

INFONEX CONFERENCE

Meeting Your Duty to Accommodate:

Latest Developments and Techniques for Effective Accommodation

Chronic Illnesses From an Employee's Perspective:

Dealing with Chronic Fatigue, Chronic Pain and Fibromyalgia

By: Richard M. Bogoroch
BOGOROCH & ASSOCIATES

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I. Introduction*

Illnesses such as chronic fatigue, chronic pain and fibromyalgia present inherent difficulties in trying such cases due to several factors:

- widespread skepticism of the existence of these conditions within the medical community;
- onset of severe and disabling symptoms even following a relatively minor traumatic incident; and,
- the absence of “objective” physical findings to substantiate the plaintiff’s symptoms and resultant disability.

The challenge posed to plaintiff’s counsel is to develop the plaintiff’s case using highly qualified and experienced experts and to present the case in a manner which demonstrates powerfully and convincingly the plaintiff’s disability. To do so, plaintiff’s counsel must understand the nature of these conditions and marshal the evidence necessary to establish the legitimacy of the plaintiff’s condition. Further, counsel must be aware of the challenges to be faced and must be able to neutralize the impact of the defence experts and, ultimately, to persuade the trier of fact to award the plaintiff fair compensation for his or her losses.

Despite the inherent limitations in trying cases involving chronic fatigue, chronic pain and fibromyalgia, there have been recent judicial decisions that have improved the situation of employees suffering from such illnesses.

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In *Nova Scotia (Workers' Compensation Board) v. Martin*,¹ the Supreme Court held that the workers' compensation scheme of Nova Scotia unjustly discriminated against injured workers suffering from chronic pain in that it excluded chronic pain from the application of the general compensation provisions. The Court held that the equality provisions of the *Charter of Rights and Freedoms* were infringed and, for this reason, held that the challenged provisions of the workers' compensation scheme were of no force or effect.

Furthermore, a review of recent judicial decisions pertaining to chronic fatigue, chronic pain and fibromyalgia indicates that the courts in Canada are willing to recognise that such illnesses can be triggered by trauma arising in a variety of different settings, and that the illnesses can be triggered following relatively minor traumatic incidents. Canadian courts have held that, despite the lack of "objective" physical findings, such conditions can create entitlement to employment-related disability benefits, if the disability is supported by medical opinions. In *Britt v. Zagjo Holdings Ltd.*,² the Court concluded that the plaintiff's fibromyalgia condition was caused by the slip and fall trauma that the plaintiff suffered, as the linkage had been shown by doctors in "compelling and incontrovertible detail".

Further, in *Fidler v. Sun Life Assurance Co. of Canada*,³ the Court recognised that the plaintiff's acute kidney infection lead to chronic fatigue, thereby entitling the Plaintiff to long-term disability

¹*Nova Scotia (Workers' Compensation Board) v. Martin*, [2002] S.C.R. 504.

²*Britt v. Zagjo Holdings Ltd.*, [1996] O.J. No. 1014.

³*Fidler v. Sun Life Assurance Co. of Canada* (2004), 196 B.C.A.C. 130.

benefits. Also, in *Swain v. Moore Estate*,⁴ the Court held that the plaintiff's chronic pain, post-traumatic stress syndrome and fibromyalgia were caused by the motor vehicle accident in which she was involved.

A discussion of what is meant by the terms chronic fatigue, chronic pain and fibromyalgia is set out below, followed by a discussion of the issues insurance companies should consider in adjudicating claims involving chronic illness.

II. Features of Chronic Fatigue, Chronic Pain and Fibromyalgia

A. Chronic Fatigue Syndrome/Myalgia Encephalitis

The following is the case definition for chronic fatigue syndrome as published in the *Annals of Internal Medicine* in 1994⁵:

Patients suffering from chronic fatigue syndrome must have:

1. otherwise unexplained, relapsing fatigue that is new (not life-long);
2. not the result of ongoing exertion;
3. not relieved by rest; and
4. that results in substantial decreases in levels of occupational, social, educational, or personal activities.

Four or more of these symptoms must be exhibited, and have persisted for at least 6 months, and have not predated the fatigue:

- a. self-reported impairment of memory or concentration that affects occupational, social, educational, or personal activities;
- b. sore throat;

⁴*Swain v. Moore Estate*, [2000] O.J. No. 1628.

⁵F. Keiji, et al., *International Chronic Fatigue Syndrome Study Group*, 15 December 1994, Vol. 121, Issue 12, at 953-959.

