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**MITIGATION IN PERSONAL  
INJURY CASES**

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# MITIGATION IN PERSONAL INJURY CASES<sup>1</sup>

## INTRODUCTION

If you have been practising in the personal injury area for any length of time you have acquired a basic knowledge of the law of damages. You innately know what a plaintiff needs to prove to recover damages and what steps can be undertaken by the defence to attack the plaintiff's damages claims. However, in my experience, while many lawyers are aware of the concept of mitigation they fail to consider it in sufficient detail when preparing their cases for discovery, mediation, pretrial and trial. The purpose of this paper is to provide you with a basic understanding of the law of mitigation and some practical advice regarding how to properly address mitigation issues.

## WHAT IS THE SO-CALLED DUTY TO MITIGATE?

### Overview: The duty to mitigate

The duty to mitigate is unlike other duties owed in law. It is not an actionable duty. Lord Justice Pearson in *Darbishire v. Warran* is often quoted with succinctly explaining this concept:<sup>2</sup>

It is important to appreciate the true nature of the so-called “duty to mitigate the loss” or “duty to minimize the damage.” The plaintiff is not under any actual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of

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<sup>1</sup> I would like to thank Stephen Gaudreau a student-at-law with Blaney McMurtry LLP for doing a great deal of the legal research for this paper. I have cut and pasted significant portions of his research memo into this paper.

<sup>2</sup> *Darbishire v Warran*, [1963] 3 All ER 310.

making good the loss. In short, he is fully entitled to be as extravagant as he pleases, but not at the expense of the defence.

A plaintiff is not permitted to recover damages which could have been avoided by acting reasonably. What is reasonable is a question of fact and varies depending on the circumstances of the case. As we will see below the onus is on the defendant to demonstrate that the plaintiff has failed to mitigate their loss. Additionally, doubts on this question are often resolved against the defendant who created the plaintiff's predicament in the first place.<sup>3</sup>

Mitigation is a two edged sword. If the court concludes that the plaintiff has failed to mitigate their damages, then the plaintiff is not entitled to recover the damages which might have been avoided if they had taken reasonable steps to mitigate their losses. However, the plaintiffs' bar often fails to exploit the flip-side of the mitigation question. The plaintiff is entitled to recover any expenses reasonably incurred in an attempt to mitigate his or her loss even if the attempt does not succeed.<sup>4</sup>

## **Onus**

The onus is on the defendant to persuade the trier of fact that the evidence, on a balance of probabilities, points to the plaintiff's failure to mitigate.<sup>5</sup> To succeed on a mitigation defence the defendant has the burden of proving: (1) the steps the plaintiff might have taken to avoid the loss; (2) that it would have been reasonable for the plaintiff to take such action; and (3) the extent to which the loss would have been reduced if the steps had been taken.<sup>6</sup>

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<sup>3</sup> Waddams, *The Law of Damages* (2011) (looseleaf) at §15.140 ("Waddams")

<sup>4</sup> *McGregor on Damages*, 18<sup>th</sup> Ed. (2009), at §§7-006; Waddams, *The Law of Damages* (2011) (looseleaf) at §15.290.

<sup>5</sup> *Janiak v Ippolito*, [1985] 1 SCR 146 at para 14, 16 DLR (4<sup>th</sup>) 1, Wilson J [*Janiak*].

<sup>6</sup> Cooper-Stephenson, *Personal Injury Damages in Canada (Second Ed.)*, 1996 at page 868. ("Cooper-Stephenson")

## Reasonableness

The overarching theme in the plaintiff's duty to mitigate is the reasonableness standard: whether or not the plaintiff has reasonably tried to mitigate his losses. As in many other areas of the law the reasonableness standard can be problematic - what is reasonable to me may not be reasonable to my neighbour. This is largely a question of fact and the appellate courts are usually reluctant to interfere with the trial judge's ruling on this issue. However, it is not a simple question of fact as determining whether someone has acted reasonably requires a legal conclusion to be drawn.<sup>7</sup>

The area which creates the most problems regarding reasonableness involves a plaintiff's duty to undergo medical treatment that may or would improve his condition. Let us suppose that a plaintiff sustains a back injury in an accident which totally prevents him from returning to any occupation for which he is reasonably suited because of training, education or experience. Let us further suppose that there is an operation which held out some hope of allowing him to return to meaningful work. Does the plaintiff have an obligation to have the operation? Does it matter what risks are associated with the surgery? Does it matter what the chances of improvement are? Does it matter if the plaintiff has a psychological fear of undergoing surgery? Would it matter if this fear pre-dated the accident, was caused by the accident or developed following the accident independent of the injuries sustained in the accident? These are the types of issues that come up involving the duty to mitigate that cause the most problems for both the plaintiff and defence bars. We will attempt to explore them as we discuss the concept of "reasonableness" later in this paper.

