LITIGATING CHRONIC PAIN CASES: WHAT PLAINTIFFS, HEALTH PRACTITIONERS, & PERSONAL INJURY LAWYERS NEED TO KNOW

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INTRODUCTION

For a long time, "chronic pain" has been seen as an unfavourable term in personal injury litigation. Although there have been some positive strides in recent years, there still remains a perception for many that the disability is not real. But for many people, chronic pain syndrome is a very genuine, very disabling condition; and it is one for which they are entitled compensation under the law if caused by another person's wrongdoing. Front and center in these cases is the credibility of the Plaintiff (the person bringing the lawsuit). As stated recently by Tzimas J.: "The issue of credibility is especially important in a case where the source of pain is soft tissue injury and where the magnitude of the pain cannot be measured objectively.[1]"

The purpose of this paper is to provide prospective Plaintiffs (people who advance lawsuits), health care professionals (both treating and medical-legal experts), and personal injury lawyers with an understanding of:

1. What to expect when embarking upon a chronic pain case;
2. Medical-legal strategies to create a persuasive chronic pain case; and
3. Recent judicial treatment of chronic pain cases.

WHAT TO EXPECT IN A CHRONIC PAIN CASE

Expect a Jury

In civil litigation, the parties have the choice of seeking a trial by judge or jury. In Canada, a civil jury is made up of six adults who are chosen at random. Juries are typically considered to be unpredictable and "cheap". They are also, arguably, more likely to bring their own personal experiences to the decision-making process as compared with a judge.

By personal experience, I mean that a juror in a chronic pain case could end up being someone who has experienced a motor vehicle crash him or herself, has suffered through years of pain, but has continued working in order to support his or her family. This type of juror, whether subconsciously or consciously, might be inclined to compare his or her level of pain with the pain expressed by the Plaintiff; might dislike the Plaintiff for not working when he or she has continued pushing through the pain; and might think to himself or herself "Why should I award you money when no one has paid me for my pain?"

For these reasons, in virtually every chronic pain case, the *Defendant* files a Jury Notice.

Expect to Face Biases

The singular greatest hurdle in a chronic pain case is getting the jury to believe that the Plaintiff's pain is real. There are a number of biases that will have to be overcome.

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[1] *Dimopoulos v. Imad Tafaso Mustafa*, [2016] O.J. No. 287 (Sup.Ct.) at para. 56 [*Dimopoulos*].

First, there is often a biased belief that the Plaintiff is faking (otherwise known as malingering) in order to get money. Unlike most brain injuries, fractures, or tears, chronic pain is not associated with "objective" injury; meaning, that the syndrome was not caused by an injury that would show up on an x-ray, MRI, CT scan, or other diagnostic test. Rather, pain is something that is intrinsically felt. Absent that objective, corroborating proof of injury, insurers, defence lawyers, and juries have to simply determine whether or not they believe the Plaintiff.

Second, even if the Plaintiff is believed to be in pain, there tends to be a biased belief that the pain cannot be "that bad". As compared with a brain injury, for example, pain is something that at some point everyone has experienced. The difficulty is that while people can relate to pain, they cannot necessarily relate to the level of severe, constant, long-term pain that is experienced by people with chronic pain. This translates to low awards for damages (compensation for losses).

Third, even if the Plaintiff is believed to be in serious pain, there can be a biased belief that the Plaintiff chooses to remain in pain in order to be compensated, rather than choosing to get better.

Prior to the Supreme Court of Canada's 2004 seminal decision in *Nova Scotia (Workers' Compensation Board) v. Martin*[2], the Court's distrust of chronic pain cases and the evidentiary "hoops" through which Plaintiffs were expected to jump was palpable. By

[2] [2003] 2 S.C.R. 504 [*Nova Scotia*].

way of illustration, in the matter of *Barriffe v. Janiten*[3], a decision released the year prior to *Nova Scotia*, the Court stated the following about a Plaintiff claiming to suffer from chronic pain syndrome[4]:

> I find that he has exaggerated and, to a degree, faked his pain. Even if it is assumed that he subjectively experiences pain to the extent claimed, he still bears the onus of demonstrating a psychological link between the accident and his state of chronic pain; of proving that the Defendant's tortious act caused or materially contributed to his condition.
>
> I note that there was no psychiatric evidence presented to suggest that the Plaintiff's personality, pre-accident, was such that he could not tolerate moderate trauma without a descent into chronic pain. As result, there was no evidence that he had an "egg-shell" personality, which the authorities state is no different in principle than an egg-shell skull: *Malcolm v. Broadhurst*, [1970] 3 All E.R. 508.
>
> There is no proof of a physical link between the tortious act and the chronic pain. There is no evidence of a persisting psychological condition, nor of psychological trauma at the time of the accident, which resulted in the chronic pain.
>
> In accepting Dr. Russell's comment that the Plaintiff's chronic pain is a product of his behaviour, I mean that he has talked himself into it. The accident is a hook on which he has chosen to hang all of his troubles. There is a volitional element to his pain, which manifests itself in exaggeration and the faking of symptoms.

