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The Courts' Treatment of 'Mitigation' Clauses

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Part 1 “Mitigation Clauses”

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Vocational

- *Branco v. American Home Assurance Co*[2013] S.J. No. 151
  Related to 'vocational retraining program'

- AIG discontinued payments because Branco refused to "attend an inappropriate vocational retraining program chosen by AIG and refused to do the job of AIG and find a more appropriate vocational program".

- Evidence was established that at that point Branco was in no condition to enrol in a vocational retraining program.

Vocational

- What was ‘inappropriate’ about the program?

The court found (*Branco*, paras 141-143):

- The facility was a great distance from his home (3 hours).
- The program focussed on retraining for much lower paid occupations.
- AIG chose ‘gardener’ as a new occupation for Branco which was inappropriate given his medical impairments.
- Enforcing the vocational rehabilitation clause was inconsistent with what the WCB program in Saskatchewan would have done.

Vocational

- Evidence showed that counsel for Branco provided AIG with information about what WCB Sask. deemed ‘appropriate’ vocational training for a 58 year old man with Branco’s injuries and geographical location.

- WCB would look at age, severity of injury, and residential location in order to ascertain whether vocational retraining would be a cost effective option for the WCB

- Counsel passed this information on to AIG and they took this as a refusal to participate in a vocational retraining program and terminated the benefit.

Vocational

- Mitigation (*Branco*, paras 19-30)
  - In house counsel demanded that Branco rehabilitate himself without having received benefits (in Portugal you have to pay as you go for medical visits) even though he had no income. *“He was being expected to pay for his rehab and medical appointments without obtaining benefits.”*
  - Branco did attend physio and other specialists (chosen by AIG) but none provided any occupational rehab options.

Rehabilitation

- *Fulton v. Manufacturers Life*, [1990] I.L.R. 1-2620.
- 39 year old locomotive repairman, travelling salesman, and finally plant maintenance (heavy work).
- Also had a lot of extra curricular activities including raising and hunting pheasants, wood gathering, ATV'ing.
- Fibromyalgia and depression and anxiety
- "…negative circumstances to be considered…" He terminated a multidisciplinary investigation into his condition to go home to work on his boat. And he failed to seek physiotherapy.
- Doctors: None of the specialists said physio would fix him.
- He did not do physio because of 'financial constraints'. Judge found financial limitations not legitimate excuse

Rehabilitation

- *Fulton*, continued…
  - Should have participated in the physio.
  - However, "…his case has been a baffling one, and the resort has been to trial and error treatments, none with outstanding success. For Mr. Fulton to have had faith at that stage that the physio would help him recover sufficiently to resume work would have required considerable optimism on his part. He was being treated for a state of mind quite the opposite of optimism." para 55
  - "For his own reasons which he related to expense and inconvenience, he has not undergone this program. I am satisfied from the evidence that it would be reasonable for him to do so because it might be beneficial. It remains speculative whether this could result in his eventual return to work. Any lesser improvement in his condition would not mitigate damages." para 56

Rehabilitation: Judicial Considerations

- *Fulton*, continued.
  - 1) Risk to the plaintiff in accepting treatment;
  - 2) The potential benefit of the treatment; and
  - 3) The gravity of the consequences in refusing treatment

Rehabilitation

- *Fulton*, continued.
- "Impecuniosity" is not an excuse but something that should be looked at carefully.
- Had it been made clear enough to the insured that physio would benefit him? (para 59) "…I would be more inclined to find Mr. Fulton had failed in his duty to mitigate." Specialist 1 did not include it in his 'recommendations. Specialist 2 "I am somewhat limited in any therapeutic suggestions…"
- Others did not exhibit 'confidence' that it would 'result in significant improvement'.
- He was demoralized and depressed. He did discuss it with his doctor. It would be quite reasonable in the circumstances to conclude it would not help.

Rehabilitation

- “”I do not find that during the relevant time period Mr. Fulton had notice, either from the insurer or his doctors, that physiotherapy could result in his return to work. He was participating in an exercise program under the care of his GP. He appears to have cooperated with his doctors in all other respects. I do not find that he was in breach of his duty to mitigate.” para 61

Part 1 'Mitigation' Clauses Summary

- *Branco v. American Home* , 2013 SKQB 98

  Insurer's unreasonableness in light of the insured's circumstances both in choosing an inappropriate program and then insisting that the insured rehabilitate himself without having received benefits could lead to significant aggravated and punitive damages.

