**THE CANADIAN INSTITUTE**

**Litigating Personal Injury Damages**

# DAMAGES FOR EMOTIONAL DISTRESS

**by**

**RICHARD. M. BOGOROCH**
**Bogoroch & Associates**

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# DAMAGES FOR EMOTIONAL DISTRESS[1]

## I. Introduction:

The claims for emotional distress are among the most challenging and difficult for the litigator. Emotional distress refers to mental or psychological trauma and can be occasioned as a result of tortious or non-tortious conduct. This paper, however, will focus on claims for emotional distress occasioned by the negligence of others.

Personal injury claims in which the injuries are objective are relatively easy to resolve. The injury is objective, it is visible, and it is easily understood by a jury. Emotional distress claims on the other hand are quite different. They are hard to understand and even more difficult to explain. Psychological and emotional trauma from an accident results in depression, anxiety, stress and great sadness and causes or contributes to the development of psychiatric or psychological disorder. In these circumstances, plaintiff's counsel faces the daunting task of persuading a jury that his/her client merits compensation and that these injuries are real, significant and permanent.

The aim of this paper is to discuss claims for emotional distress and to articulate strategies and tactics for plaintiff's counsel to achieve justice for their clients.

## II. Claims For Emotional Distress: Origins

Courts have awarded damages for emotional distress as far back as 1897 in the famous case of *Wilkinson v Downton*[2] which concerned a practical joke gone awry. In Wilkinson the Defendant,

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[1] I wish to thank my associates Mr. Cass Litman and Ms. Tripta Chandler for their assistance in the preparation of this paper.

[2] [1897] 2 Q.B. 57

as a joke, told the plaintiff that her husband had been severely injured in an accident causing her shock and resulting in a period of incapacity.[3]

In *Wilkinson*, Mr. Justice Wright enunciated the principle "that if a person wilfully does an act, calculated to cause harm to another, and thereby infringes his legal right to personal safety, and in consequence causes physical harm including mental distress, a cause of action arises in the evidence of lawful justification for the act."[4] What is noteworthy about *Wilkinson* is that this statement of principle was made well before the Court created the tort of negligent infliction of mental distress.[5]

With the rapid industrialization of Great Britain and North America in the late 19th and early 20th centuries, the development of psychoanalysis and psychiatry and the experience of two world wars, medical science began examining critically the consequence of emotional distress and psychological injury as a result of a traumatic event. War experiences, in particular, have provided fertile ground for the study of emotional disturbances and disorders. Emotional disorders resulting from war, have been described as "battle or flight fatigue, shell shock, neurasthenia, war neurosis, combat exhaustion and post-traumatic stress disorder"[6].

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[3] Fleming, Law of Torts, 9th Edition, p. 38; Linden, Canadian Tort Law, 7th ed., p. 54.

[4] Fleming, p. 38.

[5] Ibid.

[6] Hoffman, B., Rochon, J., Terry J. & Thorsen A. "The Emotional Consequences of Personal Injury" 2nd ed., Butterworth 2001, at p.13 (This textbook is quoted frequently in this paper and for the sake of convenience it will be referred to as Hoffman, et al. "The Emotional Consequences of Personal Injury."

## III. History of Damages for Emotional Distress

The practice of granting damages to individuals for mental distress has developed very slowly. Historically, the primary reason for this slow recognition was a fear of unleashing a 'flood' of litigation. When determining liability for death or property damage emerging directly from an incident, the plaintiff is easily identifiable and the damages readily quantifiable. However, when liability for psychological injury becomes available, the pool of potential plaintiffs can expand to include the individual bystanders to the incident, family members who suffer emotional damage upon seeing the incident, and even friends of the victim who suffer trauma upon hearing of the event. Opening the legal system to these types of claims threatened to overwhelm defendants with an abundance of claims and overwhelm the insurance industry with increased premiums to deal with increased liability.

