

**The Canadian Institute's Conference  
Managing and Litigating Invisible Disabilities**

***The Latest on Chronic Fatigue Syndrome and Fibromyalgia: Best Practices for Successful  
Management and Litigation of Chronic Fatigue and Fibromyalgia Claims***

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**June 18, 2007**

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**I. Introduction<sup>1</sup>**

*The world is full of suffering, it is also full of overcoming it.*  
- Helen Keller

*The greatest evil is physical pain.*  
- St. Augustine

The subject of pain remains an elusive and controversial one, largely due to its subjective experience, which poses difficulty in determining its etiology and for diagnosis. Chronic nonmalignant pain is more difficult to understand, assess and treat than acute pain or cancer pain. A diagnosis of a pain-associated disorder includes components of both a physical and emotional or psychological nature. What is of primary importance, and often the most significant barrier, is the largely subjective experience of the disorder. This poses a difficulty for both the medical and legal professions when faced with the difficult task of determining the extent, duration and effect of chronic pain on the plaintiff. Despite these difficulties, however, there have been numerous developments, both in the medical and legal communities in understanding pain-associated disorders including chronic fatigue syndrome and fibromyalgia.

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<sup>1</sup>I wish to acknowledge the contribution of my associates, Melinda Baxter and Kate Cahill, to the preparation of this paper.

**(a) Chronic Fatigue Syndrome**

The following is the case definition for Chronic Fatigue Syndrome as published in the Annals of Internal Medicine in 1994:

***(i) Fatigue:***

Patients must have otherwise unexplained, relapsing fatigue that is new (not lifelong); 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.

***(ii) 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.

- (a) Self-reported impairment of memory or concentration that affects occupational, social, educational or personal activities.
- (b) Sore throat.
- (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.
- (h) Post-exertional malaise, lasting more than one day.

**(b) Fibromyalgia**

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

***(i) 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.

**(ii) *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 three months. The presence of a second clinical disorder does not exclude the diagnosis of fibromyalgia.”<sup>2</sup>

**II. Judicial Treatment of Pain-Associated Disorders**

Cases involving pain-associated disorders, whether in the context of a tort action, accident benefits claim or long-term disability action, present difficult and unique challenges, not only because of the complexities of this medical condition but also because of the need to explain how an injury that can be assessed subjectively, and without objective medical evidence, can render an individual vocationally and/or functionally disabled.

Over the last decade, judicial decisions have evolved to recognize pain-associated disorders as disabilities. However, there are still judges and adjudicators that look at these types of disorders with skepticism.

In *Swain v. Moore Estate*<sup>3</sup>, the plaintiff suffered from extensive soft tissue injuries, chronic pain, post-traumatic stress, fibromyalgia, anxiety and depression as a result of a motor vehicle

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<sup>2</sup> F. Wolfe, et al., “ The American College of Rheumatology 1990 Criteria for the Classification of Fibromyalgia: Report of the Multicenter Criteria Committee.” (1990 Feb) 33(2) *Arthritis Rheum* 160-72.

<sup>3</sup> [2000] O.J. No. 1628 (S.C.J.).

accident. After the accident, the plaintiff, despite numerous attempts was unable to continue working in the family business and had difficulty coping with her activities of daily living. Ultimately, Justice Patterson concluded that her injuries were catastrophic and that she was totally disabled. The plaintiff's damages were assessed at \$100,000.00.

In *Jones v. Prudential Group Assurance Co. of England (Canada)*<sup>4</sup>, Justice Cusinato commented upon the expert evidence presented and states that “Fibromyalgia is classified as a syndrome, because science has not yet perfected an objective diagnosis for the disease.”