The Supreme Court of Canada's decision in *Nova Scotia* marked the first time that the Court addressed and rejected this bias against chronic pain syndrome. *Nova Scotia* involved two appeals brought simultaneously by separate individuals; both of whom had been diagnosed with chronic pain following workplace injuries and whose worker's compensation benefits had been terminated on the basis of their diagnoses. Gonthier J. speaking for the Court stated[5]:

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[3] [2003] A.J. 1617 (Q.B.) [*Barriffe*].
[4] *Ibid*. at paras. 267-270.
[5] *Ibid*. at paras. 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 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. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians…

Nova Scotia has since been cited favourably by judges, leading to favourable outcomes in some chronic pain cases in recent years.[6]

Expect the Litigation to Last for Years

As a personal injury lawyer, two common questions that I receive from prospective clients include: 1) How long will this take? And 2) How much is my case worth? Unfortunately, there is no deadline in civil litigation by which time the action has to resolve or the Judgment has to be made, and there is no way to properly valuate a case from day 1.

[6] *Dimopoulos v. Mustafa*, *supra* note 1; *Maxwell v. Luck*, [2014] O.J. No. 6017 (Sup.Ct.) [*Maxwell*]; *Lutes v. Air Canada*, [2014] O.J. No. 2382 (Sup.Ct.); to name a few.

As to timing, *on average*, a personal injury case (non-medical malpractice) typically takes *approximately* three years. Chronic pain cases tend to fall on the outer edge of this range for the reasons to be discussed below.

First, chronic pain, by its very definition, involves chronicity. A person who experiences neck pain on day one of a tortious incident (a wrongdoing, such as a motor vehicle crash) is not going to be diagnosed with "chronic pain syndrome" the same day. Rather, the diagnosis is one that is made after *many* months have passed with little to no improvement. The value of a neck pain case at month one post-incident is different from the value of a chronic pain case two years post-incident.

Second, in motor vehicle cases (and *only* motor vehicle cases), there are statutory hurdles which limit the right to recover compensation unless a certain "threshold" of impairment is reached. This "threshold" applies to the recovery of general damages (claims for pain, suffering, and the loss of enjoyment of life) and health care costs (both past and future). If the disability does not pass the "threshold", the Plaintiff is not entitled to recover general damages or health care costs. The "threshold" is defined in the *Insurance Act*[7] as:

- a permanent serious disfigurement; or
- a permanent serious impairment of an important physical, mental, or psychological function.

The definition is further clarified by section 4.2(1) of the *Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996*[8] as follows:

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[7] *Insurance Act*, R.S.O. 1990, c. I.8 at s. 267.5 [*Insurance Act*].
[8] Reg. 461/96 [the *Regulation*].

A person suffers from permanent serious impairment of an important physical, mental or psychological function if all of the following criteria are met:

1. The impairment must,

i. substantially interfere with the person's ability to continue his or her regular or usual employment, despite reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment,

ii. substantially interfere with the person's ability to continue training for a career in a field in which the person was being trained before the incident, despite reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her career training, or

iii. substantially interfere with most of the usual activities of daily living, considering the person's age.

2. For the function that is impaired to be an important function of the impaired person, the function must,

i. be necessary to perform the activities that are essential tasks of the person's regular or usual employment, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment,

ii. be necessary to perform the activities that are essential tasks of the person's training for a career in a field in which the person was being trained before the incident, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her career training,

iii. be necessary for the person to provide for his or her own care or well-being, or
iv. be important to the usual activities of daily living, considering the person's age.

3. For the impairment to be permanent, the impairment must,

i. have been continuous since the incident and must, based on medical evidence and subject to the person reasonably participating in the

> recommended treatment of the impairment, be expected not to substantially improve,
>
> ii. continue to meet the criteria in paragraph 1, and
>
> iii. be of a nature that is expected to continue without substantial improvement when sustained by persons in similar circumstances. O. Reg. 381/03, s. 1.

Given this requirement for "permanency", there is going to be some delay before a medical expert can opine that a disability arising from a soft-tissue injury is permanent. This is distinct, for example, from a case involving an amputation where one can determine with ease that the disfigurement is permanent and serious.

Further, in addition to this hurdle called the "threshold", there is a further hurdle in the context of motor vehicle cases (only) with respect to claims for general damages. Even if the injuries pass the threshold, a statutory deductible may apply to the general damages. Effective August 1, 2015 the law changed with respect to this deductible. For injuries sustained in a motor vehicle crash that took or takes place on or after August 1, 2015, if the value of the Plaintiff's general damages is not more than $121,799.00[9] (in 2015 dollars) then a statutory deductible of $36,540.00[10] (in 2015 dollars) will be applied. To illustrate, if the Plaintiff's general damages are assessed to be worth $75,000.00, then he or she would only receive $63,460.00. Further, and notably:

- in many cases (not all), the award for general damages in a chronic pain case is less than $121,799, such that the deductible will apply;
- the jury will <u>never</u> know about the existence of this deductible (it would likely be grounds for a mistrial if counsel mentioned it during the trial);

[9] *Insurance Act*, supra at s. 267.5(8.3)(1).
[10] *The Regulation*, supra at s. 5.1(1)(1).

