changed by statute or the terms of the policy (See *Insurance Law in Canada*, Brown and Menezes (2nd ed. 1991) paragraph 15:3:1) It is not disputed the policy was a contract of indemnity.

[23] In this proceeding, the clause which is entitled "Subrogation" is a subrogation clause which is commonly referred to as contractual subrogation because of the changes from general principles effected in the agreed terms of the policy.

[24] The Applicant's first submission is that the subrogation clause is not binding on her because it did not exist at the time of the motor vehicle accident in March 1994. The accident caused the Applicant's disability. The policy was accepted by the President of the Treasury Board on May 9th, 1994 but the policy with the subrogation clause had an effective date, according to the policy, of March 1st, 1993. The evidence was negotiations on the terms of the policy and the DI Plan continued from 1992 to 1994, and it is argued the clause cannot bind the Applicant because it seeks to retroactively effect the rights and claims she had on March 9th, 1994, the date on which, it is argued, the rights crystalized. The Applicant's position is that there was no subrogation clause on the day of the accident and if Sun Life had any rights they would be found in equity.

[25] The parties to the contract of insurance, the Treasury Board and Sun Life decided what the effective date would be and made as part of the contract March 1st, 1993, as the effective date. Of interest, is the comment in Appleman's "Insurance Law and Practise", Vol. 1 at p. 119:

> The terms of the policy control as to the effective date of coverage, in determining the eligibility of an employer.

[26] I would point out Mr. Lutz, in his submissions, raised a further argument that the date of the motor vehicle accident is irrelevant. He hypothetically advanced circumstances such as the Applicant on the day following the accident settling her claim with the tortfeasor for a significant sum which included loss of income and did not make a claim on the policy. He also refers to the fact the Applicant went back to work and was on salary until July 1995, as another example of the policy becoming engaged not when the tort occurs but when she qualifies for benefits under the policy which would be in July, 1995.

[27] In my view, the Applicant's argument must fail and I find the subrogation came into effect on March 1st, 1993 as stipulated in the policy and applies to the issues raised between the parties to this application.

[28] There is no need to consider the Applicant's second submission which involves consideration of the rights under common law subrogation in view of my finding there exists a contractual right to subrogation.

[29] The Applicant says the subrogation clause is ambiguous and the court ought to limit recovery under the clause to the disability income paid by Sun Life to the date of settlement. Sun Life relies on paragraphs 1 and 2 of the subrogation clause and Mr. Richardson argues that although a literal reading of those paragraphs might support Sun Life's claim to be able to recover all past long-term disability payments prior to the settlement and all future benefits paid after the settlement it is argued there is a latent ambiguity in the wording. The reasons advanced by counsel to support such an ambiguity is the use of the word "subrogation" to introduce the wording and certain representations of Sun Life when the draft clause was introduced as to what it was attempting to do in drafting the wording.

[30] One must consider the principles set out by the Supreme Court of Canada in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* (1979), 112 D.L.R. (3d) 49 at 59 when it directed that, apart from the doctrine of *contra preferentem*, a court must search for an interpretation to coincide with the intent of the parties. In particular the court stated:

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

> would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the Courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

[31] With respect to the use of the word "subrogation" which is the first point raised by counsel for the Applicant to suggest the clause is ambiguous, I refer to the words set out in the Applicant's pre-hearing brief:

> **The Use of the Word "Subrogation"**
>
> The doctrine of the equitable concept of subrogation is well-known and of long standing. Subrogation, as a creation of equity, stands on the fundamental point that an insured ought not to receive more than his or her full loss. If he or she does recover more than complete compensation, any excess is held in trust for the insurer.
>
> Subparagraphs 1 and 2, on their face, entirely upend this concept. Instead of the insured recovering 100% first, it is the insurer who has first entitlement to recover 100% of its payout; only then can the insured recover anything.
>
> While it might be possible to conceive of an insurer and an insured arriving at just such an agreement, the fact that they chose to characterize the right as being one of "subrogation" suggests that they did not in fact mean to accomplish such a radical upending of the relationship between an insured and an insurer. Otherwise, why use the word at all?

