

The Law Society of Upper Canada
Chronic Pain, Chronic Fatigue and Fibromyalgia: Strategies of Litigating and
Defending Pain-Related Cases

Tactics and Strategies: The Plaintiff's Perspective
Managing the Plaintiff's Chronic Pain, Fibromyalgia
and Chronic Fatigue Case

Richard M. Bogoroch and Tripta S. Chandler

Bogoroch & Associates

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I. Introduction

Chronic pain, fibromyalgia and chronic fatigue cases present unique challenges for plaintiff's counsel whose task it is to prove disability, whether within the context of a tort or statutory accident benefits case or when claiming entitlement to long-term disability benefits. The primary symptoms associated with these conditions are pain and fatigue. These symptoms are largely subjective experiences and, as such, the management of cases involving plaintiffs who suffer from these conditions pose difficulty for personal injury practitioners accustomed to relying upon medical assessments to determine pain and quantify damages.

The difficulties inherent in these cases are the result of several factors: (1) widespread skepticism of the existence of these conditions within the medical community; (2) onset of severe and disabling symptoms even following a relatively minor traumatic incident; and (3) 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.

In this paper, approaches to chronic pain, fibromyalgia and chronic fatigue cases will be discussed from the perspective of a plaintiff in a tort case arising out of a motor vehicle accident.

In a motor vehicle accident case, the difficulties in proving disability are further complicated by issues of causation. Individuals who develop chronic pain, fibromyalgia or chronic fatigue following motor vehicle accidents are frequently involved in relatively minor collisions with limited property damage. Further, their "objective" injuries are often limited to soft-tissue or WAD injuries.

In addition to marshalling expert evidence which is objective and persuasive, the challenge posed to

plaintiff's counsel is to create a historical framework, based on the plaintiff's own pre-accident history, in which the plaintiff's pre-accident qualifications, achievements and work history are invoked to build a framework for establishing credibility.

II. Definitions¹

A. Chronic Pain and Chronic Pain Syndrome

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. Other medical professionals have designated a time line of three to six months after the expected recovery time in describing pain that has become chronic.

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". Dr. Corey expands this definition as follows²:

1. The chief complaint is of severe and prolonged pain in excess of what could be

¹ The following section is taken from my previous paper, co-authored with Leanne Goldstein, "Understanding and Managing the Increase in Chronic Claims and Newly Classified Disabilities" presented at the 3rd Annual "Managing Your Duty to Accommodate" conference on October 21 and 22, 2003.

² D. Corey, "Chronic Pain Syndrome: Identification and Management" (1988) 9 The Advocates' Q. 223.

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;
 - 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 activities of daily living. Chronic pain erodes the sufferer's confidence, self-esteem and general well-being³. The defining feature is that chronic pain has rendered the pain sufferer vocationally and/or functionally disabled.

³ Minnesota Board of Medical Practice Update Newsletter, Spring 1997.

The difficulty medical professionals have encountered with chronic pain syndrome is that it often has what Dr. Manish Singh, Assistant Professor at Pennsylvania Hahnemann University, has described as “a complex natural history, unclear etiology and poor response to therapy”⁴. According to Dr. Singh, “some authors have even suggested that CPS (chronic pain syndrome) might be a learned behavioural syndrome”⁵. The suggestion is that there may be an initial noxious stimulus that causes pain and when the pain behaviour is rewarded, that behaviour is reinforced resulting in a continuation of the pain behaviour in the absence of the noxious stimulus⁶. This may account for the belief of certain individuals in the medical and legal professions that the litigation process may in fact perpetuate chronic pain syndrome.

B. Fibromyalgia

The American College of Rheumatology has provided the following classification for fibromyalgia⁷:

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

⁴ Manish K. Singh, M.D., et al., “Chronic Pain Syndrome”, online: emedicine <<http://www.emedicine.com>>.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ F. 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.

not exclude the diagnosis of fibromyalgia.

C. Chronic Fatigue Syndrome/Myalgia Encephalitis

The following is the case definition for chronic fatigue syndrome as published in the *Annals of Internal Medicine* in 1994⁸:

Fatigue:

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

⁸ F. Keiji, et al., International Chronic Fatigue Syndrome Study Group, 15 December 1994, Vol. 121, Issue 12, at 953-959.

Symptoms:

The patient must have four or more of the following eight symptoms. Symptoms must persist for six months and the patient must not have predated fatigue.

1. Self-reported impairment of memory or concentration that affects occupational, social, educational, or personal activities.
2. Sore throat.
3. Tender cervical (neck area) or axillary (underarm area) nodes.
4. Myalgias (muscle pain).
5. Arthralgias (pain along the nerve of the joint). No redness or swelling.
6. Headache of a new type.
7. Unrefreshing sleep.
8. Post-exertional malaise, lasting more than one day.

II. Building the Case: Developing a Personal History

A. Pre-Accident History

As is apparent from the medical definitions of these conditions, the nature of chronic pain, fibromyalgia and chronic fatigue often involve non-specific, subjective symptoms. Therefore, the focus in these cases is generally the plaintiff's pre-accident history. When marshalling the evidence to support a client's case, plaintiff's counsel must make every effort to establish a contrast between the plaintiff's health, activities, social relationships and employment prior to the accident and the changes in these fundamental aspects of the plaintiff's life after the accident.