Other concerns regarding damages based on psychological injury emerged. Would the allowance of damages for trauma that is neither overtly visible nor plainly assessable encourage fraudulent claims? Is the damage that makes up these claims attributable instead to the individual, internal emotional composition of the claimants?

These concerns have been heard and addressed by the legal system. It is not appropriate to deny protection to individuals because of a fear of the "floodgates" opening. Damage suffered unfairly must be compensated, even at the expense of an increase in lawsuits.[7] In addition, the judicial system has proven time and again the capacity to differentiate between deserving cases and groundless actions. The appropriate response, when concerned about fraudulent lawsuits, is a vigorous pursuit of the truth, not in the abdication of judicial responsibility.[8]

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[7] *Prosser and Keeton on the Law of Torts,* 5th ed. (1984), p. 360.

[8] Linden, Canadian Tort Law, 7th ed., at pp. 389.

Eventually, the courts began awarding damages for emotional distress, but only where there was an accompanying physical injury. The court reasoned that, where a person suffers physical injury, however slight, damages could be claimed for the fright occasioned thereby.[9] Subsequently, the physical injury requirement was discarded when it was decided that damages resulting from nervous shock generated by fright may be recoverable in a negligence action, even where no physical injury has occurred.[10]

## IV. The Components of a Claim for Emotional Distress

A claim for damages for emotional distress can come in a variety of forms. One may be claiming, in the words of Lord Denning, damages for "nervous shock".[11] Other commonly used terms are damages for emotional upset, intentional infliction of mental distress, negligent infliction of emotional distress or negligent infliction of psychiatric damage. The common element to these claims is that, under Canadian law, the complainant must establish two components: first, the psychological injury suffered by the plaintiff was a foreseeable consequence of the defendant's negligent conduct, and second, that the psychological injury was so serious that it resulted in a recognizable psychiatric illness.[12]

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[9] *Toronto Railway Co. V. Toms* (1911), 44 S.C.R. 268 at 274.

[10] See *Dulieu v. White & Sons*, [1901] 2 K.B. 669.

[11] See Hinz v. Berry [1970] 2 Q.B. 40, where Lord Denning explained that damages are recoverable for "nervous shock, or, to put it in medical terms, for any recognizable psychiatric illness caused by the breach of duty by the defendant."

[12] See Linden, Canadian Tort Law, supra 1, at pp. 389-92.

## A. What is meant by "foreseeable"?

Foreseeability has generally been interpreted as what a "reasonable person" would foresee. In the context of an accident, foreseeable emotional distress means psychiatric injury as a reasonably foreseeable consequence of exposure to the trauma of the accident and its aftermath.[13]

In general, the law expects its citizens to be reasonably robust and hesitates to impose liability for the exceptional frailty of certain individuals. Before being held to be in breach of a duty to an accident bystander, a defendant must have exposed him to a situation where it was reasonably foreseeable that a person of reasonable robustness and fortitude would be likely to suffer psychiatric injury.[14]

The Ontario Court of Appeal addressed this issue in *Vanek* v. *Great Atlantic & Pacific Co. Of Canada Limited* ("*Vanek*").[15] In this case, an 11-year-old girl consumed a small amount of foul tasting grape nectar at school. Her parents were called, attended the school and took her to the hospital. After an examination revealed no alarming symptoms, she was discharged and returned to school the next day. Her parents, on the other hand, became extremely concerned about their daughter's health. They were prescribed tranquillizers and the father was hospitalized due to heart problems. The parents sued the owner of the store where the drink was purchased and the distributor of the juice. The Ontario Court of Appeal found that the damage suffered by the parents could not reasonably have been foreseen by the defendants. In becoming obsessed with their daughter's

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[13] McLoughlin v. Arbor Memorial Services Inc. [2004] O.J. No. 5003.

[14] Enunciated by the House of Lords in *White v. Chief Constable of South Yorkshire*, [1998] 3 W.L.R. 1509 (H.L.), and approved by MacPhearson J.A. in *Vanek v. Great Atlantic and Pacific Company of Canada Limited* (1999) 48 O.R. (3d) 228 (O.C.A.).