- *Fulton v. Manufacturers Life*, [1990] I.L.R. 1-2620.

  State of mind of the insured can be a defence to a failure to mitigate. Lack of notice from insurer and/or specialists about the appropriateness and viability of treatment options can also be a defence to a failure to mitigate.

- *Martin v. Mutual of Omaha*, [1002] I.L.R. 1-2795

  Rehab program not enforced as insured had tried other programs in the past and had failed.

“Regular Care” and “Appropriate Treatment” Clauses

- *Kirkness Estate v. Imperial Life Assurance Co. of Canada* [1993] O.J. No. 160 (Ontario Court of Appeal)
  - 21 year high school teacher; increasingly bizarre behaviour; wife applies for LTD
  - Established he suffered from schizophrenia of the insidious or slow onset type for ten years prior to trial. Had seen doctor in 3 out of 8 years.
  - Insurer denied benefits because insured “continues to refuse ongoing psychiatric care”
  - “Unchallenged psych evidence” accepted that ‘the degree of denial of illness on the part of the plaintiff was so great that it prevented any form of treatment. This is a well known symptom of schizophrenia….he is in effect untreatable…”
  - Plaintiff was “incompetent to make a decision to either accept or reject treatment and found that he had ‘not refused and is not continuing to refuse treatment’.
  - TJ in favour of plaintiff; insurer appealed under the ‘regular care’ clause
  - CA looks to US cases for interpretation of ‘regular care’ clauses. Should be interpreted liberally. Not strictly.
  - **Where permanent disability is established and no useful purpose served by regular attendance on a physician ‘regular care’ clause NOT a bar to recovery.**

“Regular care….”

- *Kirkness,* continued…
  - *Para 30 “Compliance with a ‘regular care and attendance” clause is not a condition precedent for recovery. Rather, the purpose of such clauses is evidentiary. They provide insurers with reliable assessments of the condition of insureds and protect insurers against fraudulent claims. Where permanent and irremediable disability exists, regular medical care and attendance is futile and ineffective…”*

- *Andreychuk v. RBC Insurance, 2008 BCCA 49*
  - Benefits denied as insured not under regular care of physician. Fibromyalgia.

Appropriate Treatment: Drugs and Alcohol

- *Brown v. Canada Life*, [1996] N.B.R. (2d) (Supp.) No. 53
  - Reflux asophogitis: heartburn, nausea, vomiting
  - Provision: No benefits paid for “unless…receiving appropriate treatment…the appropriateness of the treatment must be agreed upon by the Employer and Individual’s treating physican…if a difference of opinion Employer reserves right to seek”…IME.
  - Plaintiff smoked and drank daily, contrary to advice of his doctor
  - Doctor suspected he drank more than he admitted to plus “addicted to tobacco”.
  - “Long term prognosis poor unless there are significant lifestyle modifications on his part…”
  - Insurer refused benefits as his drinking, smoking and poor eating habits exacerbated his condition
  - His bad habits were beyond his control and benefits payable. Court rejected 50% offset for failure to mitigate “…failing to take scheduled physio or other routine active medical treatment to treat a fracture is quite different than failing to overcome the bad habits of smoking, drinking or eating too much.” para 40”those habits appear to be beyond his control..” para 42
  - Insurer should have included an exclusion if it intended to avoid paying.

Appropriate Treatment: Drugs and Alcohol

- *Liesch v. Standard Life*, 2003 BCSC 1749
  - Insured’s failure to inform his doctors about his use of cocaine was symptom of his disabling depression and so unnecessary to determine whether he had failed to seek appropriate treatment. Para 68

Appropriate Treatment: Alcohol, Cigarettes, Coffee, Psych Treatment, Cutting back on Work

- *Hamilton v. Constellation Assurance*, 40 C.L.L.I. 185 (the 'common social vices' case)
  - Chartered accountant in hospital administration; 52 years old
  - Duodenal ulcer disease, IBS, enlarged liver; long history of same in the 'voluminous medical evidence presented'.
  - Initially approved. Insurer ordered IME. IME found not TD. Insurer terminated insurance to retroactive to the date of the IME
  - Existence of work-related stress was crucial to the plaintiff's claim
  - Insurer agreed it was there for the purposes of their initial approval but not a factor that entitled the plaintiff to further receipt of benefits.