Accordingly, when evaluating the plaintiff's case during the initial client meeting and when building the case over the course of the litigation, **the plaintiff's pre-accident health and employment history are critical tools** in proving that the plaintiff's symptoms were caused or contributed to by the motor vehicle accident.

Ideally, a plaintiff will have no significant pre-accident medical history and there will have been no recurrent prior complaints to physicians of musculoskeletal pain, fatigue, headaches or any of the myriad of symptoms associated with these conditions. However, in reality, the majority of plaintiffs (and indeed the majority of individuals) have some pre-existing medical conditions, prior injuries or previous motor vehicle accidents or have recorded complaints of back pain, neck pain, headaches or other musculoskeletal pain prior to the motor vehicle accident. Plaintiff's counsel should pay careful attention to pre-accident clinical notes and records, as well as the plaintiff's decoded OHIP summary, which should be obtained and reviewed with the plaintiff prior to the Examinations for Discovery.

When acting for a plaintiff with an extensive pre-accident medical history, the plaintiff's pre-accident work and social history is critical. If, notwithstanding his pre-accident health conditions, the plaintiff was able to work full-time and to carry on an otherwise independent and productive life, there is a strong and, in our view, cogent argument to be made that the accident is the source of the plaintiff's disability.

In all cases, but particularly those in which a plaintiff has an extensive pre-accident medical history, counsel should contact the plaintiff's pre-accident employer as soon as possible. Obtaining information such as a *detailed* job description and information regarding work hours, particularly overtime hours, is essential. A plaintiff with a strong work history, a highly demanding pre-accident job, a history of continuous employment and no significant pre-accident work difficulties (i.e., performance concerns or conflicts with co-workers) will likely be significantly more credible when describing his or her inability to work at examinations for discovery, mediation or trial. Counsel must obtain all information regarding any pre-accident difficulties in the workplace, which defence counsel may use to infer a lack of motivation to return to work. Plaintiffs' counsel should obtain statements from direct supervisors or co-workers who are supportive of the plaintiff's pre-accident work ethic and job performance. These statements are particularly compelling as they are generally viewed as objective evidence, in contrast to statements made by the plaintiff or his family members.

In developing the plaintiff's personal history, it is also helpful to obtain information regarding pre-accident activities, including sports, travel, family activities, courses and hobbies. By doing so, counsel's objective is to highlight the plaintiff's image as a well-rounded individual with an active, full and satisfying pre-accident life. Often, the inability to perform previously pleasurable activities speaks powerfully to the credibility of the plaintiff, as motivation for *choosing* not to participate in these activities (unlike motivation for choosing not to work) is often more difficult to establish. Further, evidence regarding the plaintiff's inability to pursue leisure activities will strengthen the plaintiff's case for non-pecuniary general damages.

In developing this portrait of the plaintiff's pre-accident history, it is important to speak with friends and family members, whose statements are often eloquent testaments to the changes in the plaintiff's personality and behaviour since the accident. These individuals can also provide important demonstrative evidence such as photographs or videotapes which show the plaintiff as a previously high-functioning individual. While such evidence is essential at trial, at mediation, the presence of a well-spoken friend or family member who can describe the impact of the accident and the plaintiff's disabilities on the plaintiff's life can be a valuable tool in reinforcing the plaintiff's credibility.

B. Choosing the Right Expert

Plaintiffs with chronic pain, fibromyalgia and chronic fatigue have often seen a plethora of physicians in early attempts to obtain a diagnosis. While a plaintiff may eventually be fortunate enough to come under the care of a competent rheumatologist, physiatrist or other physician with experience in dealing with these conditions, quite often the plaintiff has simply been referred from one specialist to another, all of whom have concluded that they are unable to determine any "physical cause" of the plaintiff's symptoms. Eventually, a plaintiff may obtain a diagnosis of chronic pain, fibromyalgia or chronic fatigue and will generally be referred back to her family physician for treatment, often consisting solely of renewal of medications for pain control.

It is essential, particularly given the vast array of medical records and reports which have likely been

generated during medical investigations, to have the plaintiff examined for medico-legal purposes by a well-respected rheumatologist or physiatrist, preferably one with a clinical practice and one who has assisted both plaintiff's and defence counsel, who will be respected for his objectivity and his ability to render an independent and unbiased opinions. However, counsel must note that, while expert reports can be the cornerstone of the case, the report must be relevant to the issues.

A helpful medico-legal report should synthesize the various medical documentation and place the plaintiff's symptoms within the framework of either chronic pain, fibromyalgia or chronic fatigue. It is essential that the expert be provided with all pre- and post- accident medical records, going back at least two years prior to the accident, as well as all defence medical reports, as well as IME and DAC reports generated in the accident benefits case. Having read all of the medical evidence will provide your expert with a strong foundation on which to give her evidence at trial and will ensure that reports which do not support disability (usually defence medical, IME and DAC reports) are thoroughly reviewed and critiqued. It is also important that the expert's report be provided to the plaintiff's treating physician in order that any recommendations may be implemented and to avoid allegations of failure to mitigate by failing to consider treatment recommendations, particularly those made by the plaintiff's own experts.