A plaintiff may decline to undergo a surgery for purely rational reasons or because of an irrational fear of surgery. For example, if the surgery had a 50:50 chance of success and carried a 5% morbidity risk, then even a plaintiff who was not averse to having surgery might rationally decline such surgery. On the other hand, a plaintiff might be offered a surgical option which carried a 90% chance of success and a morbidity rate of 1%. These issues have tended to be addressed most frequently in the latter rather than the former case. The leading decision in this

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<sup>7</sup> Waddams, at §15.140

area is the Supreme Court of Canada's decision in *Janiak v. Ippolito*.<sup>8</sup> However, in my opinion, this case does not clearly spell out the answers to all of these questions but, rather, walks us through the English and other common law authorities and hints at what those answers might be.

### ***Thin Skull Principle***

*"If the wrong is established the wrongdoer must take the victim as he finds him."*<sup>9</sup>

The Supreme Court in *Janiak v. Ippolito* was faced with the following fact situation. In *Janiak* as a result of a motor vehicle accident the plaintiff refused rehabilitative surgery on a disk protrusion in his back. The Court was only faced with the quantum of damages as the defendant admitted 100% liability. The rehabilitative surgery in question had a 70% chance of being successful, and if successful an almost 100% chance of recovery. Without the surgery the plaintiff would not be able to return to work as a crane operator.

The plaintiff claimed to suffer from a great fear of surgery of any kind, and refused the surgery unless he could be guaranteed 100% success. No doctor would guarantee this. The evident issue was whether the plaintiff failed to mitigate his damages when refusing the surgery.

Normally, if a plaintiff's damages are aggravated because of a pre-existing condition (the so-called "thin skull plaintiff), then the defendant is obliged to pay the aggravated damages because the defendant must take their victim as they find him.<sup>10</sup> However, the Supreme Court concluded that a plaintiff cannot simply assert they have a psychological condition that prevents them from mitigating their damages. The Court developed a test. Once it is established there is a

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<sup>8</sup> (1985), 16 D.L.R. (4<sup>th</sup>) 1.

<sup>9</sup> *Hay or Bourhill v Young*, [1943] AC 92, at pp109-10.

<sup>10</sup> *Janiak*, note 5 at 10.

“psychological thin-skull,” the inquiry shifts to (a) the timing and (b) the nature of the alleged psychological infirmity.<sup>11</sup>

### Timing

The Court distinguished between a psychological disorder that pre-existed the accident and a psychological disorder that was arose subsequent to the accident. The main concern was whether a plaintiff’s reasonableness to refuse mitigating surgery should be evaluated on an objective or subjective basis. A psychological thin skull developed after an accident was held to be factored in on an objective basis.<sup>12</sup> In other words, the personal characteristics of the plaintiff would not be factored into the discussion of what is reasonable. The court also seems to hint that if the accident caused the psychological disorder, then subjective factors might be more readily considered.

### Nature

Not every pre-existing state of mind will amount to a psychological thin skull.<sup>13</sup> It is a difficult line to draw. The Court managed to articulate a general rule: the plaintiff assumes the cost of any unreasonable decision so long as he is capable of choice.

The analytical focus on the pre-existing state of mind is the capacity of the plaintiff to make a reasonable choice.<sup>14</sup> On the other hand, if due to some pre-existing psychological condition the plaintiff is incapable of making that choice, then he should be treated as falling within the thin

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<sup>11</sup> *Janiak*, note 5 at 11.

<sup>12</sup> *Janiak*, note 5 at 23.

<sup>13</sup> *Ibid* 5 at 24.