[32] It must be noted the brief refers to the equitable concept subrogation, but we are dealing with contractual subrogation. In *Gibson v. Sun Life Assurance Co. of Canada* (1984), 6 O.L.R. (4th) 746, there is reference by Justice Henry, in his often quoted reasons, to a passage from *National Fire Ins. Co. et al v. McLaren* (1886), 12 O.R. 682 at 687 (which was cited with approval by the Supreme Court of Canada in *Ledingham et al v. Ontario Hospital Services Commission et at*, [1975] 1 S.C.R. 332 at p. 337) defining subrogation as a creature of equity. After the passage, Henry, J. said:

> The insurer may also find his right of subrogation in the terms of the contract of insurance, or in statutory provisions confirming or abrogating it.

[33] In *Maritime Life Assurance Co. v. Mullenix* (1986), 75 N.S.R. (2d) 118 at 121, Rogers J. quoted Brown and Menezes Insurance Law in Canada, Toronto, Carswell's 1982 at p. 313:

> The right of subrogation in insurance arises under common law and its operation is governed by common law principles. The general principles have, however, been modified by statute in Canada. In addition, the parties to an insurance contract may modify them for the purposes of that contract.

That which is in issue in this hearing is a subrogation clause which has been modified by the parties to a contract and its terms on the recovery procedure prevail.

[34] The second reason advanced by counsel for the applicant said to support a finding of ambiguity in the subrogation clause are some discussions carried on by the parties, Sun Life and the Treasury Board, in the period 1992 to 1994. There is particular reference to the letter sent to the Applicant from the Chief Human Resources Officer of the Treasury Board, which is dated December 13, 2000 and which purports to explain the provision to Ms. Ryan. Reference is made to this statement in the letter:

> The purpose of subrogation under the disability contract is to make certain the right party pays and that a party does not get paid twice for the same loss.

[35] It is counsel's position that the use of the words "for the same loss" mean the subrogation clause indicate that, to quote from counsel's brief:

> "It is accordingly respectfully submitted that paragraphs 1 and 2 of the subrogation clause, properly construed, mean that Sun Life is entitled to recover not **all** LTD benefits paid prior to settlement, but only that portion of the LTD benefits reasonably attributable...to past loss of income"

[36] I will deal with the substance of Mr. Richardson's submission later in these reasons but will say I find no ambiguity in the clause. The comment to Ms. Ryan supports a finding that the true intent of the parties in including "general damages" as a source of recovery was to prevent employees from getting paid twice for the same loss.

[37] It is fortunate, in this case, there is evidence of what the parties intended in the clause. The affidavit of Ms. Desjeans traces the steps taken in the drafting of the subrogation claim and there are a number of relevant documents attached to the affidavit identified as exhibits. There has been reference to some of these exhibits but, at the risk of some repetition and for the purpose of further clarification on the main issue, I will deal further with these exhibits.

[38] Ms. Desjeans refers to the 1992 report and the observations concerning the need, to avoid misinterpretation and confusion, to set out in the DI Plan a specific clause dealing with the "offset of Legal Entitlement Related to some Disability". This report which reviewed the DI Plan was prepared by The Health Insurance Programs Committee of the National Joint Council of Canada of the Public Service of Canada (NJC).

[39] On January 20, 1993, Jackie Crowe of the Pension and Benefits Branch of the Department of Finance and Treasury Board of Canada sent to Sun Life a subrogation clause wording which had been discussed by representatives of the two parties. The description of the subrogation portion attached to the letter reads:

> **Subrogation**
>
> Where a Monthly Income Benefit becomes payable with respect to an employee who has a right to recover damages from any individual or organization, the Insurer will be subrogated to the rights to recovery of the employee against such individual or organization to the extent of the benefits paid or payable.
>
> In order to qualify for a Monthly Income Benefit the employee shall be required to sign a subrogation agreement if requested to do so by the Insurer.
>
> Whether or not a subrogation agreement has been signed, the employee shall reimburse the Insurer up to the amount of any benefit paid or otherwise payable under this policy out of the damages recovered, which shall include any lump sum or periodic payments on account of past, present or future loss of income.
>
> The employee shall notify the Insurer as soon as any action is commenced against any third party which involves a claim which would otherwise be payable under this Benefit and shall provide the Insurer information, including copies of all relevant documentation, about any judgement or settlement of any such claim. Unless the prior approval of the Insurer has been obtained, no such settlement of any claim against the third party shall be binding on the Insurer.