- the monetary trigger level for the deductible to apply and the amount of the deductible will increase each year, effective January 1st, by virtue of indexation and adjustment.[11]

Accordingly, as the threshold and deductible significantly impact (in a motor vehicle case) the viability of a potential chronic pain case, it can take some time to give a proper opinion as to that viability. Prospective clients who contact personal injury lawyers early on following a motor vehicle crash in which they sustained only soft-tissue injuries should not be surprised if the lawyer suggests that they "wait and see" for a few months before calling back and then determining if it is appropriate to retain a lawyer.

Third, most of these cases (due to the credibility and threshold issue) will involve at least one defence medical examination. These examinations will be discussed later in this paper but, briefly, with respect to the duration of the lawsuit, defence medical examinations can prolong the litigation because: 1) they are not typically arranged until after the Plaintiff has been examined for discovery (a step in the litigation wherein the Plaintiff answers questions under oath); 2) there are wait times for these appointments since most assessors also have treating medical practices; and 3) for the same reason, the reports are not typically delivered for a few months after the assessment.

Expect Some Intrusion into Your Privacy

All personal injury cases involve a degree of intrusion into the Plaintiff's privacy. As part of the standard process, for example, the Plaintiff's pre and post-incident medical, financial, and employment records are produced to the defence. In some personal injury

[11] *Insurance Act*, supra at s. 267.5(8.3)(2); the *Regulation*, supra at s. 5.1(1)(2).

cases, and this is especially so in chronic pain cases, there is a further intrusion into the Plaintiff's privacy, whereby the Plaintiff is put under surveillance and/or his or her social media accounts are reviewed by the defence.

The goal of the defence in any personal injury case, an especially in a chronic pain case, is to establish an inconsistency between what the Plaintiff says and what he or she does. As such, it is extremely common in chronic pain cases for the Defendant's insurance company to hire a private investigator to follow the Plaintiff around. Sometimes, the surveillance can last for days. The investigator can follow the Plaintiff into any public place (e.g. grocery stores, malls, restaurants, etc.). The investigator typically takes video footage and/or photographs, and may keep a written log. This is unfortunate, but legal.

Similarly, the investigator or the defence lawyer may also search online to see whether the Plaintiff has any social media accounts, such as Facebook, Instagram, Twitter, LinkedIn, etc. Even where the accounts are private, they are not necessarily protected. It is possible that the defence lawyer could bring a motion before the Court to ask that the Plaintiff be compelled to print out the contents of his or her Facebook account.

STRATEGIES FOR BUILDING A SUCCESSFUL CHRONIC PAIN CASE

Do Not File a Jury Notice

For the reasons identified above, personal injury lawyers would generally be ill-advised to file a Jury Notice in a chronic pain case. An exception to that rule of thumb may include, for instance, a case whether the Defendant is particularly unlikeable (e.g. one

who was convicted of impaired driving relating to the subject crash) and the Plaintiff is particularly likeable (e.g. an attractive, young, pleasant, educated, charitable person who had a long demonstrated work history at an admirable job).

Try to Mitigate the Losses

Every Plaintiff has a duty to mitigate; meaning a duty to try to get better in order to reduce the losses that would otherwise be claimed in litigation. As such, where the Plaintiff can improve his or her circumstances but elects not to, it would be open to the jury to reduce the award for damages that would have otherwise been given. Long before trial, however, there are many opportunities to settle the case. In order to incent the Defendant's insurer to settle and to settle for a reasonable sum, the Plaintiff has to make a positive impression upon the defence lawyer. One of the best ways to do so is to demonstrate an effort to mitigate. It is far better to be a Plaintiff that 'tries and fails' than one who 'never tries at all.'

Ways in which a Plaintiff may mitigate losses include, but are not limited to:

- try returning to work, even if at reduced hours, a modified position, or only for a brief period of time;
- try participating in rehabilitation, even if it causes some discomfort or inconvenience;
- try following the reasonable recommendations of treating medical and health care professionals, even if it causes some discomfort or inconvenience;
- try paying out-of-pocket, if you can afford it, for housekeeping services, devices, or therapy if there is no funding available for it otherwise, even if you just hire a housekeeping (for example) once;

- try getting back to those activities that you can, even if you are concerned it may reduce your chances at passing the threshold.

Avoid the Use of Absolute Words

There are many times throughout the course of the litigation where the Plaintiff will be asked about his or her impairments. Treating medical and rehabilitation professionals are under a legal obligation to maintain clinical notes of treatment sessions; the Plaintiff will be asked questions under oath at an examination for discovery; and the Plaintiff will be interviewed by medical-legal assessors. During each of these occasions, the wording and language used by the Plaintiff is critical to preserving his or her credibility.

Unlike how we might speak in our day-to-day life, in the context of litigation, lawyers take words at their literal meaning. It is important, therefore, for Plaintiffs to avoid the use of "absolute" words that offer no flexibility; words such as: can't, don't, always, and never. Instead, words that provide some cushion should be used; words such as: typically, generally, approximately, on average, rarely, usually, 'with difficulty', and yes/no…but.