<sup>14</sup> *Ibid* at 26.

skull category and should not be made to bear the cost of any unreasonable decisions after he is injured.<sup>15</sup>

This decision and those that have considered it subsequently are not easy to decipher. It strikes me that the timing issue is actually less important than the nature issue. If the psychological aversion to treatment pre-dates the accident it will be considered on the question of whether the failure to mitigate was reasonable but only if it prevents a plaintiff from making a rational decision. I suspect that the same test will be applied to psychological problems which arise after the accident but are precipitated by the accident. However, it seems relatively clear that if the condition arises subsequent to the accident and was not caused by the accident a purely objective test will be applied.

In practice, this can and does lead to all sorts of problems when one attempts to “handicap” a case. On the one hand, the nature test is a very difficult one for the plaintiff to satisfy but the onus is on the defendant on this issue. There is also a lot of wiggle room in this test itself. When does a subjective psychological problem meet the requirements of the test? Different triers of fact will disagree on this. There is also wiggle room in deciding when the psychological condition arose and whether it was causally related to the accident.

#### Additional Guidance from the Courts

The line between a squeamish or stubborn plaintiff and a plaintiff with a real pre-existing psychological disorder is often difficult to draw. Which side of the line the case falls on can make a significant difference to the amount recovered by the plaintiff.

The line is blurry because it can often come down to an argument between counsel regarding whether the plaintiff’s refusal to undergo medical treatment does or does not arise from a true incapacity to make a rational choice. Although the courts have dealt with a number of these situations the case law to date provides, at best, limited guidance. However, there are instructive

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<sup>15</sup> Ibid at 24.



on how counsel should seek to formulate their arguments, and what to pay attention to when investigating a plaintiff's unwillingness to mitigate.

From *Janiak* it is clear that a plaintiff's capability to choose is the overarching determination of whether they should have mitigated their losses. If the plaintiff cannot choose to mitigate by reason of a pre-existing psychological condition then the defence will have to bear the cost of the plaintiff's refusal to undergo treatment. The defendant will have to take the plaintiff as he found him.

In *Janiak*, Madam Justice Wilson discusses the meaning of choice and proposes that someone who can choose is someone who is "capable of making a rational decision." This proposition proved to be problematic as it just begged a further question for clarification: what is rational?

In *Tomizza v. Fraser*<sup>16</sup>, the court was faced with determining the question what is rational. The Court determined it was someone who could make a decision in a proper and sensible manner. However, even with this clarification the Court knew the line was just as blurry. Justice Holland notes:

In the present case, Mr. Tomizza had the ability to reason and did reach a reasoned conclusion. Objectively, the basis of his reasoning was faulty. I must consider whether the basis for his reasoning was so faulty as to amount to a serious pre-existing psychological infirmity which amount to more than a mere pre-existing state of mind. It is a difficult line to draw.

In *Tomizza*, the plaintiff Mr. Tomizza, had been admitted to a psychiatric hospital in the past. At first glance, this would seem to be beneficial to the plaintiff's position that there was a pre-existing mental disorder. However, upon further investigation the defence was able to lead evidence that while admitted the plaintiff was not certified insane, and actually showed promising signs that he was mentally stable.<sup>17</sup>

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<sup>16</sup> *Tomizza v. Fraser*, 71 OR (2d) 705 [*Tomizza*].

<sup>17</sup> This is a good reminder for counsel to thoroughly investigate matters that may seem undesirable to their case.

Eventually, it was found that Mr. Tomizza did in fact have some sort of paranoid personality disorder. He was capable of reasoning, but in an illogical manner. Nonetheless, he was capable of making a decision even though his reasoning was faulty.

The court made the final determination that even though Mr. Tomizza had a pre-existing psychological condition that affected his ability to reason logically it was not enough to absolve him of his duty to mitigate.

### ***Conflicting Medical Opinions***

Going back to our example of the man with a serious back injury, what if in the hospital after visits from several doctors he receives conflicting medical opinions. Some of the proposed treatments carry different risks, chances of success, and outcomes. How does the man know which treatment to undergo so as not to be liable for not mitigating his damages? On the flip side, how does the defence persuade the court that the man should have chosen the treatment which has the best chance of reducing the plaintiff's damage claims?