- c. tender cervical (neck area) or axillary (underarm area) nodes;
- d. myalgias (muscle pain);
- e. arthralgias (pain along the nerve of the joint). No redness or swelling;
- f. headache of a new type;
- g. unrefreshing sleep; and
- h. post-exertional malaise, lasting more than one day.

B. Chronic Pain

Chronic pain can be distinguished from acute pain, which is generally regarded as pain that begins suddenly and arises directly from injury or disease. The International Association for the Study of Pain describes chronic pain as any pain in any area of the body that lasts for over one month beyond the reasonable or expected recovery time for an injury or disease.

In his article entitled “Chronic Pain Syndrome: Identification and Management”, Dr. David Corey defines chronic pain as “pain persisting for more than six months from its onset”⁶. Dr. Corey expands this definition as follows:

1. The chief complaint is of severe and prolonged pain in excess of what could be expected on the basis of organic findings; and
2. At least six of the factors listed below are exhibited:
 - a. Diagnosis of soft tissue injury;
 - b. Multiple symptoms complaints, e.g., headaches or fatigue;
 - c. An unsuccessful attempt to return to work;
 - d. Guarded movements or avoidance of many activities, i.e., an invalid-like lifestyle;
 - e. Ingestion of multiple analgesics, tranquilizers, etc.;
 - f. Frequent and multiple physician contacts;
 - g. Development of family and marital problems;
 - h. Reduction in or loss of libido;
 - i. Diffuse anger, frustration and irritability;

⁶D. Corey, “Chronic Pain Syndrome: Identification and Management” (1988) 9 The Advocates’ Q. 223.

- j. Anxiety and/or depressive symptoms; and
- k. Sleep disturbance.

Chronic pain syndrome is a condition in which chronic pain has persisted over a period of time and is intense enough that it substantially interferes with an individual's ability to function and to carry on his or her activities of daily living. Chronic pain erodes the sufferer's confidence, self-esteem and general well-being.

C. Fibromyalgia

The American College of Rheumatology has provided the following classification for fibromyalgia:⁷

1. History of widespread pain. Definition: Pain is considered widespread when all of the following are present: pain in the left side of the body, pain in the right side of the body, pain above the waist, and pain below the waist. In addition, axial skeletal pain (cervical spine or anterior chest or thoracic spine or low back) must be present. In this definition, shoulder and buttock pain is considered as pain for each involved side. "Low back" pain is considered lower segment pain.
2. Pain in 11 of 18 tender point sites on digital palpation.

For classification purposes, patients will be said to have fibromyalgia if both criteria are satisfied. Widespread pain must have been present for at least 3 months. The presence of a second clinical disorder does not exclude the diagnosis of fibromyalgia.

⁷F. Wolfe, et al., "The American College of Rheumatology 1990 criteria for the classification of fibromyalgia: report of the multicenter criteria committee" (1990) 33:160 *Arthritis Rheum* 72.

III. Adjudication of Claims by Insurers

Insurers faced with claims from individuals diagnosed as suffering from Chronic Fatigue, Chronic Pain or Fibromyalgia arising out of a motor vehicle accident or other injury, or those claiming disability benefits as result of these conditions often err in the adjudication of such claims by denying, or terminating, benefits on the basis of an alleged lack of “objective” findings.

As all insurers and claims adjusters are aware, the sole consideration of a disability claim is whether the employer/insured satisfies the criteria for disability under the policy in question. In dealing with illnesses such as chronic fatigue, chronic pain and fibromyalgia, insurers often superimpose an “objective evidence” requirement on claims where no such requirement exists in the policy.

In order to avoid claims for bad faith, insurers must ensure that claims are handled promptly and that relevant medical reports are obtained and carefully reviewed. Insurers should write to the claimant’s treating doctors before any decision is made to terminate benefits and the opinions of the treating doctors, as it is those who have the most personal and prolonged contact with the insured, should be carefully considered by the insurer.

If appropriate, the insurer should arrange for relevant medical experts to assess the claimant and comment on the nature of the claimant’s medical condition and how that condition affects the claimant’s vocational and/or functional abilities. A job site analysis is often useful in this regard as the analysis will establish the parameters within which the claimant’s disabilities can be analyzed.

A decision to deny or terminate benefits based upon medical reports that merely dismiss the claimant’s complaints because these complaints are not supported by objective findings may be subject to serious scrutiny, and carry legal sanctions, at a later date.

Failing to properly investigate the claimant’s medial condition and disabilities could potentially expose the insurer to a claim for bad faith, particularly where all of the claimant’s treating practitioners are attesting to the claimant’s extensive disabilities and functional limitations and the insurer has not obtained any contradictory medical reports in this regard.

