SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Kontuk*, 2018 NSSC 89

Date: 2018-04-12
Docket: Hfx. No. 455293
Registry: Halifax

Between:

The Nova Scotia Public Service Long Term Disability Plan Trust Fund

Applicant

v.

William Kontuk

Respondent

Judge: The Honourable Justice Timothy Gabriel

Heard: January 2, 2018, in Halifax, Nova Scotia

Counsel: Colin D. Bryson Q.C., for the Applicant
Jamie McGillivray, for the Respondent

By the Court:

[1] In this matter, the Nova Scotia Public Service Long Term Disability Plan Trust Fund (hereinafter referred to either as "the Applicant" or "the Fund") seeks an order fixing:

> (a) The amount (if any) to be reimbursed by the Respondent, William Kontuk to the Fund; and
>
> (b) The amount (if any) of the bi-weekly offset from LTD payments to the Respondent as of May 23, 2013.

[2] The Respondent takes the position that the Fund is entitled to nothing.

[3] This all originates from a settlement by the Respondent of a personal injury claim arising from a motor vehicle accident (the "MVA"). That accident occurred in Ontario on July 14, 2005.

Background

[4] The basis of the order sought by the Applicant is referenced in the Notice of Application in Chambers (as amended) this way:

> 1. The Respondent was injured in a motor vehicle accident on July 14, 2005, which injuries disabled him from work;
> 2. The Respondent was an insured under the long-term disability plan provided by the Applicant … and received and continues to receive long-term disability benefits pursuant to the LTD plan arising from the disability caused by the accident;
> 3. The Respondent commenced action for personal injury damages against the party responsible for the accident and settled his claim on May 23, 2013;
> 4. The plan contains subrogation and offset provisions which, from the income loss portion of the proceeds of the settlement, entitle the Applicant to:
>
> (a) Reimbursement of long-term disability benefits paid to the Respondent; and

(b) An offset against long-term disability benefits payable from the date of the settlement.

[5] Preliminarily, the parties have made certain agreements. They are set forth in the agreed statement of facts filed with the court and dated July 25, 2016. The facts as agreed are as follows:

> 1. William Kontuk was injured in a motor-vehicle accident on July 14, 2005 in Port Dover, Ontario. His vehicle, while stopped, was struck from behind by a vehicle driven by Hugh Muth. Mr. Muth's liability for Mr. Kontuk's damages was governed by the *Ontario Insurance Act*, RSO 1990, Chapter I.8.
>
> 2. Mr. Kontuk moved to Nova Scotia in December 2005 and, in 2006, began working as a truck/plow operator for the Nova Scotia Department of Highways. As a result of his employment, Mr. Kontuk was an insured under the Nova Scotia Public Service Long Term Disability Plan (the "LTD Plan") (Tab 1).
>
> 3. Mr. Kontuk went off work in January 2010, and commenced receiving disability benefits under the LTD Plan as of January 25, 2011.
>
> 4. Mr. Kontuk commenced legal action in Nova Scotia against Mr. Muth in 2007 (Hfx. No. 276661). Mr. Kontuk and Mr. Muth participated in a judicial Settlement Conference on April 11, 2013. The positions of Mr. Kontuk and Mr. Muth were set out in their respective Settlement Conference Briefs (Tabs 2, 3 and 4). Settlement was not reached at this Settlement Conference.
>
> 5. Counsel for Mr. Kontuk and Mr. Muth engaged in further settlement negotiations, finally arriving at a settlement of $123,750.00 on May 23, 2013 (Tab 5). The LTD Fund consented to this settlement.
>
> 6. Mr. Kontuk's legal fees for this settlement were a contingency fee of 25% of the $123,750.00, plus HST ($30,469.57), plus disbursements of $35,432.41.
>
> 7. Mr. Kontuk received $47,592.48 in long term disability benefits pursuant to the LTD Plan for the period from January 25, 2011 to May 23, 2013. Attached as Tab 6 is a complete record of the LTD payments made to Mr. Kontuk for benefits to June 1, 2016.

[6] I agree with the manner in which the issues have been identified in the Applicant's brief. They are, restated slightly, as follows:

1. Does the "no subrogation" provision in the Ontario *Insurance Act* prevent the Fund from asserting its rights to the income loss portion of the Respondent's settlement?
2. If the answer to question 1 is "no", what is the income loss portion of Mr. Kontuk's settlement?

3. What is the extent of LTD Fund's entitlement with respect to the income loss portion of Mr. Kontuk's settlement?

Analysis

1. Does the "no subrogation" provision in the Ontario Insurance Act prevent the Fund from asserting its rights to the income loss portion of the Respondent's settlement?

[7] The parties have reproduced the entire text of the LTD plan ("the Plan") at Tab 1 of the agreed statement of facts. However, the two sections that are of most interest for present purposes are sections 9(8) and 16(1).

A. The Broad Principles

[8] I begin with Section 16(1) (formerly s. 18(1)) of the Plan, which states as follows:

> 16. (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 reimbursement to the Trustees of any disability benefits paid, and the balance, if any shall be paid to the employee whose rights were subrogated.
>
> (b) any settlement or release does not bar the rights of the Trustees under subsection (1) unless the Trustees have concurred therein.
>
> (c) 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.

[9] Our Court of Appeal has previously considered what is now Section 16(1) of the Plan. One such example, cited by both parties, is *NSPS LTD Plan Trust Fund v. McNally* 1999 NSCA 129. In *McNally*, *supra*, the Respondent was a provincial employee covered under the Plan, which provided for salary continuation in the case of long-term disability. Mr. McNally sustained a whiplash neck and shoulder injury in a motor vehicle accident. He ceased working and received long-term disability

benefits from the plan. The insurer proposed a settlement subject to the approval of the trustees of the plan. The trustees gave their consent, but put Mr. McNally on notice that they claimed reimbursement.

[10] The trustees' claim was permitted at first instance. Justice Stewart determined that even though a global settlement was reached without a break down, and even though the Fund had not asserted its right to pursue the action (itself) in Mr. McNally's name, the portion representing wage loss could still be determined, and the Fund was entitled to reimbursement based upon that determination.

[11] Mr. McNally appealed. Among other things, he argued that the only way that the trustees could recover was if they themselves had conducted the action in the insured's name and made the recovery from the tortfeasor.

[12] In dismissing the appeal, Justice David Chipman summarized the findings made by the Chambers Justice:

> 19. Stewart, J. reached the following conclusions:
>
> (1) The Plan was one of indemnity. Section 18(1) was unambiguous. It constituted a contractual subrogation. All of the insured employees' rights and remedies against the third party were subrogated to the Trustees. As between the Trustees and the appellant, only the former had the right of recovery. In pursuing the action the appellant acted in effect as the agent of the Trustees. The words "amount recovered by the Trustees" was not of interpretative significance.
>
> (2) There was a nexus between the injuries from the accident and the disability benefits which, on the evidence, "remained alive and well and reflected" in the settlement.
>
> (3) As to the allocation of the recovery, when the settlement was negotiated by the appellant rather than the Trustees the latter needed only to prove that the insured received a settlement from a third party. Then the onus shifted to the appellant to account for the apportionment of the lump sum amount over the various heads of damages and to establish that no portion of the recovered amount fell within the deduction provisions of s. 9(8) and s. 18.
>
> (4) The loss of income aspect was calculable with sufficient certainty that the obligation to account may be effected pursuant to s. 9(8) and/or s. 18. The income portion of the settlement was to be attributed to past loss of income in this case. The Trustees were therefore entitled to recover $40,238.21, plus interest at 4% from July 28, 1995 to December 31, 1997, for a total of $42,183, plus interest, together with costs of $700.00.

