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ILLINOIS LAW MANUAL

CHAPTER IX SPECIAL DEFENSES

C. MITIGATION OF DAMAGES

An injured plaintiff has a duty to mitigate his damages. That is, he must use ordinary care to obtain medical treatment in an effort to be cured of those injuries. I.P.I. No. 33.01, *et seq.* A plaintiff cannot recover damages for those injuries that are proximately caused by his failure to obtain medical care. A plaintiff's failure to mitigate damages is an affirmative defense to be pleaded by the defendant with his/her answer, and the burden of proof on this issue rests with the defendant. Brady v. McNamara, 311 Ill. App. 3d 542 (1st Dist. 1999). For example, the defendant-physician in Corlett v. Caserta, 204 Ill. App. 3d 403 (1st Dist. 1990), was permitted to show that the plaintiff-decedent had refused a blood transfusion on religious grounds and, therefore, failed to mitigate his damages. The decedent had undergone colon surgery, and then developed gastric bleeding due to alleged medical malpractice. He refused the transfusion and died.

While a plaintiff must exercise ordinary care to obtain medical treatment, he is generally not required to undergo a serious operation. McDonnell v. McPartlin, 303 Ill. App. 3d 391 (1st Dist. 1999). In Lapidus v. Hahn, 115 Ill. App. 3d 795 (1st Dist. 1983), a female tenant sued her landlord for injuries received after falling on ice in front of her dwelling. She suffered from diabetes and had gone into a coma following an operation years earlier. The tenant was not required to undergo a serious operation (fusion of her elbow) in order to minimize the damages to be paid by the landlord, especially in light of her diabetic condition, and her previous medical history that indicated such an operation could be highly dangerous. In Montgomery v. Terminal R.R. Association, 73 Ill. App. 3d 650 (5th Dist. 1979), the

court held that the plaintiff, to whom it had been recommended to have back surgery to improve his back injury, did not have a duty to mitigate his damages by agreeing to the surgery, even though the refusal was based solely on religious grounds. In fact, it has been held that the reasons for the refusal to obtain treatment are not relevant. Instead, the issue is the risks associated with the proposed treatment. In Hall v. Dumitru, 250 Ill. App. 3d 759 (5th Dist. 1993), plaintiff underwent surgery for a tubal ligation, which failed due to the doctor's alleged negligence. The plaintiff refused to undergo a second operation to correct the failed tubal ligation. The plaintiff later had two unwanted pregnancies, with the first resulting in her giving a child up for adoption and the second resulting in surgery and a three-day hospital stay to correct an ectopic pregnancy. In finding that the plaintiff was not required to undergo the second operation for a tubal ligation, the court held:

... we believe that the rule regarding mitigation of damages in relation to suggested medical treatment is as follows:

A patient has a duty to submit to reasonable medical care and treatment intended to improve the patient's condition and reduce or eliminate the consequences of the defendant's tortious act. This duty exists in both the area of medical malpractice as well as in the area of injuries caused in a nonmedical malpractice setting. An exception to this general rule exists with respect to surgical procedures as well as nonsurgical procedures which present a risk of enhanced or additional injury. We believe the use of the term major surgery or serious

surgery to describe the exception leads only to confusion and debate. These undefined terms must be analyzed in light of the interest being protected: that is, the right to forego potentially injurious procedures. A more useful approach, and we believe the correct one, is to ask whether a recognized risk is associated with the proposed treatment. The risk may or may not be common. But nevertheless, if the proposed treatment could result in an aggravation of the existing condition or the development of an additional condition of ill health, or if the prospect for improved health is slight, then there should be no duty to undergo the treatment. If the risk is clearly remote, the exception should not apply. But the risk need not be significant or even probable in order to trigger the exception. Once the grounds for the exception are established, it should be unnecessary for the patient to articulate the particular reason for choosing to forego the treatment since this is an objective test, not a subjective one. It is not the place of the court or jury to evaluate a patient's reasons for declining surgery or treatment, if the risks are recognized.

A defendant may not introduce into evidence the fact that a plaintiff was not wearing a seatbelt at the time of an automobile accident to allege that, had plaintiff done so, the injuries/damages would have been mitigated. This is expressly prohibited by the Illinois Motor Vehicle Code, even if a plaintiff receives a traffic citation for failure to wear a seatbelt. 625 ILCS 5/12-603.1(c); Schomer v. Madigan, 120 Ill. App. 2d 107 (4th Dist. 1970); DePaepe v. General Motors Corp., 33 F.3d 737 (7th Dist. 1994). However, the statute does not preclude introducing evidence concerning seatbelt usage if it is offered to show something other than plaintiff's failure to use it. For example, evidence of seatbelt usage may be properly introduced into evidence in an attempt to show whether the accident involved a front or side collision.

A plaintiff in a case alleging damage to his property is similarly required to exercise ordinary care to mitigate damages to his property. The jury in this type of case would be instructed that:

In fixing the amount of money which will reasonably and fairly compensate the plaintiff, you are to consider that a person whose property (or business, as the case may be) is damaged must exercise ordinary care to minimize existing damages and to prevent further damage. Damages proximately caused by a failure to exercise such care cannot be recovered.

I.P.I. No. 33.02.

This rule does not, however, obligate a plaintiff to take action which he is financially unable to do. Behrens v. W. S. Bills & Sons, Inc., 5 Ill. App. 3d 567 (3rd Dist. 1972); American Management & Maintenance Corp. v. State, 33 Ill. Ct. Cl. 49 (1980).

A personal injury award is not subject to federal income taxation, and a jury will not be told the award is not subject to income taxation. This fact will not reduce the amount of damages to be recovered by an injured plaintiff. Naqvi v. Rossiello, 321 Ill. App. 3d 143 (1st Dist. 2001). This is true even if the damage award includes compensation for lost income which would have been taxable if earned. Klawonn v. Mitchell, 105 Ill. 2d 450 (1985); Exchange National Bank of Chicago v. Air Ill. Inc., 167 Ill. App. 3d 1081 (1st Dist. 1988). Evidence on this issue is frequently barred at the beginning of trial when the trial judge grants the plaintiff's motion in limine to keep this fact from the jury. In fact, the Klawonn case holds that, if the fact that an award is not subject to income taxation is mentioned in closing argument, or an instruction is given to the jury, over plaintiff's objection, then it is reversible error.