In the FSCO decision, *Quattrocchi v. State Farm*<sup>5</sup>, Arbitrator Makepeace reviewed and highlighted some general principles that have emerged in chronic pain cases. She notes the following:

- (a) Where there is no objective evidence of impairment, or the objective evidence does not explain the degree of pain reported by the insured person, credibility is paramount. In considering the insured person's credibility all circumstances must be considered, including the consistency of their complaints and apparent functional level;
- (b) In order to prove entitlement to weekly benefits, an insured must show that his/her disability resulted from the accident. The accident need not be the only cause, but must be a significant or material contributing factor. Therefore, even if the insured person's own attitudes or inaction has delayed his/her recovery, he/she may still be entitled to benefits, if the accident remains the more significant factor;
- (c) It is not sufficient to dismiss a chronic pain case on the basis that returning to work would not harm the applicant.

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<sup>4</sup> [1999] O.J. No. 2862 at para. 72 (S.C.J.).

<sup>5</sup> (OIC A-006854), September 29, 1997.

More recently, in the decision of *Nova Scotia (Worker's Compensation Board) v. Martin*<sup>6</sup>, the Supreme Court of Canada recognized chronic pain as a legitimate condition and ruled that the exclusion of a person disabled by chronic pain from the usual worker's compensation scheme violated section 15(1) of the *Canadian Charter of Rights and Freedoms*.

In this case the Nova Scotia Worker's Compensation Board had denied full benefits to a worker diagnosed with chronic pain and only permitted limited access to benefits. Justice Gonthier wrote:

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.<sup>7</sup>

This decision represents clear recognition of those suffering from chronic pain and the existence of this disorder.

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<sup>6</sup> [2003] S.C.J. No. 54 (S.C.C.).

<sup>7</sup> *Ibid.*

Subsequent decisions have acknowledged those suffering with pain-associated disorders and recognized their suffering in significant general damage awards. In *Peloso v. 778561 Ontario Inc.*<sup>8</sup>, the plaintiff suffered from soft tissue injuries, chronic pain, headaches and pain in her back as a result of a motor vehicle accident. After the accident, the plaintiff, attempted to implement work plans without success and had difficulty coping with her activities of daily living. Ultimately, Justice Aitken concluded that the plaintiff suffered from chronic pain and was impaired in many aspects of her life as a result of the motor vehicle accident. The plaintiff's general damages were assessed at \$80,000.00 before deduction of 30% due to the plaintiff's pre-existing condition and a further 30% for inadequate mitigation, leaving a net general damage award of \$24,200.00.

In *Hartwick v. Simser*<sup>9</sup>, a mother, father and daughter were involved in a motor vehicle accident, wherein the family's vehicle was rear-ended at high speed. Liability was admitted. The mother suffered permanent and disabling chronic pain in her spine as well as post-traumatic stress disorder and anxiety disorder. She did not return to her pre-accident occupation but returned to full-time sedentary work. The daughter suffered permanent and disabling chronic pain in her spine as well as chronic anxiety and depression that prevented her from pursuing post-secondary education. Both the mother and daughter's general damages were assessed at \$85,000.00.

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<sup>8</sup> [2005] O.J. No. 2489 (S.C.J.).

<sup>9</sup> [2004] O.J. No. 4315 (S.C.J.).



### **III. Fidler v. Sun Life - A Fresh Approach**

The Supreme Court of Canada's decision in *Fidler v. Sun Life*<sup>10</sup> is an important decision for those suffering from pain-associated disorders. The plaintiff was insured under a group policy that included long-term disability benefits. At age 36, she became ill and was diagnosed with chronic fatigue syndrome and fibromyalgia and began to receive long-term disability benefits. The plaintiff's benefits were terminated and she initiated a lawsuit. Claims were also made for both aggravated and punitive damages.

One week before the trial was scheduled to start, the defendant offered to reinstate benefits and pay all arrears due and owing with interest. The issue remaining was the plaintiff's entitlement to aggravated and punitive damages as a result of the insurer's breach of contract. The plaintiff was awarded \$20,000.00 in aggravated damages for mental distress at trial. On appeal, the Court of Appeal unanimously upheld this award and an additional \$100,000.00 was awarded in punitive damages. On further appeal to the Supreme Court of Canada, upheld the plaintiff's claim for aggravated damages in the sum of \$20,000.00 but dismissed the plaintiff's claims for punitive damages.

