

CHALLENGING AN INVISIBLE DISABILITY CLAIM

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INTRODUCTION

There was a time when fibromyalgia and chronic pain syndrome cases were viewed with scepticism, if not a degree of contempt. Certainly, many such cases were not taken seriously by defence counsel and their clients. On July 2, 2009, Justice Gray delivered the decision in *Degennero v. Oakville Trafalgar Memorial Hospital* and awarded the plaintiff 3.2 million dollars in damages for a case involving chronic pain syndrome and fibromyalgia. If any question remained about the need to take these cases seriously, surely the decision in *Degennero* removes all such doubt.

This paper will review and discuss the controversial nature of chronic pain syndrome and fibromyalgia cases as well as the importance of properly assessing the plaintiff's credibility in such claims. It will conclude by setting out the essential requirements for a successful defence of an invisible disability claim.

THE CONTROVERSIAL NATURE OF SUCH CLAIMS

Although there is no precise definition of an invisible disability claim, such claims usually refer to those cases where a plaintiff does not have (or no longer has) an objective injury to support the pain and disability which is the subject of the claim. Chronic pain syndrome and fibromyalgia are perhaps the most common claims of this nature.

Dr. Ogilvie-Harris defines chronic pain syndrome as follows:

Chronic Pain Syndrome is a state in which the pain no longer acts as a symptom but actually becomes a disease in itself. Although many factors interact, the syndrome is often initiated by physical trauma. However, the

pain becomes independent of any continuing insult or damage to the body. There are three significant features of chronic pain syndrome:

- *Disuse of the injured part of the body because of pain. Disuse results in loss of flexibility, strength and endurance.*
- *Dysfunction and a disengagement from pre-injury activities, affecting quality of life. This leads to an inability to perform daily activities or to pursue gainful employment.*
- *Depression which may be associated with anxiety, leading to the mood of suffering.*

Ogilvie-Harris and Lloyd, Personal Injury: A Medico-Legal Guide to the Spine and Limbs, (2nd Edition) at page 336.

Fibromyalgia generally refers to a clinical syndrome defined by chronic and wide spread muscular pain, fatigue and tenderness. The American College of Rheumatology sets out the following criteria for a diagnosis of fibromyalgia:

- Wide spread pain of at least three months duration.
- Pain in all four quadrants of the body.
- Pain occurring in at least 11 of 18 specified “tender” points, with at least one point in each quadrant.
- Pain defined, in this context, as discomfort when eight pounds of pressure are applied to tender points.
- Tender points usually occur in a specific distribution.

Challenging the Existence or Legitimacy of Such Claims

For some counsel, there is a desire to challenge the very existence of chronic pain syndrome and fibromyalgia. Such strategies have been met in the past with apparent approval as demonstrated by Mr. Justice Rawlings in his decision in *Mackie v. Wolfe* (1994), 21 Alta, L.R. (3d) 11 where he states:

“The evidence in this case satisfies me that the symptoms diagnosed as fibromyalgia are a re-labelling of a condition by rheumatologists that has been with mankind for hundreds of years and represents a personality disorder. This particular disorder is often found in individuals who will not or cannot cope with everyday stresses of life and convert this inability into acceptable physical symptoms to avoid dealing with reality. To suggest that a motor vehicle accident with very minor injuries is the cause of such symptoms would be simplistic at best...”

As cited in Mario Pietrangeli’s article “Defending Invisible Claims: Fibromyalgia and Chronic Pain Under Disability Policies”

However, while chronic pain syndrome and fibromyalgia claims remain controversial in some circles, there is really little doubt that Canadian courts will accept these conditions as real and valid.

The Supreme Court of Canada clearly stated this in *Nova Scotia (Workers Compensation Board) v. Martin*, [2003] 2. SCR 504 at paragraph 1:

“Chronic Pain Syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing Workers Compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury or under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real.”

More importantly, it is not the role for the judge or jury to determine whether or not chronic pain syndrome or fibromyalgia are legitimate medical conditions or, for that matter, that a particular plaintiff’s condition fulfills the medical requirements of such a diagnosis. The role of the judge or jury in these cases is to determine whether or not the plaintiff has met the legal requirements necessary to establish that they are suffering from an impairment caused by the negligence of the defendant. (See for example *Chaplin v. Sun Life Assurance Co. of Canada* 2001 BCSC 310 at paragraph 41.)