> The solicitor acting for the employee will represent the subrogated rights of the Insurer unless the Insurer gives notice that another solicitor is to be appointed to act on its behalf. The Insurer reserves the right to pursue its subrogated rights against the third party and, in this respect, the employee and his solicitor shall fully cooperate with the Insurer in the pursuit of its claim.
>
> In the event a lump sum payment is made under a judgement or a settlement for loss of future income or for future periodic lump sum benefits which might otherwise be payable under this Benefit, and the employee fails to reimburse the Insurer to the extent of the benefits paid, no benefits will be paid by the Insurer until such time as the Monthly Income Benefit which would otherwise be payable under this Benefit equals the amount received under the judgement or settlement.
>
> If the third party damage claim is settled prior to trial of the action, the Insurer shall be reimbursed in an amount that **reasonably reflects the benefits that would otherwise be payable under this Benefit, on account of past, present, and future income** without regard to the terms of settlement that may have been agreed to by the employee and the third party. [emphasis added]

[40] The policy underwent a number of revisions prior to its completed form and on September 3, 1993, Sun Life provided to Jackie Crowe the expectations of the proposed amendments:

> (a) To make the Policy both easier to read and to understand for the parties to it and the Employees;
>
> (b) To clarify certain provisions which have in the past caused confusion;
>
> (c) To reduce the amount of litigation arising out of this Policy; and
>
> (d) To increase the efficiency of the administration of the Policy thereby ensuring cost-effective and timely service.

[41] The letter deals with the subrogation provision in terms set out in paragraph 13 of these reasons and which has reference to the problems the clause was to eliminate involving settlements with no sums allotted to loss of earnings or unreasonably small sums allotted to loss of earnings. The letter is exhibit 10 to Ms. Desjeans' affidavit and it states the change in drafting to eliminate the problems were the words Sun Life could seek recovery from "all types of damages recovered by an employee from a third party", a change from the previous provision which limited the recovery to damages resulting from loss of income.

[42] Jackie Crowe of the Treasury Board wrote to Sun Life on October 13th, 1993. This letter is Exhibit 11 and attached to the letter is a draft policy which contains the subrogation clause as finally worded except in paragraph 2 the words "by the employee" were not inserted to show who held the recovery in trust and no percentage figure was inserted to show the extent of the net recovery the employee had to pay Sun Life. The letter carried this comment on the subrogation clause:

> Further to our telephone conversation this afternoon, I am attaching a copy of Draft 4(B) of the policy, with our suggested changes marked in red. I have retained a copy as well so that we can discuss the proposals on Friday.
>
> You will note that most of the suggestions are minor; there are, however, a few matters which I need to discuss with you such as the Subrogation Clause, in particular the specification of the percentage which could be recovered. We also have suggested a couple of changes in the order of certain clauses within the overall document - we can discuss these on Friday as well.

The only change suggested by the Treasury Board was the insertion of "50" as the percentage to be inserted in paragraph 2. Effectively the Treasury Board accepted the terms of the subrogation clause at this point and those were the final terms.

[43] There was a further letter from Jackie Crowe to Sun Life dated December 1, 1993 which is exhibit 13 and carries these comments on the clause:

> **Page 8-2 - Subrogation Clause**
>
> The last paragraph of this clause has caused a problem - it is felt that the ability to withhold or discontinue benefits, on account of a refusal by the Employee to acknowledge that he or she is bound by the provision, is too harsh. The suggestion has been made that the phrase "to execute such acknowledgement" be removed from the last line and that the phrase "to honour the terms of this provision" be substituted. Presumably, an employee who refuses to execute the acknowledgement specified in the first line of the paragraph has refused to honour a term of the subrogation provision - therefore the right to withhold or discontinue benefits under these circumstances would be implied rather than stated.

[44] In the letter from the Treasury Board to the applicant dated December 13, 2000 there is the following paragraph:

> The Disability Insurance Plan employee booklet, issued by the Treasury Board Secretariat, explains how the Plan will supplement other income sources. In other words, some additional income the employee receives will be deducted from benefits payable under the Plan. Some of these other sources of income are pension benefits, disability benefits received under the Canada Pension Plan and amounts received under a third-party damage award. Employing departments routinely provide copies of this booklet. I trust you had received this document. I am nevertheless enclosing a copy of the most recent version for your information.