In this case, the Supreme Court of Canada confirmed that the objective of a disability insurance contract is to secure a psychological benefit that brings the prospect of mental distress upon breach is within the reasonable contemplation of the parties.

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<sup>10</sup> [2006] S.C.J. No. 30.

The Court stated that a disability insurance contract:

...was not a mere commercial contract. It is rather a contract for benefits that are both tangible, such as payments, and **intangible, such as knowledge of income security in the event of disability. If disability occurs and the insurer does not pay when it ought to have done so in accordance with the terms of the policy, the insurer has breached the reasonable expectation of security.**<sup>11</sup> (emphasis added)

The Court goes on to state that:

People enter into disability insurance contracts to protect themselves from this very financial and emotional stress and insecurity. An unwarranted delay in receiving this protection can be extremely stressful.<sup>12</sup>

The Court ultimately concluded that merely paying arrears and interest did not compensate for the years the plaintiff was without benefits and accordingly, as previously stated, allowed the plaintiff's claim for aggravated damages.

It is also important to note, on review of this decision, that both the Court of Appeal and the Supreme Court of Canada, have again acknowledged and have given credence to pain-associated disorders. This decision, as well as the Supreme Court of Canada's decision in *Martin*, as referenced above, should give chronic fatigue and fibromyalgia survivors great comfort in knowing that the highest Court in Canada recognizes the legitimacy of their suffering.

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<sup>11</sup> *Ibid.* para 56.

<sup>12</sup> *Ibid.* para 58.

**IV. The Successful Management and Litigation of Chronic Fatigue and Fibromyalgia Claims**

**(a) The Plaintiff's Pre-Accident History**

A thorough and complete analysis of the plaintiff's pre-accident history is vital in litigating and developing a case involving pain-associated disorders. Every effort must be made to establish a contrast between the plaintiff's health, activities, employment and social relationships prior to the accident and the significant changes that have occurred since the accident.

While a client with no significant pre-accident medical history is ideal, this is rarely the case. It is therefore important for plaintiff's counsel to obtain and review the client's pre-accident clinical notes and records, the client's decoded OHIP summary and any compensation claims prior to Examinations for Discovery. A plaintiff with a history of numerous medical complaints, will have a more difficult time proving causation and establishing the validity of his/her claims. In cases where the plaintiff's family physician is not supportive, the plaintiff may be well advised to choose an alternative physician who is more compassionate and understanding of his/her condition. However, if, notwithstanding his/her pre-accident medical history the plaintiff was able to work in a full-time capacity and to carry on an otherwise independent and productive lifestyle, the argument can be made that the accident is the source of the plaintiff's disability and not his/her pre-existing conditions.

This highlights the importance of the plaintiff's pre-accident work history. A plaintiff with a strong work history, a highly demanding pre-accident occupation, a history of continuous

employment and no significant pre-accident work difficulties will be more credible when describing his/her inability to work. Therefore, in all cases it is imperative that plaintiff's counsel contact the client's pre-accident employer to obtain the client's employee file, as well as a detailed job description and information regarding regular work hours, including any overtime hours. It is also strongly advisable that plaintiff's counsel obtain statements from supervisors or co-workers, supporting the client's pre-accident work ethic and job performance.

The value of lay and character witnesses, namely the plaintiff's family and friends, cannot be overemphasized, and are vital to the proper handling of a chronic pain case. Often family and friends can provide evidence that clearly demonstrates the changes in the personality and behaviour of the plaintiff, demonstrated in photographs or videotapes that show the plaintiff as a previously high-functioning individual, reinforcing the plaintiff's credibility. Further, in discussions with both the plaintiff, and family and friends, a history of pre-accident social and athletic activities emerges. This evidence will help to demonstrate the plaintiff as a well-rounded individual who can no longer perform previously pleasurable activities, in addition to his/her inability to return to employment.

