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Publications

"Own Occupation" v. "Any Occupation" – What Is The Difference?

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Policy definitions of terms like "disability" and "total disability" are varied. Typically, the policy will cover the insured against the inability to perform "each and every duty pertaining to his occupation,"[1] or against the inability "to engage in any gainful occupation for which he is reasonably fitted by education, training or experience,"[2] or "having regard to his skill and ability."[3] The existence of disability, and its duration, is the issue most likely to form the basis of a dispute between the insurer and the insured, and the outcome of the case will depend on the interpretation which the court gives to the policy definition.

Disability policies fall into two broad categories: "own occupation" coverage, which insures the claimant against the inability to pursue his usual line of work, and "any occupation" coverage, in which benefits are payable only so long as the insured is prevented from engaging in work for which he is suited. Since "any occupation" benefits terminate as soon as the insured has recovered sufficiently to perform work for which he is reasonably fitted, regardless of whether or not he can do his usual job, the insured will find it much more difficult to establish "any occupation" disability than "own occupation" disability.

INTERPRETATION

The principles which apply to the interpretation of the policy definition of "total disability"

1 Matthews v. Continental Casualty, 56 B.C. 213 (C.A.).

2 Campbell v. Canada Life (1990), 45 C.C.L.I. 73 (Man. C.A.).

3 DePape v. M.P.I.C., [1981] I.L.R. 1-1351 (Man. Q.B.).

were established by the Supreme Court of Canada in **Sucharov v. Paul Revere.**[4] The insured was the owner-manager of an insurance brokerage who suffered from hypertension and stress. He had a very hands-on involvement in his business, and performed most of the tasks involved in operating a brokerage, including sales, bookkeeping, and customer service. He could perform most, if not all, of these tasks on an individual basis, but when he tried to do them all together as he would in a normal work day, attacks of anxiety prevented him from functioning.

Under the policy definition of disability, the insured qualified for benefits if he was "completely unable to engage in his regular occupation." In a dissenting opinion, Mr. Justice Ritchie took a literal approach to the policy language:

> I am unable to satisfy myself that an insured who incorporates in his claim under this policy the statement that he is able to perform individually most of the duties of a general manager can be said to be completely unable to engage in that occupation.
>
> The use of the word "completely" in the above definition appears to me to preclude recovery by an insured under this policy for "total disability" when he is able to perform individually most of the duties of his regular occupation. To my mind the word "completely" imports reference to an inclusion of each individual part making up the totality described.

The literal approach was rejected, however, in the majority opinion, which was delivered by Mr. Justice Laskin. He concluded that the court had to look at the insured's occupation as a whole, and that Mr. Sucharov was disabled so long as he was unable to perform "substantially all" of his normal duties. The fact that he could function as a bookkeeper or sales agent in an insurance brokerage did not prove that he could perform as an owner and manager taking on these roles and other duties besides. To hold otherwise would change the policy from "own occupation" to "any occupation" coverage.

In subsequent cases, **Sucharov** has been taken to mean that the policy definition of disability is to be construed liberally rather than literally,[5] and that the term "total disability" means substantial inability regardless of the particular language of the policy.[6] Although the distinction between "own occupation" and "any occupation" coverage is important, the principles

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[4] [1984] I.L.R. 1-1732 (S.C.C.).

[5] Hiscock v. Metropolitan Life, [1989] I.L.R. 1-2417 (Nfld. S.C.).

[6] Kay v. Blue Cross (1990), 75 D.L.R.(4th) 571 (N.B. C.A.); Michaud v. Blue Cross (1989), 41 C.C.L.I. 25 (N.B. C.A.).

of interpretation established in **Sucharov** apply to both categories of coverage.[7] Disability always means the substantial inability to perform the proposed job taken as a whole, and not the complete inability to perform each and every one of the discrete tasks that make up the job.

Medical Evidence

Expert medical evidence is important in any case in which disability is an issue, whether the test is "own occupation" or "any occupation" disability. Although the court will normally hear the testimony of the insured's treating physicians, as well as that of specialists retained by both sides, a diagnosis is not a prerequisite to a finding of disability. So long as evidence establishes an inability to work, it is not necessary for the insured or her doctors to precisely identify the disabling condition. In a Saskatchewan case in which "eminently qualified experts disagree[d] on the appropriate naming" of the insured's problem, the court found it "unnecessary to label or categorically determine the disease or diseases" in question.[8]

"OWN OCCUPATION" COVERAGE

If the insured has an "own occupation" policy, he is entitled to benefits so long as he is unable to resume his regular occupation. Usually, this refers to the occupation the insured was engaged in at the time he became disabled. Total disability does not require complete helplessness, so the insured can collect benefits if he is "unable to perform all the substantial and material acts" required in his usual occupation."[9]

The insured is disabled if a reasonable person would recognize that he shouldn't work. Sometimes the insured is capable of carrying out the tasks which make up his job, but his performance is hindered by pain, fatigue, or medication. In other cases, medical advice or common sense make it necessary to cease work in order to effect a cure or prolong the insured's life.[10]

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[7] MacEachern v. Co-operative Fire & Casualty (1986), 19 C.C.L.I. 189 (N.S. S.C.), aff'd 25 C.C.L.I. 168 (C.A.).

