S.C.A. No. 02738

NOVA SCOTIA COURT OF APPEAL

Cite as: Mutual Life Assurance Co. v. Tucker, 1993 NSCA 24

Jones, Hallett and Freeman, JJ.A.

B E T W E E N:

THE MUTUAL LIFE ASSURANCE COMPANY	**Michael T. Pugsley and M. Patricia Towler for appellant**
appellant	
- and -	
KEVIN ANDREW TUCKER	**Floyd K. Horne, Q.C., and Mary Jane McGinty**
respondent	**for respondent**
	Appeal Heard: January 19, l993
	Judgment Delivered: February 5, l993

THE COURT: Appeal of appellant insurer seeking recovery of weekly disability benefits paid insured under sickness and accident policy dismissed per reasons of Freeman, J A.; Jones and Hallett, JJ.A., concurring.

FREEMAN, J.A.:

The issue in this appeal is whether the appellant is entitled to claim back weekly benefits paid under a sickness and accident insurance policy from the respondent insured, who refused to recognize the appellant's claim to subrogation and who accepted a global settlement from third parties.

The respondent was injured in an automobile accident and recovered $23,700 by way of the all-inclusive settlement. As an incident of the settlement he released the third parties, which precludes the insurer from any further proceedings in his name. The appellant, Mutual Life Assurance Company, sought to recover from the settlement amount the $5,046.85 it had paid him under a group insurance policy during his period of disability. This appeal is from the dismissal of the appellant's claim by Mr. Justice Boudreau of the then Trial Division.

The insurer was entitled to subrogation only if the policy under which the weekly benefits were paid was a policy of indemnity. If it was a policy of indemnity, the insurer's rights to subrogation did not arise until the respondent was indemnified in full for his loss. Until he was fully indemnified the respondent was entitled to manage his own claim against third parties without interference by the insurer. If the weekly benefits plus the settlement resulted in more than full indemnification for the insured, he would have become a trustee for the insurer for all monies recovered in excess of the amount required to indemnify him for his loss. He was entitled to enter into a global settlement which did not specify an allocation for lost wages, provided only that he did so in good faith.

The position of the respondent is that the settlement was made in good faith and fell short of indemnifying the respondent in full for lost income.

The trial judge accepted that position. After considering the evidence before him including the respondent's legal expenses, non-pecuniary damages, and the one-third of his lost wages not covered by the weekly benefit, he found the respondent had not been fully indemnified for lost income. He found the global settlement had been negotiated in good faith.

In dismissing the claim the trial judge made no reversible error of law and no palpable error in his assessment of the facts. To dismiss the appeal on that basis at this point, however, would leave unanswered the issue whether the insurance policy was a policy of indemnity giving rise to the right of subrogation.

The policy was written between Mutual Life and the respondent's employer. Under its provisions employees were designated as members and could elect for certain coverage at specified premiums. The premium for weekly indemnity for wages lost as a result of disability due to sickness or accident was .74 per month per $10.00 of weekly benefit. The respondent paid the premium. The amount of the weekly indemnity for which the parties contracted amounted to about two thirds of the respondent's lost wages.

The amount paid under the policy was arrived at by an agreed formula taking into account the rate of weekly wages. Under the provisions of the policy the insurer was entitled to deduct some types of income, but not others, from the weekly benefits. The policy is silent as to the effect of third party accidents.

There was no provision in the policy imposing any duty upon the respondent in the event his disability arose as the result of a tort for which another person was liable. When the claim began Mutual Life sought to have the respondent sign an agreement which would have entitled the insurer to participate in the settlement. The respondent refused, as he was entitled to do, and did not yield any of his control over the action. If Mutual Life was contractually liable to pay him the agreed amount of weekly benefit, that is, if the policy was not one of indemnity, the proposed agreement lacked consideration.

The following is the appellant's key submission:

> "Where an insurance policy provides for automatic payment of fixed benefits which fall due upon proof of the happening of an event such as death, accident or dismemberment, regardless of the actual loss suffered by the insured, the policy is not one of indemnity. See *MacGillivray and Parkington*

> *on Insurance Law* (7th ed. 1981) at 481. However where the contract of insurance requires the insurer to pay only that amount to be determined upon proof of accident and proof of lost earnings, such a policy, it is submitted, is a contract of indemnity. Where, as here, the insurance policy contemplates not that an automatic benefit fall due upon the happening of the accident, but only that there be an indemnity for loss or reduction in income resulting from the accident, the contract is one of indemnity. As such, it entitles the insurer to a right of subrogation: **Glynn** [**v. Scottish Union & National Insurance Co**. **Ltd.** (1963), 40 D.L.R. (2d) 929 (Ont. C.A.)] at 939; **Orion Insurance Company and Brovender v. Hicks and Donnelly,** [1973] 2 W.W.R. 209 at 214 (Man. Q.B.); **Gibson** [**v. Sun Life Assurance Company of Canada)** (1984), 45 O.R. (2d) 326; 6 D.L.R. (4th) 746 (H.C.)]"