**(b) Qualifying a Chronic Fatigue Syndrome or Fibromyalgia Expert**

It is important to arrange medical/legal assessments with experts who are well-respected, experienced and knowledgeable about chronic fatigue syndrome and fibromyalgia. It is also important to ensure that the experts will be qualified by the courts to provide expert testimony. The requirements that must be met before a party can lead expert evidence at trial, were established by

a unanimous decision of the Supreme Court of Canada in *R. v. Mohan*.<sup>13</sup> The requirements are as follows:

- (a) That the expert's evidence is relevant;
- (b) That the expert's evidence is necessary to assist the trier of fact;
- (c) That there are no exclusionary rules that would prohibit the expert from testifying; and
- (d) That the expert is properly qualified.<sup>14</sup>

As with other rules of evidence, all of these factors are to be balanced considering the probative value of the proposed evidence and its potential prejudicial effect. The admissibility of expert evidence must be proven in each case and is not a matter of precedent. The Ontario Court of Appeal has been clear to state that simply because expert evidence has been admitted in one case does not mean it will be admissible in another.<sup>15</sup>

**(i) *Relevance***

The determination of whether an expert's evidence is relevant is a question of law that is decided by the trial judge and is the basic threshold requirement for the admissibility of evidence. A trial judge determines whether the evidence is relevant by looking at whether there is a logical relationship between the proposed evidence and the facts in issue in the trial.

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<sup>13</sup> *R. v. Mohan*, [1994] S.C.J. No. 36.

<sup>14</sup> *Ibid.* at para. 17.

<sup>15</sup> *R. v. A. K.*, [1999] O.J. No. 3280 at para. 76 (C.A.).

As stated by Charron J.A., in *R. v. A. K.*,<sup>16</sup> the trial judge should ask the following questions:

- (a) Does the proposed expert opinion evidence related to a fact in issue in the trial?
- (b) Is it so related to a fact in issue that it tends to provide it?

If both of these questions are answered affirmatively, then the logical relevance of the evidence has been established.<sup>17</sup>

**(ii) Necessity**

The expert evidence must be necessary to assist the trier of fact in an area that he or she would not otherwise be able to understand, “the purpose of the expert is to assist the trier of fact by providing special knowledge that the ordinary person would not know. Its purpose is not to substitute the expert for the trier of fact.”<sup>18</sup> Therefore, if an expert is able to provide the judge and jury with opinions and inferences which are outside of the range of everyday experience and knowledge of the judge and jury, the evidence of the expert is necessary.<sup>19</sup> The Supreme Court of Canada elaborated on the necessity requirement in *R. v. D.(D.)*, stating that experts should only be used in situations where lay persons are likely to reach wrong conclusions without the assistance of an expert or where information would be lost unless it was explained by an expert.<sup>20</sup>

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.* at para. 77.

<sup>18</sup> *R. v. J. (J-L)*, [2000] 2 S.C.R. 600 at 56.

<sup>19</sup> *R. v. Abbey*, [1982] S.C.J. No. 59.

<sup>20</sup> [2000] 2 S.C.R. 275 at para. 57, citing *D. Paciocco, Expert Evidence: Where Are We Now? Where are We Going* (1998) at pgs. 16-17.

**(iii) Exclusionary Rules**

Even if expert evidence is relevant and necessary, it may not be admitted if the evidence would otherwise be excluded by the operation of a rule of evidence.<sup>21</sup> For example, an expert will not be permitted to testify if his or her evidence violates the rule against oath helping. This issue was discussed by McLachlin, J. in *R. v. Marquard*, wherein she stated:

It is a fundamental axiom of our trial process that the ultimate conclusion as to the credibility or truthfulness of a particular witness is for the trier of fact, and is not the proper subject of expert opinion.<sup>22</sup>

**(iv) Properly Qualified**

It must be established that the proposed expert has acquired special or peculiar knowledge through study or experience.<sup>23</sup> For this requirement, the focus of the question is not how the expert acquired their knowledge and expertise but whether in fact the expertise has been acquired. Therefore, relevant considerations are the witness' education, private study, work experience, or other personal involvement with the subject matter at issue.<sup>24</sup>

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<sup>21</sup> *Mohan*, *supra* note 12 at para. 26.

<sup>22</sup> [1993] 4 S.C.R. 223 at para. 49.

<sup>23</sup> *Mohan*, *supra* note 12, at para 27.

