

**THE DUTY TO MITIGATE:  
*DOES THE CLAIMANT HAVE  
A DUTY TO “GET BETTER”?***

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# THE DUTY TO MITIGATE: DOES THE CLAIMANT HAVE A DUTY TO “GET BETTER”?

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## 1. Law of Mitigation - Introduction

While many LTD policies may be silent with respect to mitigation of damages, Canadian Courts generally impose a common law duty to mitigate for lawsuits involving a breach of contract or tort if the LTD policy is silent in that regard.

That is, the aggrieved party must take all reasonable steps to mitigate the loss and cannot claim for avoidable loss. A plaintiff cannot sit back and allow their losses to accumulate and then expect to recover damages for losses they ought to have avoided. The common law obligation is clearly set out in *Janiak v Ippolito* (1985), 16 D.L.R. (4<sup>th</sup>) 1 (S.C.C.) which stated that:

"Every plaintiff has a duty to minimize losses from personal injury by surgery or other medical treatment. The general rule of mitigation of damage applicable to both breach of contract and tort is that the aggrieved party must take all reasonable steps to mitigate the loss and cannot claim for avoidable loss ... In the case of contract, damages for breach are reduced by the amount of loss that should have been avoided if the plaintiff had taken reasonable steps to mitigate."

In LTD cases, pleading mitigation as a defence against the plaintiff is almost always alleged since the decision of *Peterson v Bannon* (1993), 21 C.C.L.I (2d) 45 (B.C.C.A.). The award may be reduced by the amount of the loss that should have been avoided if the plaintiff had taken reasonable steps to mitigate. The failure to mitigate is not a bar to recovery, it merely reduces the claim.

What exactly the claimant is required to do with respect to mitigation is an issue of fact. The Court, for instance, will require that the insured person act reasonably in seeking out medical treatment to get better, but will not require the claimant to undergo surgery or treatment which is dangerous or futile or where the likelihood of a successful outcome is uncertain.

While the plaintiff has the burden of proving the breach of contract, the defendant must prove that the plaintiff could have and should have mitigated the loss.

More recently, insurers have inserted mitigation clauses into the disability contract to provide that the claimant has a duty to take reasonable steps to:

- (1) participate in reasonable treatment, rehabilitation programs and accept reasonable offers of modified duties from an employer;

- (2) obtain training in order to qualify for an alternative occupation, if it is apparent that the employee is unable to return to their own occupation;
- (3) obtain benefits that may be available from other sources, and if those benefits aren't obtained, benefits from this contract may be withheld or discontinued.

Each case stands on its own merits with respect to what degree of mitigation is reasonable. Courts have gone as far as interpreting mitigation to state that a claimant may be required to abandon an otherwise unhealthy lifestyle or fail to follow doctor's advice to lose weight (see *Cowie v Mullin* (1992), 111 N.S.R. (2d) (S.C.) and *Reeves v Arsenault* [1998] P.E.I.J. No. 95 (PEISC)) or undergo a surgical procedure with associated risks provided that there is a substantial likelihood that they could improve their wellbeing (see *McGrath v Exelsior Life Ins. Co.* (1973) 6N & PEIR 203 (NTD), *McGinn v Seaboard Life Insurance Co.* (1992), 9 CCLI 69, [1992] ILR 1-2853 (NTD), *Tomizza v Fraser* (1990), 71 O.R. (2d) (HCJ), *Fulton v Seaboard Life* [1992] I.L.R. 1-2853 (Nfld. S.C.) and *Martin v Mutual of Omaha* [1992] I.L.R. 1-2795 (Ont. Gen.Div.)).

## 2. Hypothetical Fact Scenario

Consider the following typical scenario which many of us have encountered:

Your insured is Tom, a 52-year old man, who injured his back in an MVA in 1998 and has been unable to return to his job as a labourer for a construction company. Tom has a grade 6 education, speaks limited English and has worked as a labourer all of his life. He has seen his family physician as well as two orthopaedic surgeons and a physiatrist.

In 1999, Dr. Cut, one of Tom's orthopaedic surgeons, recommends that Tom undergo surgery to his back. Dr. Cut was available to do the surgery that very day.

In Dr. Cut's opinion, the surgery has a 95% chance of success, in which case Tom would be completely and permanently relieved of his symptoms within one month's time and then could return to work. There is a 5% risk that the surgery will fail and leave Tom without the use of his legs.

Dr. Careful, Tom's other orthopaedic surgeon, recommends to Tom not to undergo any surgery to his back but to continue with his physiotherapy and pool exercises.