[8] Simard v. Saskatchewan, [1998] I.L.R. 1-3653 (Sask. Q.B.). See also Ritch v. Sun Life, [1998] I.L.R. 1-3574 (Ont. Gen. Div.) (chronic fatigue), and McIsaac v. Sun Life (1997), 48 C.C.L.I.(2d) 299 (B.C. S.C.) (fibromyalgia). Cf. Mathers v. Sun Life, [1998] I.L.R. 1-3564 (B.C. S.C.), in which the policy language required evidence of a specific injury or sickness. See also Mugford v. Canada Life (1998) 4 C.C.L.I.(3d) 66 (Ont. Gen. Div.), and Gill v. Canada Life [1999] I.L.R. 1-3654 (B.C. S.C.), as to the nature of the medical evidence required on a motion for summary judgment in a total disability case.

[9] Myshrall v. Commercial Union (1986), 17 C.C.L.I. 76 (B.C. S.C.).

[10] Poudrier v. Imperial Life (1994), 25 C.C.L.I.(2d) 225 (B.C S.C.). The allegation that a return to work will bring on a new episode of illness must be supported by evidence rather than speculation, however: Rose v. Paul Revere (1990), 45 C.C.L.I. 35 (B.C. S.C.), aff'd 85 D.L.R.(4th) 433 (C.A.).

Pain alone is not a disabling condition, but there are cases in which extreme or persistent pain make it impossible for the insured to continue working. Judges are very skeptical, however, where there is little objective evidence of injury or disease, or where pain persists for long periods beyond the normal recovery date.[11]

The courts recognize that some jobs require much greater precision and consistency than others. While impaired performance may be tolerable in some occupations, in others, even a small error can have unacceptable consequences, and an individual with a minor disability will be incapable of performing adequately. Thus a group home worker with whiplash was held to be totally disabled because episodes of disorientation had resulted in two mistakes in dispensing medications to residents.[12]

Business Owners

Often the insured has recovered sufficiently that she can begin to assume a role in her business, performing at least some of the tasks of her former occupation. At what point she is able to perform "all the substantial and material acts" which make up that occupation is a question of degree, but the courts tend to be lenient towards the insured. This is especially so where the claimant is self-employed or operates her own business. The courts don't expect the claimant to shut down her business because of an illness or injury. The fact that the insured goes to her usual place of business and does what work she can, or works through pain in order to keep the business going, does not by itself establish that she is no longer disabled.[13]

Thus a restaurant manager was considered to be disabled, although he could complete his paperwork,[14] and a carpenter could be disabled even though he was able to supervise the renovation of his home.[15] In another case, a businessman was held to be disabled despite the fact that he had arranged financing for his enterprise and completed some documentation.[16]

In one case, an HIV positive executive who suffered from depression was held to be disabled, although he was reporting for work on a regular basis. The court concluded that the insured was "in denial" concerning his psychological problems, and accepted the evidence of

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[11] Mathers v. Sun Life, above, note 8.

[12] Smith v. Empire Life, [1998] I.L.R. 1-3635 (Ont. Gen. Div.).

[13] Mercuri v. Imperial Life, [1990] I.L.R. 1-2660.

[14] Garavellos v. Mutual of Omaha (1976), 14 O.R.(2d) 448. (Co. Crt.).

[15] Myshrall v. Commercial Union, above, note 9.

[16] Crawford v. Citadel General Assurance (1982), 54 N.S.R.(2d) 407 (S.C.).

his manager and co-workers, who testified that his contributions to the business were minimal.[17]

The fact that the claimant continues to draw profits from the business is irrelevant to the question of disability.[18]

Employees

The courts take care not to penalize the claimant for trying to work, so the insured who has taken temporary work, or who has tried to return to his job without success, can usually continue to claim benefits:[19]

> No one...should be discouraged from attempting to take up their former work, or any work, out of fear that the attempt might be held against him. Far from necessarily proving that an insured has the capacity to perform his task it may...prove the reverse. There is no better evidence of incapacity to perform a task than the failure of an honest and sustained attempt to do it.

