Defending Invisible Claims: Fibromyalgia & Chronic Pain Under Disability Policies

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Canadian courts have long recognized that damages may be awarded for intangible losses—such is the nature of "pain and suffering" and "loss of amenities of life". Typically, however, these kinds of losses are compensable because they arise as a consequence of tangible, physical injuries-- for example, damages for pain and suffering as a result of a fractured leg. Damages are also recoverable, for example, for pain and suffering attendant upon soft-tissue issues, such as "whiplash", where there may be few outward signs of injury, but where it appears to be accepted that some degree of spraining or other damage to the tissues may be responsible. Generally speaking, however, the law did not provide compensation for purely psychological injuries, other than in highly restricted circumstances.[2]

More recently, however, the question of damages for purely intangible losses has assumed greater significance as claims for substantial damages have been asserted, not solely on the basis of unseen injuries temporarily affecting the neck and back, but more generally, on the basis of untreatable pain syndromes, largely based on self-reported pain symptoms and other subject complaints, with allegedly broad-reaching effects on the plaintiffs' activities of daily living, and ability to earn income.

One of the areas in which this development has arisen is in the context of disability claims. The amounts at issue in claims for permanent disability under long term disability policies may approach or exceed the amounts awarded in tort

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[2] See, for example, *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114, 2008 SCC 27

in the case of serious physical injury, or death. In short, claims for chronic pain or fibromyalgia under disability policies may involve substantial amounts asserted on the basis of little apparent objective evidence.

These claims raise a number of potential issues. How are “chronic pain” and “fibromyalgia” generally been treated by the courts? Under what circumstances are such claims recoverable under disability policies? How does a reasonable insurer defend against such claims, without offending against the principle of good faith and avoid the award of aggravated or punitive damages?

This paper will attempt to address these and related issues which arise in the defence of claims for fibromyalgia and chronic pain under first-party disability claims. It purports to do so from the "defence" perspective, which raises the further question: what is the defence perspective in such cases?

One must start from the premise that a disability policy provides insurance against the risk of disability-- therefore, an insurer is in the business of paying legitimate claims. The "defence" perspective, therefore, does not involve the denial of claims, but rather, separating the legitimate claims which should be paid, from those which may not be legitimate.

Given the risk of bad faith, and aggravated if not punitive damages, the defence perspective does not involve the denial of claims on suspicion alone, or on the basis of weak evidence which will not stand up to cross-examination at trial. An insurer or defence counsel who were to try this approach would quickly find that it is anything but a "defence" approach-- on the contrary, it will provide to be a very quick way to spend very large amounts of money on payments to insureds and their counsel, including potential awards of aggravated and punitive damages and enhanced costs awards, together with legal and investigation expenses incurred by the insurer in its fruitless denial of such claims.

The defence perspective, in truth, involves an objective and fair consideration of the evidence as a whole against the language of the policy and the applicable legal principles, even where the claim is based on so-called "invisible" injury.

“Fibromyalgia” and “Chronic pain”

The terms “fibromyalgia” and “chronic pain” are applied by physicians and others to conditions, the cause and precise nature of which are not fully understood. While the descriptions below are illustrative, it is beyond the scope of this paper to provide conclusive medical or legal definitions.

(a) Fibromyalgia

Fibromyalgia generally refers to a clinical syndrome defined by chronic and widespread muscular pain, fatigue and tenderness. Many people with fibromyalgia experience symptoms such as fatigue, headaches, irritable bowel syndrome, irritable bladder, cognitive and memory problems (often called “fibro fog”), temporomandibular joint disorder, pelvic pain, restless leg syndrome, sensitivity to noise and temperature, and anxiety and depression. These symptoms can vary in intensity and, like the pain of fibromyalgia, wax and wane over time.[3] It was estimated by the Centers for Disease Control and Prevention (CDC) that approximately 3.7 million people in the U.S. have fibromyalgia.[4]

In 1990, a Multicenter Criteria Committee under the direction of Dr. Frederick Wolfe at the University of Kansas was formed to define fibromyalgia. The results of the investigation produced a set of criteria which was endorsed in 1990 by the

[3] Daniel J. Clauw, M.D. and Denise Taylor-Moon, and reviewed by the American College of Rheumatology Patient Education Task Force. http://www.rheumatology.org/public/factsheets/diseases_and_conditions/fibromyalgia.asp
[4] R. Chitale, "Like Chronic Pain, Fibromyalgia Debate Continues" online: *ABC News: Health* (January 16, 2008) http://abcnews.go.com/Health/PainManagement/Story?id=4138715&page=1

American College of Rheumatology (ACR),[5] which we understand continue to be used, as follows:

1. Widespread pain of at least 3 months duration (this rules out viruses or traumatic insults that resolve on their own).
2. Pain in all four quadrants of the body.
3. Pain occurring in at least 11 of 18 specified "tender" points, with at least one point in each quadrant.
4. Pain defined, in this context, as discomfort when 8 pounds of pressure are applied to tender points.
5. Tender points usually occur in a specific distribution.[6]

