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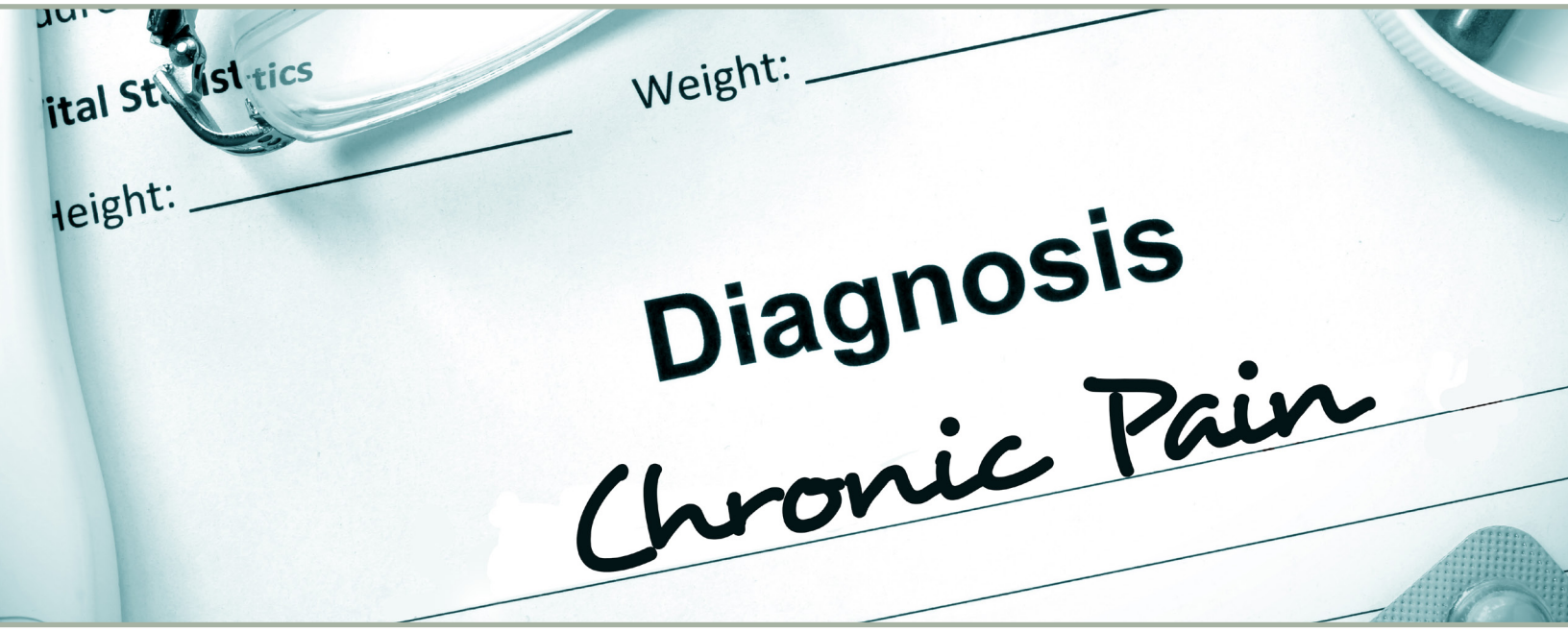

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LITIGATING CHRONIC PAIN CASES: WHAT PLAINTIFFS, HEALTH PRACTITIONERS, & PERSONAL INJURY LAWYERS NEED TO KNOW

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]*"*

This article is a shortened version of a paper that I have authored (found at https://www.thomsonrogers.com/directory/deanna-gilbert/) to provide prospective Plaintiffs,

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

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 PROSPECTIVE CHRONIC PAIN PLAINTIFFS SHOULD EXPECT

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

Expect to Face Biases

The single greatest hurdle in a chronic pain case is getting the jury to believe that the Plaintiff's pain is real. There are generally three biases that will have to be overcome:

1. 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.
2. 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).
3. 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.

Expect the Litigation to Last for Years

Unfortunately, there is no deadline in civil litigation by which time the action has to resolve or the Judgment has to be made. *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 three reasons:

1. 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.
2. 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*[2] as a "*permanent* serious disfigurement" or a "permanent serious impairment of an important physical, mental, or psychological function." 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.
3. Most of these cases (due to the credibility and threshold issue) will involve at least one defence

[2] *Insurance Act*, R.S.O. 1990, c. I.8 at s. 267.5 [*Insurance Act*]. The definition is further narrowed in s. 4.2(1) of the *Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996*, Reg. 461/96 [the *Regulation*].

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; for example, by virtue of the Plaintiff's medical records having to be produced. In chronic pain cases, however, it is more common than in other personal injury cases for the Plaintiff to also be put under surveillance and/or for his or her social media accounts to be monitored. The purpose of surveillance and monitoring social media is to see whether an inconsistency can be established between what the Plaintiff says and what he or she does.

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.