<sup>24</sup> *Dulong v. Merrill Lynch Canada Inc.*, [2006] O.J. No. 1146 at para. 20 (S.C.J.).

**(v) *Laudon v. Roberts***

The issue of qualifying an expert in chronic pain treatment was recently addressed in the case *Laudon v. Roberts*.<sup>25</sup> The plaintiff in *Laudon* sought to qualify Dr. David A. Murphy as an expert physician/psychotherapist with special expertise in chronic pain treatment and chronic pain medication. Dr. Murphy testified that he had 14 years of clinical experience providing psychotherapy services for patients with chronic pain.

The defendant argued that Dr. Murphy should not be qualified as an expert because his practice consisted of clinical work rather than the publication of scientific articles and that he did not have a specific designation or qualification with the College of Physicians and Surgeons.<sup>26</sup> In addition, the defendant argued that Dr. Murphy's evidence was not necessary because his evidence would overlap with the evidence that was to be provided by a physician who had been qualified as an expert in family medicine and palliative care.<sup>27</sup> Finally, the defendant argued that if Dr. Murphy was permitted to testify it would violate the rule against oath helping, in that his evidence would corroborate the evidence of the plaintiff's other expert, who had been qualified as an expert in family medicine and palliative care. The basis of defendant's argument was that Dr. Murphy's reports contained opinions that were similar to the family doctor opinions.

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<sup>25</sup> [2007] O.J. No. 1702 (S.C.J.).

<sup>26</sup> *Ibid.* at paras. 15, 18 and 19.

<sup>27</sup> *Ibid.* at para. 30.



Ultimately, Justice DiTomaso dismissed the defendant's submissions and qualified Dr. Murphy as an expert. In doing so, Justice DiTomaso confirmed that an expert witness does not have to demonstrate that he or she has gained expertise through advanced education or through the delivery of publications or lectures. Expert witnesses can obtain the necessary expertise through training and experience.<sup>28</sup> With respect to the issue of necessity, Justice DiTomaso found that Dr. Murphy's evidence was necessary because his evidence would provide a unique perspective of a physician who had 14 years of clinical experience in dealing with chronic pain treatment.<sup>29</sup>

Justice Di Tomaso also dismissed the defendant's argument that Dr. Murphy's evidence would constitute oath helping, stating that, "evidence of a witness violates the rule against oath helping only when the material point it primarily addresses is the credibility or reliability of another witness and where it affirms, directly or indirectly, that witness' belief in what the other witness is saying." In this case, Justice Di Tomaso found that although there were areas where the doctors confirmed each other's opinion, Dr. Murphy prepared independent medical reports with a view to providing his own independent opinions and therefore did not violate the rule against oath helping.

Notably, Justice DiTomaso also concluded that if, at trial, there appeared to be duplication of evidence, the issue could be dealt with at that time, with the result that specific portions of the

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<sup>28</sup> *Ibid.* at para. 24.

<sup>29</sup> *Ibid.* at para. 32.

expert's testimony could be curtailed.<sup>30</sup> This point is important for all plaintiffs' lawyers litigating, chronic fatigue syndrome and fibromyalgia cases. Many people who suffer from these conditions have a vast constellation of symptoms and plaintiffs' counsel will need to qualify medical experts in different areas of expertise. Plaintiff's counsel faced with qualification motions can rely on the *Laudon* case for the proposition that to the extent that overlap in the various experts' testimony is anticipated, this issue should be dealt with by the trial judge when the expert's testimony is being provided rather than at the qualification stage.

*(c) Providing Information to the Expert*

If all relevant information is not provided to the expert, his/her opinion may be weakened or undermined. Provision of the following information will help to ensure that a complete and detailed expert report is received. It is essential that the expert be provided with all **pre- and post-accident medical records**, going back years prior to the accident or termination of benefits, as well as any defence medical reports, DACs and IMEs. The expert should also be provided with copies of any prior compensations claims, a description of any previous traumatic event and any relevant surveillance evidence. Failure to provide the expert with this information may lead to his/her credibility being attacked and little weight being given to his/her opinion.