To illustrate, consider a chronic pain Plaintiff who says that he or she "never" does the grocery shopping anymore because it is too hard to reach up on the shelves or to carry the heavy bags. What the Plaintiff may really be thinking in his or her mind is that grocery shopping is *almost* never done anymore, but "never" and "almost never" are entirely different. If that Plaintiff is caught, even once, under surveillance grocery shopping, then he or she becomes a liar. Conversely, had that Plaintiff merely said that he or she

"rarely" or "almost never" grocery shops, then being caught under surveillance once shopping does not prove the Plaintiff to be a liar. at the grocery store is not inconsistent with the Plaintiff's statement. When credibility is crucial in a chronic pain case, little things like using the right words can help preserve that credibility.

In addition to avoiding *using* absolute words, Plaintiffs should be mindful of any absolute words that are *put to them*. In other words, if a question presupposes that you "can't" do something, your answer might clarify that it is not that you "can't" do something, but that you "have difficulty" doing something.

Properly Prepare for Examinations for Discovery & Medical-Legal Assessments

Examinations for discovery and medical-legal assessments (whether arranged by Plaintiff's counsel or the defence) are very important steps in the litigation.

A Plaintiff's testimony at an examination for discovery is given under oath or after an affirmation. It is also recorded into a transcript, which the defence can introduce at trial. One common use of the transcript is to impeach the Plaintiff; meaning to establish an inconsistency, misrepresentation, or false statement.

For example, if at the discovery, the Plaintiff admits that it was not until a couple of days after the incident that he or she first noticed any pain, but at trial testifies that he or she was in terrible pain at the scene of the incident, the defence lawyer will use the transcript

to highlight this inconsistency and leave the jury wondering whether the Plaintiff is someone who can be trusted.

The Plaintiff's examination for discovery is also important because it is one of the only opportunities before trial for the defence lawyer to meet the Plaintiff in person and judge for him or herself what type of witness the Plaintiff may make. Sometimes, with a credible Plaintiff, this can facilitate settlement.

Similarly, statements given by the Plaintiff at a medical-legal or defence medical examination, although not given under oath, are also critical as they will form part of the foundation for the expert's opinion. If an expert relies upon a statement provided by the Plaintiff and that statement is proved to be false, then the value of the expert's opinion will be diminished.

For example, a Plaintiff may report to the doctor that he or she did not have any medical history of pain and, relying upon that history, the doctor concludes that the incident was the likely cause of the Plaintiff's chronic pain syndrome. If it turns out that pre-incident medical records establish that the Plaintiff was complaining of pain leading up to the crash (and, for whatever reason, the expert did not review those records), the expert's opinion will be put into question.

As such, a competent personal injury lawyer will take the time to carefully and properly prepare the Plaintiff for his or her examination for discovery and for medical-

legal/defence medical examinations. In a chronic pain case, the primary goal is to ensure that the Plaintiff appears credible and that Plaintiff does not put him or herself into a position conducive to future impeachment at trial. In this respect, helpful preparation tips for Plaintiffs include, but are not limited to:

1. Avoid absolute words.

- Avoid answering questions with language that does not allow for any flexibility or cushion.
    - *Example: How often did you experience any back pain in the 3 years before the crash?*
        - Bad answer: Never.
        - Good answer: Infrequently, if ever.

2. Use ranges and approximations for numerical answers.

- When a question calls for a numerical answer, avoid providing an absolute or singular number. Instead, either preface that number with a qualifier, such as: typically, generally, on average, or approximately; or, provide a range.
    - *Example: How many times a week to you get headaches now?*
        - Bad answer: Twice.
        - Good answer: On average, 1-3 times.
    - *Note:* If you are asked (and you will be) to rate your pain on a scale from 0 to 10, where 0 is no pain and 10 is excruciating pain, avoid the answer "10". Even if you feel that way, this answer is usually seen as a "red flag" for someone who exaggerates. If you think it is a 10, consider saying "approximately 9".

3. Be responsive.

- Do not be evasive, answer questions with questions, or give overly broad answers that essentially do not provide any information at all.
    - *Example: What chores do you have difficulty with now?*
        - Bad answer: Everything.
        - Good answer: Generally, it is tasks that require repetition of the same movement, heavy lifting, or lots of bending; for example: vacuuming, mopping the floor, cleaning the bathtubs, changing the linens [go on…]

4. Do not guess.

- Defence counsel is only entitled to answers based upon your knowledge, information, and belief. Do not guess. If you have a best estimate, which is based upon reason and rational, you can give an estimate but identify it as such. If you really have no idea, then say "I do not recall at this time" or "I am not sure." Lawyers can usually tell when a witness is guessing, because there is a rise to the intonation at the end of the sentence as though there is a question mark. Unfortunately, the transcript will neither reveal intonation nor show a question mark at the end. As such, the answer will be the answer.

    - *Example: When did you first consult with a doctor after the incident?*
        - Bad Answer: Two days (???).
        - Good Answer: I cannot recall exactly, but my best estimate is that it was within that first week.

