

TACTICS AND STRATEGIES IN HANDLING THE CHRONIC PAIN AND FIBROMYALGIA LAW SUIT - FROM THE PLAINTIFF'S PERSPECTIVE

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INTRODUCTION

“A jury trial is a fight and not an afternoon tea”¹

When Mr. Justice Riddell famously said that a law suit is not “an afternoon tea” he could not have anticipated but must have had in mind fibromyalgia litigation. The clash and clamour of conflicting views, the ferocious attempts to impugn the credibility of both the plaintiff and the plaintiff's experts alike have made this type of litigation one of the most difficult, complex and expensive cases to prosecute. The purpose of this paper is to enable plaintiff's counsel to more fully understand the complex nature of fibromyalgia, how to prepare their case for trial and, ultimately, to obtain a just and appropriate result for their clients.

I. WHAT IS FIBROMYALGIA?

While the medical experts will be providing more detailed and explicit definitions and discussions of this “syndrome”, it may be usefully noted that the American College of Rheumatology² described fibromyalgia as a “syndrome of widespread pain”³ and unknown to the

¹ *Dale v. Toronto R.W Co.*, (1915) 34 O.L.R. 104 at 108.

² D.A. Gordon, “Chronic Widespread Pain as a Medico-Legal Issue” in *Balliere's Clinical Rheumatology* (Vol. 13, p. 531-543,1999).

patient, decreased pain threshold at site-specific soft tissue tender points. Among the symptoms most frequently associated with fibromyalgia are sleep disturbance, poor memory, morning stiffness, fatigue and psychological distress, along with headaches, irritable bowel and bladder, joint swelling and numbness.”⁴ It is to be noted that in literature disseminated by The Canadian Arthritis Society, fibromyalgia is ranked second only to osteoarthritis as the most common musculoskeletal condition afflicting Canadians.⁵ According to a 1994 study, approximately three out of 100 Canadians suffer from fibromyalgia and it is a widespread and common affliction.

According to the American College of Rheumatology⁶ the specific conditions necessary for a diagnosis of fibromyalgia are as follows:

i) **History of Widespread Pain**

Pain will be widespread when all of the following are present:

- a) **pain in the left side of the body;**
- b) **pain in the right side of the body;**

³ *Ibid.* at 532.

⁴ *Ibid.*

⁵ Arthroscopie, The Arthritis Society, 1998, p. 7

⁶ Wolfe et al. “Arthritis Rheumatology” in *The American College of Rheumatology 1990 Criteria for the Classification of Fibromyalgia Report of the Multicenter Criteria Committee.* (1990) 33:160-172.

c) **pain above the waist;**

d) **pain below the waist.**

As well, axial skeletal pain must be present. In addition, shoulder and buttocks pain is considered pain for each side involved.

ii) **Tender Points**

Pain in 11 of 18 tender point sites on digital palpation. The ACR recommendation requires digital palpation to be performed with an approximate force of 4 kilograms and further requires that for a tender point to be considered “positive” the subject must state that the palpation was painful.

Patients will be said to have fibromyalgia if both of these criteria are met. Finally, widespread pain must be present for at least 3 months.

II. **CASE SELECTION⁷**

Throughout this paper I will, from time to time, refer to fibromyalgia and chronic pain interchangeably. The first step in structuring a successful fibromyalgia law suit is selecting the right case.

⁷ See Appendix 1 for a list of cases where fibromyalgia has been considered. This list is not exhaustive.

It is a truism to state that you want a presentable client. The fibromyalgia plaintiff is, at times, a poor witness primarily because he or she is mired in pain, disability, conflict and stress. However, in my experience, the following indicia generally result in successful outcomes:

i) **A Plaintiff with a relatively good work history**

It is not required that the plaintiff be employed for 20 years without interruption; the fact, however, that the plaintiff was regularly and continuously employed is an important factor which builds credibility. People with good work histories are generally considered much more reliable, trustworthy and hence more credible than people with checkered histories. Most people do not wish to stay home and to be mired in pain and discomfort. Most people want to get back to their friends and co-workers and to provide for their families. The dignity of work is an essential ingredient of life and most people want to work. The fact that the plaintiff has had a credible work history augurs well for the success of the law suit.