Accordingly, if the entire theory of the defence is based on challenging the very existence of chronic pain syndrome or fibromyalgia, such a theory will likely end in failure. There are, however, derivative benefits that can flow from a review at trial of the

nature and controversy surrounding these conditions. This is particularly true in jury cases.

In this regard, obtaining evidence from the plaintiff's own doctor that the plaintiff's pain *has persisted beyond the normal healing time or is disproportionate to the nature of the injury originally sustained or is not supported by objective findings at the site of the injury* may be helpful indeed to the over all defence of the case. At a minimum, such evidence can create a perception that the plaintiff's claim is of a less serious classification than other types of disability claims involving objective injuries and evidence.

A well prepared plaintiff's counsel, trying an invisible disability claim, will no doubt go to great lengths to establish that the plaintiff is suffering from a real and recognized medical condition (indeed, there is a very real possibility that one's own defence doctor will acknowledge that such medical conditions are real). While defence counsel will likely not be able to refute this, bringing out the "controversy and suspicion" regarding such medical conditions will act as a helpful counter-balance and will no doubt be consistent with the real theory of the defence case which is the overall credibility of the plaintiff's claim.

THE IMPORTANCE OF THE PLAINTIFF'S CREDIBILITY

Any one challenging an invisible disability claim should review Geoffrey Adair's article entitled "Tactics and Strategies in Disproving Pain" published in *Special Lectures of the Law Society of Upper Canada 1998 – Personal Injury*. In his article, Mr. Adair makes the point that the three critical features of a chronic pain case, in order of importance, are: Credibility, Credibility and Credibility.

Essentially, the entire case will ultimately turn on whether or not the judge or jury believes the plaintiff who testifies as to the pain he or she suffers.

At the risk of over simplification, a plaintiff's credibility in this regard can be categorized as follows:

- 1) cases where the plaintiff has serious credibility issues and there is solid evidence of one or more deliberate falsehoods in relation to the claim;
- 2) cases where an exhaustive investigation reveals a truly credible plaintiff;
- 3) cases where there is no direct evidence that the plaintiff has made a deliberate falsehood in relation to the claim but there is considerable evidence that questions the credibility of the plaintiff's overall claim in general.

Obviously, the first two categories are easier to deal with given their more extreme nature. The first category of cases are obviously good candidates for trial. The exposure of a deliberate falsehood in relation to the claim will call into question the entire claim and seriously undermine the plaintiff's case. The second category of cases must surely be settled as there is little doubt that a credible and likeable plaintiff will carry the day at trial. It is the third category, with its more nebulous features, that causes counsel the greatest concern. It is these cases that often require the most effort and preparation in order to advance a proper defence.

REQUIREMENTS FOR CHALLENGING AN INVISIBLE DISABILITY CLAIM

Before counsel can decide which of the above categories a particular case falls within, it is necessary to conduct an exhaustive investigation of the facts through the following processes:

1. Documentary Discovery;
2. Oral Discovery;
3. Surveillance;
4. Defence Medical Examinations;
5. Other investigation.

1. Documentary Discovery:

It is absolutely necessary to obtain all relevant pre and post accident documents pertaining to the plaintiff. Such documents provide a fairly objective standard by which to compare the plaintiff's truthfulness. Many aspects of a successful cross-examination of the plaintiff originate from this documentary investigation and review.

For example, some plaintiffs will deny a pre-accident injury or health condition at examinations for discovery. If such conditions did exist prior to the accident, defence counsel will have excellent evidence to attack the plaintiff's credibility.

Similarly, a plaintiff's description of their pre-accident abilities including income earning ability may often differ dramatically from the employment and tax records. Tax records themselves often provide an excellent opportunity to bring a plaintiff's credibility into question.

The types of documents that should be requested from the plaintiff include:

- a. Pre and post accident clinical notes and records from every treating healthcare provider;
- b. Pre and post accident decoded OHIP summary;
- c. Pre and post accident medication summaries;
- d. Pre and post income tax returns and notices of assessments;
- e. Pre and post accident employee files;
- f. Pre and post accident WSIB, AB, LTD, ODSP and Refugee files, etc.