5. Avoid flat-out denying pre-existing conditions or complaints.

- Do not try to hide pre-existing conditions or pretend that a complaint did not occur. You may be afraid, understandably, that you genuinely will not recall every ache or pain about which you complained to the doctor in the last five years. A competent personal injury lawyer will familiarize him or herself with your medical history and take you through it to refresh your memory in preparation for the discovery or defence medical. If a defence lawyer or a medical assessor asks a *pointed* question about a *specific* complaint, there is a good chance that he or she has read about it somewhere. Most defence lawyers do not just invent pre-existing injuries. So, if a question like that arises and you really do not recall the instance, it is still better to say "It does not ring a bell" or "I do not recall", as opposed to flat-out denying that it ever happened.

    - *Example:* In May of 2014, were you suffering from tingling in your right shoulder that was bothering you when you were gardening?
        - Bad answer: Definitely not.
        - Good answer: As I sit here today, that isn't ringing a bell for me.

6. Do not get defensive or angry.

- Examinations for discovery and defence medical examinations can be very stressful, but it is important to stay calm. A defensive, agitated witness is someone who looks like he or she has something to hide. A competent personal injury lawyer will take you through some of the more personal (e.g. changes to your sex life) or "touchier" questions that might be asked so that your reaction will be muted when asked by the lawyer or expert.

    - *Example:* Your job is sedentary, so why is it that you cannot work?

- Bad answer: Are you suggesting that I don't *want* to work?! You have no idea what I am going through!
- Good answer: Sitting for long periods of time aggravates my back pain; having my neck angled downwards to look at the computer monitor aggravates my neck pain; having to lift heavy boxes of files off our shelves aggravates my neck and shoulder pain; [go on…]

7. Avoid theatrics.

- If you are injured, you do not need to "act" injured to make the point. Over-the-top theatrics will be met with rolling eyes by defence counsel. If you do not normally walk with a cane, do not suddenly bring one to the discovery.

8. There is no such thing as "off the record".

- Anything said to a defence medical examiner is "fair game." You cannot say "between you and I" or "off the record" and expect that it will be so. At a discovery, although there is a formal record and you can *formally* be off the record, for practical purposes, there is no such thing. A defence lawyer is always watching and listening. If you testify that you cannot carry anything heavy anymore, but walk in and out of the discovery room carrying a large tote, although your actions may not be read on a transcript, there are kept in the mind of the defence lawyer.

9. Do not be afraid to correct an answer.

- If you realize in the midst of the discovery or medical examination, or sometime later, that you have given an incomplete, incorrect, or absolute answer, do not be afraid to correct it or to speak to your lawyer about it later. In fact, you have a duty under the law to correct any incomplete or incorrect answers.

    - *Example: What are the chores you can't do at home anymore?*
        - Bad answer: Vacuuming and mopping.
        - Good answer. Vacuuming and mopping…I'm sorry, I should correct that, it is not that I "cant" do the vacuuming and mopping, but rather that I "can't do them for a long time" anymore without experiencing a lot of pain.

10. Put forth a good effort with testing.

- With respect to medical-legal and defence medical examinations, the assessor can employ validity tests that measure your effort. Where credibility is crucial in a chronic pain case, the last thing you want is to be seen as someone who puts forth a sub-maximal effort with testing. It suggests that you are afraid that if you really put forth an effort, then you actually would not be that disabled.

Be Proactive to Defend Against Surveillance & Social Media

Many of the tips above will proactively "defend" the Plaintiff against the potential adverse impacts of surveillance and social media. A Plaintiff who testifies at discovery that he or she can still walk the dog, but not for as long is not a "liar" if he or she is caught on surveillance walking the dog for one block. With respect to social media, Plaintiffs should put their privacy settings at the highest and should avoid posting anything that they would not otherwise be prepared to put directly into the hands of the defence lawyer.

Choose the Right Medical & Rehabilitative Experts

In a chronic pain case, the defence is likely to retain an orthopaedic surgeon (or perhaps less so, a neurologist). These specialists tend to be focused upon objective injuries; they are not specialists in pain. Conversely, physiatrists are typically more specialized in disability arising from pain. It is often advisable for Plaintiff's counsel to retain both a physical and a psychological expert in a chronic pain case to provide a holistic view of how the Plaintiff experiences pain.

It can also be helpful, especially in a chronic pain case, to retain experts who are known for doing or having done some defence work. There are some medical-legal experts who are disproportionately retained by Plaintiffs and others who are disproportionately retained by Defendants. Where the Plaintiff is credible and the case is genuinely viable, it can be very persuasive to retain an expert who is frequently retained by both Plaintiffs

and Defendants. That expert's opinion might be one that will be taken more seriously by defence counsel and/or the insurer.

A competent personal injury lawyer will also do some research on the expert(s) that he or she plans to retain. Some experts have been praised by judges for their objectivity, experience, and/or specialty in chronic pain. Others have been accused as being advocates. Naturally, the more credible the expert, the more credible the presentation of the case will be as a whole.

Finally, retaining *treating* physicians, specialists, and/or rehabilitation professionals to prepare expert reports in a chronic pain case can be helpful as well. Treating specialists are in a better position to attest to the Plaintiffs' efforts at rehabilitation, the progress that has been made, and the goals still to be accomplished. They are also people who have become involved in the Plaintiff's care not because his or her lawyer hired them, but through referral from a physician or psychologist.