The central question is whether the insurance policy in issue meets the criteria stated above by the appellant. That is, is the respondent's sickness and accident insurance a policy of indemnity? That question is crucial. If the present policy is one of indemnity, the insurer may be entitled to be subrogated in the rights of the insured, and thus even might justify demands to be involved in the respondent's action against the tortfeasor. If the policy is not one of indemnity, there is no right of subrogation.

As suggested above by the appellant, the key test for determining if a policy is one of indemnity is whether proof of the amount of the loss is necessary, in addition to proof of the occurrence of the event insured against. Here, the event is the occurrence of a period of disability. Most insurance policies are contracts of indemnity; life insurance, and sickness and accident insurance, are frequently cited by text book writers as examples of non-indemnity policies which do not give rise to rights of subrogation. As pointed out in **Glynn**, the mere classification of a policy is of little help. What the parties agreed to must govern.

The principles of indemnity and subrogation were carefully considered by the Ontario Court of Appeal in the **Glynn** case cited above by the appellant. The plaintiff Glynn and his wife were injured in a motor vehicle accident. They recovered medical and related expenses in an action against the tortfeasor. They sued the defendant insurer under Section B of their automobile insurance policy for the same expenses. In holding they were not entitled to double

recovery Kelly, J.A., writing for the court, stated that he intended

> "that the decision of this case be considered as relating solely to the exact situation presented--the rights of the insured plaintiff to recover the medical expenses of himself and his dependent."

Despite this disclaimer **Glynn** has been widely followed for its statements of principles of fundamental importance in insurance law. However the sickness and accident coverage in the present case is not "the exact situation presented" in **Glynn**, which dealt with medical expenses. The coverage in the present policy must be carefully examined in light of **Glynn** and other cases.

Kelly, J.A., reviewed extracts from insurance texts asserting that life insurance and personal accident insurance contracts are not contracts of indemnity, and concluded that (p. 933 D.L.R.)

> "In making these statements, the authors have attempted to over-simplify the problem of determining what insuring agreements are contracts of indemnity, and have applied a more or less arbitrary identification without fully examining the features which really determine when a particular contract is one of indemnity and when it is not so.
>
> Whether any particular engagement of an insurer constitutes a contract of indemnity is to be determined by the exact nature of the agreement into which he has entered and not by whether the insuring agreement can be conveniently categorized under one or other of several general designations."

Upon a review of a number of leading cases Kelly, J.A., stated the principle that indemnity is the governing rule in insurance policies, but, at p. 936 D.L.R.,

> "Notwithstanding that, as a general rule, indemnity is the governing principle applicable to all forms of insurance, the terms of any insuring agreement may be such as to indicate that indemnity was not contemplated. Where the provisions of a contract indicate that indemnity was not the intention, the application of the principle of indemnity is excluded."

Descriptive words in the policy are of little help. Subrogation is an equitable principle, and the policy must be judged by what it does, not by what it says.

On page 938 Kelly, J.A., discussed "a policy which provides that, upon the happening of some contingent event, a sum fixed or calculable becomes payable to the insured, regardless of whether the insured suffers any pecuniary loss."