[emphasis added]

[13] The Court, in *McNally*, went on to explain the equitable concept of subrogation this way:

> 22. In equity, the right of subrogation accrues to an insurer only in cases where the insurance is a contract of indemnity. Subrogation is the right of the insurer to stand in place of the insured and recover from any party liable for the insured's loss. The right only arises after the insured has been fully indemnified by the insurer. In the event of partial indemnity, the insured retains the right to recover from the third party.
>
> 23. Subrogation has two aspects: the right to pursue the insured's rights against a third party, and the right to recover any benefits received by the insured with respect to the loss for which he has been indemnified.
>
> 24. Unlike an assignment, the right of subrogation vests by operation of law rather than by an express agreement. The assignee may sue in its own name in pursuing its assigned rights, to the extent provided in the *Judicature Act*, R.S.N.S. 1989, c. 240, s. 43(5). The subrogated insurer must sue in the name of the insured in pursuing the subrogated rights.
>
> [emphasis added]

[14] Other types of subrogation were then referenced:

> 26. Apart from the operation of equity, subrogation may arise by statute or by contract. Examples of the former are s. 149 (automobile) and s. 172 (fire) of the *Insurance Act*, R.S.N.S. 1989, c. 231. An example of the latter is a provision just such as that contained in s. 18 [now s. 16] of the Plan.
>
> [emphasis added]

[15] The circumstances under which contractual subrogation may arise are straightforward. As Freeman, J.A. observed in *Mutual Life v. Tucker* (1993), 119 N.S.R. (2d) 417 (CA), "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 the contract" (para. 28).

[16] In the present case, according to the plain wording of the Plan, the Fund is entitled to rely upon its contractual rights, including those arising under Sections 9(8) and 16(1) of the Plan.

[17] As to the significance of the "employee" (or the Respondent, in this case) exercising control of the action for recovery of damages (instead of the Fund), the Court in *McNally* went on to say at para. 40:

> …Moreover, even if the appellant in fact exercised full control, this does not, in my opinion, diminish the right of the Trustees to do so. In view of the unambiguous language respecting the transfer of the rights of subrogation to the Trustees, and the giving of priority in the recovery to the Trustees, any de facto control exercised by the appellant over the recovery proceedings must be regarded as being exercised on behalf of the Trustees. I agree with Stewart, J. 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.
> >
> > [emphasis added]

[18] What this boils down to was concisely summarized in para. 46:

> …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.

[19] Future wage loss was not dealt with by the Court of Appeal in *McNally*, *supra*. It has been held to arise pursuant to Section 9(8) of the Plan, the relevant portion of which says:

> 9. The benefit to which an employee is entitled under this section shall be reduced by:
>
> …
>
> (8) the amount of earnings recovered through a legally enforceable cause of action against some other person or corporation.

[20] This section was interpreted in *Nova Scotia Public Service Long Term Disability Trust Fund v. Warner* 2006 NSSC 160, wherein a component of the Respondent's injury award was for loss of earning capacity. This portion of her total award comprised $125,000.

[21] In determining the method by which the Fund was to be reimbursed for that recovery, the Court (in *Warner*) approached the matter by reducing the amounts which the Fund would have been otherwise obliged to pay on a monthly basis. It was determined that $77,212.00 (which was considered to represent the award for loss of earning capacity, net of legal fees) should be prorated over the period of time (22 years) from the personal injury recovery to Ms. Warner's 65th birthday, which was the date upon which it was considered likely that she would have retired. This amounted to a reduction in the future payments which she was to receive from the LTD Plan by $209.14 per month. The court conceded that individual circumstances may dictate an alternative treatment of funds in different factual scenarios.

[22] These then, in brief, are the broad principles which would generally be applicable in a case where reimbursement is sought by the Fund against a party in Mr. Kontuk's position. Before application of any of these to the instant case, however, I must determine whether any are modified or negated by the *lex locus* of the Respondent's motor vehicle accident.

B. Ontario's *Insurance Act*

[23] As noted, this motor vehicle accident occurred in Ontario (Port Dover, Ontario, to be exact) on July 14, 2005. It was a rear end accident. The *Insurance Act* of that province, RSO 199, c. I.8, was applicable by virtue of this location.

[24] The parties have focused upon the following portions of that legislation:

> 267.8 (1) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by the following amounts:
>
> 1. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of the income loss and loss of earning capacity.
>
> 2. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan.
>
> 3. All payments in respect of the incident that the plaintiff has received before the trial of the action under a sick leave plan arising by reason of the plaintiff's occupation or employment. 1996, c. 21, s. 29.
>
> …
>
> Future collateral benefits
>
> (9) A plaintiff who recovers damages for income loss, loss of earning capacity, expenses that have been or will be incurred for health care, or other pecuniary loss in an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile shall hold the following amounts in trust:
>
> …
>
> 2. All payments in respect of the incident that the plaintiff receives after the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan.
>
> …
>
> Limitation on subrogation
>
> (17) A person who has made a payment described in subsection (1), (4) or (6) is not subrogated to a right of recovery of the insured against another person in respect of that payment.
>
> [emphasis added]

[25] The Respondent argues that these provisions preclude the Applicant from seeking recovery with respect to any payments made to him by way of wage loss or wage replacement. In particular, the Respondent contends:

> An issue very similar to the matter at hand was dealt with in the Ontario case of *Landry v. Roy* , [2001] O.J. No. 3366 (ONSCJ). In *Landry*, the plaintiff , a New Brunswick resident, was involved in an accident in Welland, Ontario. Justice Pitt

> of the Ontario Superior Court of Justice was called on to determine the following question of law:
>
> > whether the New Brunswick Ministry of Health and Community Services has a subrogated claim against the alleged tortfeasor for any medical services provided to the plaintiff as a result of injuries sustained in the subject motor vehicle accident, pursuant to the *Medical Services Payments Act*, R.S.N.B. 1973, c. M-7.
> >
> > (Respondent's brief, p. 5)

[26] He continues thus:

> … Both cases involve the applicability of Ontario law to parties located outside Ontario. Both of the benefits in these cases were issued in a province that was different from the province where the tort occurred. Despite this, Ontario law was still held to be applicable and the insurer's subrogated claims were disallowed under s. 267.8(17) of the *Insurance Act.*
>
> (Respondent's brief, p. 6)

[27] With respect, I disagree. In my view, this argument fails to give proper effect to the Court's determination in *McNally*, *supra.* Subrogation has two components: first, the right to pursue the insured's claim against the third party in the name of the insured and second, the right to the benefit of any other amounts available to the insured for the particular loss to which the paid benefits apply.

[28] These two aspects are not contingent or co-dependant. The Fund's right to recovery is not obviated by its failure (or its inability, in this case) to assert its right to pursue Mr. Kontuk's action in Ontario and obtain recovery in his name.

[29] The Plan and, in particular, Sections 9(8) and 16(1) thereof, govern the rights of Mr. Kontuk and the Fund *inter se*. As we have already seen, the Plan does not require full indemnification of Mr. Kontuk before the Fund's contractual right to recover "any benefits received by the insured" is triggered.

[30] What the Ontario legislation can and does do is prevent the Fund from pursuing compensation with respect to the MVA in Mr. Kontuk's name. It does not, nor can it, purport to alter the contractual relationship between the Respondent and the Fund.

