"The life insured just won't co-operate" – is this a failure to mitigate?

Lisa Norris and Melissa Godfrey | August 2012 | Insurance & Financial Services

Insurers assessing disability claims are often faced with a situation where a claimant refuses to undertake certain treatment which might (or even would) enhance their prospects of recovery, perhaps to the extent that they would no longer qualify for benefits under the life insurance contract in issue. This frequently raises the question whether the claimant has 'a duty to mitigate' in these circumstances.

The answer is, often, yes and no.

Who does this impact?

Insurers and Superannuation Fund Trustees assessing disability insurance claims.

What action should be taken?

An unreasonable refusal to undertake available treatment may place a life insured in breach of the duty of utmost good faith (or the duty of good faith and fair dealing). You may wish to seek advice regarding the best action to take in such circumstances.

What is the duty to mitigate?

Technically, the legal 'duty to mitigate' only arises in relation to a claim for damages, where the claimant has incurred a compensable loss. Arguably that does not arise in the context of claim assessment, unless and until there is a breach of contract by the insurer.

However, all claimants owe insurers a duty of utmost good faith and/or good faith and fair dealing in relation to the claim. Such a duty may or may not require the claimant to undertake certain steps that would enhance their prospects of recovery (and consequently cessation or reduction of entitlement to benefits), subject always to the facts and circumstances of the case.

If a prognosis for recovery if certain treatment was to be undertaken is available, and liability would be affected if the insured took reasonable steps to undertake this treatment, refusal to undertake it may place the life insured in breach of the duty of utmost good faith or good faith and fair dealing.

The duty to mitigate is a person's duty to take steps to avoid or minimise as far as reasonably possible any compensable loss they may otherwise suffer as a result of another party's wrongdoing (eg, breach of contract / policy). Because it is concerned with the concept of minimising 'loss' or damage, an insured's duty to mitigate only arises if the insurer repudiates the policy or demonstrates an intention not to be bound by the policy, and the insured claims damages for breach of contract.

Such damages are assessed on the basis that the life insured should take 'reasonable steps to mitigate his loss by promoting his own recovery'[1]. A failure to mitigate therefore does not prevent an insured from seeking damages altogether, but it does potentially reduce the amount of damages to which he/she is entitled.

The duty to mitigate would certainly apply in the context of litigated proceedings where there is an allegation that the life insurer has breached the policy and the life insured is entitled to damages. Imagine this in the context of an income protection claim where the life insured is, for instance, 40 years old and claims damages quantified by reference to benefits to age 65.

It is less clear whether the duty to mitigate arises in the context of a claim that is still the subject of assessment. Strictly speaking, no duty to mitigate loss arises unless the contract is breached. However, as we explain below, similar duties (the duty of utmost good faith and/or good faith and fair dealing) may require the life insured to take certain actions while on claim that may possibly have the effect of reducing the insurer's liability under the policy.

Duties of the Life Insured

The duty of utmost good faith is owed by all parties to an insurance contract to one another, and is implied into all insurance policies by s13 of the *Insurance Contracts Act 1984* (Cth)). This duty is certainly owed by a life insured to a life insurer where there is a direct contract of life insurance.

In the context of a group life insurance policy, where the life insured is not a party to the policy, the duty of *utmost good faith* does not apply; however, a bilateral duty of *good faith and fair dealing* is certainly owed by **both** the life insured and the group life insurer[2]. The *Insurance Contracts Act* does not define the duty of utmost good faith. Case law has described this duty, as owed by an *insurer*, as a duty to act fairly, reasonably and with due regard to the interests of a claimant[3]. The duty of good faith and fair dealing is similar, requiring that the insurer act with due regard to interests of a claimant, allow a claimant to comment on adverse material, consider and determine the correct question and act reasonably in considering the claim.

What is required of an *insured* to comply with his/her duty of utmost good faith or good faith and fair dealing is not exhaustively defined in any legislation or case law. However, it might (depending on the circumstances of each case) be inconsistent with such duties for a life insured to refuse certain medical treatment, refuse to participate in rehabilitation and/or retraining if so capable.

If the Policy wording entitles you to compel a claimant to participate in reasonable treatment and/or rehabilitation, to accept reasonable offers of modified duties, retraining and/or obtaining benefits from other sources (such as a workers compensation insurer or Centrelink), then these provisions may of course be relied upon.

Even if the policy does not contain any specific provision compelling the insured to assist in their own recovery, where an insured refuses to take such steps, an insurer may not necessarily be without remedy if the claimant is in breach of the equitable duty of good faith and fair dealing.