For classification purposes, patients are said to have fibromyalgia when the above criteria are satisfied. Widespread pain must have been present for at least 3 months. The presence of a second clinical disorder does not exclude the diagnosis of fibromyalgia.[7]

The above criteria were adopted by the World Health Organization in 1993. The WHO recognized the use of the criteria for research purposes but defined fibromyalgia as part of a wider spectrum encompassing headache, irritable bladder, spastic colitis, painful menstrual periods, temperature sensitivity, atypical patters of numbness and tingling, exercise intolerance, and complaints of weakness in addition to persistent fatigue, stiffness, and non-restoring sleep.[8]

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[5] D. J. Wallace & J. B. Wallace, *A Short Guide to Fibromyalgia* (Oxford University Press, 2003).
[6] *Ibid* at 4.

[7]Smythe, W.F. et al. "The American College of Rheumatology 1990 criteria for the classification of fibromyalgia: report of the multicenter criteria committee." (1990) Arthritis Rheum, 33:160---72. online: http://www.rheumatology.org/publications/classification/fibromyalgia/fibro.asp

[8] *Supra* note 3 at 4.

(b) Chronic Pain

According to the Chronic Pain Association of Canada,[9] millions of Canadians suffer from chronic pain syndrome ("CPS"). Surveys indicate over 18% of Canadians suffer from severe chronic pain.

The general consensus in the literature is that Chronic Pain Syndrome is a poorly defined condition, involving a constellation of syndromes that usually do not respond to the medical model of care. Most authors consider ongoing pain lasting longer than 6 months as diagnostic, while others have used 3 months as the minimum criterion. In chronic pain, the duration parameter is used arbitrarily. Some authors suggest that any pain that persists longer than the reasonable expected healing time for the involved tissues should be considered chronic pain.[10]

While still poorly understood, the pathophysiology of chronic pain syndrome (CPS) is multifactorial and complex. Some authors have suggested that CPS might be a learned behavioral syndrome that begins with a noxious stimulus that causes pain, and is then reinforced by external or internal stimuli to occur even in the absence of noxious stimulus. Internal reinforcers are said to potentially involve personal, emotional factors (e.g., guilt, fear of work, sex, responsibilities); external reinforcers may include such factors as attention from family members and friends, socialization with the physician, medications, compensation, and time off from work.[11] Patients with several psychological syndromes (eg, major depression, somatization disorder, hypochondriasis, conversion disorder) are prone to developing CPS. Various neuromuscular, reproductive, gastrointestinal,

[9] http://www.chronicpaincanada.com/

[10] M. K. Singh et. al, (2009). Online: Chronic Pain Syndrome: http://emedicine.medscape.com/article/310834-overview (last updated, June 29, 2009).

[11] *Ibid.*

and urologic disorders may cause or contribute to chronic pain. Sometimes multiple contributing factors may be present in a single patient.[12]

How Do Courts Approach "Fibromyalgia" and "Chronic Pain"?

The reported cases reveal that "fibromyalgia" is often used as a label to describe numerous characterizations of chronic pain, and that rightly or wrongly, the terms "chronic pain" and "fibromyalgia" are frequently used interchangeably.[13]

In addition, courts have commented that there does not appear to be a single medically accepted opinion as to the cause of fibromyalgia.[14] Experts at trial may disagree regarding the factors which may trigger fibromyalgia or chronic pain, the prevalence of these conditions in the general population, and the diagnosis in any particular case.[15] While there remains some debate as to whether fibromyalgia is caused as a direct result of a traumatic physical experience,[16] there is also some support for the proposition that it is a curable condition.

The judicial treatment of fibromyalgia and chronic pain generally has varied between skepticism and acceptance of the condition. An example of the skepticism with which such claims have been viewed is the decision in the Alberta tort case of *Mackie v Wolfe* (1994), 21 Alta L.R. (3d) 11 (Q.B.), in which Justice Rawlings wrote:

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[12] *Ibid.*
[13] *Russell v, Turcott* [2009] A.J. No. 144 at para 148.
[14] *Lynne v. Taylor,* 2006 ABCA 12.
[15] *Supra* note 11 at 148.
[16] See *Lynne v. Taylor*: At paragraph 15, Dr. Skeith, a rheumatologist maintained that less than five percent of fibromyalgia suffers can trace their conditions to trauma. Later at paragraph 35, a second expert, Dr. Russell, "confirmed" that 3-5% of fibromyalgia cases are associated with motor vehicle accidents. Defense counsel in this case were able to locate two experts to agree on this point, however the remaining case law and other medical literature on the subject appears to be vastly contradictory to this hypothesis, namely, most studies and experts will look to previous instances of trauma as a means of explanation for the development of CPS and fibromyalgia symptomatology..