[31] Put differently, there is no need to give the Ontario *Insurance Act* extra provincial effect in order to fulfill its intended purpose in this case. The purpose of the Ontario legislation is to protect automobile insurance consumers by allowing

insurers to deduct (from their obligation to reimburse for wage loss) amounts recoverable by the victim arising out of the accident from other sources, and thereby keep premiums as low as possible. There is no need, nor does the legislation purport, to override the clear provisions of the contract between Mr. Kontuk and the Applicant.

[32] Therefore, I conclude that nothing in the Ontario legislation prevents the Applicant from relying upon its rights as contained in ss. 9(8) and 16(1) of the Plan.

2. If the answer to question 1 is "no", what is the income loss portion of Mr. Kontuk's settlement?

A. What led up to the settlement?

[33] It will be recalled that Mr. Kontuk was not yet employed with the Province of Nova Scotia in July 2005 when he was involved in the MVA. It was later in that year that he relocated to Nova Scotia. He became a Nova Scotia provincial employee, which led to his becoming a Plan member, in 2006.

[34] Nonetheless, it is clear that Mr. Kontuk left this employment ("the job") in 2010. He did so on the basis that he was unable to continue performing it. He maintained (when he brought action for personal injuries arising out of the MVA) that his inability to do so was causally related to the MVA, even though he had acquired the job afterward.

[35] In the course of the discovery examinations associated with his personal injury claim, the Respondent indicated that his reason for leaving the job in 2010 was different. He said it was due to the stressful interaction between himself and a new supervisor on the job.

[36] This is apparent from the materials which were filed with the agreed statement of facts. As previously indicated, contained at tabs 2, 3 and 4 thereof are the settlement conference briefs filed by the parties to the litigation initiated by the Respondent in relation to the MVA. Present counsel for Mr. Kontuk represented him as the Plaintiff in that action. Geoffrey Machum represented the Defendant. Excerpts from these materials will hereinafter be referenced simply by the tab numbers under which they appear.

[37] The MVA Defendant was an individual named Hugh Muth. I will be referring to him either as the "tortfeasor", or "Mr. Muth". In his settlement conference brief, Mr. Kontuk summarized his claim against the tortfeasor ("the original demand") as follows:

Claim Summary

General Damages	
General Damages	$150,000.00
PJI (5% over 8 years)	$ 60,000.00
TOTAL	$210,000.00
Special Damages	
Future Wage Loss (net of LTD)	$202,229.00
Past Wage Loss (net of LTD)	$ 34,478.00
Loss of Valuable Services	$ 68,671.00
Cost of Future Care	$ 63,393.00
Subtotal	$368,771.00
PJI	$ 68,840.74
TOTAL	$437,611.74
Costs and Disbursements	
Costs and Contribution (Tariff F)	$ 15,952.24
Disbursements	$ 35,222.96
TOTAL	$ 51,175.20
TOTAL VALUE OF CLAIM	$698,786.94

(Tab 2, p. 32)

[38] Mr. Muth, although he admitted liability, took issue with most of the monetary components of the original demand. He focussed upon the claims of past and future wage loss in particular.

[39] The tortfeasor contended (in the settlement conference brief filed by his counsel):

> 55. The Defendant denies that the Plaintiff has suffered any past loss of income as a result of the injuries he sustained in 2005 MVA.
>
> 56. The Plaintiff continued working on a full-time basis with his employer in Ontario until December 2005 when he returned to Nova Scotia and abandoned his job, ostensibly to pursue medical treatment which was reasonably available to him in Ontario.
>
> 57. He immediately began working for the Nova Scotia Department of Highways and remained employed in that capacity until 2010 when he went off on work due to stress in his workplace arising from an interpersonal conflict with his supervisor.
>
> 58. For the reasons mentioned above, the Defendant denies any causal connection between the injuries sustained in the 2005 MVA and his reported inability to work after 2010.

[40] With respect to future income loss, the Mr. Muth had this to say:

> 67. As above, the Defendant denies that the Plaintiff has suffered any future loss of income as a result of the injuries he sustained in the 2005 MVA. Any loss in that regard arises solely from workplace issues which have nothing to do with the injuries he sustained in the 2005 MVA. (Agreed Statement of Facts, Tab 3)

[41] This is to be contrasted with the manner in which Mr. Kontuk characterized his injuries in his settlement conference brief. Therein, he claimed (among other things) that he had been left with a continuously deteriorating cognitive function from the date of the motor vehicle accident (2005). He said that this culminated in his inability to continue to carry out the duties of the job in 2010, and that this cognitive deterioration was merely aggravated, rather than caused, by the negative interpersonal conflict with his work supervisor.

[42] A more particular sense of this contention is obtained from some of the selected references to the medical reports that appear in Mr. Kontuk's settlement conference brief. For example, his counsel noted that:

> 16. Neurologist Richard Leekey reported again on July 9, 2012 after having reviewed Dr. Baker's neuropsychological evaluation:

> …I recognize that some of the test suggests that Mr. Kontuk may not have been putting in a full effort. It is notable that the neuropsychological evaluation is long and even for someone without any cognitive impairment it is difficult to put in a full effort throughout the entire testing. It is also difficult for a person not to become frustrated and upset and provide complete attention during this time. I agree that he has significant cognitive limitations. I suspect that he although that he probably did not have the highest education, most of these cognitive limitations as I have stated have come from his motor vehicle accident. I would also agree that I have significant concerns about him living alone and a home occupational therapy assessment maybe worthwhile and also with his emotional distress…
>
> (Tab 2)
>
> [emphasis in original]

[43] Counsel went on to further describe Mr. Kontuk's injuries from the MVA this way:

> 27. Mr. Kontuk stopped working in Ontario following the accident. However, he worked for several years following his return to Nova Scotia. There is also a gap in his treatment during that timeframe that he was working with the Department of Transportation. However, Mr. Kontuk was essentially knuckling down and doing what he felt he had to do to make a living. Mr. Kontuk should not be penalized for his grit and stoicism in persevering for as long as he did. The Defendant is attempting to exploit this to argue that Mr. Kontk's current disability is not caused by the car accident.
>
> 28. The early post-accident treatment history diagnosis a "closed head injury/concussion and a severe whiplash which tore his neck and shoulder muscles. Dr. Leckey and Steven Dunsiger both indicate that the car accident was a significant contribution to the development of Mr. Kontuk's chronic pain. Dr. Loane also indicates that he is not employable due to chronic pain caused by the car accident.
>
> 29. There is no suggestion that Mr. Kontuk's physical injures were caused by anything but the accident. Occupational Therapist Felicia Boutilier performed a Functional Capacity Evaluation on August 7, 2011. The FCE protocol used by Ms. Boutilier has built in consistency measures to ensure that a participant is given a maximal effort. Page 2 of the report concludes that 'The results of this evaluation suggest that Mr. Kontuk gave a reliable effort, with 12 of 12 consistency measures within expected limits.' The measures within the FCE give it a level of objectivity that is otherwise difficult to find in chronic pain cases. Ms. Boutilier's findings concluded:
>
> > Mr. Kontuk does not demonstrate the physical abilities to perform the essential job demands of his pre-injury occupation.