An employee can collect benefits despite returning to work so long as he can establish that his duties are restricted to light work,[20] or that he is working at a reduced capacity and that co-workers have taken on some of his responsibilities.[21]

Some policies, however, contain a two part definition of disability, under which benefits are payable so long as the claimant is unable to work at his own occupation, *and* is not engaged in any gainful occupation. Under this type of policy, the insured who returns to work temporarily may have to account for his earnings, or may lose his entitlement altogether during the period he is working. Other policies expressly permit the insured to recover partial benefits during a period of rehabilitative employment.

Multiple Occupations

There are cases in which it is unclear what the insured's occupation actually is. This issue can arise where the insured has held a variety of jobs, or has changed occupations shortly

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[17] Spring v. A. Saley & Associates (1997), 1 C.C.L.I.(3d) 167 (Ont. Gen. Div.).

[18] Glassman v. Constellation Assurance (1983), 1 C.C.L.I. 22 (Ont. H.C.J.).

[19] Foden v. Co-operators (1979), 88 D.L.R.(3d) 750.

[20] Campanella v. Great American Insurance, [1977] I.L.R. 1-876 (Ont. Co. Crt.).

[21] Cohoe v. Safeco Insurance, [1993] I.L.R. 1-2951 (Ont. Gen. Div.).

before the disability arose. Sometimes the insured holds two jobs, or operates more than one business. What if the insured is able to resume one of her occupations, but not the other?

The courts recognize that a person can have more than one occupation, especially if she is engaged in seasonal work.[22] In one case, the court resolved the issue by making a factual determination that one occupation was the claimant's "principal work."[23] There isn't enough case law in this area, however, to establish a hard-and-fast rule.

Specialists

The court may take either a broad or narrow view as to what constitutes the insured's regular occupation. This type of problem can arise in cases involving professionals who specialize in a particular area of practice. In one such case, the court found that the insured's occupation was that of an ear, nose and throat specialist, and held that he was disabled from this occupation although he may have been able to perform other work as a physician.[24] In another case, however, the court concluded that a dentist's occupation was general dentistry rather than a crown and bridge specialist.[25]

"ANY OCCUPATION" COVERAGE

A typical employer's group insurance policy provides the disabled employee with own occupation benefits for a period of one or two years, followed by a period of long-term disability coverage on an any occupation basis. The claimant will continue to receive benefits during the "any occupation" period so long as he is prevented from engaging in work for which he is "reasonably suited by training, education or experience," or work which is suited to his "skill and ability," or some other, similar phrase.[26]

The transition from own occupation to any occupation coverage is an important juncture in the disability claim. Most insurers will take a hard look at the claim when it reaches this point. They will ask for an update from the claimant's treating physicians, and they may request specialists' reports. The insurer may also exercise its right to have its own physician conduct an

[22] Macdonald v. Mutual of Omaha (1987), 25 C.C.L.I. 91 (N.S. C.A.).

[23] Lefebvre v. C.N.A. (1978), 20 O.R.(2d) 37 (H.C.J.).

[24] Attridge v. Fidelity & Casualty Co. (1972), 26 D.L.R.(3d) 730 (B.C. S.C.).

[25] Willinsky v. Imperial Life, [1993] I.L.R. 1-2903 (Ont. Gen. Div.).

[26] Some policies define "any occupation" disability by reference to the insured's capacity to earn a stated proportion of his pre-disability income; see, for instance, Ritch v. Sun Life, above, note 8.

examination of the insured, and if it hasn't done so already, consult experts in rehabilitation regarding alternative occupations.

An alternative occupation must be something that is comparable to the insured's former line of work in status and potential earnings. Even if the policy doesn't contain the words "reasonably fitted by education, training or experience," the proposed occupation must be something for which the insured is qualified by virtue of his schooling and work experience.[27]

The words "occupation," "work," and "employment" all suggest a degree of regularity and continuity in a line of endeavour.[28] The proposed job must require some sort of real application or effort on the part of the insured, and a position that "involves the performing of practically no work" will not be considered adequate.[29] In a western case, the insured obtained an appointment as postmaster in a small town, but virtually all of the work was done by employees and family members, and the court concluded that the appointment was an occupation in name only.[30]

The court will be interested in the insured's physical and mental condition, age, his formal education, his work history, any professional or skills development courses he has taken while working, his tolerance of stress, his energy level, consistency, and endurance. All of these matters are relevant in assessing the capacity of the insured to succeed at the proposed job. The insured's tastes, interests, and personality are important, too, as some kinds of work are unsuited to certain personalities.[31]

The ability of the insured to carry on with day-to-day activities, household chores, family obligations, and a social life may help to demonstrate his energy level and endurance.[32] In the final analysis, however, these kinds of activities aren't directly relevant to the issue of the insured's ability to complete the tasks involved in an alternative occupation.[33]

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[27] Stutt v. Alberta (No. 1) (1988), 34 C.C.L.I. 78 (Alta. Q.B.).

[28] Dale v. Commercial Union, [1980] I.L.R. 1-1271 (Ont. Co. Crt.).