[15] Ibid.

ingestion of contaminated juice, the parents were not acting like the average concerned parent, and they lacked the reasonable fortitude and robustness that law expects of all its citizens.

Within the test of foreseeability, courts have recognized the importance of proximity. Liability will only attach where a duty of care can be established. In general, judges have an easier time dealing with cases where the conduct of the defendant directly affects the plaintiff. Reasonable foreseeability is easily established where there is a close and direct relationship between the parties. However, many cases of nervous shock are not pursued by the primary victim, but by the secondary victim. Secondary victims either see or hear of a tragic event, and suffer emotional damage therefrom.

Courts have chose to deal with the issue of proximity by differentiating between the duty required for a primary versus a secondary victim. To collect damages, a primary victim needs to show only that physical injury, not psychiatric damage, is foreseeable by the conduct of the defendant. In contrast, a secondary victim must establish that psychiatric damage was foreseeable.[16]

**B. What is meant by psychiatric illness?**

As mentioned above, a successful claim for mental distress requires that the psychiatric damage was so serious that it resulted in a recognizable psychiatric illness. The determination of whether one has a "recognizable psychiatric illness" is most effectively accomplished by the use of experts. It has become clear that psychiatric illnesses such as schizophrenia or morbid depression fall into the category of recognizable psychiatric illness. Moreover, courts have been reluctant to award damages for mental distress that falls short of this classification. Mere emotional upsets (i.e.,

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[16] See Linden, Canadian Tort Law, Supra 1, at p. 388.

stress and anxiety) that fall short of a psychiatric illness, no matter how distressing, are not sufficient to constitute a cause of action.[17]

Even where the plaintiff has suffered a psychiatric illness triggered by the defendant's inability to fulfil a duty of care, the courts will sometimes deny liability if the individual's psychiatric damage is a result of their own particular "hypersensitivity".[18] The courts like to use, as a baseline, the ordinary person of reasonable mental fortitude. Where this fictional individual would not normally suffer psychiatric damage, a uniquely vulnerable person who does suffer damage would be barred from recovery.

## V. Recent Developments

Although the general tendency of the court has been to provide damages only where recognizable psychiatric illness has been proven, there have been decisions that reject this stringent interpretation of damages for emotional distress.

In *Easton v. Ramadonovic Estate* ("Easton"), the court rejected Lord Denning's limitation of compensation to cases involving recognizable psychiatric illness.[19] This case involved two sisters who saw their parents killed from the back seat of a motor vehicle accident. Although a recognizable psychiatric illness could not be established in the younger sister, the court still awarded damages for her emotional injury. In doing do, the court likened her "scar of the mind" to "a scar of the flesh." The court held that, since a scar of the flesh has been held to be compensable although it causes no

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[17] See Linden, Canadian Tort Law, supra 1, at p. 390.

[18] See Vanek v. Great Atlantic and Pacific Co. of Canada Ltd. (1999), 48 O.R. (3d) 228 (C.A.).

[19] [1988] B.C.J. No. 824.

pecuniary losses, emotional distress that has resulted in a "scar of the mind" should be likewise indemnified.

*Easton* has been upheld in Canada, as have subsequent, similar cases. For example, in *Mason v. Westside, Cemetaries Ltd.*[20] the court decided that, although the plaintiff did not suffer a complete mental breakdown or psychiatric illness, his emotional pain was 'real, foreseeable and, compensable.' Similarly in *Vanek*,[21] MacPherson J.A., stated in *obiter* that it may be appropriate to allow for recovery for psychiatric damage short of a recognizable psychiatric illness.