## 3. Seeking Reasonable or Appropriate Medical Care

What is reasonable for Tom to do in the above scenario?

The claimant such as Tom is required to take all reasonable steps to mitigate their loss.

The case of *Martin v Mutual of Omaha* is a similar situation. Here a 46-year old woman labourer was unable to return to work on the production line due to pain and swelling in her legs.

She was diagnosed as having soft tissue rheumatism. The insured also felt that all available treatment was not doing her any good. All attempts at rehabilitation had failed and the prognosis was poor. The Court found the insured to be entitled to continuation of payment of benefits on the basis that the plaintiff had not failed to mitigate by entering a rehabilitation program where the evidence was there was a poor chance of success.

A different result occurred in *Flewwelling v Blue Cross Life Insurance Co. of Canada* [1999] AJ No. 381 (QB) where the insured suffered from chronic fatigue syndrome and was found to have been totally disabled as of a certain date. The Court concluded that it was "possible" that if the claimant had taken the treatment suggested by her physicians, including a course of psychiatric treatment, she would not have remained totally disabled. However, the insured did not seek out that form of treatment and allowed herself to become totally disabled. The Court was satisfied that she failed to mitigate her losses by not following the medical recommendations she received. The Court found that she would have been able to return to work approximately three months after her total disability date. Therefore, failure to follow reasonable medical advice may be crucial to the plaintiff's claim.

Courts have found that claimants who delay or wait years before seeking out medical help have failed to mitigate their damages. And if the claimant's condition has worsened due to the delay, then the claimant may substantially have reduced his or her claim.

Therefore, while the obligation is not necessarily expressed in the LTD policy, there is an obligation for a claimant to undertake medical therapy, including surgery, where this is a reasonable step based on medical opinion.

In *McGrath v Exelsior Life Ins. Co.*, the Court held that disability benefits could be terminated if it was unreasonable to have refused to undergo a recommended surgical procedure that probably would have cured the disability. However, in this particular case, since there were some conflicting opinions as to the benefits of the surgery, the Court gave the benefit of the doubt to the plaintiff.

In *McGinn v Seaboard Life*, the Court also found in favour of the plaintiff when the insured refused eye surgery to correct his eyesight difficulties. In this case, medical opinions revealed that there was a serious risk involved of exacerbating a prior surgery.

Finally, in *Tomizza v Fraser*, there was a 5% risk of failure or serious complications developing from the proposed surgical procedures. Notwithstanding, the Court assessed damages on the basis that the plaintiff should have undergone the surgery to mitigate his loss. Although it does not appear that the Court focused on a risk-benefit analysis, the Court may have found the plaintiff's refusal unreasonable since even though there was a risk of serious complications associated with the proposed treatment, it was only a 5% risk and without the surgery, the plaintiff's condition remained serious and even a relatively minor trauma could cause quadriplegia or even death.

Where there is a minimal risk, a failure to mitigate will be found more readily.

In our hypothetical example, a Court would likely consider a risk-benefit analysis to determine whether the surgery is reasonable. The surgery by one doctor boasts a 95% chance of complete recovery. However, if the surgery failed, there would be a 5% chance that Tom would lose the use of his legs. There are always risks associated with surgery, however, should a plaintiff be required to assume serious risks of surgery, over and above those common risks, no matter what the likelihood of success of the surgery? A risk of 5% may be high if the standard risk is 1%.

Assuming the Court found that Tom ought to have had the surgery, then the benefits would be reduced from the date of the expected recovery from the surgery. Future benefits would be reduced by the percentage of risk associated with the surgery.

Our example is similar to the *Tomizza* decision. However, it is important to note that the gravity of the consequences of not undergoing the recommended procedure is vastly different in the two cases. In *Tomizza*, the evidence was that if the plaintiff did not undergo the recommended treatment, a relatively minor trauma could cause paralysis or even death. In our case, however, there was no evidence that Tom's condition would deteriorate if he did not have the proposed treatment.

Overall the Risk Benefit Analysis can be broken down as follows:

1. If the surgery is successful, what are the potential benefits?
2. Degree of risk to the claimant from the surgery.
3. Consequences to the claimant if surgery is refused.
4. If it does relieve the condition, will it allow the claimant to return to work at their previous occupation?

What is required of the claimant in terms of life style choices? Are they required to give up smoking, drinking and/or coffee consumption if there is a medical opinion that suggests this to the insured? What about losing weight which is frequently recommended? How far do you go to force the claimant to rehabilitate a life-long addiction?