ii) **Few, if any Workers' Compensation Claims**

There seems to be a skepticism or distrust of people with multiple Workers' Compensation claims and a checkered work history. It is a fact of life that people discriminate. Most people's view of life and other people are coloured by their own background, income and life's experiences. One cannot change society but one must understand human nature if one is to try cases. A plaintiff with a checkered work history, with multiple Workers' Compensation claims will not necessarily be considered unreliable, but will have, in my view, a higher burden of proof to establish the validity of his or her claims. For that reason, in choosing the fibromyalgia case to litigate, it is obviously preferable to choose a case where the plaintiff has few, if any,

Workers' Compensation claims and where the plaintiff has not had many periods of unemployment.

iii) **Family and friends**

The value of lay and character witnesses cannot be over emphasized. It is helpful and useful at the outset if the plaintiff's family and friends support and confirm the disability and are able to testify as to how the plaintiff was before the onset of fibromyalgia. These character and family members are absolutely vital to the proper handling of the case. The presence or absence of compelling and credible testimony of family and friends are important factors in deciding to take on the case let alone proceed to trial.

iv) **Medical support**

Many family physicians today do not understand fibromyalgia or, if they do, their knowledge, information and experience are limited. Absence of support from the family physician is not fatal to the case though it is always helpful if there is support from the family physician. If the family physician is unsympathetic, the plaintiff would be well advised to choose a physician who has compassion, understanding and appreciation for his/her plight.

III. THE INITIAL INTERVIEW - What Must be Asked and What Must be Obtained

After you have interviewed the plaintiff and ascertained that you wish to go forward with the case, whether the damage results from a car accident or the retainer is to sue the disability insurer for nonpayment of disability benefits, you must start preparing the case for trial. While it is a truism that preparation is the key to success, it is worth repeating and reinforcing that view.

Preparation, preparation, and more preparation is the difference between success and failure in fibromyalgia -based litigation. At the initial interview or shortly thereafter the following information should be **obtained**:

i) **A list of at least five or six friends, relatives and co-workers of your client**, together with their addresses and phone numbers. Early on you should have your client write or e-mail or otherwise advise their friends that you will be contacting them. Obtain statements as to how your client was before and their recollections of how the chronic pain and fibromyalgia affected him or her and the effect that the disability has had on their friendship and family relationship. For example, they may no longer be able to socialize, or to engage in other previously enjoyed social and recreational pursuits. This is all very useful information as it helps build credibility for your client.

ii) Ensure that you have a decoded OHIP Summary listing all the treatment providers that your client has seen and is currently attending, certainly over the course of the past five years and longer if that information is available. Once you obtain the summary, send a copy to your client and review the summary with her/him.

iii) **Write for all the treating doctors' clinical notes and records.** You may as well obtain them now because ultimately you will be required to produce them. If there are any “ticking time bombs” in the records, it is preferable to know early on so that you can adjust your strategy accordingly.

iii)It goes without saying that **income tax returns** and **employment information** is vital. Early

on, you should obtain records of employment from all employers together with a copy of the plaintiffs' personnel file. Find out early on whether there are negative as well as positive comments. This information will be produced in any event and early warning is critical to the proper handling of the fibromyalgia case.

IV. SCHEDULING THE MEDICAL/LEGAL ASSESSMENT

In virtually all cases, it is important to arrange medical/legal assessments with properly qualified experts since it will be these experts who will be asked to proffer opinions on the nature of your client's disability, the cause of the disability and the prognosis for recovery. In chronic pain or fibromyalgia-based litigation, rheumatologists as opposed to orthopaedic surgeons possess the skill, expertise and qualification to offer opinions about the nature of fibromyalgia. It is important that your expert has the clinical experience and the knowledge and understanding of fibromyalgia.

V. INFORMATION TO BE PROVIDED TO YOUR EXPERT

Your expert's opinion may be weakened or undermined if he or she is not in possession of all relevant information. In a law suit, no expert can be in receipt of the "entire" medical history. However, clinical notes and records from the treating physicians must, as a matter of course, be sent to the expert. He must be aware of your client's prehistory, any prior Workers' Compensation claims, and any previous traumatic events such as car accidents or slip and falls in order to provide an opinion which is balanced, thorough and complete. Failure to provide your expert with appropriate documentary evidence will result in the expert's credibility being

attacked at trial and little weight being attached to his opinion. If you are in receipt of any surveillance information including surveillance tapes, it is prudent to provide those to your expert. The use of surveillance and the role of surveillance will be discussed later in this paper.