Brief the Expert on Medical-Legal Report Writing

A competent personal injury lawyer will not only select the right expert(s) for the case, but help the expert(s) "hit the right notes" in the report. Proper expert report drafting is another topic in-and-of-itself and will, as such, only be canvassed *in brief* in this paper as it relates particularly to chronic pain cases. For a more fulsome review of expert report writing, please see my paper entitled "Becoming an Expert 'Expert'" found at https://www.thomsonrogers.com/resources/becoming-an-expert-expert/#more-4851.

As with all personal injury cases, it is important that the expert complies with the *Rules of Civil Procedure* regarding expert opinions[12] and prepares a report that honours the duty to be non-partisan. In order to avoid coming across as an advocate for the Plaintiff rather than an independent expert there to assist the Court, experts should:

1. base their opinions upon independent analysis and conclusion, even if the conclusion is ultimately favourable to the party by whom the expert was retained;[13]

2. avoid making bald assertions or conclusions without accompanying those conclusions with a reasoned explanation;

3. concede the obvious, including any weaknesses in the expert's assumptions, methodology, or opinion;

4. confine the opinion to within the scope of the expert's expertise;

5. summarize the medical records reviewed in a neutral fashion, as opposed to "cherry picking" only those references which support the expert's opinion;

6. avoid launching personal attacks against the opposing party, expert, or lawyer;

7. avoid the use of unnecessary hyperbole (e.g. "the Plaintiff suffered a soft-tissue injury" rather than "the Plaintiff *clearly* suffered a soft-tissue injury);

8. acknowledge areas of agreement with the defence medical expert;

9. acknowledge areas of disagreement but provide a reasoned basis for why one opinion should be proffered over the other;

10. cite supporting literature.

With chronic pain cases, it is also especially helpful when the expert specifically highlights in his or her report aspects of the Plaintiff's presentation that will help establish the Plaintiff's credibility. Examples include pointing out where the Plaintiff:

1. answered questions in a forthright manner;

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[12] R.R.O. 1990, Reg. 194 [*Rules*] at r. 4.1, 53.03.
[13] *Alfano v. Piersanti*, [2012] ONCA 297 at para. 108 (CanLII) [*Alfano*].

2. provided a history that was consistent with what was stated in the records, including acknowledging a pre-existing medical or psychological history;

3. did not have a pre-existing medical history remarkable for complaints of pain;

4. did not engage in pain magnification behaviours;

5. appeared to provide good effort into testing;

6. passed validity tests;

7. behaved in a manner that was consistent with his or her reported limitations (e.g. if a Plaintiff reports having a limited sitting tolerance and, throughout the day, does stand to relieve the pain);

8. reported symptoms that were consistent with what might be expected based upon how the injury was sustained;

9. reported symptoms that were consistent with literature on chronic pain syndrome;

10. had made efforts to mitigate his or her damages; and

11. asked questions during the examination about treatment or otherwise appeared to be genuinely focused upon improving his or her health, as opposed to just undergoing the assessment.

Get the Right Evidence for Trial

i. Lay Witnesses

At trial, in addition to the testimony of the Plaintiff, any treating medical or rehabilitative witnesses who are called, and any medical-legal at trial and the testimony of any medical-legal experts who are called, it is helpful to call independent “lay” (non-medical) witnesses. In a chronic pain case, since the focus should always be on building the Plaintiff’s credibility, where possible, it is helpful to call co-workers and friends, as opposed to immediate family members. The concern with immediate family members is that the jury may believe they are more likely to say things just to help out the Plaintiff and/or that they may benefit financially if the Plaintiff is successful at trial.

Co-workers (former or current), in particular, can be very persuasive witnesses as they can talk about the Plaintiff's work ethic, they might have direct knowledge on the physically laborious tasks of the Plaintiff's line of work, they might be able to testify about ways in which they have helped the Plaintiff cope with her duties since the crash, and they may be able to testify about observations of the Plaintiff in the workplace (e.g. "I have noticed that since the crash, she tends to rub her neck a lot throughout the day, take frequent breaks to get up and walk around, and keep prescription medication at her desk that she takes throughout the day").

ii. Demonstrative Aids or Evidence

It can be helpful to find creative ways to help the jury "see" how the Plaintiff is injured. Examples of helpful demonstrative aids or evidence can include, but not be limited to:

1. Property damage photographs.

- If this was a case that involved extensive or frightening looking damage to one or more vehicles, blow up the photographs.

2. Medical illustrations.

- In some cases, although the Plaintiff may not have suffered an objective injury as a result of the incident, it may be that a pre-existing objective deformity or condition may have rendered the Plaintiff vulnerable to injury. In chronic pain cases, it is sometimes the case where the Plaintiff had a pre-existing disc bulge in his or her spine that was asymptomatic until the incident occurred. An appropriate medical-legal expert can explain how the disc bulge can become symptomatic upon an impact. To assist the expert explain this to the jury, a medical illustration of the disc bulge can be shown.