## VI. Emotional Distress and Motor Vehicle Accidents

Plaintiffs who suffer from emotional distress are often met with skeptism and disbelief as to the legitimacy of their symptoms, particularly when the property damage occasioned by the accident is relatively minor. In an article entitled "Traumatic Neurosis and Other Injuries", Dr. H. Modlin wrote that:

> "Our sociological system long ago discarded the literal quote, "an eye for an eye" philosophy, and replaced it with money, the universal meeting of exchange for redress for tort grievances. Consequently, the possibility of monetary compensation has acquired enormous symbolic significance...a potential source of security...and legitimization of dependant needs."[22]

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[20] (1996), 34 C.C.L.T. (2d) 125.Note that this decision was subsequently questioned since Justice Molloy failed to consider the issue of foreseeability.

[21] Supra note 12.

[22] H. Modlin, "Traumatic Neurosis and Other Injuries". Psychiatr. Clin. North Am. 1983; 6:661-82 at p. 673 and referred to in Hoffman et al, "The Emotional Consequences of Personal Injury" (at p. 25).

With all due respect to Dr. Herbert Modlin, his thesis does not do justice to the many innocent accident victims who suffer pain in silence, with indescribable sadness and with despair.

Reactions to traumatic events effect people biologically, psychologically and socially.[23] As Hoffman, et al., state[24],

> "At the psychological level, traumatic reactions affect thinking, feeling and behaviour. In the acute phase after a period of shock there may be anxiety, insomnia, nightmares, sensitivity to noise, fatigue and pain intrusive recollections of the trauma in thoughts or images, either spontaneously or when reminded of the trauma. In the long term there may be emotional disability (with or without physical injury) that is complicated by depression, irritability, philosophical pessimism, loss of hope and decreased expectations in life, which eventually lead to personality change." (Underlining mine)

According to Hoffman et al., "accident victims may feel uncontrollable anger (similar to victims of crimes), guilt and self-blame (like victims in child abuse) or passivity, futility and demoralization (similar to some Holocaust survivors). Unfortunately, the victims of civilian personal injuries tend to feel isolated and alone in their pain because there are no group experiences or social support system to allow them to share their experiences with other victims."[25]

How then, does plaintiff's counsel go about establishing and building a claim for emotional distress?

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[23] Hoffman et al. "The Emotional Consequences of Personal Injury", p. 25.

[24] Ibid.

[25] Ibid, p. 26.

## VII. Building the Claim - The *Insurance Act*

Claims for emotional distress have long been recognized and, since 1994, have been permitted by the various incarnations of the *Insurance Act*. It may be useful to recall that the Ontario Motorist Protection Plan (the first no-fault legislation which governed motor vehicle accident cases between June 22, 1990 and December 31, 1993), allowed compensation only if an injured person's impairments were physical in nature. Claims for emotional distress unadorned with any physical component resulted in the claim being dismissed.

However, if the emotional distress claim could be characterized as a "chronic pain claim" with both physical and psychological aspects, compensation was permitted (see in this regard, *Chrappa v Ohm*).[26] During the OMPP era plaintiffs' counsel went to great lengths to meld psychological distress with a physical component in order to be free of the rigid straightjacket of the OMPP threshold.

With Bill 164, which took effect on January 1, 1994 and governed motor vehicle accident cases until October 31, 1996, there was no impediment to obtaining compensation for a "serious impairment of an important physical, mental or psychological function". Bill 59 (which applies to motor vehicle accidents between November 1996 and October 31, 1998) and Bill 198 allow compensation for victims who suffered purely economic distress or psychological trauma as a result of a motor vehicle accident.

In *Altomonte v. Mattews*,[27] Mr. Justice McDermit addressed the issue of whether the plaintiff's injuries could be considered to be a "permanent impairment of a physical function." After hearing opposing expert testimony from two physiatrists, McDermid, J. concluded that the

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[26] (1998) 38 O.R. (3d) 651.