> His demonstrated sitting, standing and walking tolerances indicate a 4 hour workday tolerance at below the sedentary degree of strenuous allowing for changes in position between sitting and weight bearing.
>
> Should he not have the ability to change positions between sitting and weight bearing, his workday tolerance would be reduced accordingly. Should the job demands exceed his physical limitations his workday tolerance will be further reduced.
>
> (Tab 2)

[44] Then at para. 31 and 32, counsel for the Respondent continues:

> 31. [In his] December 14, 2011 report Dr. Loane explains the worsening cycle of pain and depression:
>
> > …It is also clear that the presence of increased anxiety and depression can lead to perpetuation of chronic pain states leading to 'vicious cycle' of emotional distress and pain. Therefore, I believe that there is a close interaction between his pain disorder and his mental state and that it is important and, in fact, necessary to have adequate and combined rehabilitation approaches to both the mental and physical spheres in order to maximize recovery…
>
> 32. In his February 3, 2012 report, Steven Dunsiger (psychologist) also comments on the pain depression cycle. Mr. Kontuk's vulnerabilities, and concludes that Mr. Kontuk's difficulty with pain and life changes contributed to his depression:
>
> > …This concept that injuries/pain that results in significant changes to one's day-to-day life can cause significant problems with one's emotional state is supported by Dersh, Polatin, and Gatchel (2002) and Sharp and Keefe (2005). Unfortunately, they also note that problems with emotional states and chronic pain will make it that much more difficult to deal with new stressors as they arise.
> >
> > Mr. Kontuk reported, and was treated for, physical injuries and major pain after the MVA of 2005. Lynn Jaffray, RN noted on August 30, 2005 and September 1, 2004 that Mr. Kontuk was dealing with headaches and pain in both his shoulders, with numbness and tingling down his arm to his fingers. As well as, problems with concentration, agitation, fidgetiness, mood swings and irritability was also noted, symptoms that he reports are still present and interfering with his life.
> >
> > One can thus conclude that the MVA, which led to Mr. Kontuk experiencing difficulty with pain and life changes, contributed to Mr. Kontuk's problems with depression. Mr. Kontuk's tendency to OCP traits would have made him more vulnerable to being negatively affected by his day-to-day

> life/work being disrupted by the pain, and his perception that his will never be the same.
>
> He was already experiencing problems with pain and depression when he began working for the Department of Highways. As noted above, this would have left him more vulnerable to the stresses he experienced on the job…

33. Dr. Leckey believes that the MVA, 'workplace injury', is a significant cause of his physical and psychological problems:

> …Based upon review of his previous history, it is quite clear that there had been one episode of previous headache; however they have not prolonged and they have not impaired him from working for a long prolonged period of time. This is the longest that Mr. Kontuk has not been working and therefore it is my opinion as a neurologist that <u>he has significant contribution to his pain syndrome, depression and anxiety from this workplace injury</u>…

34. Dr. Loane's September 26, 2011 report indicates that the car accident is the cause of Mr. Kontuk's disability:

> …At the present time, he is experiencing ongoing symptoms and disability relating to a pain disorder arising from the motor vehicle accident. Although there do not appear to be musculoskeletal or neurologic injuries or pathologies that can be attributed to the accident, <u>his pain condition appears to have been triggered by the 2005 accident and his current level of functional disability related to chronic pain is high</u>…

35. Dr. Loane reported on July 16, 2012 after reviewing additional reporting from Dr. Leckey, Mr. Dunsiger, and Dr. Baker:

> …I believe that the picture is one of an individual who is struggling with severe depression in spite of medication, who is functioning at a low cognitive level, likely of multi-factorial etiology and an individual who is not employable due to his chronic pain and psychological condition…
>
> [emphasis added]
>
> (Tab 2)

[45] As for the arguments that the MVA was not the cause of the Respondent's inability to carry out his duties of his job with the Nova Scotia Department of Transportation after 2010, Mr. McGillivray countered with:

> 37. In an August 22, 2012 report Steven Dunsiger reviewed various reports including the psychiatric assessment from Dr. Ross. Mr. Dunsiger noticed that Dr. Ross in her June 27, 2012 Psychiatric IME for the LTD insurer, Dr. Ross made observations counter to the opinions of Dr. Loane and Dr. lackey. Specifically, Mr. Dunsiger quotes Dr. Ross at the second page of her report as follows:

> …A motor vehicle accident in 2005, in which he was rear-ended and left with chronic neck pain and back pain, did not hamper his ability to work, and he continued to cope well with his life…

38. It is important to note that Dr. Ross did not have the treatment records from Ontario when she made this statement. Mr. Dunsiger drills down into the evidence from the early medical records following the MVA to respond to Dr. Ross' comment:

> …Mr. Kontuk was off work after the MVA under the auspices of the WSFB, and only returned to work after being let go by his employer and refused further WSFB benefits, even though he reported still experiencing pain, memory problems, and depression. Dr. Alpert, in his report of 2005, noted that:
>
> > Mr. Kontuk also demonstrates some element of pain focused behaviour on his current orthopaedic evaluation as well as during his recent Functional Abilities Evaluation and this type of behaviour may act as a potential barrier to recovery or delay to recovery…

39. In his February 3, 2012 report Mr. Dunsiger points out:

> …Lynn Jaffray, RN noted on August 30, 2005 and September 1, 2004 that Mr. Kontuk was dealing with headaches and pain in both his shoulders, with numbness and tingling down his arm to his fingers. As well, problems with concentration, agitation, fidgetiness, mood swings and irritability was also noted, symptoms that he reports are still present and interfering with his life…

40. In his August 27, 2012 report Mr. Dunsiger indicates the role of Mr. Kontuk's pain in contributing to his depression:

> …I agree with Dr. Ross that the issues occurring at his job with the Department of Transport would play a 'triggering' role in the etiology of Mr. Kontuk's present level of Depression, but <u>the problems with pain and associated emotional discord he was displaying prior to going to work for the Department of Transport would have caused him to be more vulnerable and less resilient to stresses</u> he experienced at that job. Not all individuals in a similar situation would react to the degree that Mr. Kontuk did. It is widely accepted in the psychological literature that the individual's pre-existing emotional functioning and exposure to trauma will affect how they deal with ensuing stresses and traumas.
>
> His continuing problems with pain since the MVA (Note Dr. Loane's diagnosis of 'Pain Disorder, Chronic type, associated with both psychological factors and a general medical condition in his report of September 26, 2011) and its interference with his day-to-day life would also contribute to the degree of Depression he is presently exhibiting.
>
> (Tab 2, emphasis in original)

[46] Then we have (at para. 43):

> Dr. Loane, Steven Dunsger, and Dr. Leckey all argue that the MVA was triggering event and a materially contributing cause of Mr. Kontuk's psychological diagnosis. Dr. Loane and Dr. lackey agree that hs physical and concussion symptoms were caused by the car accident. They diagnose a chronic pain syndrome and attribute this to the accident. Even the defense expert Dr. Rosenberg concedes that the psychiatric issues with depression and anxiety were indirectly caused by the car accident.
>
> (Tab 2)

[47] The tenor of Mr. Muth's position in response is easily conveyed by selections from the settlement conference brief submitted by his counsel. First, we have the following:

> 27. The Defendant submits that the evidence does not support the conclusion that the Plaintiff's current level of disability was caused by injuries he sustained in a relatively minor motor vehicle accident eight years ago.
>
> 28. At the time of the accident, his only complaint was neck pain. He denied any other injuries at the time, though he now claims he sustained one. He denied striking his head, but now claims that he did. He continued to work full-time hours after the accident until 2010. He has told an examining psychiatrist that he continued to cope well with his life following the accident. He confirmed at discovery that he left the DOT because of the stress caused by the interpersonal conflict with his supervisor, Gerard.
>
> 29. Multiple treatment providers have diagnosed him with a WAD II (neck complaints with decreased range of motion and point tenderness in the neck). No treatment provider has been able to identify any neurological impairment. An MRI of his head two months after the MVA produced as completely normal result, a clear indication that the early diagnosis of "closed head injury" or concussion is inaccurate.
>
> (Tab 3)

[48] Then, he continues:

> 31. Despite the Plaintiff's ongoing complaints, the Defendant submits that the evidence clearly shows that his physical injuries were minor.
>
> 32. From a psychological perspective, the Plaintiff presented with no symptoms whatsoever until 2010 when he started experiencing depression and anxiety related an interpersonal conflict with his workplace supervisor. The weight of the medical evidence clearly shows that his psychological symptoms stem from this workplace conflict.