To answer the former question there is authority that states the plaintiff need only choose one of the proposed treatments so he is not said to have acted unreasonably.<sup>18</sup> But, the Court will still take into consideration the degree of risk, the gravity of the consequences of refusing it, and the potential benefits derived from it.<sup>19</sup>

To answer the latter question the Court in *Janiak* cites some interesting English authority that in choosing one of the proposed treatments the plaintiff should consider the defendant's interests as well.<sup>20</sup> It is doubtful that the plaintiff needs to actually consider the defendant's interests in making a choice. However, a plaintiff who ignores the fact that his choice may significantly

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<sup>18</sup> Ibid note 5 at 29.

<sup>19</sup> Ibid note 5 at 31.

<sup>20</sup> *Janiak* at para 30.

increase their damages may do so at their own peril. If the defence intends to argue that the plaintiff should have undergone treatment that has been rejected by the plaintiff's doctor, then it will have to adduce very persuasive expert evidence on this issue.<sup>21</sup>

#### Other Situations Where the Plaintiff May Choose to Refuse Treatment

Is it reasonable for a plaintiff to decline to mitigate for religious or cultural reasons? What if the reason for refusing to mitigate arose from family circumstances or for financial reasons? Generally, the defendant will be obliged to take their victim as they find them and that includes their religious, cultural beliefs and their family circumstances or financial situation.<sup>22</sup> It may well be, however, that if the reason for the refusal arose from a change in cultural or religious beliefs post-accident, then that change may not justify the refusal to mitigate.<sup>23</sup>

#### *How far does the duty to mitigate extend?*

The plaintiff in *Janiak* was faced with the decision to have relatively safe back surgery.<sup>24</sup> His refusal was considered unreasonable. Does this mean that plaintiffs without a pre-existing psychological disorder who refuse mitigating surgery are acting unreasonably? What if the plaintiff in *Janiak* was faced with the decision to have a more invasive surgery, like the amputation of a leg? Would refusal still be considered unreasonable because the procedure would mitigate their damages?

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<sup>21</sup> Ibid at 29.

<sup>22</sup> See the detailed discussion of the role impecuniosity plays with respect to the duty to mitigate in Cooper-Stephenson at pgs 881-2 and in Waddams at §§ 15.330 to 15.390.

<sup>23</sup> Cooper-Stephenson at page 876.

<sup>24</sup> Different triers of fact could differ on this issue. Some triers of fact might feel uncomfortable obliging anyone to go invasive surgery with its attendant risks of morbidity.

*Bourgoin v. Leamington (Municipality)*<sup>25</sup>, a 2006 Ontario Superior Court decision, involved a plaintiff who was faced with the decision to amputate her own leg to alleviate chronic pain. The doctors' gave her 95% chance of success should she carry through with the surgery. Defence took the position that she should amputate because of the high chance of success. The plaintiff simply did not want to. It was her leg.

The Court was faced with the decision in *Janiak* which states that if the plaintiff does not have a pre-existing psychological condition which prevents them from seeking treatment, and the proposed treatment is reasonable, then their refusal is unreasonable. In this case, all the elements were in a favour of amputation: high chance of success; no pre-existing psychological problem; no other options for treatment; and, without surgery her pain would continue.

The Court was not prepared to stretch the ruling in *Janiak* that far:

It is my view that it is one thing to say that such an operation is objectively reasonable. It is quite a different thing to say that Ms. Bourgoin is acting unreasonably in refusing to have an amputation of part of her right leg. Refusing a back operation as the plaintiff did in *Janiak v. Ippolito* is not the same thing as refusing to have a major limb removed. It is my view that our law is not such that a refusal of an amputation can be considered unreasonable with the result that a plaintiff could be found to not have mitigated his or her losses.<sup>26</sup>

*Bourgoin* offers counsel important guidance to the limits of the duty to mitigate. The rule in *Janiak* is not a hard and fast rule. In deciding whether it is unreasonable to refuse a certain treatment all of the factors need to be weighed. This includes the likelihood of success, the risks from the treatment, the degree to which the treatment impacts on the plaintiff etc. The mere fact that a possible treatment has a high percentage chance of mitigating a plaintiff's condition does not mean refusing it will be held to be unreasonable.

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<sup>25</sup> *Bourgoin v. Leamington (Municipality)* (2006), 9 CCLT (3d) 41 (available on CanLII), MJ Nolan J [*Bourgoin*].

<sup>26</sup> *Ibid* at 111.