> "Another example of such a contract is the undertaking of an insurer to pay upon death or dismemberment or the suffering of some designated injury due to accident, a fixed sum set out in the provisions of the policy. Since the event of accidental death or injury is not itself a pecuniary loss any payment which is made, while it may be an advantage counterbalancing the loss or injury, cannot be a reinstatement. *Porters Law of Insurance*, 8th ed., p. 449;
>
> > But at present the usual form of an accident policy or contract is to pay a certain fixed sum per week in case of injury, and a certain other fixed sum in case of death. Such policies do not contemplate indemnity, and avoid the necessity of going into the assured's accounts or private affairs.
>
> Thus, on account of impossibility or extreme difficulty of the insured ever proving any pecuniary loss, the contract is intended to provide that the amount payable shall become due on the proof of the happening of the event and shall be payable regardless of whether the insured is able to prove or has actually suffered a pecuniary loss; it would be payable even if the insured has in some way benefitted by the injury.
>
> It is my view that it is the latter type of insuring agreement to which the attention of text writers has been directed when they have formulated statements above quoted that policies of personal accident insurance are not contracts of indemnity.
>
> **Such statements are valid, however, only to the extent that, in the personal accident insurance contract concerned, there is no requirement that the insured, in order to become entitled to recover under the policy, prove pecuniary loss, in addition to the occurrence of the accident. They would be true of a contract whereby the insured agreed to pay a fixed sum per day for each day the insured be necessarily disabled from working. Since, under such a policy, it is not necessary for the insured to prove that any loss of wages or earnings were occasioned by the accident but only that a disabling accident had occurred to him, the contract is not one of indemnity."** (my emphasis.)

It is to be noted that Kelly, J.A., was dealing with an appeal from a judgment allowing recovery of medical expenses from both the tortfeasor and Mr. Glynn's Section B insurer. He found it necessary to distinguish authorities which held that personal accident insurance policies were not policies of indemnity. At p. 939 (D.L.R.) he stated:

> "But where a contract of insurance provides that the insurer will pay to

> the insured the amount of any medical, hospital or nursing expenses and loss if earnings resulting from an accident, the insured would be required to prove before becoming entitled to payment, (1) the occurrence of an accident within the meaning of that term as defined in the policy, and (2) the amount of the hospital, medical and nursing expenses and loss of earnings resulting from the accident. Although such a contract might commonly be referred to as a personal accident insurance policy, in my view, since the right to recover depends on the proof of financial loss as well as the happening of the accident, it would be a contract of indemnity and in the absence of express provisions to the contrary would entitle the insurer to be subrogated to the rights of the insured.
>
> "The essential qualities of a contract of life insurance dictate that it be a contract other than one of indemnity--in fact it would seem to be impossible so to draft such a contract that it be one of indemnity. The same may be said of a contract providing for the payment of a fixed sum on dismemberment or a fixed weekly or monthly payment during incapacity arising from a personal accident. But all other forms of insurance contracts are capable of being so drafted that they may be contracts of indemnity or otherwise according to the intention of the parties entering into the contract. Accordingly, in contracts which are capable of being drawn to exclude the principle of indemnity, the words employed must be scrutinized without regard to the label commonly attached to the policy."

Kelly, J.A. was dealing only with medical expenses; his remarks relating to indemnity for loss of earnings must, strictly speaking, be considered *obiter*. I am mindful as well of his disclaimer. Subject to those reservations, I accept his judgment as a persuasive statement of the law as it relates to matters at issue in this appeal. What chiefly distinguishes indemnity policies from policies that do not give rise to subrogation is the requirement for proof of the actual loss. The appellant acknowledges this point in the submission quoted above. It is now necessary to focus on the present policy.

The following provisions are relevant:

> **"WEEKLY INDEMNITY INSURANCE PROVISION**
> **Definitions**
> "Totally disabled" means that the member has a medically determinable mental or physical impairment due to injury or disease which prevents him from performing the regular duties of the occupation in which he participated just before the disability started.
>
> The availability of work for the member does not affect the determination of "totally disabled"

Amount of Weekly Benefit

The amount of weekly benefit is calculated by applying the benefit formula to the member's weekly rate of earned income. This amount is rounded to the next higher $1.00. It may not exceed the Maximum Weekly Benefit.

All Sources Maximum for the Weekly Benefit

If a member is receiving disability income or retirement income from other sources, the weekly benefit will be reduced so that the total amount of disability and retirement income receivable by or on behalf of the member from all sources does not exceed 100% of his weekly rate of earned income in force on the date he became totally disabled.

'Other Sources' include but are not limited to
1. another group insurance policy, (including a policy under which the member is insured because he belongs to an association),
2. an automobile insurance policy,
3. a retirement income plan providing income that becomes payable only after the member became totally disabled,
4. a government plan providing disability income that becomes payable only after the member became totally disabled.

Excluded from 'other sources' are
1. a policy which is solely an individual disability income policy,
2. a disability attachment to an individual life insurance policy,
3. a government plan providing disability income if we receive proof that the initial application for those disability benefits has been declined.

The weekly benefit playable is not less than the amount that would otherwise be payable by the Employment and Immigration Commission.