The damage award is described as a "source of income" which tends to associate the part of the general damage award Sun Life can recover is that part of the award which relates to loss of income.

[45] Counsel was not able to advance an authority directly on point to assist in the interpretation of the clause and I was unable to find such authority. The most helpful case was *Nova Scotia Public Plan Trust Fund* v. *McNally, supra*, but in that case the part of the settlement which related to loss of earning was "clearly identified" and the Court of Appeal did not have to rule on whether the policy permitted the insurer's recovery of money from that part of the settlement or judgment which did not relate to a loss of income. Chipman, J.A. commented on this issue by way of obiter.

[46] The subrogation clause in the McNally case read as follows:

> **18 Subrogation**
>
> (1) Where a long-term disability benefit is payable for an injury or illness for which any third party is, or may be, legally liable, the Trustees will be subrogated to all rights and remedies of the employee against the third party, to recover damages in respect of the injury or death, and may maintain an action in the name of such employee against any person against whom such action lies, and any amount recovered by the Trustees shall be applied to
>
> (a) payment of the costs actually incurred in respect of the action, and
> (b) reimbursement to the Trustees of any disability benefits paid,
>
> and the balance, if any, shall be paid to the employee whose rights were subrogated (April 6, 1992)

(2) Any settlement or release does not bar the rights of the Trustees under subsection (1) unless the Trustees have concurred therein. (April 6, 1992)

(3) An employee will fully cooperate with the Trustees in order to allow the Trustees to do what is reasonably necessary to assert the Trustees' rights to subrogation. (April 6, 1992)

[47] Justice Chipman agreed with the comments of Justice Stewart, the trial judge, when she said:

> Section 18(1) is unambiguous. The wording is clear. Long term disability is payable for an injury for which a third party tortfeasor is liable. All of the insured employee's rights and remedies against a third party are subrogated to the Trustees for damages for the injury. No rights are reserved to the employee. The Trustees may maintain an action in the name of the employee against such third party with any amount recovered being applied to legal costs of the action, reimbursement of paid benefits to the Trustees and the balance, if any, to the employee, in that specific order. The reimbursement provision is not limited to the contractual circumstances of the amount being recovered by the Trustees. The assignment of rights and remedies is not stated to be conditional. The assignment of rights is absolute. One cannot isolate the provisions in s. 18(1). The section must be read as a whole. Since rights are subrogated absolutely to the Trustees obviously only Trustees can recover. Settlement payments to any other party by the third party is in effect a payment in trust for the Trustees. The employee has contracted his rights and absent any re-assignment he has no right between himself and the Trustees to sue. Pursuant to s. 18(2), if an employee attempts to settle or release, this does not bar the rights of the Trustees for the obvious reason that the rights were conclusively assigned to the Trustees, with the only exception being the Trustees' consent or concurrence to its rights being barred. An employee in pursuing an action is in effect the Trustees' agent and pursuant to s. 18(3) must fully cooperate with the Trustees in order to allow the Trustees to do what is reasonably necessary to assert the Trustees' rights to subrogation

[48] There being no ambiguity the Court, referring to Justice Estey’s comments in the *Consolidated-Bathurst, supra,* case stated:

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

> It might be said - as the appellant in effect submits - that the subrogation provisions in s. 18 of the Plan are harsh. They are, however, clear. I do point out that counsel agree, and it is obvious, that it is not necessary on the facts of this case to decide whether the right of subrogation of the Trustee extends to any part of the recovery which is not related to the income loss. Obiter, I would think that the true intent of the parties leads to a construction of the language in s. 18 of the Plan that would not permit subrogation respecting recovery that the insured can show does not relate to his income loss. The justice of such a result is particularly plain where, for example, an insured was contributorily negligent and received but a small percentage of his various losses. If, for example, he received only 10% of his total claim fairly assessed, a court should not favour an interpretation which would require him to pay to the Trustees more than what was recovered for loss of earnings. Such a result would take away some or perhaps even all of the other components of the settlement such as pain and suffering, loss of amenities, disability, special damages and so forth. See Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co. (1979), 112 D.L.R. (3d) 49 (S.C.C.) at p. 58 per Estey, J.
>
> On the facts of this case, however, it is clear that the loss of earnings component of the settlement have been clearly identified, and the Trustees have sought recovery of what they paid out during the period to which they allocate the loss of income recovery. This produced the result that the Trustees did not claim all of what was recovered in the settlement for loss of income.