## *Non-Medical*

There are a myriad of non-medical situations where the plaintiff may have a duty to mitigate. The most common involve the question of when or if a person should have returned to work. Often, the question is whether the pain being suffered by the plaintiff justifies staying off work. Often the answer to this question will turn on the credibility of the plaintiff. The other common situation involves a reluctance by the plaintiff to accept a position that differs from their pre-accident employment particularly where the new position involves working in a job that the plaintiff has no interest in or the job is less prestigious than the plaintiff's former work.

These cases often turn on the views of the trier of fact on what a plaintiff should reasonably do to get on with their life. Some judges or juries may feel that a plaintiff should return to work in a much less prestigious position to mitigate their losses. Other judges and juries who would be uncomfortable in holding that the plaintiff's refusal was unreasonable.

There are a number of cases that discuss this issue but I will include only one example here. In *Cudmore v. Seaman*<sup>27</sup> a taxi driver's car was "written off" after an accident. The Court found that the driver should have taken out a loan to purchase a new car and hire substitute driver while the taxi driver was incapacitated.

## Retraining

In *Mathers v. O'Haver* after getting into a car accident the plaintiff suffered from serious back problems.<sup>28</sup> At the time of the accident he was a meat cutter, which involved heavy lifting. The plaintiff lost his job because he was unable to perform his duties at work due to his physical constraints as a result of the accident. Three doctors testified that he would no longer be able to be a meat cutter.

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<sup>27</sup> *Cudmore v. Seaman*, [1987] P.E.I.J. No. 2.

<sup>28</sup> *Mathers v O'Haver*, [1990] BCJ No 1341, 47 BCLR (2d) 303, [Locke JA].

The plaintiff claimed for lost future earnings. This had the potential of being a large sum; however, defence asserted he had a duty to mitigate. Defence conceded he would not be able to be a meat cutter anymore, but he was able to do less physically intensive work. The problem was the plaintiff had very little training and education. He had only known how to be a meat cutter, and he did not have the skills to find new suitable employment.

The Court was faced with a conundrum: the plaintiff must mitigate his losses by finding employment, but he cannot find employment because he is only trained in his prior job which he can no longer perform.

The Court solved the conundrum by requiring the defence to pay for the plaintiff's further education and retraining for two years. The defence would also have to pay for the plaintiff's shortfall in wages for those two years. The end result was a damages award much lower than if the defendant had to pay for future wages for decades to come.

### **Consequences of failing to mitigate**

Now let's assume the man in our example received a strong medical opinion that he should undergo back surgery with an 80% chance of success. If the surgery was successful, then the man would be able to return to work in 6 months. There is another proposed non-surgical treatment but the results would reduce his pain modestly but probably not allow him to return to work. The man refuses the surgical treatment because he is uneasy with the thought of going under anaesthesia.

The defence is able to lead expert evidence that there are few risks with the surgery. Further, the defence is able to lead evidence that the man had undergone surgery only four months before the accident, thus demonstrating his fear of anaesthesia was not pre-existing. The cost of refusing the surgery will mean a damage award for future earnings that is significantly larger than if the surgery took place. The Court decides look at the man's refusal on an objective basis and concludes he is being unreasonable. How does the court evaluate damages?

The correct approach is to “determine what damages are avoidable by assuming that the plaintiff has agreed to an operation which has not yet been performed.”<sup>29</sup> Then the court will discount by any chance of failure in performing the treatment. In our example, this would mean a 20% discount. For example, since the man did not receive the surgery his future earnings damages are estimated at \$1,000,000, but the court will discount this by 80% as his avoidable loss. He would only receive \$200,000 to account for the chance that even if he received the surgery there is a 20% chance it would not be successful.

The Court even addressed the troubling defence concern that the plaintiff will assert that he will not undergo the surgery and collects his \$200,000 damage award and then opts for the surgery and makes a full recovery. He would pocket \$200,000 even though his loss was zero. The Court was not concerned with this outcome because it cannot decide these issues on the assumption that someone will intentionally attempt to perpetrate a fraud on the court. Also, it would remain true even if the plaintiff gets the surgery after the trial there is still the 20% chance it is unsuccessful. In that event he would be stuck with the \$200,000 instead of the \$1,000,000 if the surgery was unsuccessful prior to the trial. In short, it is a double-edged sword. This, of course, is a problem that arises frequently in damage calculations because a plaintiff’s damages must be determined a point in time and any positive or negative contingencies that come to pass in the future will almost certainly lead to the result that the plaintiff was over or under compensated.