[27] [2001] O.J. No. 5756 (S.C.J.).

plaintiff's ongoing pain resulting from soft-tissue injuries was unlikely to improve and could therefore be considered permanent. Indeed, it is now considered to be trite law that chronic pain arising from injury sustained in a motor vehicle accident, and which accounts for limitation in function unlikely to improve in the indefinite future, will meet the requirement of 'permanence' under the threshold.[28]

In determining whether a function is 'important', the Court generally considers the particular facts of the case. In *Meyer v. Bright*,[29] the court considered the meaning of the word 'important'[30] and determined that the word must be considered with reference to the "injured person as a whole and the effect which the bodily function involved has upon that person's way of life in the broadest sense of that expression." Therefore, if the function is important to that particular injured person, the injury will pass the second part of the threshold test.

The question of what functional limitations will constitute a "serious" impairment continues to be interpreted by the courts. In *Meyer v. Bright*, the court held that the injured person must be able to endure some permanent impairment without being able to sue. The pertinent question for our purposes is whether chronic pain fits into the 'endurable' level, as interpreted by the courts.

In *May v. Casola*, [31] the plaintiff was appealing a decision that her injuries did not constitute a serious impairment. The plaintiff was suffering from permanent symptoms, including severe pain and headaches. Justice Carthy found that ongoing debilitating pain, even in the absence of objective

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[28] See *Hartwick v. Simser*, [2004] O.J. No. 4315 (hereinafter referred to as "*Hartwick*").

[29] (1993) 15 O.R. (3d) 129 (Ont.CA.)

[30] This decision was made in reference to s. 266(1) of the *Insurance Act*, but applies to the current interpretation of the verbal threshold and therefore mental and psychological functions in addition to physical or bodily functions. See *Hartwick*, supra note 28.

[31] [1998] O.J. No. 2475 (Ont. C.A.).

findings by medical experts, would constitute a serious impairment. In *Cadotte v. Cadotte*,[32] the plaintiff was involved in a motor vehicle accident resulting in permanent neck pain. The court found that the accident substantially interfered with the plaintiff's ability to participate in her pre-accident activities in a pain-free manner, including her inability to function at work, an inability to sleep through the night, an inability to enjoy city life on weekends, an inability to perform household tasks and an inability to maintain the intimacy which she previously enjoyed with her husband. This substantial interference constitutes 'serious' impairment.

Interestingly, in recent weeks, there have been two Superior Court decisions which have restrictively interpreted the "threshold". In particular, I draw your attention to the decision of Madam Justice Ellen MacDonald in *Pinchera v Langille*[33], in which the plaintiff, who underwent serious and risky back surgery, (a microscopic posterolateral decompression with foranentony) was held not to have a permanent and serious impairment of an important physical function. I have attached a copy of the *Pinchera* case to this paper as it provides a vivid illustration of how the threshold has been interpreted. This case highlights the need to have before the Courts appropriate, compelling, powerful and persuasive expert evidence. If a plaintiff who underwent serious back surgery, performed by one of Canada's leading neurosurgeons, does not "cross" the threshold, what then must counsel do for claims for emotional distress?

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[32] [1998] O.J. No. 2993 (S.C.J.).

[33] 2005 CanLII 3391 (released Feb. 14, 2005).

## VIII. What Must be Done

Preparation, preparation and more preparation. Read The Diagnostic and Statistical Manual of Mental Disorders, 4th edition (DSM-IV TR.). The DSM-IV, published and endorsed by The American Psychiatric Association is the leading text on the diagnosis of psychiatric disorders. If the emotional distress claim can be grounded in a diagnosis within the DSM-IV classification system, the claim will be much more persuasive. However, not all claims for emotional distress will necessarily fit within the DSM-IV classification system. The DSM-IV consists of a five part classification system divided into fives Axes:

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| Axis I: | Clinical Disorder |
| Axis II: | Personality Disorder and Mental Retardation |
| Axis III: | General Medical Condition |
| Axis IV: | Psycho-Social and Environmental Problems |
| Axis V: | Global Assessment of Function |

(See also Hoffman et al, "The Emotional Consequences of Personal Injury") p. 124 and following)

Preparation begins at the initial interview. The plaintiff's history must be carefully scrutinized, a list made of all the plaintiff's pre-accident physicians and caregivers and the usual authorizations signed enabling counsel to obtain an OHIP summary, medical and hospital records and most importantly, the clinical notes of every doctor and health care professional or therapist that the plaintiff has ever seen. Only then will counsel have the basis for proceeding to the next step.