VI. PREPARING AND BRIEFING YOUR CLIENT FOR DISCOVERY

Briefing for discovery is perhaps the most important aspect of chronic pain or fibromyalgia-based litigation. The Examination for Discovery process is the opportunity for the other side to evaluate your client, to determine how he or she will stand up under cross-examination, to make assessments and judgments about his or her credibility and to advise their insurance company client about the strengths and weaknesses of your case. No matter how good the medical evidence is, if your client comes across as unprepared, deceitful, evasive or equivocal, your case could be irreparably damaged. What creates credibility is believability and your client's familiarity with his or her pre-accident or pre-trauma medical condition. A briefing of this very nature must be extensive. Before the discovery, your client should be sent a letter explaining the discovery process. He/she should also be sent copies of the medical brief, including copies of summaries of the clinical notes and records of the treating physicians. Your briefing for the discovery should be extensive and should involve the client's understanding about the role of counsel on a discovery, the purpose and technique of cross-examination and what the objective of the opposing party is on discovery.

Your client should also be advised that if he or she comes across as evasive, does not own up to pre-existing problems and is in any way misleading, the case could be lost or could result in a unsatisfactory settlement. It is very important to mention at the briefing about surveillance.

Surveillance is commonplace and it is a rare case in which no surveillance has been undertaken.

Prepare your client for surveillance.

Your client should be told not to give categorical answers such as “I was in perfect health before the accident”, “I never had any problems whatsoever before” and “I can’t do anything”. Categorical answers are rarely ever true, they get clients in trouble and it is the role of the lawyer to properly prepare the client to understand the toil and turmoil of litigation.

It is my experience that a client who has been thoroughly briefed for discovery is not only less intimidated by the process but will present well on discovery, resulting in either early resolution of the claim or a different and better appreciation by the other side of the merits of your case.

It is my view that most cases are damaged if the client is not properly briefed for discovery.

Discoveries take time, the briefing process is labourious, but it must be done if you wish to structure your case for success.

Many people are nervous about the discovery process and are forgetful about their pre-accident history and their work history and so it is therefore important to obtain the documentary evidence early on and to brief and remind and show your client the documents which outline his/her pre-accident, medical and employment history.

VII. SURVEILLANCE

Plaintiff's counsel argue, for good reason, that all surveillance does is provide a brief "snapshot" in time of the plaintiff. It does not disclose pain, it does not disclose suffering, and it rarely discloses disability. If the plaintiff has migraine headaches, is forgetful, depressed, in agony or in torment that will not be revealed by surveillance. Most fibromyalgia and chronic pain survivors are able to function, but it is the activities of daily living, their inability to sustain productive employment which is impaired. Surveillance tends to sensationalise trials rather than to fairly and accurately portray what is wrong with the plaintiff. Occasionally however, there are situations where there are contradictions between Discovery evidence and evidence disclosed by surveillance and in those situations the effect on the case can be devastating if the plaintiff does not have a convincing explanation.

As I indicated earlier, plaintiffs, even in the initial interview, should be reminded about surveillance evidence and that should be reinforced from time to time.

Most people are honest. Most people try and do the best they can in a difficult situation. It is worth noting what Dr. Rickey S. Miller said about surveillance evidence in a recent article published in *The Advocates' Quarterly*⁸:

"Erroneous conclusions about pain are also common when they are based on the patient's activity level. For example, a surveillance report indicates that a man has taken his children to the park and played ball with them when he has previously reported that he

⁸ *"Toward an Unbiased Assessment of Personal Injury"*, (1999) 21 ADV. Q. 203.

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

VIII. OBTAINING SURVEILLANCE EVIDENCE

Before proceeding to Examinations for Discovery, insist on an Affidavit of Documents which should list in Schedule "B" the surveillance evidence as well as other privileged documents. Ensure you properly brief your client about surveillance. In every case, serve and file your client's sworn Affidavit of Documents first and then serve an Appointment. That will entitle you to discover the Defendant first (see Rule 31.04(2) & (3) of the Rules of Civil Procedure). At the Defendant's discovery, obtain details of the surveillance and investigation that has been carried out. If defence counsel refuses, do not allow your client to be examined. Bring a motion and compel disclosure of the surveillance evidence.