An interesting example which involves this concept and what is reasonable concerns the obligation to utilize experimental treatments such as experimental drugs therapy. In *Brown v. Matheson*, the plaintiff’s damage award was reduced due to the fact that they did not want to take a drug that had not been adopted in Nova Scotia, but was used in Toronto, Vancouver and the States. The drug had an 80% chance of rehabilitating the plaintiff versus a 20% chance without the drug.<sup>30</sup>

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<sup>29</sup> Ibid at 39.

<sup>30</sup> *Brown v. Matheson*, [1990] N.S.J. No. 178.

## **The Costs of Mitigation**

Clearly if a plaintiff takes steps to mitigate, such as undergoing retraining which reduces the future loss of income claim, then the costs of that retraining and the lost wages during that retraining are recoverable from the defence. What happens if the attempt to mitigate is unsuccessful?

If the attempt was reasonable but fails, then the plaintiff is still entitled to recover the costs of the attempt even though the damages would have been less if the plaintiff had done nothing. In fact, the attempt to mitigate might even aggravate the injury in which case the plaintiff would be entitled to recover damages for this aggravation. The most common example of this type of situation is where the plaintiff undergoes a surgery which had a good chance of ameliorating the plaintiff's condition but, in fact, makes the situation worse.<sup>31</sup>

## **LAYING THE GROUNDWORK ON THE MITIGATION ISSUE**

Now that we have a basic understanding of what the law of mitigation is, what steps should counsel take and when to be in a position to deal with the issue of mitigation?

From the plaintiff's perspective there are two basic issues that must be dealt with. The first, is addressing anticipated arguments that the plaintiff has failed to mitigate. The second is ensuring that claims for the cost of mitigation are properly claimed. Plaintiff's counsel will need to be alert to these two issues during the entire pendency of the claim as these issues can arise at any time.

On the other hand, the defence needs to consider whether the plaintiff has properly mitigated, whether the plaintiff has a reasonable excuse for not mitigating and whether the claimed costs for mitigation are reasonable and arose from a reasonable attempt to mitigate. In most cases the defence must ask the correct questions at discovery and ask their experts the appropriate questions to lay the foundation for a mitigation defence. There will be instances where mitigation

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<sup>31</sup> See Waddams at §§ 15.290 to 320.



issues arise following discoveries and, in such cases, the defence needs to be alert to the requirement for additional discoveries and additional expert opinions.

Let us first address the questions from the plaintiff's perspective.

## **What Should Plaintiffs' Counsel Do?**

Plaintiff's counsel needs to be alert to mitigation issues from the outset. On occasion, there will be a very limited window to mitigate and if the attempted mitigation is not undertaken, then the plaintiff's claim may be permanently compromised.

Plaintiff's counsel needs to review every recommendation that is made by either the plaintiff's own medical experts. Is the plaintiff following the recommendation? If not, what is the justification for not following it? Will the justification fly at trial? Plaintiff's counsel should also be alert to the recommendations made by in SAB IMEs and recommendations made in defence medical-legal reports. These should be forwarded to the appropriate treating doctor or expert witness for comment. If these recommendations are addressed in a timely manner by the appropriate expert and then discussed with the plaintiff, there is a much stronger chance that the court will find that there were legitimate differing medical opinions and the plaintiff's refusal to undertake the recommended treatment was reasonable.

Similar questions needed to be addressed regarding non-medical issues. If the plaintiff tells you they are not prepared to do something for cultural, religious or financial reasons, you will need to investigate these allegations in detail. I have had cases where I have been told that a particular reason for refusal was religious but when I spoke to the client's religious advisor I found out that the religion did not actually object to the proposed form of mitigation. If they indicate that they are impecunious, then you need to really dig into their finances not only to make them consider the issue in detail but also to ensure that you can assemble the evidence to demonstrate impecuniosity.

If a defence orthopod recommends surgery do not rely on the plaintiff's GP's opinion to counter this recommendation. Make sure you have addressed this issue with an equally qualified expert. Also makes sure that your expert is really prepared to go to the wall in excusing your client's

refusal to mitigate. Your expert should discuss the two differing opinions with your client. In the end it is the client's decision and shielding the client from that decision has the potential to cause problems at trial.