[29] Lang v. Metropolitan Life (1937), 4 I.L.R. 302 (Sask. K.B.).

[30] Froelich v. Continental Casualty Co., [1956] I.L.R. 1-210 (Sask. Q.B.).

[31] Mercuri v. Imperial Life, above, note 13.

[32] Ritch v. Sun Life, above, note 8.

[33] Harding v. Maritime Life (1998), 4 C.C.L.I.(3d) 11 (N.B. Q.B.).

Availability of Work

Disability policies cover the loss of the insured's capacity to work, but do not insure against unemployment itself.[34] High unemployment, or the inability of the insured to find a job, are irrelevant to the issue of disability.

Although the insurer need not show that there is a job opening for the insured, the court will require evidence that a specific job does exist and that the insured is capable of performing that job. Normally, expert evidence in the form of a transferrable skills analysis or a labour market survey will be required on this point. In most cases the insured will not be called upon to relocate, so the court will want to hear evidence as to the kinds of employment that are available in the insured's community.[35]

Remuneration

Often the earning potential of an alternative occupation is less than that of the insured's former work. The proposed job must be "reasonably comparable" to the insured's previous work "in status and reward,"[36] but the pay level need not match the income which the insured is accustomed to receiving. A disparity between the income of the two occupations is one factor which the court will consider when deciding whether or not the new occupation is suited to the claimant.[37]

The adequacy of the remuneration is a question of degree, and there is no clear rule establishing a point where the discrepency between the old income and the new is unacceptable.

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[34] Constitution Insurance v. Coombe (1993), 19 C.C.L.I.(2d) 259 (Ont. Gen. Div.), aff'd (1997), 50 C.C.L.I.(2d) 119 (C.A.).

[35] Collin c. Les Cooperants (1988), 36 C.C.L.I. 263 (Que. C.A.); Braun v. Mutual of Omaha, [1987] I.L.R. 1-2181 (B.C. S.C.).

[36] Rutherford v. Crown Life (1996), 38 C.C.L.I.(2d) 260 (Alta. Q.B.), aff'd (1998), 6 C.C.L.I.(3d) 98 (C.A.); Millward v. Maritime Life (1989), 38 C.C.L.I. 184 (Alta. C.A.) (an income which was 60% of the insured's former wage was considered adequate).

[37] Young v. Saskatchewan (1991), 48 C.C.L.I. 193 (Sask. Q.B.); McCulloch v. Calgary (1985), 15 C.C.L.I. 222 (Alta. Q.B.); Green v. Mutual of Omaha (1983), 4 C.C.L.I. 34 (N.S. S.C.). Remuneration is not the only relevant factor, however, so "...judicial interpretation of the definition of 'total disability' does not impose a burden upon the respondent to prove that the appellant is receiving the same or similar remuneration to what he received prior to his accident, but only that he was able to enter into an occupation that is reasonably suitable in status and reward." Constitution Insurance v. Coombe, above, note 34, at p. 122 (C.A.).

Nature and Status of the Work

The courts recognize that an alternative occupation must be consistent with the insured's personality and social background. Thus the tastes and interests of the insured, as well as the nature and status of her previous work, are important factors. The courts are reluctant to accept that an individual can retrain for work that involves a social context and workplace environment that is foreign to her, particularly where the individual is an older worker, or someone who has been involved in a particular line of work for a long time.

There are many cases in which courts have refused to compel people who are accustomed to physical labour or outdoor work to switch to clerical duties or light work in a store or office.[38] Similarly, courts have often rejected the suggestion that professionals, managers, and executives should take on work which involves a reduction in social status, or even a new speciality within the same profession.[39]

Where the claimant is a young person with no long-standing commitment to a particular type of employment, judges are more likely to conclude that retraining is appropriate.[40]

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[38] Rutherford v. Crown Life, above, note 36; Hood v. Metropolitan Life (1992), 98 Sask. R. 189 (Q.B.), aff'd (1993), 109 Sask R. 130 (C.A.); Brooks v. London Life, [1979] I.L.R. 1-115 (Alta. C.A.); McKenzie v. Federation Insurance, [1981] I.L.R. 1-1412 (Ont. S.C.); Laflamme c. Bell Canada (1985), 15 C.C.L.I. 210 (Que. C.S.); Silliker v. Aetna Life, [1976] I.L.R. 1-737 (B.C. S.C.); Campanella v. Great American Insurance, above, note 20.

[39] Walls v. Constellation Assurance (1986), 17 C.C.L.I. 212 (Ont. S.C.); Willinsky v. Imperial Life, above, note 25; cf. Pound v. Continental Casualty, [1977] I.L.R. 1-835 (Que. C.A.).

[40] Labelle v. Great-West Life (1986), 17 C.C.L.I. 173 (B.C. S.C.).