3. A calendar or timeline of appointments.

- A blown up calendar or timeline can be created to show the difference between the number of medical and rehabilitative appointments that the Plaintiff attended in a given period (e.g. six months) prior to the crash, as compared with after the incident. If each appointment is marked by a dot, for example, it can be quite

> compelling to see virtually no dots on one side of the timeline (pre-incident) as compared to dozens, if not hundreds, of dots on the other side of the timeline (post-incident).

There are, of course, legal tests for what is considered to be a demonstrative aid versus demonstrative evidence, and when these aids and evidence can be introduced at trial. That discussion is beyond the scope of this paper.

RECENT CHRONIC PAIN & THRESHOLD DECISIONS

In this section, I will review a number of decisions in chronic pain syndrome ("CPS") cases, which have been delivered since 2015. Jury decisions are not reported; however, they are sometimes summarized by a judge reporting on a threshold motion. As such, the summaries below are by no means meant to represent *every* chronic pain case decided since 2015 and they may be missing some information where not otherwise reported. Further, I will only make note of the awards for general damages ("GD"), future loss of income ("FLOI"), and future care/housekeeping & home maintenance ("FC/HH"), even where other headings of damages were claimed and/or awarded.

Case	Facts	Damages	Threshold
Carson v. Sulaiman [June 13, 2016, unreported]	A 27 year-old female was t-boned by another driver. Extensive damage to the Defendant's vehicle, but minimal damage to the Plaintiff's vehicle (yet both vehicles were towed). The Plaintiff attended the E.R. later that day and was discharged the same day. She developed CPS. At the time of the crash, the Plaintiff was working as a hygiene coordinator at her father's dental office. She held a B.A. in political science. She had been accepted to start law school in Australia. Following the crash, the Plaintiff never completed law school, nor did she return to work. Instead, in an effort to re-train, she has entered a B.A. program in psychology and is receiving accommodations (e.g. extra time for exams, etc.) to help her complete the program.	(Jury) GD: $100K FLOI: $761K FC/HH: $690K	No motion.

Bishop-Gittens v. Lim [2016] O.J. No. 2236 (Sup.Ct.)	A female developed CPS following a motor vehicle crash. At the time of the crash, she was general manager for a flagship clothing retail store. She took one day off following the crash but, upon returning to work, received significant accommodations.	(Jury) GD: $40K FLOI: nil FC/HH: n/a	Passed
Bruff-Murphy (Litigation guardian of) v. Gunawardena [2016] O.J. No. 6 (Sup.Ct.)	A female in her mid-30s developed CPS following a rear-end crash. Her vehicle sustained $2.9K in damage and the Defendant's vehicle was written off. She went to the hospital from the scene and was discharged that night. The Plaintiff did have some pre-existing injuries. At the time of the crash, she worked for Rogers. She returned briefly after the crash then left, reportedly due to her pain. She then briefly obtained a retail position, which she also left. The Defendant argued that she was a malingerer and failed to mitigate her losses.	(Jury) GD: $23.5K FLOI: nil FC/HH: nil	Passed
Valentine v. Rodriguez-Elizalde [2016] O.J. No. 2945 (Sup.Ct.)	At the time of the crash, the female Plaintiff was a 17 year-old high school student. She was involved in school sports, helped with household chores, and worked part-time at McDonalds. She developed CPS; however, she was able to return to sports, most chores, and full-time work.	(Jury) GD: $30K FLOI: $50K FC/HH: $1.2K	Failed
Corbett v. Odorico [2016] O.J. No. 1459 (Sup.Ct.)	A 40 year-old female suffered CPS arising from a head-on collision. Her vehicle sustained moderate damage, though air bags did not deploy. She did not receive immediate medical attention following the crash. At the time of the crash, the Plaintiff was a homemaker. She alleged that the crash resulted in the break-up of her marriage and that she forced herself to continue carrying out her household as the sole adult in the house with two children with special needs.	(Jury) GD: $33K FLOI: n/a FC/HH: $21K	Passed
Wheeler-Ellesworth v. Rawlins [2016] O.J. No. 472 (Sup.Ct.)	A female was a passenger in a vehicle that was rear-ended. She had worked in building management for a number of years, but was unemployed at the time of the crash. Following the crash, she obtained work in building management. The Plaintiff's medical history included sexual and physical abuse, as well as obesity.	(Jury) GD: $10K FLOI: nil FC/HH: nil	Failed
Arteaga v. Poirier [2016] O.J. No. 2925	A female Plaintiff (believed to be in her '40s) was rear-ended in a crash that resulted in her vehicle being written off. She was discharged from hospital within 24 hours. She took two weeks off work then returned. She developed CPS. Subsequently, she was involved in 3 further crashes and two slip & falls. The two falls resulted in fractures.	(Jury) GD: $20K FLOI: nil FC/HH: $13,150	Passed
Dimopoulos v. Mustafa	A 61 year-old male developed CPS following a motor vehicle crash. He was in good health prior to the crash.	(Jury) GD: $37K	Passed