If you are faced with a difference of opinion on the utility of a surgical procedure, try to enhance the difference in medical opinions by augmenting the risks of surgery or demonstrating that there is a difference of opinion regarding the likely outcome. If the defence expert says that the risk of morbidity is 1% and there is an 80% chance the surgery will allow the plaintiff to return to work, then you want to obtain an opinion that the risk of morbidity is higher, particularize the risks if something goes wrong, reduce the chances of a successful outcome etc. If the plaintiff's doctor concludes that the risk of morbidity is 3%, can outline exactly what might go wrong, opines that the chances of a successful outcome are 60% and would not recommend the surgery, you have a much better chance of convincing the trier of fact that it was reasonable to decline the treatment. Additionally, even if you lose the mitigation argument you may double the damages if the trier of fact accepts your expert's opinion on the likelihood of success.

Plaintiffs' counsel must also be alert to the question of the cost of mitigation. Make sure that if your client pursues any attempt at mitigation you document the costs of that attempt. If the attempt involves an expenditure of money to allow a business to continue operating, you must talk to others familiar with that business to ensure that the attempt to keep the business running is reasonable. I would suggest that you not only speak to the plaintiff, but the plaintiff's family, his or her business advisor and trusted senior employees. You may even wish to have an expert provide an opinion on the risks surrounding the attempted mitigation before commencing the attempt. You must ask tough questions and make sure those interviewed advise you objectively and honestly of the risks of any proposed mitigation. You must also monitor these attempts. You must always be asking if the attempt is working and is it still reasonable to continue the attempt.

Assuming your client does not wish to mitigate, you must consider whether this refusal can be justified on ground of objective reasonableness or whether you can document a pre-existing situation or situation created by the accident which prevents him from making a rational choice. This may require that you have your client assessed by a mental health expert if the reason for refusing treatment is fear to determine if this fear prevents the client from making rational

choices. You need to understand whether any psychological problems pre-existed the accident or were caused by the accident. You need to openly discuss with the expert the potential frailties in his or her opinion so that you can properly counsel your client. Your client needs to understand the full potential implications of a refusal to mitigate. This needs to be documented to ensure that you avoid a potential e & o claim.

If the reason for refusing to mitigate is religious or cultural make sure you have expert evidence to support prove the cultural or religious belief. You should also assemble evidence that your client adhered to cultural and religious teachings before and after the accident.

Most defence counsel include a boilerplate allegation in their defence that the plaintiff has failed to mitigate his or her damages. At discovery, it is important that you ask precisely what facts, documents and evidence is being relied upon to support this plea. The usual answer is that “at the moment we have none”. I would suggest that you ask defence counsel to advise you of any evidence, facts and documents they have in support of this plea, at the latest, by the date of the pre-trial. You must ensure that you actually get an updated answer to this undertaking.

You should consider trying to out expert the defence on these claims. In other words, you want to have a number of witnesses who will testify that it was reasonable for your client to decline to mitigate. Make sure your multiple experts meet with your client and provide their opinion to him or her. This way your client can testify that x number of doctors recommended against the proposed mitigation. You should have no trouble convincing the trier of fact that you need to call each of these experts so that the jury understands that your client’s failure to mitigate was reasonable. This is a situation where you should be able, for example, to convince the trial judge that you can call two orthopaedic surgeons rather than one.

Finally, it is important to crunch the numbers. If on a proper analysis, taking into account that the proposed mitigation has a limited chance of success, the amount of the savings will not significantly reduce the damages, the less likely it is that the court will find the refusal to mitigate unreasonable. For example, if the surgery had a 60% of allowing the plaintiff to return to work but at a reduced rate of pay and 60% of the reduced rate of pay would reduce the future

damages by only 15%, a court might more readily excuse the plaintiff's refusal to undergo invasive back surgery with a risk of morbidity.

## **What Should Defence Counsel Do?**

The critical question for defence counsel is asking the correct questions at discovery and of their experts.

