

Can Injuries In An ICBC Claim Be Worth Less For Failing To Lose Weight?

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The short answer is yes. In BC, if a Defendant who negligently injures you can prove that the extent of your injuries would have been less if you took reasonable steps to 'mitigate' your loss then the value of your damages can be reduced accordingly. This principle of law is called 'failure to mitigate'.

Failure to mitigate can include failing to follow a reasonable treatment or rehabilitation program such as a weight loss program. Reasons for judgment were released today by the BC Supreme Court demonstrating the 'failure to mitigate' principle in action.

In today's case ([Rindero v. Nicholson](#)) the Plaintiff was injured when seated as a rear-seat passenger in a pick up truck which struck a vehicle that ran a red light. Fault was admitted leaving the court to deal with the issue of quantum of damages (value of the Plaintiff's injuries and loss). In assessing the Plaintiff's non-pecuniary damages (money for pain and suffering and loss of enjoyment of life) at \$36,000 Mr. Justice Meiklem found that the Plaintiff suffered from Patellofemoral pain (knee pain), a slight exacerbation of pre-existing post traumatic stress disorder and recovered soft tissue injuries to the neck and shoulders with accompanying headaches.

The Court found that the Plaintiff's knee injury was the most serious of the injuries and summarized its effect on the Plaintiff's life as follows:

The plaintiff's knee injury is probably chronic and not likely to fully resolve. It is troublesome and painful when he stands for long periods, sits for long periods, or overextends any vigorous physical activity....The most significant limiting effect on his activities that he mentioned in relation to his knee pain was restriction on his style of big game hunting, and fishing. He hunts only from roads as opposed to hiking off into the bush as he sometimes did, and he avoids fishing areas that involve difficult access.

In arriving at the \$36,000 figure the court reduced the damages by 20% for the plaintiff's failure to mitigate, specifically the failure to lose weight which would have reduced the extent of the knee pain. Mr. Justice Meiklem summarized and applied the law of failure to mitigate as follows:

[30] The defendants argue that the plaintiff's failure to significantly reduce his weight has contributed to the severity and persistence of his knee pain and amounts to a failure to mitigate, which should reduce his award. There can be no doubt that the plaintiff would suffer less with knee pain that is increased with physical activity if he lost weight. The medical evidence confirms this elementary physical principle. At an estimated 265 pounds at trial he was about 25 pounds heavier than he was when examined by Dr. McKenzie in July 2008. I note that in July 2008 his left knee pain, which is his primary injury, was less prominent than his right knee pain. I appreciate that sore knees would probably make it more difficult to engage in the vigorous exercise that is usually part of a weight loss program, but the plaintiff has demonstrated that he can lose a considerable amount of weight when he changes diet and lifestyle, and that his left knee pain was lessened when he weighed less.

[31] I note that the plaintiff told Dr. McKenzie that he experienced knee pain when riding his mountain bike more than an hour soon after the accident as June 2005, which, apart from showing that his knee injury was not very disabling, shows that exercise is not out of the question for him. I find that the defendant has established a failure on the part of the plaintiff to mitigate his damages.

[32] The extent to which damages should be reduced is obviously not amenable to any precise calculation on these facts, but I note that in the Collyer case cited by the plaintiff, an award of \$80,000 was reduced by \$10,000 for a comparable failure. In the Crichton case cited by the defendants a 30% discount was applied for failure to participate in group psychotherapy sessions recommended by a psychiatrist and a family doctor, which would address an anxiety disorder and thereby assist in dealing with chronic pain. I find that a discount of 20% to the award I would otherwise make to account for failure to mitigate is appropriate.

On another note, this case contains a useful discussion of plaintiff credibility and some of the factors courts look at when gauging this. Additionally, this case contains a very useful discussion of the law of 'diminished earning capacity' (future wage loss) at paragraphs 35-39.