[2016] O.J. No. 287 (Sup.Ct.)	Following the crash, somewhat fortuitously, he was able to change to a higher paying job.	FLOI: FC/HH: $30K	
Nkunda-Batware v. Zhou [2016] O.J. No. 2290 (Sup.Ct.)	A 54 year-old female was a passenger in a vehicle that was rear-ended. She was discharged same day from the hospital. She developed CPS. Her pre-crash history included depression and, in fact, she was on stress leave at the time of the crash. She was employed as a social worker. She never returned to work after the crash.	(Jury) GD: $15K FLOI: $150K FC/HH: $101.5K	Passed
Parra v. Laczko [2016] O.J. No. 641 (Sup.Ct.)	A female was rear-ended in a low speed crash. At the time of the crash, the Plaintiff was a successful real estate agent who was in good health. She developed CPS following the crash, worked fewer hours, and earned significantly less income (in the context of an increasing housing market).	(Jury) GD: $10K FLOI: unknown FC/HH: $5K	Passed
El-Khodr v. Lackie [2015] O.J. No. 4037 (Sup.Ct.).	A 51 year-old male was rear-ended by a truck. He declined medical care at the scene but later that day went to hospital. He developed CPS. At the time of the crash, he worked as a tow truck operator. He had a solid income for 9 months prior to the crash, but before that had years of little to no income.	(Jury) GD: $225K FLOI: $395,593 FC/HH: $2.1 mil	No motion.
Lee v. Rezai [2015] O.J. No. 1586 (Sup.Ct.)	A female suffered from headaches and CPS resulting from a minor rear-end crash. Her vehicle sustained $1,000 damage. Neither police nor medical personnel were called to the scene. At the time of the crash, she was a volunteer and co-Director of a missionary youth organization. The Plaintiff's credibility was a central issue at trial.	(Jury) GD: nil FLOI: n/a FC/HH: nil	Failed.
Abousamak v. Izzo [2015] O.J. No. 3212 (Sup.Ct.)	A 33 year-old RCMP officer suffered CPS following a motor vehicle crash. He did not go to hospital. He was able to return to work, but reduced his overtime hours. The judge noted that the Plaintiff led little evidence at trial as to what his activities of daily living were prior to the crash and how these activities or his lifestyle had been impacted by the crash.	(Jury) GD: $30K FLOI: nil FC/HH: n/a	Failed
Giordano v. Li [2015] O.J. No. 2464 (Sup.Ct.)	A female developed CPS following a motor vehicle crash. The Defence approach was not acknowledge the pain, but attribute its cause to previous motor vehicle accidents and injuries. The threshold decision is unreported so no further facts are known.	(Jury) GD: $68,625 FLOI: $371,076 FC/HH: $59,752	Unknown
Ayub v. Sun [2015] O.J. No. 1415 (Sup.Ct.)	A 32 year-old male was rear-ended in a minor crash, involving only a bent bumper. He was discharged from the hospital the same day. At the time of the crash, he was in the first year of an ESL program. He did not work before or after the crash. He was able to return to his ESL program.	(Jury) GD: $25K FLOI: n/a FC/HH: $5K	Failed

Ramrup v. Lazzara [2015] O.J. No. 2117 (Sup.Ct.)	A female was involved in a minor rear-ended crash. She did not go to hospital. At the time of the crash, she was not working but had secured a contract that was about to start. She did not return to work at all following the crash. Credibility was a serious problem in the case. The Plaintiff's medical history included a diagnosis of chronic pain syndrome arising from two previous crashes, high doses of narcotics, and there was evidence she had been considering going on long-term disability. She testified, however, that she had been fully functional and living a vibrant life prior to the crash.	(Jury) GD: $1,053 FLOI: nil FC/HH: nil	Failed

I do wish to note, for the benefit of other personal injury lawyers, that although the cases since 2015 have not been overwhelmingly favourable to the Plaintiff, there are other, still recent, chronic pain decisions in which the Plaintiff was awarded well over $100,000.00 for general damages (in 2016 dollars, when inflation is applied from the date of the award).[14]

CONCLUSION

In conclusion, due to the biases, time, challenges, and costs associated with pursuing chronic pain cases, not every case involving pain is one that a prospective client should consider pursuing or that a personal injury lawyer should consider taking on. Successful chronic pain cases tend to be the exception, rather than the rule. With that being said, where the Plaintiff is credible and properly briefed, where the treating and medical-legal expert evidence is strong, and where the right evidence is introduced, these cases can result in significant awards for damages.

[14] See *Doxtater v. Farrish*, [2014] ONSC 4224 (CanLII); *Lutes and MacPherson v. Air Canada and Jazz Air LP*, [2014] ONSC 3319 (CanLII); *Fulcher v. Conklin*, [2013] ONSC 2013 (CanLII); *Hoffman v. Jekel*, [2011] ONSC 1324 (CanLII); *McDonald v. Kwan*, [2010] ONSC 5861 (CanLII); *Degennaro v. Oakville Trafalgar Memorial Hospital*, [2009] ONSC 34035 (CanLII).

For questions about this paper or a free consultation respecting a potential personal injury matter, you are welcome to contact me at 416.868.3205 or dgilbert@thomsonrogers.com. I can also be found at https://www.thomsonrogers.com/directory/deanna-gilbert/ and on LinkedIn.