

## BC Personal Injury Claims And The Duty To Mitigate

February 26th, 2009

If you are injured in BC through the fault of another and advance a tort claim you have a duty to mitigate your damages. What this means is you have a duty to take reasonable steps to minimize your losses. For example, if you are capable of getting back to work you ought to do so, or if your doctor prescribes a rehabilitation program you should take reasonable steps to follow this advice.

If you fail to mitigate your damages the value of your damages may be reduced accordingly. In other words, if the Court finds that you unreasonably failed to follow a rehabilitation program and doing so would have improved your injuries by 50% the value of your Injury Claim could be reduced by 50%.

But what if you can't afford to follow your doctors advice? What if the medications prescribed are too expensive or if the physiotherapy costs are beyond your budget, surely this can't amount to a failure to mitigate, can it? Unfortunately it can if you have ICBC No Fault Benefits available to you and you fail to apply for and receive these. Section 83(2) of the Insurance (Vehicle) Act reads as follows:

*(2) A person who has a claim for damages and who receives or is entitled to receive benefits respecting the loss on which the claim is based, is deemed to have released the claim to the extent of the benefits.*

What this means is that if you could receive ICBC rehabilitation benefits and fail to apply for these the person that injured you can successfully argue that you failed to mitigate your damages.

Reasons for judgement were released today (Smith v. Tedford) highlighting this fact. In this case Mr. Justice Grist made the following observations:

*[3] Once pled as an issue by the defendant, damages will be limited if the defendant can show the plaintiff failed to take steps a reasonable person would have taken to mitigate or lessen the loss. In the case of a personal injury trial, this would include recommended treatment or therapy if pursuing the treatment is a reasonable course in the circumstances and can be proven to likely have had efficacy.*

*[4] In my view, the financial circumstance of the plaintiff falls into the overall consideration of reasonableness. If the plaintiff is of modest means, the expensive therapy may be a significant factor. The fact that such a plaintiff has been denied coverage for the therapy under the universal motor vehicle coverage provided under Part 7, is in my view, a factor for consideration when failure to mitigate of this sort is alleged. This coverage, as being ordinarily available to those injured in motor vehicle collisions, may well be assumed by a jury hearing such a case. Therefore, where there has been a request for coverage, the response becomes relevant.*

*[5] This is not a case of putting ICBC on trial. It is a matter of responding to a defence issue by reference to the plaintiff's resources and whether it was reasonable to pursue the recommended treatment. Further, a full response to the issue is not necessarily made simply by the Plaintiff indicating a lack of resources in her evidence. As here, and as it happens in many cases, the plaintiff's credibility is challenged and the ability to rely on confirmation is significant. Further, this is not a matter of determining Part 7 coverage. That is an issue for proceedings after a jury verdict and is quite independent, in my view, of this question.*

In another ICBC Injury Claim released today (Job v. Blankers) Madam Justice Ker of the BC Supreme Court penalized a plaintiff for failing to mitigate her damages. In this case the Plaintiff was found to have mild to moderate soft tissue injuries and the non-pecuniary loss was valued at \$25,000. This award was then reduced by 10% for failure to mitigate. In coming to this conclusion the Court made the following analysis:

[110] In **Antoniali v. Massey**, 2008 BCSC 1085, Mr. Justice Preston addressed the issue of mitigation of damages at ¶29-50. In that case, the defendants established that the plaintiff unreasonably failed to embark on an exercise program under the guidance of a personal trainer to rehabilitate herself and reduce or eliminate the continuing effect of her injuries.

[111] The decision in **Antoniali** provides a helpful framework for assessing whether the defendant has established that the plaintiff has failed to mitigate her damages in this case. In order then to conclude that Ms. Job's damages should be reduced by the application of the principle that a plaintiff has a positive duty to mitigate her injuries, adapting that framework to the circumstances of the present case, I would have to find that the defendant has established:

1. that a program of massage, physiotherapy and chiropractic intervention at a stage earlier than that undertaken by the plaintiff would have reduced or eliminated the effect of the injuries;
2. that the reasonable plaintiff in Ms. Job's circumstances would have followed such a program;
3. that Ms. Job unreasonably failed to follow such a program and;
4. the extent to which Ms. Job's damages would have been reduced if she had followed such a treatment program.

[112] Applying those factors to the circumstances of this case, I am satisfied the defence has established that Ms. Job failed to mitigate her injuries and symptoms. Although Ms. Job may have had some financial reasons for failing to follow through on her doctor's referrals, it appears from her evidence that her refusal to sign the appropriate documentation that ICBC sought contributed to her difficulties in that regard.

[113] Dr. O'Neill's evidence that the earlier treatment begins after an accident, the better the prognosis for the patient, and his observation that the plaintiff's recovery may have been better had she attended earlier, satisfies me that had Ms. Job engaged in earlier treatment of her injuries as directed by her family physician in August and October 2007, she would have likely reduced the disability that she has experienced as result of the injuries.

[114] I find that the plaintiff failed to take reasonable steps to mitigate the physical effects of the injuries sustained in the collision by failing to undertake the treatment regime recommended by her physician at the time the recommendation was made. On the evidence of Dr. O'Neill, this was likely an impediment to achieving an earlier recovery. Ms. Job had an obligation to assist in her recovery, even if it meant some initial financial hardship in terms of ability to pay for the treatments. The burden of establishing a failure to mitigate is on the defendant. I find that the defendant has met the onus in this case and has established that the plaintiff did not take all reasonable steps towards assisting in her recovery by failing to engage in treatment at the time her physician recommended she do so.

[115] Accordingly, I reduce her award for non-pecuniary damages by 10% to reflect her failure to mitigate those damages in these circumstances.

[116] In the end, there will be an award of \$22,500 (\$25,000 less 10% for failure to mitigate) in non-pecuniary damages