While the Defendant need not, on discovery, produce the videotape or movie or provide photographic stills to plaintiff's counsel, Defendant's counsel must provide details of surveillance, including:

- i) The name and address of the person conducting the surveillance or investigation;
- ii) The time, date and places where the surveillance carrying out;
- iii) Description of the Plaintiff's activities and observations made by the person carrying out the surveillance⁹.

IX. NEUTRALIZING THE DEFENCE EXPERT

Following the Examination for Discovery, there is an interregnum before either before mediation or trial. The defence usually uses this opportunity to obtain production of clinical notes and records and fulfilment of undertakings, as well as to schedule the defence medicals.

At the plaintiffs bar, we know who the defence oriented doctors are, the ones who are biased, who are advocates or who do not believe or accept the existence of fibromyalgia. Their reports are viewed with suspicion, alarm and unease by plaintiff's counsel for the opinions of these experts may be accorded great weight by a judge or a jury. It is the role of plaintiff's counsel to be aware of measures to neutralize, limit, modify and weaken the thrust of the defence report. Where do you begin?

i) **Curriculum Vitae**

The first stage is to scrutinize carefully the experts Curriculum Vitae. Have your clerk or associate scrutinize the Curriculum Vitae to ensure its accuracy. This can be done by enquiring

⁹ *Devji et al v. Longo Brothers* (2000) 45 O.R. (3d) 82. Reversing a decision of Master Polika at (1999) 42 O.R. (3d) 683. See also *Murray v. Woodstock General Hospital Trust* (1988) 66 O.R. (2d) 129, and *Stacey v. Berdan* (1986) O.J. No. 2575.

of the universities and hospital and other institutions where the expert reportedly graduated or attended. In addition, check the medical literature that the expert has reported to have written. Review the articles and speeches to see whether what the expert has said or written about in the past accords with his/her opinion in your case. There are times when experts have said one thing at a program or seminar and something diametrically opposite when testifying at trial.

ii) **Internet Search**

Do an internet search in all cases where the doctor has testified. Look for negative judicial comments. You would be surprised how many judges have commented negatively on certain experts. Many experts who testified, will, from time to time, not find favour with the trier of fact. A Quick Law search is your first avenue of attack, followed by a Google search. Google is a leading search engine. If the expert's Curriculum Vitae is accurate, as the vast majority are, and the expert has found favour with the Court, then ask your own expert to comment on and critique on the expert's opinion. Many of these cases are, indeed, a battle of the experts and if you have a comprehensive and thorough critique of the expert's opinion, you have a better chance of persuading the court that your expert's opinion should be accorded great weight.

X. LAY AND CHARACTER WITNESSES

In my experience, the deciding factor in many cases is the strength of the lay and character witnesses. These witnesses take on added significance in cases where the credibility of the plaintiff is at stake. Where the expert evidence on both sides may be equally compelling, what will be the deciding factor is the reliability, integrity and honesty of those people who come to

court to tell it like it is, to tell the trier of fact just how their friend or family member has been affected by fibromyalgia. The opinions of ordinary character and lay witnesses as opposed to expert witnesses resonate with the trier of fact, not only because their evidence is compelling but because it is true. They tell things the way they are. They are not being paid thousands of dollars to testify and are taking time off from their work and busy lives to attend in court to see that justice is done. And that will ring true with a judge or with a jury. I cannot emphasize the importance of compelling character witnesses.

XI. PHOTOGRAPHS

It goes without saying that in most cases today, demonstrative evidence is important. Photographs of before and after the event gives an accurate reflection as to how your client was before the incident and how he or she is now. The fact of the matter is that fibromyalgia is such an insidious disease that it totally transforms people's lives. It takes relatively happy and healthy people and transforms them, rendering them incapable of carrying on with their activities of daily living, holding down a job, concentrating and interacting with their friends, family and co-workers.

