British Columbia: What is Reasonable in the Context of the Mitigation Argument?


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The Supreme Court of Canada has held that once a plaintiff has established damages, the onus shifts to the defendant to establish any culpable failure to mitigate. The defendant must establish on a balance of probabilities that:

1. the plaintiff acted unreasonably in abstaining from recommended treatments; and

2. the extent (if any) to which the plaintiff's damages would have been reduced had they acted reasonably.[1]

However, almost every law student, lawyer, professor and (even) judge struggle with the question of what is a reasonable person? Personal characteristics, unique circumstances and other factors tend to muddy the waters of reasonableness. However, two recent decisions coming out of British Columbia have arguably gone too far and seemingly made it near impossible to argue mitigation in the context of personal injury.

In *Pearson*, the 21-year-old female plaintiff was involved in a serious motor vehicle accident.[2] She suffered from chronic pain as well as disabling headaches, depression, anxiety and PTSD. Liability was admitted at trial but there was contention regarding damages. In particular, the defendant argued that the plaintiff failed to mitigate her damages as she:

1. did not follow the rehabilitation program as recommended by her doctors; and

2. failed to take her recommended anti-depressant medication as recommended by her general practitioner.

However, the British Columbia Supreme Court (the "BCSC") found that the plaintiff acted reasonably given her circumstances and medical conditions. Regarding her failure to attend physiotherapy, the BCSC found "she was too depressed and too tired from working" to seek treatment after work (or even refill a prescription).

The BCSC also took into account that the plaintiff lived in Squamish and was "too scared" to drive to Vancouver (where the required rehabilitative resources were located) due to her PTSD and depression. Further, it was accepted that she suffered from cognitive difficulties and would forget to refill her prescriptions. As such, the failure to mitigate argument was rejected and the plaintiff was found to have acted reasonably given her medical conditions and circumstances.

In the second case, *Morgan*, the plaintiff suffered soft tissue injuries to her shoulders, neck and back, as well as headaches and chronic pain after being involved in two motor vehicle accidents.[3] The defendants admitted liability but argued the plaintiff failed to mitigate her damages as she:

1. did not inform her doctor that she had stopped taking her prescribed medications (she took one of her prescribed medications initially but stopped taking it as she did not like "the way prescription drugs make her feel" and she did feel she was not experiencing any benefits); and

2. did not complete the recommended "active" physiotherapy.

Regarding the plaintiff's decision to stop taking her prescribed medications, the BCSC appeared inconsistent in their definition of a reasonable plaintiff. At one point the BCSC states, "A reasonable plaintiff might well have consulted with his or her doctor before declining to take prescribed medications". However, the BCSC then goes on to state, "Nevertheless, in my view it is entirely realistic to expect that even after consulting with a doctor, a reasonable plaintiff who experienced the kind of side effects experienced by Ms. Morgan might decide not to continue with prescription medications."[4]

The BCSC also found the plaintiff's choice to stop her active physiotherapy was reasonable as it only resulted in the "management" of her condition rather than "amelioration". Nonetheless, the plaintiff was still awarded $2,520.00 for costs of future care in order for her to pursue active physiotherapy as she claimed at trial that she was now open to the treatment.

While British Columbia case law tends to assess damages for personal injuries at higher rates when compared to other jurisdictions, this mitigation analysis could have an impact outside British Columbia. This is worrisome as these cases arguably go too far and make it near impossible for defendants to successfully make the failure to mitigate argument in the context of personal injury.

In both cases, the plaintiffs did not follow their recommended treatment nor take their recommended medications (albeit for different reasons). Admittedly, chronic pain, PTSD and depression are still relatively unknown in terms of their effect on people and the required treatment. However, in this writer's opinion, a plaintiff ignoring their recommended treatments/medications is not acting reasonable and damages should be reduced accordingly.

If you have any questions with respect to this bulletin, please contact
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[1] *Janiak v Ippolito*, [1985] 1 S.C.R. 146.
[2] *Pearson v Savage*, 2017 BCSC 1435 [*Pearson*].
[3] *Morgan v Allen*, 2017 BCSC 1958 [*Morgan*].
[4] *Ibid* at para 48.