Once all medical opinions have been obtained, counsel should arrange for the plaintiff to be assessed by a vocational expert to comment on her future employability. This expert should also be highly qualified and should be provided with all medical records and reports. Further, information from the employer such as a job description or other information regarding pre-accident job duties should be provided to the expert to permit him to comment on the plaintiff's pre-accident capabilities and the changes in the plaintiff's abilities following the accident. As in the case of the medical expert, the vocational expert must be advised of the legal test and the legal considerations to be applied; specifically, the expert must be instructed to comment on the plaintiff's ability to work *competitively*; that is, for a competitive number of hours per week at a competitive pace. The expert should comment, not only on the plaintiff's ability to perform job tasks on a discrete occasion but on her ability to perform such tasks on a consistent and regular basis. The issue of the ability to work

consistently and competitively is critical in chronic pain, fibromyalgia and chronic fatigue cases, where the plaintiff's physical tolerances are generally significantly compromised and where symptoms will often vary in intensity from day to day.

C. Preparing the Plaintiff for Examination for Discovery

Due to the subjective nature of the symptoms of chronic pain, fibromyalgia and chronic fatigue, the plaintiff's credibility is of primary importance. Counsel must therefore thoroughly prepare the plaintiff for Examinations for Discovery by encouraging him to speak as objectively as possible about his symptoms and level of disability. There is sometimes a tendency in such plaintiffs to exaggerate symptoms or to exhibit pain behaviours such as grimacing, sighing and frequent movements in an attempt to convince defence counsel of the pain they feel, which they believe will not be understood if narrated in an objective manner. Counsel should explain to the plaintiff that it will be up to her counsel and the medical experts to convince the trier of fact that she is disabled and that her role is to ensure that she presents as a straightforward, honest and reliable witness.

When dealing with a plaintiff with an extensive pre-accident medical history, it is of particular importance that he not categorically deny pre-accident symptoms when posed to him by defence counsel. Relevant notations in the plaintiff's pre-accident clinical notes and records and the OHIP summary should be brought to the plaintiff's attention prior to the Examination for Discovery in order that the plaintiff is provided the opportunity to reflect on his pre-accident history.

The plaintiff should also be advised to think carefully and never to be categorical when asked about his current ability to perform certain activities, as the nature of chronic pain, fibromyalgia and chronic fatigue is such that there will likely be days that the plaintiff has been able to perform such activities. Counsel should explain to the plaintiff that the focus will be on his ability to perform activities consistently and competitively and admitting to attempts to perform certain activities or to having "good days" will help, rather than harm, the case by portraying the plaintiff as honest and forthright.

D. Mediation: Tactics and Strategies

Mandatory mediation is an effective tool which can assist in early resolution of cases. However, it is not in the plaintiff's best interest to proceed to mediation until her case is ready to settle. Counsel must determine the appropriate time to mediate and must ensure that, prior to mediation, reports and records have been obtained from all treating physicians and expert reports (both medical and vocational) and accounting reports are prepared to increase the chances of settlement.

As stated above, the presence of a well-spoken friend or family member can be important objective evidence of the impact of the accident on the plaintiff. Further, supportive statements from employers and supervisors detailing a strong work ethic and excellent performance records are highly effective in lending credence to the plaintiff's current complaints. Family photographs, work performance evaluations, awards and strong academic records will present the plaintiff as a highly motivated, successful individual who has sustained significant losses as a result of the accident and as such, has no motivation for choosing to remain in a disabled role.

In addition to building the plaintiff's case, counsel must be prepared at mediation to address the defence case, which may include Functional Abilities Evaluations and surveillance. It is essential that counsel emphasize that plaintiffs suffering from chronic pain, fibromyalgia or chronic fatigue are not generally invalids; while they may be able to perform tasks over a limited period of time or on "good days", their ability to perform such tasks *competitively* is impaired. At best, surveillance can be characterized as a "snapshot" of a brief moment in the life of the plaintiff which does not in any way portray the pain the plaintiff may be experiencing. In chronic pain, fibromyalgia and chronic fatigue cases, pain and fatigue are subjective and cannot be captured by the camera.

III. Conclusions

Although the diagnoses of chronic pain, fibromyalgia and chronic fatigue present challenges to plaintiffs' lawyers because they cannot be objectively measured, counsel may still achieve fair and equitable results for clients suffering from one of these conditions. This is accomplished by building a case based on the plaintiff's entire medical, social and employment history, retaining well-respected experts who are provided with all information required to provide a fully informed opinion and ensuring that the plaintiff is fully prepared for the discovery process. While these cases are unique, challenging and often difficult, counsel who recognize and understand the nature of these conditions and are willing to bear the cost of obtaining costly expert reports will be able to obtain appropriate results for their clients.