Claims

A claim must be received by us within 3 months after the date the member became totally disabled.

We may require
1. proof the member continues to be totally disabled,
2. a medical examination by a physician appointed by us, and
3. other information we consider necessary for the assessment of a claim.

Proof of claim is at the claimant's expense.

There is a time limit for proceedings against us for payment of a claim. A proceeding must be started within 1 year of our receipt of the proof of claim.

Payment of Weekly Benefit

We will pay the member the amount of weekly benefit in force on the date the disability began when we receive proof that he has been totally disabled for the qualifying period. The qualifying period begins on the date the member

> becomes totally disabled. A benefit equal to one-seventh of the weekly benefit is payable for each full day he is totally disabled.
>
> If a member is absent from active work for more than half of any day because he is totally disabled, the absence is considered one day of disability.
>
> Benefits are payable from the later of
>
> 1. the date after the end of the qualifying period, or
> 2. the date the member is no longer entitled to receive regular earnings or benefits under salary continuance plan or short term disability income plan.
>
> Benefit payments stop on the date that
> 1. the benefit period ends,
> 2. the member is no longer totally disabled,
> 3. the member participates in any occupation for remuneration or profit,
> 4. the member dies,
> 5. the member fails to submit proof to us that he continues to be totally disabled, or
> 6. the member fails to submit to a medical examination at our request, by a physician we appoint,
> whichever is earliest."

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

benefit is a creation of a contractual formula, independent of the actual amount of the loss suffered by the insured, the policy cannot be considered one of indemnity: it is not intended to make the insured whole, merely to provide him with a predetermined weekly income during disability. Therefore subrogation does not arise.

The jurisprudence following **Glynn** has not been uniform, nor can it be expected to be. The language and purpose of each policy must be evaluated by the court. In **Gibson v. Sun Life Assurance Co. of Canada** (1984), 6 D.L.R. 746 Henry, J. of the Ontario High Court of Justice found a policy to provide a group of federal employees with a fixed percentage of their incomes during long term disability to be a policy of indemnity. There is a distinction between insurance for a fixed percentage of an actual loss of income, and a contract to pay a predetermined amount to be ascertained by a formula applied to the weekly rate of earned income of the insured employee. In **Orion Insurance Company Limited and Brovender v. Hicks and Donnelly** (1973), 2 W.W.R. 209, Wilson, J. of the Manitoba Queens Bench allowed an insurer's claim to be subrogated for loss of earnings payments under "Section B" accident policy; s. 273(1) of the **Insurance Act**, R.S.M. 1970 c. 40 created a statutory right to subrogation.

However, the late Mr. Justice Rogers of the Supreme Court of Nova Scotia, Trial Division, held in **Maritime Life v. Mullenix** (1986), 76 N.S.R. (2d) 118 that the weekly benefit portion of a group disability policy "falls into the classic accident policy classification and is not an income replacement policy for which indemnity must follow as in the case of the monthly disability portion of the policy." Rogers, J., noted that under that policy the insured was entitled to work in some other occupation and be paid for it while drawing benefits, an option unavailable under the concept of disability in the present policy. Ability to work relates to proof of disability, not loss, and there is little to distinguish the policy in **Mullenix** from the present policy.

A distinction between weekly benefits and long term disability was also noted in

Confederation Life Insurance Co. v. Causton (1989), 38 C.C.L.I. 1, (B.C.C.A.) although the trial judge's finding that both were contracts of indemnity was not an issue in the appeal. Locke, J.A., found it "more doubtful" that the "weekly indemnity benefit" was a true indemnity, but agreed with the trial judge upon considering requirements for the reduction of benefits which appear more comprehensive than those in the present case.

The authors of *MacGillivray and Parkington on Insurance Law,* Seventh Edition, London, 1981, state in Paragraph 1146;

> "If, on a proper construction of the contract of insurance, the insurer has promised to pay a certain sum of money on the happening of a certain event (e.g. on accident or death) regardless of the actual loss suffered by the insured, there is no room for the doctrine of subrogation."

Even if the policy in question were a policy of indemnity, subrogation would not arise in the present circumstances. The authors of *Insurance Law in Canada*, Brown and Menezes, Second Edition, Carswell, 1991, state in Paragraph 15:3:1:

> "Subject to statute and terms of the policy the insurer's right of subrogation arises only when the insured has been fully indemnified for his loss, even if the insurer has paid to the full extent of its liability."