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. Plaintiffs who 'try but fail' are seen more favourably than those who 'never try at all.' For example, a Plaintiff who tries to return to work after an incident, but after two weeks realizes it is not physically feasible is one who will be better received by the defence lawyer than a Plaintiff who never attempted to return to work at all.

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 (speaking to rehabilitation professionals, testifying at examination for discovery, attending a defence medical examination, etc.). In litigation, words are taken at their literal meaning. A Plaintiff who says that he or she can "never" carry heavy bags and is caught on surveillance doing just that will be seen as a liar. Conversely, a Plaintiff who says that he or she "rarely" carries heavy bags and is caught on surveillance once doing just that has not been proved a liar. Absolute words that should be avoided include: always, never, can't, and don't. Preferable words that provide some cushion include: typically, generally, usually, frequently, infrequently, rarely, 'with difficulty', and 'but' (e.g. yes, but…).

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 important steps in the litigation. Discovery evidence is given under oath or after an affirmation, and can be used to impeach the Plaintiff at trial. Similarly, the expert's opinion can be undermined if the expert relied upon something the Plaintiff said which is later proved to be inaccurate.

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. Helpful preparation tips for Plaintiffs include, but are not limited to:

1. Avoid absolute words.
2. Use ranges and approximations to allow for some cushion.
3. Be responsive and particular, rather than evasive or overly broad.
4. Do not guess, as a guess can be proved wrong through records or other witnesses.
5. Do not deny pre-existing conditions or complaints, but do explain or distinguish them.
6. Do not get defensive or angry, or you may look like you have something to hide.
7. Avoid theatrics; if you are injured you do not need to "act" injured.
8. There is no such thing as "off the record".
9. Do not be afraid to correct an answer if you later realize it was incorrect, incomplete, or involved an absolute word.
10. Put forth a good effort with testing at medical/defence medical examinations.

Be Proactive to Defend Against Surveillance & Social Media

Many of the tips above will proactively "defend" against the potential adverse impacts of surveillance and social media. 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, where the credibility of the Plaintiff is usually in issue, choosing the right medical-legal expert may include:

1. Choosing a physiatrist and/or psychologist who can speak to the experience of pain; rather than an orthopaedic surgeon or neurologist, who may be more focused on the presence or absence of an objective injury.
2. Choosing an expert who has done both Plaintiff and defence work, and whose opinion might, therefore, be given greater weight by a defence lawyer.
3. Choosing an expert whose opinion has been received favourably by a judge in another decision, or whose expertise in chronic pain has been highlighted by a judge.
4. Choosing one or more *treating* physicians, psychologists, and/or rehabilitation professionals to write an expert report, since these experts would not have become involved in the Plaintiff's care simply by being hired by his or her lawyer and who will have greater knowledge of the Plaintiff's condition from having treated him or her over time.

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. For a more fulsome review of expert report writing, please see a paper authored by Wendy Moore Mandel and I "Becoming an Expert 'Expert'" found at https://www.thomsonrogers.com/resources/becoming-an-expert-expert/. Briefly, however, in a chronic pain case, it is 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 (e.g. note that the Plaintiff answered questions in a forthright manner, acknowledged pre-existing complaints, provided a consistent history, etc.).

RECENT CHRONIC PAIN & THRESHOLD DECISIONS

A more fulsome review of chronic pain jury awards and threshold decisions since 2015 is found in the full paper version of this article. Briefly, however, the cases are "all over the map", confirming the theory that juries are notoriously unpredictable. For instance, in 2015 decision of *El-Khodr v. Lackie*, a 51 year-old tow truck driver with an inconsistent work history who developed chronic pain after a rear-end collision for which he did not receive immediate medical assistance was awarded general damages of $225,000.00 by the jury. Comparatively, in the 2015 decision of

Lee v. Rezai, a middle-age woman who was the volunteer co-Director of a missionary youth organization and who developed chronic pain after a rear-end crash was awarded nothing for general damages. Notably, the Plaintiff's credibility in *Lee* was called into question.

CONCLUSION

In conclusion, 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. If you are wondering whether you may have a viable chronic pain case, you may wish to consult with a personal injury lawyer. ■■■

THE 2016 AWARDS OF EXCELLENCE IN BRAIN INJURY REHABILITATION

The Ontario Brain Injury Association along with the Personal Injury Alliance (PIA Law) are pleased to present the 2016 Awards of Excellence in Brain Injury Rehabilitation.

These awards are meant to recognize exceptional service to the brain injury community in the following categories: Hospital Social Worker, Case Management, Health Care Provider, Community Brain Injury Association, Rehabilitation Company.

Voting for the selected nominees will take place online between August 8th and September 2nd, 2016. Awards of Excellence will be presented to recipients at the Awards Ceremony on September 16th, and formally announced at the **Back to School Conference** on September 16th at the Shangri-La Hotel.

For more information about the Awards of Excellence, visit: OBIA.ca.

