# Disability Income Replacement
# The Importance of Disclosure and The Duty of Care

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Hypothesis:

It is the duty of an agent to recommend insurance that is suitable for the client and to assist the client in the application process to assure that insurance is properly applied for and put into force and effect.

Full and accurate disclosure to both the client and the proposed insurer is essential in the application process as well as at the time of claim and consistency is necessary.

Questions:

- Would an agent be held liable for failing to recommend a type of product or for the client failing to obtain a type of coverage?
- How quickly should an agent be required to recommend appropriate coverage if it is requested by a client?
- Should an agent advise an insured not to cancel coverage when the insured has already made a tentative decision to do so?
- Is an agent obliged to assist a client in making a claim under a policy sold or serviced by the agent?
- What if an insured suffers serious, but uninsured, financial consequences and an agent has failed to either discuss or recommend appropriate coverage?

A broker's duties and responsibilities have been set out by the Supreme Court of Canada in two seminal decisions:

1. Fine's Flowers Ltd. v. General Accident Assurance Co. of Canada; and
2. Fletcher v. Manitoba Public Insurance Corporation.

In the decision on Fletcher v. MPIC the Supreme Court of Canada referred to the earlier Ontario Court of Appeal decision of Fine's Flowers v. General Accident and stated their understanding of a broker's duty of care:

"Private insurance agents owe a duty to their customers to provide not only information about available coverage, but also advice about which forms of coverage they require in order to meet their needs"; "Where the customer adequately describes the nature of his

or her business to the agent, the onus is then on the agent to review the insurance needs of the customer and provide the full coverage requested."
So, are they saying that: if an uninsured loss occurs, the agent may be liable to the client for the loss, unless he has pointed out the gaps in coverage to the client and advised him of the ways that he can protect against those gaps?

"The extent of the duty owed by an insurance agent, both in placing insurance and in indicating to the insured which risks are covered and which are not, is a fairly stringent one for the agent";

Do we have to tell anyone who applies for Disability Income Protection that it is not Life nor Critical Illness nor Long Term Care insurance and what the differences are among them?

Clients often sue insurers for what they contend is the failure of the insurer to indemnify them for a loss when they feel that they have a valid contract of insurance. When they sue an agent it is usually for failing to recommend or advise them to obtain adequate coverage, or for the coverage not being in force when required.

- Do you follow up on all unpaid premium notices?
- Do you follow up even if you haven't received an overdue notice from the insurer, or from the MGA?
- Do you call or write to any client who may have a policy that is pending lapse?

If the agent only agreed to take "all reasonable steps", then liability is often determined by a Canadian court on the basis of the negligence standard of "reasonable" care. If the agent "undertook to procure an effective insurance", liability is often determined by a court according to contractual principles where reasonableness and fault are not the issues. If so, the agent may be held to have virtually "guaranteed" that insurance would be in effect when required.

Two basic aspects to the duty of care on the part of agents:
1. To comply with our clients' instructions and assist the client to carry out the transaction requested; and
2. To use proper skill in doing so.

Depending upon the circumstances (of the engagement), there may be a third duty: to properly advise clients.

A failure to do so may be considered as "negligent misrepresentation" or a failure in the "duty to warn" a client of the possible adverse consequences of not being properly insured against a risk.

- Do you investigate the overall needs of your clients and then tell them about the variety of things that they can be insured against?

In Hornburg v. Toole Peet the plaintiff submitted:
". . . that there was a relationship of trust or contract between the insured and the agents such that the agent owes a duty to the insured to take some initiative or precautions to ensure that the client has adequate coverage."

The judge in that case (Power J.) stated that:
"I do not think this is too hard a standard to oppose upon an agent who knows that his client is relying upon him to see that he is protected from all foreseeable, insurable risks."

- Do your clients rely on you for advice about insurance? Can you show that you have advised them appropriately?
- Do they take your advice?

An agency can be held vicariously liable for the negligence of its employees. An insurer can be held vicariously liable for the conduct of its agent, depending upon who the agent was acting for with respect to what he did or did not do. This is complicated by the fact that agents may act for more than one party in respect of a given transaction. Insurers may be held vicariously liable for the conduct of an agent taken within the scope of an agency agreement.

- Do you know what all of your agreements with insurers (and MGAs) allow you to do?
- Do you know what they do not allow you to do?
- Do you know what they require you to do?