2. Oral Discovery

In addition to requesting documents, oral discovery of the plaintiff is useful for the purposes of having the plaintiff commit to a specific position on various aspects of the claim. This will often work in tandem with the aforementioned review of documents and can assist counsel greatly during the cross examination of the plaintiff at trial. For example, if a plaintiff states that he cannot work at all since the accident, any evidence

of the plaintiff working prior to that admission will expose a falsehood and seriously undermine the plaintiff's credibility.

Accordingly it is important that questions put to the plaintiff be precise so as to avoid ambiguous answers that can be explained away at trial. Counsel should do their best to get the plaintiff to commit to a specific position on issues such as:

- a) work history both before and after the accident;
- b) the degree that injuries and impairments have improved;
- c) the accuracy of income tax returns;
- d) precise levels of function;
- e) any "complete" inability to engage in any aspect of daily living;
- f) helpful statements attributable to the plaintiff contained in medical reports etc.

With respect to this last category, plaintiffs are often asked by IME doctors to rate or describe their own levels of pain and disability shortly after the accident. Often these admissions are useful to the defence and far more valuable than the IME doctor's own opinion regarding the plaintiff's level of pain and disability.

The last issue to consider is the discovery of FLA claimants. The evidence of family (and lay) witnesses plays an important part of every trial involving an invisible disability claim. In fact, in some cases, it is the evidence of family members which carries the day at trial. Accordingly, it is important that such parties be examined thoroughly so that their position is not only known but also contained where possible.

3. Surveillance

The importance of surveillance in invisible disability claims cannot be overstated. If a plaintiff is being less than truthful with respect to their claim, the best technique available to expose this untruthfulness is reliable and on-going surveillance. It is often

the most important evidence that the defendant will rely on at trial and should be conducted in every case involving an invisible disability claim.

An excellent example of the successful use of surveillance in an invisible disability claim is the decision in *Olszynko v. Larocque* [1999] 127 O.A.C. 162. This was a fibromyalgia and chronic pain case tried by a jury. The defendant relied on surveillance conducted over a 15 day period to attack the plaintiff's credibility. The jury awarded the plaintiff zero in damages. The plaintiff appealed. In its decision, the Court of Appeal stated the following:

As to damages, the appellant Frima Olszynko's complaints were subjective and the diagnosis put forward was fibromyalgia or chronic pain syndrome. The validity of the syndrome is based largely upon credibility of the patients and, in this case, the appellant's credibility was severely compromised by surveillance video taken over a fifteen-day period. Accordingly, the jury's verdict in awarding zero damages was based on credibility and cannot be characterized as perverse.

In addition to exposing credibility issues, surveillance may also be used substantively to demonstrate a plaintiff's level of function in general. It may also be used effectively in the cross examination of the plaintiff's doctors who may have based their opinions on the subjective evidence of the plaintiff and will be confronted at trial with surveillance which contradicts or undermines this evidence.

However, surveillance carries with it certain pitfalls. It has the potential to alienate a judge or jury. In this regard, surveillance may be perceived as an unwarranted invasion of privacy. In addition, any lawyer who has sat through 30 minutes or more of surveillance at trial knows just how boring that experience can be. Accordingly, the effectiveness of the surveillance must always outweigh these potential pitfalls.

4. Defence Medical Examination

Defence medical examinations can be a complicated issue at the best of times. This is particularly true in cases involving an invisible disability claim where there is typically a constellation of health issues at play that blur the boundaries of traditional medical specialties.

It is important that your defence doctor is qualified to give an opinion on chronic pain syndrome or fibromyalgia, especially given the changes to the *Rules of Civil Procedure* effective January 1, 2010. Failure to do so may result in your expert not being qualified at trial or having to defer to a plaintiff's doctor with greater expertise in the area. Other issues to consider include:

1. Ensuring that your doctor has excellent credentials and will give an honest opinion that can be supported at trial;
2. Ensuring that your doctor has had experience under cross-examination and has been previously accepted by the Court as an expert for the purpose of the opinion being sought;
3. Request a copy of your doctor's curriculum vitae, obtain references from colleagues who have previously retained this doctor and conduct an internet and legal data base search of your own doctor;
4. Provide your doctor with a complete medical brief;
5. If appropriate, provide your doctor with surveillance and other investigation evidence.