UPCOMING EVENTS 2016

1. **September 16 Back to School Conference with PIA Law and Ontario Brain Injury Association** at the Shangri-La Hotel. Click here to register.
2. **October 20 Practical Strategies for Experts: Testifying Without Fear** Click here to register.
3. **October 27 Brain Injury Association of Niagara Conference 2016** David Payne and Adam Tanel will be presenting on behalf of Thomson, Rogers.
4. **November 10 -11 Toronto ABI Network Conference** Thomson, Rogers is proud to be the Diamond Sponsor.

FOR MORE INFORMATION ON THE EVENTS LISTED ABOVE, PLEASE VISIT:

https://www.thomsonrogers.com/news/upcoming-events/

For further information on this article, please contact:

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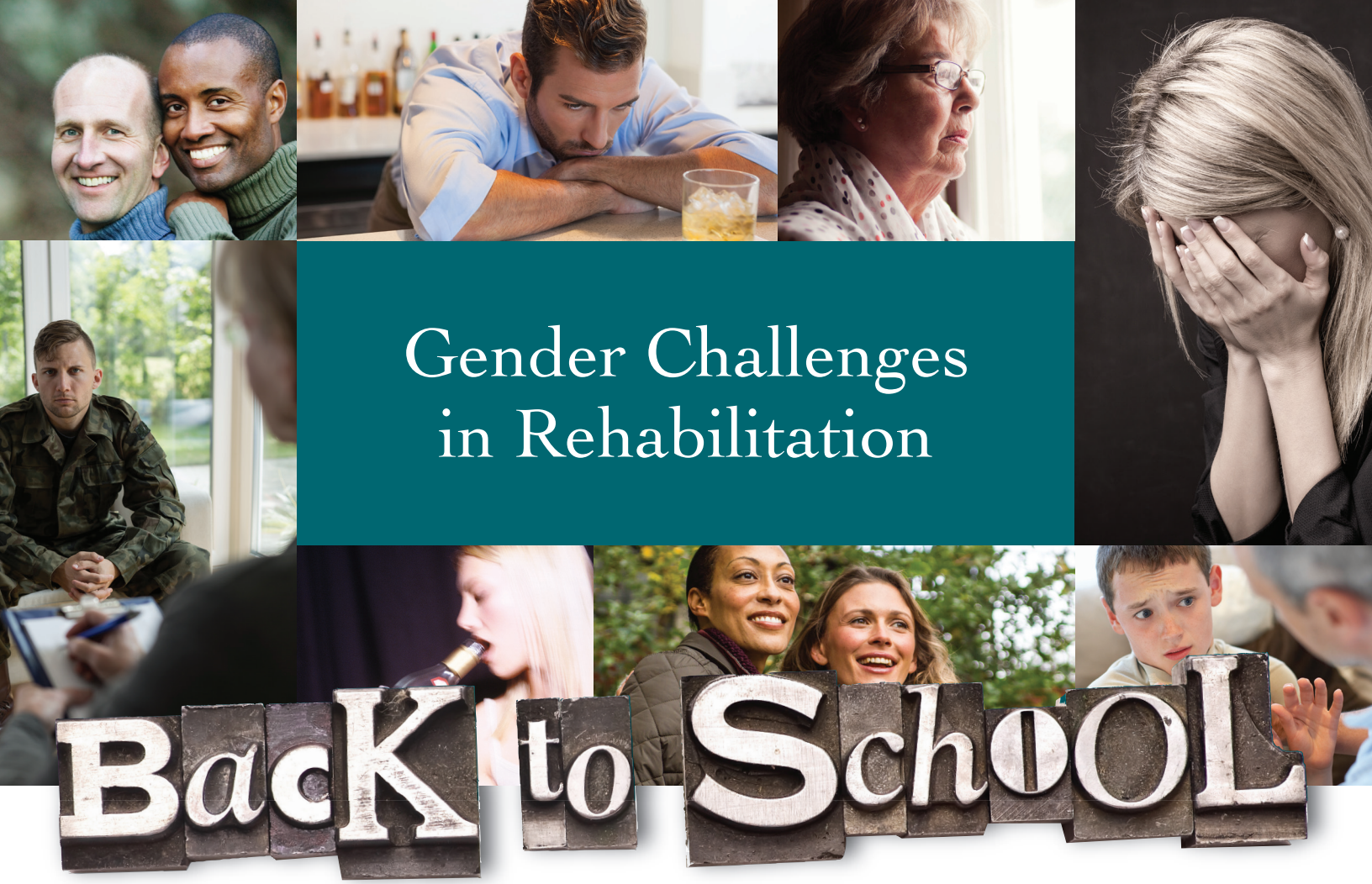

Gender Challenges in Rehabilitation

Friday, September 16, 2016

Shangri-La Hotel
188 University Ave., Toronto

Keynote Speaker:

Dr. Angela Colantonio	Associate Professor, University of Toronto Dept. of Occupational Science and Therapy

Featured Speakers:

Barbara Baptiste	President, Rehabilitation Management Inc.
Dr. David Rosenbloom	Professor, McMaster University Medical Centre
Dr. Tina Trudell	CEO/Principal, Northeast Evaluation Specialist (New Hampshire, USA)

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All proceeds will be donated to Ontario Brain Injury Association