Appropriate Treatment: Alcohol, Cigarettes, and Coffee

Hamilton, continued…

–"..in spite of cautions administered to him by various doctors" he continued to use the 'common social vices'.

–Was "candid in acknowledging he had not cut down on his smoking of one and a half packs a day…and that he drinks too much coffee as a daily regimen. With regard to alcohol, admitted that prior to 1984 he consumed eight to ten ounces of liquor per day, and that it was excessive, but maintained..that when his medical problems acclerated again…he cut down his social drinking to 2-4 ounces…"

–"…acknowledged that these habits affected his symptoms, but he did not give the impression that he 'listened' with any real intent on helping himself to the various admonitions he unquestionably received from the doctors."

Appropriate Treatment: Exercise, Cutting Back on Work and Psych Treatment (Pre-Disability)

Hamilton, continued…

–"…other indications of a clear failure…to follow MA…"

- Was advised to **exercise**. Made a short-lived attempt at tennis and no other activity since.
- After job duties reduced at work (pre-disability) because he claimed stress he still continued to work 70-80 hours per week despite being advised to slow down
- Also failed to seek assistance for stress despite being advised to do so even after advising the insurer that their termination of his benefit caused him stress

–"…In summary, the evidence is overwhelming that the plaintiff contributed to the continuation and intensity of his medical problems by his failure to reduce substantially, if not eliminate, his particular excessive abuse of alcohol, coffee and cigarettes at all material times. That being stated, there is substantial and credible evidence that the plaintiff's particular medical problems were exacerbated and/or developed within the genuine stressful work-related experience that occurred during the last two years of his full-time employment."

Appropriate Treatment: Alcohol, Cigarettes and Coffee

Hamilton, continued

- At issue was own occupation eligibility and ‘rehabilitative employment’ clause = “any occupation or employment for wage or profit for which an insured employee is reasonably fitted by training, education or experience, provided such rehab employment is performed during a period in which the insured employee is unable to perform fully his regular occupation”. Provides for a 50% reduction of income from rehab employment for a specified period of time.

- Plaintiff had started a travel agency prior to benefits being cut off which intent and plans he had advised the insurer about. Conflict of evidence as to whether defendant encouraged or approved these plans.

- Plaintiff wins. Is put on benefits. But arrears reduced by 25% for insured’s failure to stop smoking and drinking coffee as recommended by his doctor. No comment on whether they would be reduced by 25% on an ongoing basis.

Part 2 Remedies

- 1. Termination of Benefits
- 2. Offset of Benefits
- 3. Imputing Duties (Duty to Upgrade Skills)

Can an Insurer Receive an Offset for Failure to Mitigate?

- *Bassett v. Paul Revere*, 2001 BCSC 988
  - Delay in completing treatment program constitute failure to mitigate and so benefits terminated when program should have been completed.
- *Eichmuller v. Provident Life*,2012 ABQB 690
  - Reduction of 20% for failing to look for part-time work.
- *Stronge v. London Life*, [1993] I.L.R. 1-2931
  - Reduction of 25% for failure to return to part-time work.

Termination

- *Bassett v. Maritime Life Assurance Co.* [2001] B.C.J. no. 1520
  - Suspension of license case; insured under investigation with College of Physicians for sexual misconduct which he did not disclose to insurer; made claim for depression, anxiety and suicidal tendencies; agreed not to practice medicine following the investigation
  - He attended a treatment program but did not complete it.
  - He was entitled to benefits up to the point he discontinued treatment.