XII. JURY NOTICE

The defence will, more often than not, deliver a jury notice. Plaintiff's counsel have nothing to fear from a jury, and I recommend that a Jury Notice be filed. The last thing you want the other side to realize is that you have concerns that a jury will not fairly and justly deal with the case. More often than not juries bring a common sense approach to these cases. If a case is being fought against the disability carrier, I also recommend that a Jury Notice be filed, particularly

where punitive damages for “bad faith” are being claimed.

XIII. CAUSATION

One of the tactics employed by defence counsel to defeat the plaintiff’s claim is to argue that the chronic pain or fibromyalgia was not “caused” by the accident. They rely on the defence medical reports which outline in vivid detail a lengthy catalogue of pre-existing complaints, illnesses and disabilities. There is a significant difference of opinion how physicians and lawyers and judges understand causation. As it has been pointed out by one of the pre-eminent writers and commentators, the late Professor John Fleming¹⁰.

“The law does not excuse a defendant from liability for a consequence merely because other causal factors for which he is not responsible are also necessary to produce it. As we have seen, every event is the result of a complex set of (jointly sufficient) conditions, and if a defendant were allowed to escape because his conduct, unaided by other factors, would not alone produce the harm, no plaintiff would ever be compensated. A sufferer of minor back pains who sustains whiplash in a car accident, resulting in a herniated disc when resuming his regular exercise routine, is entitled to full recovery from the culpable driver.”¹¹

¹⁰ Fleming, *The Law of Torts*, 9th ed. (Toronto: Carswell, 1998) at 229.

¹¹ *Ibid.*

Of course, in the last sentence he was referring to the famous case of Athey v Leontai (1996) 3 S.C.R. 458.

While it is beyond the scope of this paper to discuss the full implications of Athey the following should be usefully noted:

- i) Even though there are tortious and non-tortious causes relating to the plaintiff's injury, so long as the accident or trauma "materially contributed" to the plaintiff's injury, the defendant will be found 100 per cent liable;
- ii) A defendant will not escape liability simply because other factors for which he or she was not responsible also helped produce the damage;
- iii) To fasten liability on the defendant, it is sufficient if the defendant's negligence was a cause of the injury.

Athey is also important because it clarifies the law regarding the "thin skull" rule. In fibromyalgia and chronic pain litigation the defence will obviously attempt to reduce the quantum of damages by arguing that the plaintiff had a "crumbling skull" such that even without the accident he or she would of become disabled at some point in the future. However, compelling and cogent evidence must be led to prove that fibromyalgia and chronic pain would have occurred without the accident. Athey is thus an important weapon in the plaintiff's arsenal.

XIV. THE CHRONIC PAIN AND THE FIBROMYALGIA CONUNDRUM:

How to determine disability¹²? One of the greatest difficulties in determining and assessing disability in fibromyalgia sufferers is the absence of any validated instruments or tests for assessing disability. A leading resource however, is the American Medical Association's Guide where the following is stated¹³:

- i) **“Pain evaluation does not lend itself to strict laboratory standards of accuracy;**
- ii) **The evaluation of chronic pain cannot be made on the basis of the degree of tissue damage - the classic medical model;**
- iii) **Pain evaluation requires a thorough understanding of the biopsychosocial model of disease; and,**
- iv) **The physician's judgment of impairment represents a blend of the art and science of medicine and judgment must be characterized not so much by scientific accuracy as by procedure”.**

How then to determine whether the patient is disabled?

In fibromyalgia litigation, plaintiff's counsel must control the agenda. He or she must not be sidetracked by issues of causation, which have been discussed above, or whether indeed the

¹² Roccamo & Hayden, *Medicine in the Litigation Process*, (Toronto: Carswell, 1999) at 826 and following.

¹³ Ibid.

plaintiff has fibromyalgia. The issue should ultimately be whether the plaintiff is disabled from productive employment. To that end, referral to a vocational consultant is required. It is these experts that will make your case - they will proffer the opinion whether the plaintiff has chronic pain, or more particularly, fibromyalgia, and whether the plaintiff's complex catalogue of complaints renders he/she unemployable. These experts are so important to these cases that in all cases where disability is an issue, a vocational report is required.

XV. CONCLUSION

Chronic pain and fibromyalgia litigation is complex and difficult. It is hoped that this paper will illuminate the way for plaintiff's counsel so that fair and appropriate results can be obtained for their clients.