This principle, repeated frequently in the jurisprudence, need not be examined in detail in the circumstances of this appeal. (See **Davis v. MacRitchie** et al., [1939] 4 D.L.R. 187 (N.S.S.C.); **Globe & Rutgers Fire Ins. Co. v. Truedell**, [1927] 2 D.L.R. 659, 60 O.L.R. 227.) Its basis seems obvious. A person damaged by the tort of another is entitled to be made whole, but to be made whole only once. If he carries insurance under which an insurer makes him whole, he still has a legal right of action against the tortfeasor. It would not be equitable for him to be compensated twice. At this point the principle of subrogation comes into operation; equity transfers his right of action against the tortfeasor to the insurer, which is free to pursue its compensation. If the insurer provides only partial indemnification, the victim still retains his legal right against the tortfeasor to make him whole. In that instance subrogation cannot

arise by operation of equity: it remains equitable for the insured to retain his right of action against the tortfeasor. Equity does not operate piecemeal: so long as the right to be made whole is subsisting it will not be taken away from the victim little by little. A victim may be partially compensated, but he retains his right against the tortfeasor to be made whole until he has been completely indemnified. If the parties to an insurance policy intend for the insurer to be compensated for partially indemnifying the insured, that can be provided for by contract. Rights of subrogation may also be provided for by statute, as they are in some provinces including Ontario and Manitoba. The **Insurance Act**, R.S.N.S. 1989, c. 23l does not provide for subrogation for sickness and acident or life insurance. In the present case, as in the **Glynn** case, subrogation by contract or statute is not in issue. All questions in issue relate to the operation of equity.

The following statement by Chancellor Boyd in **National Fire Insurance Co. v. McLaren** (1886), 12 O.R. 682 at p. 687 was cited with approval by Judson, J., in **Ledingham v. Ontario Hospital Services Commission,** [1975] 1 S.C.R.332 at 337:

> "The doctrine of subrogation is a creature of equity not founded on contract, but arising out of the relations of the parties. In cases of insurance where a third party is liable to make good the loss, the right of subrogation depends upon and is regulated by the broad underlying principle of securing full indemnity to the insured, on the one hand, and on the other of holding him accountable as trustee for any advantage he may obtain over and above compensation for his loss. Being an equitable right, it partakes of all the ordinary incidents of such rights, one of which is that in administering relief the court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company."

Ledingham was relied upon in **Causton** which is regarded as a leading case on the current law of subrogation.

If this were a policy of indemnity, the right of subrogation would arise when and if the insured was made whole through his action against the tortfeasor. He would hold any amounts recovered surplus to full indemnity in trust for the insurer. When he has not been fully

indemnified by the insurer, and negotiates a global settlement in which the lost income factor, if any, is not specified, the difficulties become daunting. That is the present situation. It could have been averted if the insurer had provided in the policy for any rights of compensation or subrogation rights it might require, and the insured had agreed to them. The policy dealt with other predictable contingencies; it must be assumed that its silence respecting third party claims was intentional.

In such circumstances courts should not be astute to characterize disability benefit policies as policies of indemnity when the insurer, which drafts the policy, has not seen fit either to protect its own rights nor to give the insured fair notice of what to expect when a tortfeasor is sued. If the insurer wishes to be "subrogated" for partial indemnity, or to impose duties upon the insured when action is brought against a third party, that provision should be made in the policy.

The trial judge dismissed the appellant's action because he found there had not been full indemnity resulting from the amounts paid under the policy and the settlement, which had been negotiated in good faith: therefore no right to subrogation arose. The appeal is dismissed on the basis that the trial judge was not in error, and on the further basis that the weekly benefit was not an indemnity but a fixed amount established by contract prior to the disability and requiring no proof of loss. In short, applying the principles of **Glynn**, the policy was not a policy of indemnity and no right of subrogation could arise regardless of the respondent's success against a tortfeasor. The respondent is allowed his costs which are fixed at $1500 plus disbursements.

Freeman, J.A.

Concurred in: Jones, J.A.

Hallett, J.A.

S.C.A. No. 02738

NOVA SCOTIA COURT OF APPEAL

THE MUTUAL LIFE ASSURANCE COMPANY	)	**REASONS FOR**
	)	
	)	**JUDGMENT BY:**
appellant	)	
	)	**FREEMAN, J.A.**
- and -	)	
	)	
KEVIN ANDREW TUCKER	)	
	)	
respondent	)	