## IX. Choosing the Right Expert

In the early phases of the case, once all of the information is obtained the OHIP summary perused, it is very important that a psychologist or psychiatrist be retained to assess the plaintiff and to proffer an opinion about the cause of the plaintiff's emotional distress, whether it is related to the trauma and his/her prognosis for the future – whether the emotional consequences will likely be permanent.

It is essential, and perhaps a truism, that the plaintiff's expert is only as good as the information that he has and the documents that he has reviewed. Cases will crumble if the plaintiff's expert is not provided with **all of the relevant medical information**, including all clinical notes and records, OHIP summary, all of the pre-accident and post-accident treating physicians and care providers. The expert's report will be accorded little weight by a judge or a jury if it is established that the expert lacked relevant medical information, was not provided with the plaintiff's complete history and was given an inaccurate picture of the plaintiff. Under Bill 198, the expert must answer these questions:

1. Whether the plaintiff suffered a permanent impairment of an important psychological function;
2. The nature of the impairment;
3. Whether the impairment was caused or contributed to by the subject motor vehicle accident; and
4. As a result of the impairment, whether the plaintiff will be affected in his/her employment or in her employment opportunities.

In a paper prepared for the *Advocates' Society* in January 2005, I and my co-author, Tripta Chandler, analyzed the interpretive requirements of Bill 198, particularly Regulation 381(03) of the *Insurance Act*, R.S.O. 1990, C. I. 8, as amended. One can conceive of situations where a plaintiff suffering physical injuries and fairly significant injuries will not achieve compensation for non-pecuniary general damages because his/her employment has not been affected. We used the illustration of a lawyer suffering significant crush injuries to the lower extremities, who despite hardships, returns to work and bills even more than he did before the accident. (that scenario would obviously only apply to defence counsel). In a case of a psychological injury, unless one is able to establish an impairment of earning capacity or, in fact, disability from employment, the plaintiff may not overcome the rigorous requirements of Regulation 381(03) of the *Insurance Act*.

I am confident, however, that with thorough preparation, a plaintiff stands a good chance of succeeding at trial.

## X. Using a Pre-Existing Problem as a "Sword" Not as a "Shield"

Thomas Edison once wrote that "**opportunity is missed by most people because it is dressed in overalls and looks like work**".

If the plaintiff has clinical notes and records that are replete with psychiatric and emotional disturbance, at first blush, this will present as an obstacle to a successful claim for emotional distress. However, what may be perceived as an obstacle by some is actually an opportunity to transform a weakness into a strength. If the plaintiff, despite evidence of pre-existing psychiatric and emotional problems, was capable of working and maintaining social relationships, and received at times promotions and good performance evaluations, then what appears as a negative is actually a

positive. It can then be argued and, in my view, quite successfully and powerfully, that the plaintiff was able to cope with a litany of complaints and that it was the motor vehicle accident that totally transformed the plaintiff's life, disabled her/him and prevented her/him from leading a normal life.

Work records, performance evaluations, the testimony of lay witnesses such as family and friends, are indispensable to successfully persuading the trier of fact of the legitimacy of the plaintiff's case. In our view, so long as the plaintiff has a reasonably good work record, has a supportive family doctor, and a family member or friends who can vouch for the transformation in the plaintiff's emotional state following the accident, counsel has a recipe for a successful lawsuit. It will still be risky but the odds, in my respectful view, weigh in favour of the plaintiff.

In most if not all claims for emotional distress, the evidence of family, friends, co-workers and lay witnesses is extremely helpful, as are photographs, videos and DVDs which convey an image as to how the plaintiff functioned before and after the accident.