> 33. on a psychiatric IME conducted at the request of his employer on January 18, 2011, the Plaintiff made no mention whatsoever of the 2005 MVA. Dr. Brunet concluded that the Plaintiff was 53 year old man with "no prior history of mental health difficulties" who had developed mental disorder symptoms and attendant dysfunction "subsequent to workplace stress". His symptoms were identified as arising out of "workplace factors". The targeting and harassment he received at work was identified as the cause of difficulty tolerating interpersonal interactions of any kind.
>
> 34. In the psychiatric IME of July 9, 2012, Dr. Rosenberg concluded that the Plaintiff's view that the MVA was directly causative of his continuing behavioural and other difficulties was not supported from a review of the medical records and the Plaintiff's history. Dr. Rosenberg's opinion was that the Plaintiff's depressive symptomatology was caused by the onset of what he viewed as "workplace stress" and not connected to any pain disorder.
>
> 35. In the psychiatric IME conducted at the request of the Plaintiff's LTD carrier on July 17, 2012, the Plaintiff himself reported that the 2005 MVA did not hamper his ability to work and that he "continued to cope well with his life". He reported everything changing when a new supervisor was assigned to the plow shed where he was based. He was diagnosed with low mood and anxiety since 2010 "which he relates to bullying in his workplace".
>
> …
>
> 38. While acknowledging that the Plaintiff suffered soft tissue injuries as a result of the accident, the Defendant denies any casual connection between the Plaintiff's current psychological complaints and resulting disability.
>
> (Tab 3)

[49] Mr. Muth concluded at para. 51 of his brief:

> The Defendant submits that the injuries the Plaintiff sustained in the 2005 MVA do not pass the threshold required to claim non-pecuniary (general) damages under the laws of Ontario. The Defendant will be putting a motion to that effect before the Court at the commencement of trial. The Defendant submits that the Plaintiff's injuries did not produce a "permanent serious impairment" of an important physical function.
>
> (Tab 3)

[50] The SEF 44 insurer, Aviva Insurance Company of Canada ("Aviva"), also participated in the settlement conference. As Aviva stated in its settlement conference brief at tab 4 of the agreed statement of facts (paras. 2 – 3):

> 2. At the time of the date assignment conference which scheduled the upcoming trial, Aviva had not been added to this litigation. Aviva was made a party to this litigation on August 20, 2012, pursuant to the SEF 44 endorsement to Mr. Kontuk's insurance policy. Aviva insured Mr. Kontuk's personal vehicle in Nova Scotia at the time of the accident (not the vehicle involved in the accident), which policy provided what is known as the SEF 44 Endorsement, or the Family Protection Coverage. This Endorsement protects an insured person in the event they are injured in a motor vehicle accident with an inadequately insured motorist.
>
> 3. Aviva had an opportunity to carry out a discovery of Mr. Kontuk on January 16, 2013. Following that discovery, it became evident that the SEF 44 insurance will not be triggered in this Action.
>
> …
>
> [emphasis added]

[51] Nonetheless, Aviva did take a position with respect to the extent of the injuries sustained by the Respondent in the subject MVA. Its counsel reviewed Mr. Kontuk's medical information and stated at paras. 56 - 63:

> 56. Mr. Kontuk has sustained no wage loss until January, 2010, other than possibly some lost overtime between July 2005 and May, 2006 when his job was scheduled to end. Ms. Gmeiner calculates the lost overtime at $8,739. Even if this figure is accepted, under Ontario law Mr. Kontuk would only be entitled to 80% of it, or $6,991.20.
>
> 57. In January, 2010, Mr. Kontuk's reason for leaving work had nothing to do with the motor vehicle accident, but rather related to a conflict with a supervisor who effectively bullied Mr. Kontuk and precipitated the development of some mental health issues. Mr. Kontuk himself told Dr. Brunet that he did not have any pre-existing issues which would have made him more vulnerable to such workplace criticisms. He cannot now suggest that the accident was the reason he either stopped working, or made him more susceptible to stopping work due to mental health issues.
>
> 58. It is respectfully submitted that the issues at work constituted a *novus actus* and broke the chain of causation regarding Mr. Kontuk's motor vehicle related a heavy capacity employment prior to the new supervisor coming on board. He was able to perform 12 hour shifts driving a snow plow, and was able to work in fairly heavy physical labour during the summer months.
>
> [emphasis added]

[52] In his settlement conference brief, we have seen that the original settlement demand put forward by the Respondent was $698,786.94 (inclusive of costs,

disbursements and prejudgment interest). The tortfeasor did not propose a global settlement figure in his brief. He essentially argued against each and every item of damages comprising Mr. Kontuk's claim. The matter did not resolve at the settlement conference.

[53] Mr. Muth, however, did later make an offer to settle dated April 16, 2013, in the amount of $70,000.00. This was promptly countered by the Respondent with a offer of $199,999.00. This was quickly followed up by another offer to settle from the Respondent, this one for $160,000.00 "inclusive of costs and in addition $35,500.00 for disbursements for a total of $195,500.00 all inclusive".

[54] Discussion ensued between the parties. The previous offers to settle and the email correspondence between the parties (which ultimately led to the settlement) are contained at tab 5 of the agreed statement of facts. The parties ultimately agreed upon the global settlement amount of $123,750.00. This figure was not broken down. As a consequence, no wage loss component was identified. The final exchange of emails which established the settlement, took place on May 23, 2013.

[55] The final document provided by the parties requiring reference herein is the printout from Manulife, the administrator of the Fund (Tab 6). This discloses that Mr. Kontuk's date of disability, from the perspective of the Fund, was August 27, 2010, the benefit start date was January 25, 2011, and that (as of June 11, 2016) Mr. Kontuk had received a total of $112,968.15 in payments from the Fund. He is designated as permanently disabled, and currently receives LTD payments of $688.96 monthly. As of the date of settlement (May 23, 2013) the Respondent had received $47,592.48 from the Fund.

B. Did Mr. Kontuk receive a "long term disability benefit… for an injury for which any third party is, or may be, legally liable…"?

[56] It is evident that the materials that are available relating to the specifics of the global settlement, and the extent to which some or any of the proceeds were directed towards the quantum of wage loss sustained by the Respondent, are less than ideal. As I noted earlier, I have been provided with settlement conference briefs and the emails exchanged between counsel for the Respondent and Mr. Muth which led to the settlement.