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<sup>30</sup>*Ibid.* at para. 36.

Finally, once all medical opinions have been obtained, counsel should arrange for the plaintiff to be assessed by a vocational expert to comment on future employability. This expert should also be highly qualified and experienced, and should be provided with all aforementioned documentation, as well as the plaintiff's employment file, detailed job description and any other information regarding the plaintiff's pre-accident job duties. As in the case of the medical expert, the vocational expert must be advised of the legal test and considerations to be applied. They must be asked to comment on the plaintiff's ability to work competitively and his/her ability to perform his/her job duties in a consistent and regular basis. This is especially important in chronic pain cases, as the plaintiff's ability to perform tasks due to the fluctuation of physical tolerances will vary from day to day.

***(d) Preparing and Briefing your Client for Discovery***

A thorough and complete briefing of the plaintiff for their Examination for Discovery is fundamental. The Examination for Discovery process is the opportunity for the other side to evaluate your client, to determine how he/she will stand up on cross-examination, to make assessments and judgments about his/her credibility and to advise the insurance company about the strengths and weaknesses of your case. Even if the medical evidence strongly supports the plaintiff's theory of the case, if he/she comes across as unprepared, deceitful, evasive or equivocal, the case could be irreparably damaged. Witness preparation is therefore critical to achieving a successful outcome in the litigation.

There is a tendency by some to exaggerate symptoms or to exhibit pain behaviours such as grimacing, sighing or frequent movements in an attempt to convince others what they are feeling. It should be explained to the plaintiff that it is up to counsel to persuade the trier of fact that the plaintiff is disabled and that the plaintiff's obligation is to be a straightforward, honest and truthful witness. It should also be highlighted to the plaintiff in preparation for their discovery that they should not categorically deny pre-accident symptoms when questioned about them. In preparation, counsel should review all of the plaintiff's pre-history to ensure that it is anything that may have been forgotten is reviewed. The plaintiff should also be advised to avoid categorical responses to any question.

The plaintiff should also be reminded about the high probability that surveillance has been undertaken at the briefing for their Examination for Discovery. This again highlights the importance of not giving categorical answers to questions asked. Often, questions will be asked by defence counsel specifically relating to evidence that is outlined in surveillance reports or depicted in surveillance videotapes, CDs, DVDs or photographs.

***(e) Surveillance***

At the defendant's discovery it is important to obtain details of any surveillance and/or investigation that has been undertaken on the plaintiff.

If asked, defence counsel is obliged to provide the following:

- (a) The particulars of the person conducting the surveillance and/or investigation;
- (b) The time(s), date(s) and place(s) where the surveillance and/or investigation was conducted; and
- (c) A summary of the surveillance and/or investigation, including a description of the plaintiff's activities and the observations made by the investigator.

If defence counsel refuses to provide you with this information, bring a motion to compel disclosure of this evidence. Defence counsel is not required, on discovery, to produce the actual report, videotapes and/or photographs taken during surveillance, unless defence counsel intends to rely on the surveillance as substantive evidence at trial.

When faced with damaging surveillance evidence which defence counsel has served and intends to rely on at trial, it is extremely important to provide the surveillance to your client and ask him or her to place the surveillance in context and, if necessary, to account for any inaccuracies between medical reports, the evidence that was provided at the plaintiff's Examination for Discovery and the surveillance evidence.

Plaintiff's counsel is in a difficult situation if the defendant does not intend to rely on surveillance as substantive evidence, but intends to use the evidence to impeach the plaintiff at trial.