Further, if the plaintiff was able to function reasonably successfully at work, then thrust of the arguments that the plaintiff had a "crumbling skull" as opposed to a "thin skull" will be substantially weakened. If the plaintiff's psychiatric condition constitutes a "crumbling skull" case, what then is a rational explanation for the plaintiff's persistence in working and coping and managing to live a normal life? There is no logically persuasive explanation to support the defence theory of the case.

Even if the defence experts come to a different conclusion, plaintiff's counsel have a very strong argument to invoke. Whatever the merits of the defence position it cannot be persuasive in view of the evidence of treating doctors, family, friends and co-workers. This evidence, by those who know the plaintiff the best, is more compelling, more persuasive and more powerful than the

abstract and perhaps overly intellectual and complicated opinions of expert psychiatrists proffering opinions for the defence.

## XI. Neutralizing the Defence Expert

Cross-examining an expert is one of the hardest tasks and one of the greatest skills of an advocate. If not done well, it is a disaster for the case. How can one do it well? This is not a course on cross-examination. Cross-examination involves intense preparation, judgment and, most importantly, knowing when to stop asking questions. Preparation involves not just knowing about your case and understanding your case, but knowing everything about the expert. Consider the following:

1. Carefully review the opposing expert's curriculum vitae. Have one of your associates verify the curriculum vitae.

2. Review the curriculum vitae to ensure that what is contained therein is true. Often we encounter CVs which are inaccurate and out of date. Ensure your own expert serves a current CV.

3. If the expert has written any books, articles or abstracts, obtain copies of them and review them. His/her articles may either betray a bias or may be inconsistent with the position being put forth in the case.

4. 'Google' the expert. 'QuickLaw' the expert. Check QuickLaw for every case in which the expert has testified. Note any adverse judicial comments. It is questionable whether you can cross-examine the expert on negative judicial

comments. In the landmark case of *Desbiens* v. *Mordini*,[34] Mr. Justice Harvey Spiegel refused to allow plaintiff's counsel to cross-examine Dr. Ameis on prior negative judicial comments. While Justice Spiegel's decision may be correct in principle, and the Court of Appeal has not weighed in on this contentious issue, it is certainly open for counsel to attempt to cross-examine a defence counsel on negative judicial comments;

7. Finally, it is essential to have your own expert critique the defence report. If your expert finds that, in providing his or her opinion, important medical information was not provided, ensure that this information is provided so that a supplementary report can be delivered, if required.

The plaintiff's experts must be articulate, knowledgeable and offer a balanced opinion. Their testimony must assist the Court in understanding the complex medical issues and not serve as another means of advocating on behalf of the plaintiff.

Defence experts who are advocates, who are not fair-minded, will today find their opinions given short shrift. It is worth remembering that the role of the expert is to assist the Court. The leading case on the role of the expert is an English case known as The Ikarian Reefer (1993) 2 QB 68, in which the following principles were enunciated by Mr. Justice Cresswell (at p.81):

"The duties and responsibilities of expert witnesses in civil cases include the following:

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[34] 2004 CanLII 41166 (released Nov. 17, 2004)

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation *(Whitehouse v Jordan*, [1981] 1 W.L.R. 246 at p. 256, per Lord Wilberforce).

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd. v. Commerical Union Assurance Co. Plc. [1987] 1* Lloyd's Rep. 379 at p. 386 per Mr. Justice Garland and *Re J,* [1991] F.C.R. 193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.

3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion *(Re J sup.).*

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one *(Re J sup).* In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report *(Derby & Co. Ltd. And Others v Weldon and Others, The Times,* Nov. 9, 1990 per Lord Justice Staughton).

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice)."

## XII. Mediating Claims for Emotional Distress

When dealing with claims for emotional distress, whether characterized as part of a chronic pain syndrome or as a 'stand alone' claim for psychological trauma, mediation provides the most efficient way and effective means of achieving justice for the plaintiff.