In *Hamilton v. Constellation Assurance Co.* [1989] O.J. No. 2567, the Court found that plaintiff's disability benefits should be reduced 25% because of the failure to mitigate his losses by failing to follow reasonable medical advice.

Other cases also reduce benefits where a claimant worsened his condition by ignoring medical advice by continuing to drink and smoke.

However, this is not true in all cases. It is important to consider the facts in each case. For example, a case involving a 46-year old woman who worked in shelters with troubled adolescents and suffered an emotional breakdown became seriously overweight. She was told by her doctors to give up smoking and to lose weight. While attempts were made, the Appellate Court determined that the insurer was unreasonable to expect that she give up smoking and lose weight when the chances of her being able to do this were non-existent.

#### **4. Duty to Upgrade Educational/Vocational Skills**

Most LTD policies in Canada are structured to provide what is called “own occupation” coverage for a certain period of time (generally the first two years following total disability) and to provide “any occupation” coverage thereafter.

A claimant will qualify for “own occupation” protection only where there is an inability to perform the substantial duties of their employment. A claimant will qualify for “any occupation” protection only where the insured cannot work in any occupation for which such person is reasonably qualified by education, training and experience.

Where “own occupation” coverage changes to “any occupation” coverage, the onus is on the insured to prove their eligibility under this second and different definition of disability. The change in protection essentially imposes an obligation on the insured to mitigate their losses by accepting a job which they are reasonably fit by education and training and experience.

There have been volumes written as to what the “reasonably fitted by education, training and experience” test is which is beyond the scope of this paper. However, the effect on the law of mitigation is important. Some LTD policies expressly impose a duty upon an insured to upgrade his or her skills through retraining where this is possible.

Does the alternative occupation have to be similar in remuneration to the former occupation? Yes, but the determination of what is similar must be assessed based on consideration of the previous education, training and experience of the plaintiff and their previous occupation.

In our hypothetical fact situation, Tom has received medical advice that he can never return to his construction job again. Following a functional evaluation set up by his insurer, other more sedentary jobs have been recommended.

Provided Tom’s policy is that of a general group policy, he is not protected unless he is unable to perform any occupation for which he is suited by education, training or experience. The burden would be on Tom to prove that the recommended job does not fit the definition.

Will Tom be required to upgrade his education to qualify for a greater range of occupations? Unlikely, due to his age, background and his intelligence potential.

Will Tom be required to mitigate his losses by taking a job with less stature and reward? A suitable alternative occupation does not mean an occupation which provides the same financial compensation. Remuneration is a factor, but it need only be reasonably comparable to the compensation previously received.

## 5. Obligation to Take on Part Time Employment

Although a claimant may have a duty to re-educate themselves or retrain, there is generally no obligation to take on part time employment especially where an LTD policy has an income threshold such as 66% of employment earnings. While an insured may be required to mitigate by choosing an alternate field of employment, the Courts have not gone as far as saying the insured should take any job at all just to reduce the amount the insurer has to pay (see *Roston v The Paul Revere Life Insurance Company* [1996] I.L.R. 1-3301 (B.C.S.C.), *Dauphinee v Canada Life* (1988), 86 N.S.R. (2d) 101 (N.S.S.C.), *Stronge v London Life* [1993] I.L.R. 1-2931 (Ont. Gen.Div.) and *Ormonde v London Life* [1991] I.L.R. 1-2696 (Ont. Gen.Div.)).

### SUMMARY

When it comes to the law of mitigation, the Court is likely to take a common sense approach in determining whether there is a duty to mitigate.

Most issues will come down to the credibility of the claimant and the specific facts of each case.

If the Court finds that it is reasonable with all circumstances considered that the plaintiff should have either undergone a medical treatment or been out looking for a job, then the Court will find that the plaintiff did not meet his duty to mitigate his damages and the assessment of damages will be reduced accordingly.

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1. Richard Hayles, *Disability Insurance, Canadian Law and Business Practice* (Toronto: Carswell, 1998).
2. *The Law of Mitigating Damages*, Kimberley K. Munro and Kathryn D. Ewald of Lerner & Associates, Ontario Trial Lawyers Association Fall Conference, 2000.
3. *The Duty to Mitigate: Does the Claimant Have a Duty to "Get Better"?*, L. Michael Shannon and Vivian Leung of Cassels, Brock & Blackwell, Toronto.
4. *The Duty to Mitigate: Does the Claimant Have a Duty to "Get Better"?*, Deborah C. Anshell and Donna Morgan of Manulife Financial.
5. *The Duty to Mitigate and Rehabilitate in LTD Cases*, Donna M. Kraft.