Who do we represent when we are taking an application for insurance?

In Pusateri the judge stated that Pusateri made it clear to (the agent) that he did not want (the agent) to advise the company about any changes to his health even after he had been diagnosed with colon cancer. He knew that (the agent) was of the view that he could not reveal to the company what Pusateri had told him concerning his health

changes without his consent and that (the agent) was not going to tell the company without his authorization in that regard.

There are three parts to this:

1. Was the agent acting for the insurer?

2. If so, was the agent acting for the insurer when he did, or, failed to do the thing in question? And

3. Was he acting within the scope of his authority at the time?

What do our agency agreements with each insurer and MGA that we deal with say about our rights and obligations:

1. To the insurer / MGA? and
2. To the applicant / client?

What do they say about our other responsibilities (legal etc.)?

Duties of an Agent:

1. Determining the client's needs:

2. Explaining the available coverage to the client and advising them as to the appropriate coverage;

3. Accurately representing coverage, including the availability of coverage, to the insured;

4. Accurately representing the risk to the insurer; and

5. Assisting the client to obtain coverage with reasonable speed after they ask us to assist them in applying.

What is the scope of the relationship?

It will often be determined by examining the instructions given to the agent by the client and any representations made by the agent.

- How do we hold ourselves out?
- What do we say that we can / will do?
- Do we use an Engagement Letter?
- What do we say on our web-sites?
- What do we say in interviews or articles?
- What do we say in social media / chat rooms?
- Do we say the same things to every client, every time?

Agents may have responsibility to more than one party with respect to an application or policy.

In Gilmore v. Waterloo Mutual:

the insured claimed for a fire loss against the insurer and also against the agent who had placed the coverage. The insurer defended on the basis of fraudulent misrepresentation or nondisclosure of material facts, namely the storage of goods in an old barn rather than the insured building. At the time the policy was arranged, the agent was aware of the location of the goods.

In Cameron v. Coopérants the judge (Hallett JA) said:

"The law relating to misrepresentations ... is clear. ...The misrepresentation of the known fact may have been due to negligence on the part of the insured ... where he meant to disclose it but did not actually do so.
It may have been due to forgetfulness on his part, where the material fact genuinely escaped his memory.
It may have been due to mistake on his part, where he genuinely believed that he had disclosed it to the insurer on a previous occasion, or where he believed that the insurer was already in possession of the fact of its own knowledge.

It may have been due to misjudgement on his part, where he felt that the fact was not really significant and he did not consider it important to relate it to the insurer.

Regardless of the good faith of the insured ..., all such misrepresentations, however innocently made and regardless of the genuine lack of appreciation of materiality, will entitle the insurer to avoid the contract as long as the misrepresentation is of a fact known to the insured ... which would be regarded by a reasonable insurer as material to the risk."

David Norwood, in his book states:

"They (the insured) must, however, reveal everything they know, whether it be a symptom or a medical test or a consultation, since these are actual facts which will enable the insurer to assess the insurability of the life insured, even though the insured or life insured does not believe or has no reason to believe that they indicate any kind of illness or anything material to the risk. In other words, the life insured may not know exactly what their symptoms indicate, but if aware of certain symptoms, the life insured must disclose them. The life insured may genuinely feel that their surgical operation was successful, that a diagnostic prognosis was reassuring, or be quite unaware of or untroubled by the results, but the life insured certainly knows they had surgery and that they undertook the diagnostic test.

While the life insured may not know what their doctor knows, and it may be that the doctor chose not to disclose fully the state of health to the life insured, however this does not alter the fact that the life insured did consult a doctor or was treated by a doctor.

Essentially, therefore, the life insured's duty is to disclose to the insurer the fact of all of their symptoms, consultations, and medical treatments or tests, regardless of the life insured's own belief as to their importance or significance or that they feel they are cured."

- Do we explain to every applicant, every time, that they have two choices, they can pay a premium or they can be insured, and full and complete disclosure will often make the difference between one and the other.

In Pusateri's Ltd. v. Prudential the judge (McFarland J.) Stated:

"In summary, the task required of an applicant is not to guess at what would be material, but to answer the factual questions posed. If headaches are asked about, then whatever are the facts, they should be disclosed. If a diagnosis has not been communicated to the applicant, they clearly cannot tell the insurer of it, but must disclose, if asked, the names of the doctors consulted or been referred to, so that the insurer may, if it wishes to do so, discover by appropriate follow-up with such doctors, what the diagnosis was."