In light of the growing recognition of Chronic Fatigue, Chronic Pain, Fibromyalgia and other pain-associated conditions and their potentially disabling effects, insurers should be prepared to resolve these types of cases for realistic values. If the disability has rendered the claimant unemployable or unable to return to his or her previous employment, the claimant, depending on the nature of his or her employment, could potentially be awarded significant damages. Judges have and continue to award aggravated and/or punitive damages and special awards where an insurer has acted in bad faith and failed to properly investigate and consider a claim.

In *Clarfield v. Crown Life Insurance Co.*,⁸ the Plaintiff claimed against Crown Life Insurance for payment of disability benefits pursuant to an insurance policy. The Plaintiff also claimed aggravated and punitive damages. Justice Juriansz awarded the Plaintiff benefits under the policy of insurance on the basis that the Plaintiff was totally disabled within the meaning of the policy until he commenced a training program. Justice Juriansz also awarded aggravated damages in the amount of \$75,000.00 and punitive damages in the amount of \$200,000.00, commenting that the insurer had failed to assess the Plaintiff's claim in a balanced and reasonable manner and had failed to act fairly and promptly when it dealt with the Plaintiff's claim.

In *Fimiani and Liberty Mutual Insurance Company*,⁹ a decision of the Financial Services Commission of Ontario, the insurer was liable to pay a special award based on its failure to accept the existence of the Plaintiff's chronic pain condition and based upon its unreasonable conduct in withholding benefits.

In *Fidler v. Sun Life Assurance Co. of Canada*,¹⁰ the Plaintiff received disability benefits due to her inability to continue her employment as a bank employee due to fibromyalgia and chronic fatigue

⁸*Clarfield v. Crown Life Insurance Co.*, [2000] O.J. No. 4074 (S.C.J.).

⁹*Fimiani and Liberty Mutual Insurance Company*, (FSCO A97-001518), January 11, 2000.

¹⁰*Fidler v. Sun Life Assurance Co. of Canada* (2004), 196 B.C.A.C. 130.

syndrome. After six years of payment, Sun Life terminated her benefits, in large part due to covert video surveillance which showed Ms. Fidler carrying out errands and personal business activities. This denial was maintained for a five-year period.

At trial, Ms. Fidler was awarded \$20,000.00 in aggravated damages for wrongful termination of her long-term disability benefits. No punitive damages were awarded. On appeal, Ms. Fidler's award for aggravated damages was upheld and she was awarded a further \$100,000.00 in punitive damages.

In discussing the appropriateness of the aggravated damage award of \$20,000.00, the Court of Appeal provided the following analysis¹¹:

The general principle in contract law is that damages will not be awarded for mental distress that results from the breach of a contract. However, there is an exception to this general principle for "peace of mind" contracts where the very purpose of the contract is to secure the peace of mind of the insured....

Accordingly, aggravated damages are available as additional compensation if the insured establishes that a breach of that contract caused her mental distress. There must be actual evidence of aggravation and mental distress. However, no independent, extra-contractual actionable wrong need be proven for such damages to be awarded. Nor is the nature of the insurer's conduct, other than the fact of breach, material since the purpose of such damages is compensatory and not punitive.

The Court of Appeal further held that financial hardship need not be proven in order to justify an award of aggravated damages.

The decision at Trial was that Sun Life's conduct should not be characterized as an act of bad faith,

¹¹*Ibid*, at paragraphs 38 and 39 (QL).

given that the nature of Ms. Fidler's illness is a type that cannot be diagnosed through objective findings on testing such as an x-ray or MRI. However, the Court of Appeal disagreed with this analysis, as set out in the following excerpt¹²:

I accept that in a contract for long-term disability insurance the nature of the insured's illness is a factor in assessing the insurer's conduct. What may be appropriate conduct for an insurer of an employee with obvious physical impairment may well differ from what is appropriate in the case of an employee with psychological or emotional problems affecting employability. Different steps may be necessary and appropriate in different cases in order to assess or verify the nature and extent of the disability, the prospects of treatment or rehabilitation, and the possibility of an eventual return to work.

However, in my view, the nature of an illness or disability is not a reason to judge the insurer's conduct by a different standard. In every case the insurer is bound to adhere to the standard of good faith and fair dealing. That the disability, or its extent, may be difficult to assess does not diminish the insurer's obligation. If anything, it would increase the need to proceed openly, fairly and cautiously. In my respectful view, the learned trial judge erred in treating the nature of the plaintiff's illness as the only, or at least overriding, factor in measuring the insurer's good faith.