5. Other Investigation

Although discovery (oral and documentary), surveillance and a defence medical are essential requirements for a proper defence of an invisible disability claim, there are times when it will be necessary to move beyond these traditional forms of investigation. This can include interviewing witnesses such as former employers as well as internet and Facebook searches etc.

ASSESSING CREDIBILITY AND THE DECISION TO GO TO TRIAL

Once the investigation is complete and all relevant evidence and documentation has been obtained and reviewed, it is necessary to assess the plaintiff's credibility and the merits of the defence case in general. This assessment should take place well before the pre-trial.

If there is solid evidence exposing the plaintiff in one or more deliberate falsehoods in support of their claim, then clearly the defence has a case for trial.

In addition, the proper presentation of the plaintiff's deliberate falsehoods at pre-trial will often preclude the necessity of going to trial. Moreover, if plaintiff's counsel is learning of these falsehoods for the first time, their willingness to continue to invest time and resources into their client's case will likely be severely tested.

In contrast are those cases where exhaustive examination has not in any way seriously undermined the plaintiff's credibility. Such cases should not be brought to trial from a defence perspective. If the plaintiff is credible, they will likely succeed at trial and create the risk of an unexpected or high damage award.

In such cases, the importance of the pre-trial is paramount. The pre-trial is the only point prior to trial where the both the plaintiff's case and the defence case is brought before a judge. However, the key point is that the case is brought before a judge without the benefit of the plaintiff's credibility on display. In addition, certain doctors who might make excellent witnesses at trial may not have the same impact on a judge hearing the pre-trial.

It is here that the defendant's pre-trial memorandum must be well prepared and where any potential attack on the plaintiff's credibility can be set out on paper and in the form of argument, with no risk of alienating a jury. Pre-trial is often the defendant's last and best opportunity to settle a case involving a likable and credible plaintiff.

That leaves the most difficult category of cases which are those cases where defence counsel has not caught the plaintiff in a deliberate falsehood but yet there is considerable circumstantial and other evidence calling into question the overall credibility of the plaintiff's case. These are difficult cases for both sides and accordingly, settlement should be canvassed thoroughly. Where a trial is necessary, defence counsel must consider the following:

1. The importance of the jury;
2. The development of a compelling alternative theory of the case including careful consideration of the issue of causation. In this regard, cases involving chronic pain syndrome and fibromyalgia often involve a plaintiff

with a significant pre or post accident medical history. This brings into play both medical and legal issues that need to be well prepared and properly presented;

3. What evidence and witnesses will be required to undermine the plaintiff's theory of the case;
4. The use of visual aids such as photographs that depict little property damage or charts that demonstrate little or no impact on income earning ability, etc;
5. Whether or not to give an opening address.

Absent from this list is the attack on the plaintiff's credibility. In such cases, it is often better to attack the overall credibility of the plaintiff's case than it is to attack the credibility of the plaintiff directly. A direct attack on the plaintiff's credibility where there is no evidence to demonstrate a deliberate falsehood, can often backfire as defence counsel appears mean spirited and unfair. Such attacks may push the plaintiff into a sympathetic light in the eyes of the jury. More effective may be an attack on the plaintiff's tendency to exaggerate, or expert opinions that go too far, or claims for future loss of income and future expenses which are truly excessive.

CONCLUSION

The decision in *Degennero* follows a number of other cases that have clearly signalled that the courts are not only willing to accept invisible disability claims but are prepared to award very significant damages in such cases. Accordingly, defence counsel and their clients must take the defence of such cases seriously and be prepared to invest the time and resources required to advance a proper defence.

The paramount consideration in any such case must be the credibility of the plaintiff. If the plaintiff's credibility is not a major issue, defence counsel must seriously question the merits of bringing such a case to trial. By contrast, evidence which severely undermines a plaintiff's credibility can be fatal as demonstrated in the *Olszynko* case in

which the jury awarded zero damages for a fibromyalgia and chronic pain syndrome case after reviewing compelling video surveillance entered at trial by defence counsel.

Accordingly, thorough investigation, including complete oral and documentary discovery, surveillance, defence medical examinations and other investigation, will often provide counsel with the evidence required to successfully challenge invisible disability claims.