[49] To have subrogation rights against general damages not related to loss of income is harsh. I agree with Mr. Richardson who made that submission. You have an employee, who may or may not know the relevant terms of the policy who recovers damages against a tortfeasor for pain and suffering only to have an insurer, who contributed nothing toward that part of the employee's general damage which has no connection with lost wages, seek recovery of part of the award for pain and suffering.

[50] Yet, as stated by Chipman, J.A., the intent of the parties with respect to the wording of the subrogation clause in this proceeding is clear - a great deal clearer than the wording in the McNally case because of the documents setting out the intent of the parties.

[51] The policy has broad application affecting many federal employees. It is of standard form setting out the rights and benefits effecting these many employees. There were difficulties experienced involving multiple recovery of lost wages from Sun Life and from tortfeasors. The clause was specifically prepared and agreed

upon by the parties to eliminate the effecting of lump sum settlements which included a lost wage portion with no indication of the quantum of that portion. The cost to the insurer in loss of subrogation recovery or in attempting to separate the allocation of damages would be substantial. This cost to the insurer would be transferred to the federal employees who should not be responsible for the cost perpetrated by some who, consciously or unconsciously, recover more than they are entitled.

[52] When you consider the purpose of the changes in the subrogation clause to create recovery from a general damage award you conclude that Sun Life cannot exercise that right indiscriminately. Even though the comments of Justice Chipman were obiter I respectfully agree with him that Sun Life's recovery through general damages should be restricted to the true intent of the parties as expressed in the subrogation clause, which I do not find ambiguous, and the letters and documents leading up to the agreement on the clause. The true intent was to effect proper recovery of income benefits paid to the employee by subrogating against a proper loss of earnings component of a settlement award and recovery against other aspects of a general damage award when the employee fails to prove the proportionment of a settlement over various heads of damage.

[53] The onus is on the employee to establish that proportionment. Chipman, J.A., in the *McNally, supra,* case agreed with the comments of Justice Stewart, the chambers judge who said:

> ... With a settlement award negotiated by the insured as opposed to a settlement award negotiated by the Trustees or a court award, the Trustees need only prove that the insured received a settlement from a third party and the onus shifts to the insured to account for the proportioning of the lump sum amount over the various heads of damages and to establish no portion of the recovered amount falls within the deduction provisions of s. 9(8) and/or s. 18(1).

[54] Justice Stewart accepted the reasons of Justice Baynton of the Saskatchewan Court of Queens Bench in *Young* v. *Saskatchewan*, [1992] 5 W.W.R. 49 which was affirmed by the Saskatchewan Court of Appeal. Baynton, J. said:

> 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. ... 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.
>
> 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 ...

Justice Chipman agreed with this reasoning.

[55] I have found the subrogation clause is applicable in that it is in effect and binding on the parties and the applicant when Sun Life seeks payment from the applicant's net recovery from the settlement in her legal proceeding for damages resulting from the motor vehicle accident which occurred on March 24th, 1994.

[56] That which is being sought is a declaratory judgment only where I am to define the meaning and scope of the subrogation clause.

[57] I find further there is no merit in submission of counsel for the applicant to restrict Sun Life's recovery to only that part of the settlement attributed to past loss of income thereby leaving control in the employee to pick the date of settlement. That is not what the policy states and it is not what the parties intended.

[58] I do find merit in the submission of counsel for the applicant that the parties' intended efforts should be made to effect recovery by Sun Life of sums designated as general damages to amounts which can reasonably be attributed to an income loss suffered in the accident. It was not the true intention of the parties to permit a recovery out of general damages in every case. It must be remembered, however, the burden on the employee is to establish what he or she received for income compensation in the settlement. Sun Life would have little evidence to effect the same determination. If the employee fails to satisfy this burden or if Sun Life, acting in good faith, does not accept the figure advanced by the employee as a reasonable amount attributed to loss of earnings in the settlement Sun Life can recover from the general damage award a reasonable amount for loss of earnings.

[59] In my opinion this result promotes the true intent of the parties and is a reasonable construction "which produces a fair result".

[60] I will hear counsel on costs but it is my inclination not to award costs in view of my findings and the novel nature of the main issues.

J.