Offset

- *Eichmuller v. Provident Life*,2012 ABQB 690
  - B pressure welder 1974-2002
  - Spinal degeneration which employer had accommodated over time until economic issues required them to put him back into his regular position
  - Insurer rejected TD bc a physio said ‘with education and exercise based retraining could return to work on graduated basis.’ Plaintiff’s doctor said disabled from regular occupation. (13 experts or expert reports at trial)
  - Insurer noted Plaintiff moved after disability and never looked for work again as evidence was not planning on returning.
  - Court found he was TD for regular occupation and then TD to 65 with a 20% reduction for partial capacity. Didn’t try to look for part-time work. Took care of his 8 year old grand daughter and did some volunteer work.
  - Court said fact he moved was evidence he couldn’t care for his acreage.

Offset

- *Stronge v. London Life [1993] O.J. No. 103*
  - 35 years old; worked for Canadian Tire for 13 years; handled and sorted merchandise returned by customers; got the flu and was intermittently absent from work until finally off; CFS ; video tape showing plaintiff engaging in 'strenuous activity' without any signs of pain; medical evidence supportive of claims, found plaintiff did not reveal full particulars of capabilities to medical advisors **Credibility** in doubt because under cross seemed to say job was heavier duties than he told his doctors it was; also on cross he was a 'keen listener, gave precise answers 'which tended to favour his position both in court and on disc."
  - Only 'objective indicator' tendered as evidence of capability was **surveillance** showing moving heavy furniture for three days in a row and on a separate occasion building a fence…asserted throughout he was in pain but this was never caught by the cameras; also evidence he assisted with plumbing, wallpapering and painting.
  - Notable that the plaintiff's expert dismissed video surveillance as 'an objective indicator of disability' while the judge thought the opposite.
  - Could have handled part-time employment but made no efforts
  - Action allowed in part; sum reduced by 25% for plaintiff's failure to mitigate losses by trying to find work

Duty to Upgrade

- Policy language
  - i.e., disability defined to include any occupation for which the insured may reasonably become qualified.
- Common Law
  - *Green v. Mutual of Omaha Insurance Co*., 4 C.C.L.I. 34
    - Benefits terminated on a date by which the insured would be able to retrain to another gainful occupation.
  - *Young v. Saskatchewan*, 48 C.C.L.I. 193
    - While undergoing retraining, deemed to be disabled until insured has become fitted for a reasonable occupation.

Surgery

- *Sanders v. Sun Life*, 2001 BCSC 1445
- Insured not required to undergo any possible treatment, only that which is appropriate and reasonable.

- Risk/benefit assessment
  - what it the nature of the harm that could result if surgery was unsuccessful;
  - What is the benefit of the surgery; and
  - What is the level of invasiveness of the proposed procedure.

Surgery, *Sanders* cont.

- Factors to be considered include:
  - Is there agreement between the physicians as to the appropriateness
  - Do the physicians agree as to the prognosis following treatment
  - Has the insured received advice concerning the nature and risks attendant upon the treatment and whether there was recommendation that the treatment be performed
  - Has the insured followed another of several appropriate treatments
  - The degree of risk associated with the treatment
  - The gravity of the consequences of refusing treatment'
  - The potential benefits of he treatment; and
  - Whether the insured suffers from a pre-existing conditions that render the insured incapable of making a choice.

Effort

- *Rozendaal v. Landingin*, 2013 BCSC 24
  - Plaintiff attended some physiotherapy but stopped because it took away from her time with her children
  - Her husband provided massage which was more helpful and she did stretches
  - Also failed to go to active rehab as recommended because the cost was more than she could manage and so worked out with a friend
  - Judge found that her condition would have improved had she followed recommended treatment but did not find that she failed to mitigate because she had acted reasonably
  - The law does not require perfection in the pursuit of rehabilitation

Part 3 Tips

- 1. Care required should be reasonable (reasonable expense, likelihood of success)
  - Know your insured's situation; resources available to them; state of mind; geography of home and resources close to home
- 2. If Insurer wants to impose treatment regime it needs to validate the likelihood of success and ensure it is fully explained to the insured. Best in writing and best set out by specialist and confirmed by insured's doctor.
- 3. If there is a failure to mitigate (either in looking for work or following treatment) insurer can discontinue benefits. By the time of trial this may look like an offset. Should give ample notice of the discontinuation of benefits.
- 4. Policy wordings need to be clear. If enforcement of mitigation provisions are applied too harshly or without direction/clarification could open up the insurer to aggravated/punitive damages.