A claimant may find it difficult to obtain equitable relief from the Court or succeed in a complaint to the Financial Ombudsman Service (**FOS**) in such circumstances. It would seem 'unfair' for the purposes of the FOS Terms of Reference to reward a claimant who is in breach of such a duty.

It may even be possible, in certain circumstances, for an insurer to decline to continue the assessment of a claim unless and until the insured co-operates. This is consistent with the case law indicating that it is not permissible to base a decision to decline a claim on pre-final medical evidence[4].

However, to succeed in showing a breach of the duty of utmost good faith or good faith and fair dealing, an insurer will require clear evidence that the refusal of the claimant to undertake the recommended treatment is unreasonable.

What is unreasonable failure to undertake treatment?

Telstra Super Pty Ltd v Flegeltaub[5] concerned a claim against a superannuation fund trustee (as opposed to an insurer) of a Total and Permanent

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Invalidity payment. In our view, the principles would apply equally to a life insurer assessing a TPD claim. It was held in this case that someone who refused treatment which would improve their condition *without genuine grounds* would not have a 'permanent disability' for the purposes of the definition in issue there.

Examples of 'genuine grounds' include (but are not necessarily limited to) religious belief, the aetiology of the refusal (such as a psychiatric condition) and the reasonableness of the refusal, bearing in mind that reasonableness will be considered according to all the circumstances of the case. For example, an operation may be likely to assist in recovery, but it would be reasonable to refuse to have the operation if it entailed risks that a reasonable person would be unwilling to take.

Prior to *Flegeltaub*, in *Dragojlovic v The Director-General of Social Security*,[6] the Federal Court had considered whether the Director-General could cancel the applicant's invalid pension because he unreasonably refused to submit to surgery which might reduce his incapacity to work. This case turned on the provisions of the *Social Security Act 1947*, but the Court considered the issue in terms of whether

> '*a person is so permanently incapacitated when his incapacity is such that it can only be relieved by treatment of such a nature that in the opinion of the fact finding Tribunal he cannot undergo it. A person who is genuinely constrained by religion or fear which he cannot overcome is no doubt such a person. But there may well be cases in which on other genuine grounds it would not be reasonable to expect a claimant for a pension or a pensioner to undergo particular treatment of a remedial nature. Dealing with the plain question of fact, with respect to a man who can be cured only by treatment objectively reasonable but actually not available to him because of fear or other genuine reason, a Tribunal would, in my opinion, find that that man was permanently incapacitated for work…*'.

These cases show that, as always, regard must be had to the facts and circumstances of the case. If a person was faced with the prospect of, say, spinal surgery with a relatively low chance of success and an attendant risk of paraplegia, it could hardly be held unreasonable to refuse that treatment. If, however, a claimant refused to undertake moderate physiotherapy, resulting in the perpetuation of what would otherwise have been a straightforward and temporary injury, perhaps that person would be in breach of the obligation of good faith towards the insurer.

Another factor to consider is whether the treatment in question is, in a practical sense, available to the claimant. It is unlikely to be unreasonable to refuse to travel for, say, 2 hours each direction on public transport for treatment if a claimant is medically certified fit to travel for only 30 minutes a day. However, if the treatment is readily available to the claimant yet he or she refuses to attend without reasonable justification, it may well be the case that the claimant is in breach of obligations of good faith to the insurer, and this **may** relieve the insurer of the obligation to continue to assess the claim until the claimant co-operates. Once again, whether this is appropriate will depend on the specific terms of the Policy, and all the facts and circumstances.

Suggested Action

If a prognosis for recovery if certain treatment was to be undertaken is available, and liability would be affected if the insured took reasonable steps to undertake this treatment, refusal to undertake it may place the life insured in breach of the duty of utmost good faith or good faith and fair dealing. If in doubt, you may wish to seek advice regarding the application of the case law discussed above to the circumstances.

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[1] *Green v AMP Life Ltd* (2005) 13 ANZ Ins Cas 90-124.
[2] *Hannover Life Re of Australasia Ltd v Sayseng* [2005] NSWCA 214 (23 June 2005). See also *Mabbett v Watson Wyatt Superannuation Pty Ltd & Anor* [2008] NSWSC 365 (1 May 2008).
[3] *Beverley v Tyndall Life Insurance Co Ltd* [1999] WASCA 198.
[4] *Vidovic v Email Superannuation Pty Ltd* (Unreported, Bryson J, NSWSC 3.3.95)
[5] [2000] VSCA 180 (28 September 2000).
[6] [1984] FCA 6.

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For more information, please contact:

Lisa Norris
Partner
T: 02 8257 5764
M: 0410 582 309
lisa.norris@turkslegal.com.au

Melissa Godfrey
Senior Associate
T: 02 8257 5752
M: 0400 868 089
melissa.godfrey@turkslegal.com.au