The Appeal Court's award for punitive damages flowed, in part, from how Sun Life utilized its video surveillance of Ms. Fidler. Although the Court indicated that there was nothing inherently wrong with Sun Life having undertaken a video surveillance of Ms. Fidler, the Court indicated that the contents of the video surveillance were exaggerated internally and misrepresented to Ms. Fidler, as the Court held that, contrary to a letter provided to Ms. Fidler, the information in the video was not

¹²*Ibid*, at paragraphs 63 and 64 (QL).

incompatible with her alleged disability.¹³

In determining the quantum of punitive damages that ought to be awarded, the Court of Appeal stated that damages must be rationally proportionate to the ends of retribution, deterrence and denunciation, and that they ought to be proportionate to the level of the defendant's blameworthiness, the degree of vulnerability of the plaintiff, the harm or potential harm directed at the plaintiff and any advantage wrongfully gained by the defendant.¹⁴

Although the Court of Appeal held that Sun Life did not deliberately set out to harm Ms. Fidler or to wrongfully gain an advantage as a result of its conduct, the Court concluded that \$100,000.00 was an appropriate penalty in the circumstances, given that the insurer's refusal to pay benefits to a "vulnerable" insured for over five years resulted in more than \$50,000.00 in benefits (including pre-judgment interest) having been withheld.¹⁵

As mentioned above, in *Fidler v. Sun Life*, the Court held that Sun Life exaggerated the contents of the video surveillance and mislead Ms. Fidler as to its contents. In using such surveillance, insurers are cautioned to consider that the footage available from surveilling an individual may be misleading, as it only contains a brief "snapshot" in time of that individual and it could fail to disclose pain or suffering. If the individual has migraine headaches, is forgetful, depressed, or in pain, this may not be revealed by surveillance.

Of particular note are the comments of Dr. Rickey S. Miller in his article dealing with surveillance evidence, as published in the *Advocates' Quarterly*¹⁶:

Erroneous conclusions about pain are also common when they are based on the

¹³*Ibid*, at paragraph 67 (QL).

¹⁴*Ibid*, at paragraph 77 (QL).

¹⁵*Ibid*, at paragraph 80 (QL).

¹⁶"Toward an Unbiased Assessment of Personal Injury," (1999) 21 ADV. Q. 203.

patient's activity level. For example, a surveillance report indicates that a man has taken his children to the park and played ball with them when he has previously reported that he can not play with them due to his ongoing back pain. The surveillance report may be taken as evidence that he has lied. But this is not necessarily the case. The reasons for the man's actions need to be assessed. Perhaps he took his children to the park and played with them despite his pain, because he was feeling guilty. His ability to play with his children may reflect his using various coping strategies to help him deal with his back pain but does not necessarily mean that he is pain-free. In fact, as a result of overactivity, he may experience a particularly intense and prolonged period of pain after he returns home. Nor does his behaviour on that one occasion necessarily indicate that he can sustain activity for long periods of time or that he can resume work.

Overall, a review of recent judicial decisions indicates that insurers must be cautious in handling claims involving chronic illnesses such as chronic fatigue, chronic pain and fibromyalgia, as the courts in Canada have awarded both aggravated and punitive damages to plaintiffs in cases where insurers unreasonably withheld benefits.

IV. Conclusion

Although the subject of pain remains an elusive and controversial one, there has been a growing recognition in recent years of pain-associated conditions such as Chronic Fatigue Syndrome, Chronic Pain and Fibromyalgia which may develop progressively or as a result of the claimant's involvement in a traumatic event such as an accident or injury.

Insurers must recognise that too heavy a reliance on reports that merely dismiss the claimant's complaints because these complaints are not supported by objective findings may prove detrimental when the denial or termination reaches litigation.

Since insurance policies providing for long-term disability benefits create an expectation of benefits and freedom from financial distress in the event of long-term disability, such contracts have been regarded by the courts as "peace of mind" contracts, and insurers are exposed to the risk of paying aggravated damages in the event of disability benefits being improperly denied under such "peace of mind" contracts. Furthermore, the courts have indicated that punitive damages may be awarded

where benefits are wrongfully denied in order to deter and denounce such actions.

In order to avoid claims of bad faith and to encourage effective mediation, relevant documentation and information should be obtained and an effort made to have the claimant assessed by appropriate experts who can comment effectively on the claimant's disabilities on a functional and vocational level.

In recent years our legal system has moved towards encouraging and facilitating early resolution and at the end of the day, the aim of all parties should be to ensure that deserving claimants receive the compensation to which they are entitled.