Where the plaintiff claims that they have a psychological aversion to surgery you must ask detailed questions on this issue. You need all previous psychological records, records from social workers they have interacted with etc. You need to understand precisely what it is they fear, whether such fears pre-dated the accident or arose subsequent to the accident. Ask the why questions. Why do you think you are afraid of surgery? The answers to these questions will allow your experts to fully understand the basis for the refusal and opine on whether it meets to appropriate tests outlined in the cases.

Make sure you ask the correct questions of your experts. In fact, if you did not ask the correct questions at discovery, if your expert is alerted to the issue and the test is explained to the expert, your expert may be able to ask the questions you failed to ask when he or she examines the plaintiff. Where a treatment is recommended, your expert on that treatment needs to outline the risks, the likelihood of success, the time to recover etc. in their report. If you decide to obtain a psychological or psychiatric opinion because the plaintiff claims an irrational fear of treatment, then you need to ask the expert when the fear arose, why it arose (that is if it arose post-accident does it relate to the accident) and whether the plaintiffs' refusal to undergo the treatment arose from an inability to make a rational decision regarding such treatment. You need to get your expert to comment on contrary opinions provided by the plaintiff's experts.

If the plaintiff appears to be relying on a very thin opinion to avoid treatment, then I would urge you to serve your defence expert report advocating treatment as early as possible. I would also suggest that you advise counsel that you are of the view that this

opinion should be shared with his client and his medical advisor.<sup>32</sup> A failure to do so opens up a number of opportunities at trial. For example, if the family doctor was recommending against treatment and you advise him in the stand that if an eminent expert did recommend the treatment would that be something he or she would want to consider with their patient. If he says yes and recognises your expert as eminent and that opinion has not been shared with the plaintiff or that expert, the expert's testimony should be undermined.

If the reason for refusal is non-medical those reasons must be explored. Is the religious reason for refusing the treatment actually rooted in the religious beliefs of the plaintiff or simply an excuse not to do what is rational? It may make sense to ask neighbours about the plaintiff's adherence to cultural and religious teachings. Consider retaining your own expert on these issues. However, be careful because cultural and religious rules can vary depending on the locale they arose in. What may be acceptable in one part of the plaintiff's home country may not be acceptable in another region.

If impecuniosity is the alleged reason for not mitigating you will need to ask probing questions on this issue and ask for all documentation that supports it. You should also ask for any advice or expert opinions that the plaintiff is relying upon. You may find out that the real reason is rooted in the advice of a person who really has no expertise on the subject rather than the opinions of real experts. This may assist you in undermining the reasonableness of the plaintiff's position. For example, you may discover that the refusal is based on the faulty advice of a friend and that the plaintiff has never actually considered the advice of the experts.

Never forget that the defence has the onus. You must prove through evidence what steps the plaintiff should have taken to mitigate. Then you must prove that it was reasonable for the plaintiff to have taken those steps. Finally, and often the most difficult to prove, you must prove

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<sup>32</sup> I would suggest putting this letter into a request to admit so that you can point out to the trier of fact that the request was made and ignored by counsel.

to what extent the mitigation would have reduced the plaintiff's damages. Generally, it will take expert evidence to answer each of these questions.

Make sure your expert understands that they must outline the chances of success and, if successful, how the mitigating conduct would reduce the plaintiff's damages. If the mitigating conduct would not allow them to return to their former employment but a different employment, you will need evidence of the likely rate of pay for that employment and the chances of obtaining that employment. Once you have carried out those calculations, then re-consider whether the savings will be sufficient that the plaintiff will actually be found to have acted unreasonably in declining to mitigate. Ask the additional question of whether the anticipated savings justify the additional time and risks of calling the mitigation evidence at trial.

You should also question the credibility of the plaintiff's excuse. For example, if they are refusing a cervical fusion but have undergone multiple facet joint injections it would be useful to compare the risks of those injections against the risk of the surgery. Did the plaintiff undergo or consider other surgery (pre or post-accident) which had similar morbidity risks and had similar or more significant potential side-effects?

## **CONCLUDING REMARKS**

This paper is intended to make introduce the factors that counsel must consider with respect to the issue of mitigation. It is not an exhaustive treatise and does not outline every consideration that counsel must consider when preparing for discoveries, mediation or trial. However, hopefully it will provide you with a starting point when you are considering mitigation issues and the steps you should take when prosecuting or defending a claim which has mitigation issues.

Stephen R. Moore and Stephen Gaudreau