Since January 1, 2005, mandatory case management and with it mandatory mediation has been eliminated and all claims henceforth are to be mediated following the setting down of the action for trial. Counsel should be aware of the mandatory mediation provisions in the *Insurance Act*. Section 258.6 (1) of the *Insurance Act* reads as follows:

> **Mediation – A person making a claim for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile and an insurer that is defending an action in respect of the claim on behalf of an insured or that receives a notice under clause 258.3(1)(b) in respect of the claim shall, on the request of either of them, participate in a mediation of the claim in accordance with the procedures prescribed by the regulations.**

Counsel should use this provision to compel the insurer to attend on a mediation. The timing of the mediation is counsel's choice. The best time would be following the discoveries and in the two or three year interval from the time the discoveries have been concluded to when the Court provides a trial date.

Plaintiffs are at a tremendous disadvantage with the systemic delay in obtaining trial dates. It is expected that claims for emotional distress will be placed on the long trials list and will likely not reach the Courtroom until late 2007 or 2008. The long delay itself will add to the plaintiff's distress. Settlement negotiation is in the plaintiff's best interest. Mediation is to be encouraged and embraced.

## XIII. Choosing the Mediator

Chronic pain cases and claims for emotional distress require a deft touch. Choose a mediator with the appropriate temperament, background and necessary experience. Do not choose a mediator who is unsympathetic to these claimants and these types of claims. Counsel know who the mediators are and know the mediators who can help them achieve a just resolution of a difficult case.

It is a truism that you have to pick the mediator to "fit the fuss," but the importance of selection of an appropriate mediator cannot be overrated in emotional distress claims.

## XIV. Preparing for the Mediation

Mediation in cases involving chronic pain and/or severe emotional distress are at times emotionally trying for counsel. As much as counsel must be objective, the clients have often fragile emotional states and are often disabled quite significantly because of their psychological distress. It is a good idea to brief the client a week or so before the mediation, to review the mediation process and in particular, the mediator's style (the mediators all have distinct personalities and different opening statements, which many counsel in the room can repeat verbatim) and discuss with the client the value of the case, within a reasonable range, and what counsel hopes to achieve.

It is our firm's practice to provide the client with a copy of our mediation summary and the opposing parties' summary and to review the defence summary with them during the briefing. We explain to the client that they will hear during the mediation things that will make them uncomfortable, unhappy and add to their distress, but we explain that is part of the process. We also advise them to attend the mediation with a book, magazines or other reading materials to help occupy their time during the many down times during the mediation. We encourage them to attend with a family member or friend during the mediation to provide support. During the mediation, each and every offer is discussed with the client and the client provides written instructions for each round of offers and counter-offers. We involve our clients in the process and make sure that each step of the way they endorse and agree with the approach that we take.

On some mediations, given the nature of the injuries and the pre-accident history, which can at times be shocking or horrifying with incidents of abuse, with counsel's permission and the mediator's assent, our clients will not be present during the submissions. While this a rare

occurrence, at times, given the trauma of not only the accident, but a dark chapter of a plaintiff's life, the client's presence during opening statements is not always conducive to achieving settlement.

## XV. Conclusion

Claims for damages for emotional distress, whether as part and parcel of a chronic pain case or unaccompanied by any physical consequence, present great challenges for plaintiff's counsel. These cases are difficult, risky and very, very expensive to litigate. Counsel seeking to litigate a case involving a chronic pain or emotional distress claim today will conservatively spend hundreds of thousands of dollars in trial costs given the number of expert witnesses required to testify at trial and the sheer length of these trials. Unless the damages are significant (by that I mean a case worth a minimum of $200,000.00), neither the plaintiff nor the defence can afford to litigate these cases. Mediation is the most effective way to resolve these cases and is to be encouraged. Cases that will indeed proceed to trial and cannot be resolved should only proceed to trial when the plaintiff is armed with opinions from leading psychologists and psychiatrists confirming the legitimacy of plaintiff's psychological complaints, and confirming that the plaintiff's impairments were caused as a result of the motor vehicle accident at issue.