[57] No medical reports or discovery evidence have been provided. No evidence, affidavit or otherwise, of the counsel involved for Messrs. Kontuk and Muth indicating what they viewed (at the time) the break down of the MVA settlement to

be, has been provided. Nor was there any attempt in the correspondence (leading to that settlement) to break down the global award or provide any other insight as to how it was achieved.

[58] It is not suggested that this additional information, had it been provided, would have been determinative. I merely observe that what is known of the Respondent's medical condition resulting from the MVA must be gleaned from the settlement conference briefs, bereft of the actual medical records. The emails between counsel involved in the settlement of the motor vehicle accident claim, exchanging figures, supplement the briefs to a minor extent. Of the medical records and discovery evidence, all that I have seen are the selected references to such portions of them as are contained in the respective briefs.

[59] Counsel for the Respondent, in his oral submissions, questioned the utility of providing further specifics to the Court. What the counsel involved in the settlement viewed as the break down in cases such as this would generally not be helpful (he submitted). He referred to the probability that counsel (in settling personal injury claims where the Fund is seeking reimbursement) would "collude" to minimize or eliminate the component of the award related to wages (past or future), as it would be to the benefit of the claimant to do so (and perhaps also to the benefit of the tortfeasor as well) in order to settle the matter.

[60] At the risk of saying too little in response to such an assertion, a number of observations may be made. First and foremost, all counsel are officers of the court. It is to be expected that they would be realistic and candid with respect to the basis upon which they had entered into the settlement.

[61] Second, in the face of concerns that such "collusion" on the part of a particular Respondent existed, it would be open for the Court (among other things) to consider whether s/he had discharged his/her onus of proof. In such a case, the Respondent would run the risk that the Court would attribute the entire settlement to wage loss (see the earlier reference, in passing, to *McNally* at para. 19, *supra.*, and the more extensive discussion of the burden of proof further on in these reasons).

[62] Third, this information may be easily provided to the court through the affidavit evidence of one or both of the counsel who negotiated the settlement. This could be accompanied by copies of the medical and discovery evidence (if any) upon which reliance was had in arriving at the settlement. This would assist the court by making available to it the most complete means of assessing the reasonableness of the component allocated to wage loss by the parties to the MVA.

[63] Finally, personal injury actions that are brought directly by a plaintiff who has received at least partial wage loss reimbursement from the Fund, occur when the latter has either foregone its right under s. 16(1) of the Plan to assert a claim in the plaintiff's name, or, as here, where the *lex locus* of the accident does not permit it to do so. Nonetheless, in all of these cases, the Fund would almost invariably maintain some level of involvement with the action prior to the settlement. This may lead it and the Respondent to consent to the overall proposed means of disposition of the settlement proceeds in question. Failing settlement of the Fund's claim, such involvement will generally make it more difficult for the parties involved in settling a MVA claim to "collude" (to borrow Mr. McGillivray's term) and thereby obscure that component of the recovery which is attributable to wage loss.

[64] Here, the Respondent settled his claim for a global amount, without break down, knowing that counsel for the Fund took the position that it was entitled to reimbursement. One need only refer to Mr. McGillivray's email to counsel for Mr. Muth of May 14, 2013 (agreed statement of facts, tab 5) to the following effect:

> I am battling two fronts with this case because of the LTD Fund. I would strongly encourage compromise by Mr. Kontuk but not to the extent and range you are suggesting. I do not have instructions, and have to clear up the LTD Fund's belief they are entitled to a subro claim, but assuming I can get those things to line up would your client consider a significant move…
>
> [emphasis added]

[65] It is apparent that the Respondent, on the basis of remarks by his counsel during oral argument, feels aggrieved by the process. The process is there, however, and the Respondent was aware at all times of the position that the Fund was maintaining.

[66] As the Court of Appeal pointed out in *McNally*, *supra*:

> 47. It might be said - as the appellant in effect submits - that the subrogation provisions in s. 18 of the Plan (presently s. 16) are harsh. They are, however, clear.

[67] Counsel for the Fund has not taken the position that the Respondent is required to account to it for any more than that portion of the settlement which can be attributed to wage loss, whether past or future. This is in accord with the significant *obiter* found in *McNally, supra* at para. 47 in any event.

[68] It is certainly the case that income loss, past and future (albeit, expressed in the proposal to be "net of LTD") together comprised the largest component of the original demand put forward by the Respondent to the MVA tortfeasor. The Respondent, in his settlement negotiations (as contained in the settlement conference brief) went to great lengths to establish a causal connection between the MVA and his ultimate decision to leave his job in 2010. He argued that most, if not all, of his medical evidence was supportive of such a connection.

[69] It is correct to observe that both the tortfeasor and Aviva, in their counsel's settlement conference briefs, were dismissive of such a connection. It is also very clear that there was some puffery or inflation of the Respondent's original demand (and the wage loss claims in particular) as expressed in the settlement conference brief.

[70] However, I am satisfied that the overall settlement figure includes some component to address lost (past and future) wages. I am also satisfied that there is a "… nexus between the injuries from [the MVA] and the disability benefits … [paid by the Fund]" to use the expression employed by Stewart J. as quoted in the *McNally* appeal decision at para. 19. As such, the Respondent received LTD benefits from the Applicant, for an injury for which Mr. Muth "is, or may be, legally liable".

[71] The thornier issue involves the determination of what would be a just quantification of the wage loss component of the settlement for present purposes.

C. The considerations impacting upon what portion of the settlement should be considered lost wages.

[72] The Fund's position is that "Mr. Kontuk has the burden of establishing the portion of the $123,750.00 settlement that is not income loss, with the rest being the income loss recovery payable to the LTD Fund". Put differently, the Fund's position is that the settlement is presumed to be entirely income loss recovery except to the extent that Mr. Kontuk is able to prove otherwise (Applicant's memorandum, page 11). I briefly alluded to this burden earlier.

[73] Support for such a position may be found in *Young v. Saskatchewan*, 1992 CanLII 7999 (Sask. Q.B.), where the Court dealt with a disability income plan. The insured took the position, having received a lump sum settlement which did not identify an allocation for wage loss, that there should be no reimbursement payable to the Plan.

[74] Justice Baynton disposed of that contention at para. 10 of his decision:

> This issue should be approached bearing the following principles in mind:
>
> 1. The Plan is designed to guarantee monthly compensation to the employee during his period of disability in an amount equivalent to 75% 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. Instead a contrary intention is indicated by the provision in the Plan requiring that any lump sum payment received by the employee must be "actuarially prorated". A like intention is indicated as well by the provision in the Plan authorizing the defendant to "estimate" what CPP and WCB benefits would have been paid to the employee had he applied for them. This type of approach is

> also indicated by the analogy of the legal principle that the court cannot avoid the quantification of damages simply because such an exercise defies a precise calculation. *Irvine Recreations Ltd. v. Gardis* (1982), 17 Sask. R. 174 at pp. 183-4.
>
> [emphasis added]

[75] This reasoning was adopted by our Court of Appeal in *McNally, supra,* at para. 53 where it was indicated:

> ... 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).

[76] The Court also went on to say at para. 57 of *McNally, supra*:

> 57. Further, whether or not the onus shifted to the appellant, there was ample material before Stewart, J. to enable her to conclude that the sum of $40,238.21, plus interest was in fact recovered as part of a settlement for loss of wages. Moreover she found, and I agree, that the income portion of the settlement is to be attributable to past loss of income. This is a position which favours the appellant in the circumstances because in this proceeding the Trustees claimed no more than what was awarded to them, and in particular, did not take the position that they were further entitled to deduct from future payments, any amount by virtue of s. 9(8) of the Plan.
>
> [emphasis added]

[77] The above was not an equivocation with resect to what was said earlier at para. 53. Rather, I view it as merely an affirmation that in *McNally*, the Court found that there was a clear evidentiary basis upon which to quantify the component of the settlement representing loss of wages.