In the Ontario Court of Appeal's reasons in Wagner v. Laurier Life the judge (Osborne, J.A.) Stated:

"The provisions (of the Insurance Act)... do not deal directly with an applicant's obligation to disclose facts material to insurability. Indeed, a change in insurability, not known to the life insured, may, because of the provisions ... prevent the contract from coming into effect."

Insurance Act (Ontario) R.S.O. 1990, CHAPTER I.8 STATUTORY CONDITIONS (as of May 18, 2010)

The Contract
1. (1) The application, this policy, any document attached to this policy when issued, and any amendment to the contract agreed upon in writing after the policy is issued, constitute the entire contract, and no agent has authority to change the contract or waive any of its provisions.

Material Facts
2. No statement made by the insured or person insured at the time of application for this contract shall be used in defence of a claim under or to avoid this contract unless it is contained in the application or any other written statements or answers furnished as evidence of insurability.

Misrepresentation and Non-Disclosure

Duty to disclose 308:
(1) An applicant for insurance on the person's own behalf and on behalf of each person to be insured, and each person to be insured shall disclose to the insurer in any application, on a medical examination, if any, and in any written statements or answers furnished as evidence of insurability, every fact within the person's knowledge that is material to the insurance and is not so disclosed by the other.

Failure to disclose, general:
(2) Subject to sections 309 and 312, a failure to disclose or a misrepresentation of such a fact renders a contract voidable by the insurer.

Group insurance, failure to disclose:
(3) In the case of a contract of group insurance, a failure to disclose or a misrepresentation of such a fact with respect to a group person insured or a person insured under the contract does not render the contract voidable, but if evidence of insurability is specifically requested by the insurer, the insurance in respect of such a person is, subject to section 309, voidable by the insurer.

R.S.O. 1990, c. I.8, s. 308. In Silva v. Sizoo Mr. Justice Lane found that the applicant for insurance also has a duty disclose even those things that are not asked by an insurer on an application:

"The plaintiff had common law, statutory and contractual duties as an applicant for insurance to disclose all material facts in any application to an insurer underwriting the insurance risk. She was under a duty to act in the utmost good faith. ...if the plaintiff's medical condition had been disclosed, Canada Life, or any reasonable disability underwriter would have refused her coverage. There were no circumstances to disentitle Canada Life from relying on that misrepresentation as a ground for avoidance of the policy. The court rejected the plaintiff's argument that the underwriter had not conducted a reasonable and competent underwriting. The insurer was not required to be a detective. There was also no merit to the argument that Canada Life was estopped

from denying the validity of the insurance policy. Nor was this an appropriate case for relief from forfeiture. "

Incontestability:

309. (1) Subject to section 312 and except as provided in subsection (2), (a) where a contract, including renewals thereof, except a contract of group insurance, has been in effect continuously for two years with respect to a person insured, a failure to disclose or a misrepresentation of a fact with respect to that person required by section 308 to be disclosed does not, except in the case of fraud, render the contract voidable;
(b) where a contract of group insurance, including renewals thereof, has been in effect continuously for two years with respect to a group person insured or a person insured, a failure to disclose or a misrepresentation of a fact with respect to that group person insured or person insured required by section 308 to be disclosed does not, except in the case of fraud, render the contract voidable with respect to that group person insured or person insured.

Pre-existing conditions:

311. Where a contract contains a general exception or reduction with respect to pre-existing disease or physical conditions and the person insured or group person insured suffers or has suffered from a disease or physical condition that existed before the date the contract came into force with respect to that person and the disease or physical condition is not by name or specific description excluded from the insurance respecting that person,
(a) the prior existence of the disease or physical condition is not, except in the case of fraud, available as a defence against liability in whole or in part for a loss incurred or a disability beginning after the contract, including renewals thereof, has been in force continuously for two years immediately prior to the date of loss incurred or commencement of disability with respect to that person; and
b) the existence of the disease or physical condition is not, except in the case of fraud, available as a defence against liability in whole or in part if the disease or physical condition was disclosed in the application for the contract. R.S.O. 1990, c. I.8, s. 311.