Rule 30.09 of the *Rules of Civil Procedure*<sup>31</sup> provides as follows:

Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection at least 90 days before the commencement of the trial, the party may not use the document at the trial, **except to impeach the testimony of a witness or with leave of the trial judge.**

In this situation, the defendant has the benefit of not having to produce the evidence prior to trial and the benefit of using the evidence at trial without plaintiff's counsel being permitted to inspect it prior to trial.<sup>32</sup> However, before the defendant is permitted to introduce the evidence, the defendant bears the onus of establishing that the evidence is admissible to impeach the plaintiff's credibility on a *voir dire*. If the evidence is in the form of a video it should not be shown to the jury, nor should any equipment be brought into the courtroom until the admissibility of the evidence has been established by the defendant.<sup>33</sup>

The test for the admission of evidence for impeachment purposes was set out in *Landolfi v.*

*Fargione* by Cronk, J.A.:

Under this test, where evidence is tendered for impeachment purposes (as in this case) the admission of the evidence requires a showing of relevance to the credibility of a witness on a material matter and a further demonstration that the potential value of the proffered evidence to assist in assessing credibility outweighs the potential prejudicial effect of the evidence.<sup>34</sup>

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<sup>31</sup> R.R.O. 1990, Reg. 194, as amended.

<sup>32</sup> *Machado v. Berlet*, [1986] O.J. No. 1195 (H.C.J.) [hereinafter "*Machado*"].

<sup>33</sup> *Youssef v. Cross*, [1991] O.J. No. 662 (S.C.J.).

<sup>34</sup> [2006] O.J. No. 1226 at para. 49 (C.A.).

Credibility in the context of Rule 30.09 has been defined as referring to the truthfulness, believability, or sincerity of the testifying witness. Therefore, if defence counsel wishes to impeach a plaintiff, he or she must establish that the surveillance tape is capable of contradicting, challenging or impugning the testimony of the plaintiff.<sup>35</sup>

In addition to establishing that the surveillance evidence is admissible to impeach the plaintiff, if defence counsel wishes to use surveillance evidence for impeachment purposes, he or she must comply with the rule in *Browne v. Dunn*,<sup>36</sup> which rule was adopted by the Supreme Court of Canada in *Peters v. Perras*.<sup>37</sup> The rule in *Browne v. Dunn* places an obligation on an opposing party who wishes to use evidence to impeach a witness to expressly put to the witness the substance of the evidence, to provide the witness with the opportunity to explain the evidence. As stated in *Machado v. Berlet*, “a witness’ testimony cannot later be impeached by contradictory evidence unless the contradictory evidence has been previously put to the witness in an express and particularized manner.”<sup>38</sup>

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<sup>35</sup> *Lis v. Lombard Insurance Co.*, [2006] O.J. No. 2578 (S.C.J.).

<sup>36</sup> [1864] 6 R. 67 (H.L.).

<sup>37</sup> [1909] 42 S.C.R. 244.

<sup>38</sup> *Machado*, *supra* note 32.

*(f) Mediation*

Mediation is an effective tool which can assist in the early resolution of cases. However, counsel must determine the appropriate time to mediate and must ensure that all necessary reports and records have been obtained prior to mediation to increase the chances of settlement. Evidence required at mediation includes: medical reports (both those of treating practitioners and medical/legal reports); vocational reports; accounting reports; supportive statements from employers and/or friends and family, photographs, videotapes and performance evaluations.

In addition to building a strong and supportive case for the plaintiff, plaintiff's counsel must also be prepared at mediation to address the defendant's case. Defence expert reports must have been reviewed and commented upon by the plaintiff's experts and surveillance must have been reviewed and addressed.

In handling mediations for cases involving pain-associated disorders, it is important to note that plaintiff's counsel should emphasize that individuals with these disorders are not invalids, and while they may be able to perform some tasks, some of the time, the ability to perform those tasks on a regular and competitive basis, is significantly and permanently impaired.



**V. Conclusion**

Over the past several years, there have been numerous developments, both in medicine and law, in both treating and recognizing pain-associated disorders including chronic fatigue syndrome, and fibromyalgia, and their effects on an individual's ability to function.

By preparing a thoroughly researched and developed case, plaintiff's counsel can achieve fair and just results for clients suffering from pain-associated disorders. This is accomplished by building a case based on the plaintiff's entire medical, social and employment history, retaining well-respected and highly qualified experts who are provided with all the relevant information required to prepare a fully informed report and ensuring that the plaintiff is fully prepared for the discovery and trial process. Only through preparation can the difficulties and challenges inherent in this litigation be successfully met.