[78] Nonetheless, there are situations in which the Courts have not hesitated to apply the "default" position set out in *Young, supra.* For example, in *Pereira v. Business Depot Ltd*, 2011 BCCA 361 it was observed:

> 73. In the present case, it was agreed at trial that Staples was entitled to have deducted from any damages awarded to Mr. Pereira for salary in lieu of notice that portion of the Sun Life settlement proceeds attributable to his claim for unpaid disability benefits. As Mr. Pereira failed to prove that any part of the net settlement amount was attributable to a head of damages other than lost income replacement,

> and since there was no evidence which would permit the trial judge to make that determination, Staples is entitled to have the full amount deducted.
>
> [emphasis added]

[79] I conclude that mere difficulty in breaking down the settlement does not and cannot relieve the Respondent of his obligation to account for wage loss to the Fund in accordance with his contractual obligations. However, the burden of proof as expressed in *McNally* only becomes a determinative factor in the event that a just basis upon which to calculate the wage loss cannot be determined on the basis of the proven facts themselves.

[80] I also conclude that there is no "one size fits all" when calculating the wage loss component and (afterward) the manner by which the Fund is to be reimbursed upon the basis of such calculation. The approach must be one which appears to be best able to do justice between the parties, and it must be ascertainable upon the basis of the established facts.

[81] If there is "no evidence which would permit the trial judge to make that determination" (per para. 73, *Pereira*) then the full amount of the settlement is to be treated as wage loss.

[82] This is acknowledged (after a fashion) by the very reasonable position put forward by the Applicant. The Fund states that:

> … an allocation [should make] some sense. What makes sense depends very much on the facts of the particular claim and the settlement negotiations.
>
> (Applicant's brief, p. 11)

D. What is the best way to calculate wage loss upon the facts of this case?

i) One Approach

[83] Certain things are immediately apparent. First, future wage loss (net of LTD) and past wage loss (net of LTD) totalled $236,707.00 out of the "total value of claim" asserted at first instance in the Respondent's settlement conference brief ($698,786.94) (Tab 2, p. 32). It comprised, therefore, 33.9% of the initially proposed figure.

[84] Second, the Fund should receive some priority with respect to the prejudgment interest attributable to the past (not future) wage loss recovery. This, after all, was the reasoning apparent in the Chambers decision in *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. McNally* (1999), 176 N.S.R. (2d) 16, at para. 50, which was undisturbed upon appeal. The same logic applies to any portion of the costs attributable to the wage loss recovery.

[85] Thus, to begin to quantify the global wage loss portion of the settlement, one possible approach would be to simply attribute 33.9% of the settlement figure achieved on May 23, 2013 (in the amount of $123,750.00), after adjustments for prejudgment interest and costs recovered have been applied.

[86] However, in *Sun Life v. Solypa* [2001] B.C.J. No. 1964 (at para. 15), the Court discussed the problems associated with such a method of assessment:

> It would appear that the nature of the losses caused by damage to the conveyor belt rendered the approach taken in Affiliated FM Insurance entirely appropriate, but it does not follow that the same approach is appropriate in a case of this kind. I say that because there can be no assurance that equity will be done. The basis of the allocation for which Ms. Solypa contends is based entirely on the claim she saw fit to present to ICBC at the outset of their negotiations. <u>It is an allocation that makes no allowance for the differing degrees of merit in the components of the claim some of which may have had little or no merit at all.</u> For example one might expect that the past income loss component had considerable merit while the loss of future income and the cost of future care may have had very little merit. One or more of the components could have been utterly spurious - having been advanced as little more than a bargaining chip - but they could have the effect of greatly distorting the allocation. In my view, the claim presented offers no sound basis on which to make any allocation, and I consider it would be wrong to make the assumption made in Affiliated FM Insurance in this or any similar case. I regard the approaches taken in McNally and Young to be what can be expected to yield the most equitable result.
>
> [emphasis added]

ii) Another Approach - The Applicant's Position

[87] With allowances for prejudgment interest to the global settlement figure and costs allocations, the Applicant argues that it would be appropriate to prorate Mr. Kontuk's recovery based upon the ratios set out in his initial claim with one further adjustment. That adjustment:

> …relates to the $68,840 in prejudgment interest on special damages [contained in the original settlement proposal] inasmuch as the special damages claim was for future loss, which clearly does not attract pre-judgment interest. The LTD Fund submits $11,000 interest is far more appropriate, based upon the $34,478 past income loss claim and the $23,551 past value services claim (as per page 29 of the settlement conference brief). That $11,000 in interest should be divided between those two claims, with $6,400 of it relating to the past income loss recovery.
>
> (Applicant's brief, p. 14)

[88] According to the Applicant, this would yield Table B (the "adjusted demand") as the basis upon which to prorate and isolate the various components of the Respondent's initial proposal, for the purposes of calculating the percentage to apply to his ultimate recovery. For ease of comparison, I have juxtaposed Table A which sets forth the Respondent's original demand:

TABLE A		**TABLE B**	
General Damages		General Damages	
General Damages	$150,000	General Damages	$150,000
PJI (5% over 8 years)	$60,000	PJI (5% over 8 years)	$60,000
TOTAL	**$210,000**	**TOTAL**	**$210,000**
Special Damages		Special Damages	
Future Wage Loss (net of LTD)	$202,229	Future Wage Loss (net of LTD)	$202,229
Past Wage Loss (net of LTD)	$34,478	Past Wage Loss (net of LTD)	$34,478
Loss of Valuable Services	$68,671	Loss of Valuable Services	$68,671
Cost of Future Care	$63,393	Cost of Future Care	$63,393
Subtotal	$368,771	Subtotal	$368,771
PJI	$68,840.74	PJI – Wage Loss	$6,400
		PJI – Valuable Services	$6,400
TOTAL	**$437,611.74**	**TOTAL**	**$379,771**
Costs and Disbursements		Costs and Disbursements	
Costs Contribution (Tariff F)	$15,952.24	Costs Contribution (Tariff F)	$15,952.24
Disbursements	$35,222.96	Disbursements	$35,222.96
TOTAL	**$51,175.20**	**TOTAL**	**$51,175.20**

TOTAL VALUE OF CLAIM (original demand)	**$698,786.94**	**TOTAL VALUE OF CLAIM (adjusted demand)**	**$640,946.20**

[89] While the Applicant's overall approach appears logical, it suffers from the same principal defect identified in *Solypa*, *supra*: despite the adjustment for interest and costs, it essentially attributes an equivalent degree of merit to all of the individual components of the adjusted demand. I have earlier commented upon the probability that there was some puffery in the wage loss claims originally included in the Respondent's settlement conference brief. I would go so far as to say that this is obvious, given the vast disparity between the original claim, as presented, and the amount for which the Respondent settled.

[90] Indeed, the past wage loss in the original demand was $34,478.00 (net of LTD). The original demand for future wage loss (again, net of LTD) comprised $202,229.00 out of an original demand of almost $700,000.00.

