

James Ludwar – Ludwar Law in Calgary takes injury and disability cases  
<http://www.yourdisabilitylawyer.ca/lawyer>

**James mentions two caveats.**

- He speaks only from his personal practice. He tends to sue early to get the case moving and gather additional information later. The average time to settlement in his practice is 1 – 2 years. But beware, some outliers take a decade.
- Regardless of what he will say James advises everyone to see a lawyer about your case – everyone is individual. This talk is about generalities which may or may not apply to you.

**James talked about:**

The Dark Ages: Mackie and Wolfe 1994 in which FM was not recognized as a valid medical condition but rather a fabrication of money seeking MDs.

The Change: Baillie vs Crown Life 1998 – CFS was recognized as a legitimate disability.

The legal scene has changed a lot in the 20 years since then.

Now the issue is not so much does ME/CFS exist but what effect it has on function and ability to work.

In deciding to take a case, James considers the honesty/credibility of the client and the medical support.

He is less interested in the diagnostic label and more interested in the impact on function and life.

**Prefers the term “employability”** rather than “disability”. An individual may be disabled eg. in a wheel chair but able to work. Another individual may have no outward manifestations of a condition and yet be unable to work.

Can the person carry out the duties of their own job or do a reasonable job as required by a reasonable employer?

**Type of policy**

80% of James’ clients are covered by a group policy from an employer.

There are other types of policies such as credit card and mortgage policies.

**Who has the onus to prove you are disabled?**

If the applicant got approved for disability payments either at the initial application stage or at the definition change at two years where most policies change from own occupation to any reasonable occupation then the onus is on the insurer to prove the circumstances of the claimant have changed. If they have paid you during the “any occupation” time they have the onus to prove your circumstances have changed.

When you sue an insurer, the onus is on you to prove you can’t work.

### **What is the reason for denial by the insurer?**

90% of the cases are a debate about the quality of the medical information.

James has never turned down a case because of surveillance.

He doesn't look at IMEs to decide whether to take a case – he considers they are hired guns and will be biased towards the insurance company.

Insurers are going more often to paper reviews rather than face to face assessments with the claimant.

James finds the information available to the reviewer is often inadequate and that judges don't weigh these heavily.

The coverage clause is important to read as this is an important reason for denial. If you are not covered due to a waiting period – it is black and white, you will not win your case.

Pre-existing conditions can be a reason for denial. In these cases, James must do a lot of research to decide whether to take the case. The time frame is important. The focus is on whether you were ill prior to taking the insurance not whether you had a diagnosis at the time.

### **What factors does James consider?**

What is the nature of the job? This is very important if “own occupation” is being argued.

How long did the claimant work at their job? The longer the period of employment, the more credible the person is. However sometimes people change jobs frequently because they get fired because they can't do the job due to illness.

Quote from a CPP case: *Regularity is the essence of employability.*

Education informs what is a reasonable occupation. More education generally increases employability. Increasingly there is a specified decrease in income in insurance policies. For example, if your income drops by 40% or 50% you are considered disabled.

The key information is about function limitations – lifestyle evidence is important here. Does the claimant have to sleep all the off-work hours to maintain time at work? Have they stopped all social, hobbies and family activities?

The case *Sucharov vs the Paul Revere Insurance* in 1983 suggests that sacrificing one's entire life to maintain work is not necessary: The judge stated that total disability does not mean absolute physical inability to transact any kind of business ... but rather there is total disability if the person must stop work to attend to his health or effect a cure.

Is the family doctor supportive? They know the claimant better than specialists who see patients once or twice and don't know the full impact of the injury of disability on life. Disability is not based on the label of diagnosis, it's based on employability.

Age is not a determining factor.

Be prepared to disclose your social media so that there are no big surprises in court. If you are paragliding in Cancun, your case may not be as strong.

Thanks James for a great summary of the factors that you and possibly other disability lawyers consider when deciding whether to take a case.

Ellie Stein MD FRCP(C)