[91] Yet, the alacrity with which the Respondent reduced his demand to just over $199,000.00 (after receipt of the first settlement offer from Mr. Muth's counsel) and with which he ultimately settled for $123,750.00, strongly suggests that the Respondent recognized significant weaknesses with respect to the quantum and the strength (of at least some) of the components of his original demand. By far, the most strident attacks upon the Respondent's assessment of his damages arising out of the MVA (by counsel for Mr. Muth and Aviva) were made upon his wage loss claims.

iii) Another possible method of calculation

[92] I have earlier commented upon the lack of availability of the medical information upon which the personal injury claim was predicated, save only for selected portions of it which appear in the respective settlement conference briefs. That said, those selected portions, together with the argument of counsel for Muth and Aviva (in their settlement briefs) satisfy me that the claim for wage loss was easily the weakest component of the original (and, by extension, the adjusted) demand.

[93] With that having been said, does an allocation that is based (even tangentially) upon the original proposal provide a just means upon which to base the wage loss component of the Respondent's claim in this matter? I believe it does, but first wish

to return to another approach, which might have been possible in this case, and will be possible (and even necessary) in some other fact scenarios.

[94] Such an approach would begin with the observation that as of May 23, 2013, the date of settlement, Mr. Kontuk had received a total of $47,592.48 in payments from the Fund. This represented the Fund's unrecovered outlay as of the date upon which Mr. Kontuk settled his claim (Tab 6).

[95] We have seen that s. 16(1) of the Plan speaks to the subrogated right of the trustees "to all rights and remedies of the employee (Mr. Kontuk) against the third party (Mr. Muth)". It goes on to speak of the trustees' right to reimbursement with respect to any disability payments paid. Should the Plan therefore receive the first $47,592.48 of any recovery relating to past wage loss? Recall that Mr. Kontuk actually received a net of $57,850.00 out of the $123,750.00 settlement amount after his legal costs and disbursements were paid.

[96] I have concluded that such an approach would not be appropriate here.

[97] First, it would be tantamount to the "default position" to which resort would be had by the Court in the event that no just basis upon to calculate the wage loss component was discernable upon the proven facts. To repeat, this burden of proof, which is borne by Mr. Kontuk, is to establish that portion of his settlement which is not income loss. The corollary of this burden is that any portion in respect of which he is unable to do so is to be treated as income loss.

[98] Second, I have concluded that there is a more just way, upon the basis of the established facts, to resolve the issue. Put differently, the Respondent has satisfied me that the income loss component of the award should be calculated upon a different basis, one which makes more sense upon the facts of this case.

iv) Disposition of Issue 2

[99] I repeat that Table B reflects the original claims for future and past wage loss, which comprises $236,707.00 of the $640,946.20 adjusted demand, or 36.9%. A proper method by which to weigh the income loss components of the demand would be one which attempts to reflect their weakness in comparison to the other components.

[100] Obviously, there is no formula which will achieve scientific precision. However, (to repeat) the approach to be adopted must emerge from the established

facts, and, upon the balance of probabilities, provide a just basis upon which to make the calculation. Otherwise, what I have referred to as the default position as set out in cases like *Young*, *McNally*, and *Pereira*, *supra.*) becomes applicable.

[101] I have considered those portions of the medical and discovery evidence referred to in the MVA settlement conference briefs. I have also considered the arguments levelled at the wage loss portions of the Respondent's claim in the MVA settlement conference briefs, and in conjunction with the vast discrepancy between the Respondent's original demand and the amount for which he settled. I have determined that the best way to account for the weakness of the income loss claims relative to the other components of the claim is to reduce the wage loss component of the overall settlement to a ratio which reflects one half of the percentage which the combined "past and future wage loss" amounts comprised of the adjusted demand. This method, frankly, may still overvalue the wage loss claims relative to the other components of the settlement amount, but not nearly to the same extent if the ratios in the original (or adjusted) demand were to be used for this purpose.

[102] Thus, when past revenue loss is considered, I take $34,478.00, add to it prejudgment interest of $6,400.00, obtain the sum of $40,878.00 (thus adjusted) and note that it comprises 6.4% of the total adjusted demand amount in Table B. The figure to be applied is therefore 3.2% (or one-half of the 6.4%) to the settlement obtained.

[103] With respect to future wage loss ($220,229.00) this comprises 31.9% of the total adjusted demand (Table B). The figure to be applied to the settlement amount of $123,750.00 is therefore 15.95% which I round to 16%. Thus, we are left with the following:

Past wage loss (3.2% of $123,750)	$3,960.00
Future wage loss (16% of $123,750)	$19,800.00
Costs & Disbursements (8% of $123,750)	$9,900.00
Non-wage loss (72.8% of $123,750)	$90,090.00
	$123,750.00 (settlement amount)
Less legal costs and disbursements	- $65,901.00
	$57,850.00 (rounded) (actual recovery)

3. What is the extent of the LTD Fund's entitlement with respect to the income loss portion of the Respondent's settlement?

[104] In addition, the Applicant has argued that:

> As set out in the agreed Statement of Facts, Mr. Kontuk was charged $65,901.00 in fees and disbursements, but also as seen . . . he recovered $9,900.00 of these fees and disbursements in his settlement. That made his net settlement costs $56,000.00.
>
> …
>
> That $56,000.00 should be deducted from his $123,750.00 settlement to arrive at an attributed settlement net of recovery costs of $67,750.00…

[105] I agree that the Applicant's suggested method of attribution with respect to the recovered costs is a logical refinement to the approach which I have determined is applicable on the facts of this case. Therefore, I combine this with my determination of the relationship between the income loss components of the settlement achieved by the Respondent to yield the following calculations:

1. $\frac{67,750}{57,850} = 1.17$

2. Past wage loss = 3.2 x 1.17 = 3.74%
   Future wage loss = 16 x 1.17 = 18.72%

3. a) 67,750 x 3.74% = 2,533.85 = past wage loss
   b) 67,750 x 18.72% = 12,682.80 = future wage loss

[106] I have acknowledged that there is no perfect manner in which to perform the necessary calculations in this or any other case, and that this method may still overvalue the wage loss component of the Respondent's overall settlement. However, in my view, the foregoing is the most logical and just method of calculation which is available to me upon the basis of the facts of this case.

[107] Moreover, I simply observe that the result is not nearly as harsh to the Respondent as that which will sometimes come about in circumstances where the Respondent arrives at a global settlement amount that is not broken down. As previously noted, in such circumstances there is always the risk that the burden of proof as set out in *Young* and *McNally, supra* (and the authorities that follow them) will result in the attribution of the entire settlement to lost wages.

Conclusion

[108] The Applicant has accepted that the Respondent is "permanently disabled" (Tab 6). This will result in Mr. Kontuk's receipt of benefits from the Fund for the remainder of what would have otherwise been his working life.

[109] The Fund is entitled to reimbursement of $2,533.00 by way of past wage loss in partial repayment of the $47,592.48 LTD benefits it had paid to Mr. Kontuk as of May 23, 2013. The $12,682.80 (future wage loss) component of his settlement is to be offset against the LTD benefits to be paid to Mr. Kontuk after May 23, 2013, in the manner adopted in *Warner, supra*.

[110] The Respondent turns 65 on June 19, 2022, which is 9 years after the date of settlement. Therefore, the annual amount of $1,409.20 ($117.43/month) will be offset from the Fund's payments to Mr. Kontuk from May 23, 2013 to June 19, 2022.

[111] If costs are sought, and the parties are unable to agree, I will accept written submissions within 30 days.

Gabriel, J.