"The evidence in this case satisfies me that the symptoms diagnosed as fibromyalgia are a re-labelling of a condition by rheumatologists that has been with mankind for hundreds of years and represents a personality disorder. This particular disorder is often found in individuals who will not or cannot cope with everyday stresses of life and convert this inability into acceptable physical symptoms to avoid dealing with reality. To suggest that a motor vehicle accident with very minor injuries is the cause of such symptoms would be simplistic at best…"

Justice Rawlings' characterization of fibromyalgia as a "personality disorder" afflicting those "who will not or cannot with everyday stresses of life… to avoid dealing with reality" has not, however, generally been accepted or applied by the courts. The Alberta Court of Appeal dismissed the plaintiff's appeal in *Mackie v Wolfe*, but held that the trial judge's decision should be confined to its particular facts. The Court of Appeal stressed the trial judge's acceptance of the particular expert evidence in that case, to the effect that the plaintiff's suffering would have occurred even if the accident had not occurred. [17]

More recently, in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] S.C.J. No. 54, the Supreme Court of Canada considered similar issues in the context of a legislative scheme by the province of Nova Scotia to exclude chronic pain from the usual Workers Compensation system, instead providing a 4-week rehabilitation program, with no benefits. The Court found that the exclusion of chronic pain from the workers compensation system was discriminatory and breached the equality provisions of the Canadian Charter of Rights and Freedoms. At paragraph 2 of the Judgment, Justice Gonthier spoke of chronic pain in the following terms:

[17] See the discussion of this case by Glen Hickerson, "Fibromyalgia: Not Quite Condito Non Grata, The Alberta Court of Appeal provides a decision in Mackie v Wolfe", at 30 C.C.L.T. (2d) 141

> “…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…”

In concluding that the blanket exclusion of chronic pain from the workers’ compensation system was discriminatory, Justice Gonthier stated, at paragraph 5:

> “It is discriminatory because it does not correspond to the actual needs and circumstances of injured workers suffering from chronic pain, who are deprived of any individual assessment of their needs and circumstances. Such workers are, instead, subject to uniform, limited benefits based on their presumed characteristics as a group. The scheme also ignores the needs of those workers who, despite treatment, remain permanently disabled by chronic pain. Nothing indicates that the scheme is aimed at improving the circumstances of a more disadvantaged group, or that the interests affected are merely economic or otherwise minor. On the contrary, the denial of the reality of the pain suffered by the affected workers

> reinforces widespread negative assumptions held by employers, compensation officials and some members of the medical profession, and demeans the essential human dignity of chronic pain sufferers. The challenged provisions clearly violate s. 15(1) of the Charter.”

In coming to this conclusion, Justice Gonthier expressed some reservations about the role of the court in addressing medical issues, stating:

> “Courts are not the appropriate forum for an evaluation of the available medical evidence concerning chronic pain for general scientific purposes. Nevertheless, because disability is an enumerated ground in s. 15(1) of the Canadian Charter of Rights and Freedoms, the question whether the way in which a government handles chronic pain in providing services amounts to discrimination is a proper subject of judicial review.”

Similar reservations were expressed at the trial level by Justice Eberhard of the Ontario Superior Court in *Dickson v. Canada Life Casualty Insurance Co.* 1996 CanLII 8045 (ON S.C.). In that case, Justice Eberhard declined to admit into evidence scholarly articles which the defendant sought to file to refute the existence of fibromyalgia and other related syndromes, stating, at paragraph 6, that:

> "Such materials invite me to engage in the conceit of resolving a medical question upon which medical experts do not agree. Specifically, the defendant invites me to find that fibromyalgia, and related syndromes, are not physical in nature but have psychological or emotional bases."

While the court is not engaged in a quest for scientific proof, by the same token, it does not accept allegations of chronic pain without scrutiny. In *Price v. Kostryba*, 1982 CanLII 36 (BC S.C.) at page 4, the Court stated:

> "[the] Court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery."

In the recent tort case of *DeGennaro v Oakville Trafalgar Hospital*, 2009 Can LII 34035 (On.S.C.), Justice Gray referred to the Supreme Court of Canada decision in *Nova Scotia (Workers' Compensation Board) v. Martin* and noted that "claims based on chronic pain have engendered suspicion", but further observed, at paragraph 128, that:

> "Notwithstanding suspicions of this sort, the expert witnesses called by both parties in this case acknowledge that chronic pain, including fibromyalgia, is real, and can be the result of a precipitating event, including trauma."

The court rejected the defendant's argument (based partly on *Mustapha v Culligan*) that the plaintiff's fibromyalgia was not foreseeable, stating:

> "In my view, it is foreseeable that chronic pain may result from a physical injury. While the actual cause of chronic pain is not known, it is known that some people will develop chronic pain after physical trauma. Thus, chronic pain is foreseeable as falling within a range of consequences that may flow from a physical injury. This is a foreseeable consequence in a person of ordinary fortitude. Thus, in my view, the defendants must take the plaintiff as they find her… this is simply a case where the damage inflicted has proven to be more serious than expected."

Another illustrative case is *Jones v Prudential Group Assurance Co. of England (Canada)*, 1999 Can LII 14862 (ON.S.C.). In that case, the plaintiff relied on medical experts who opined that she suffered fibromyalgia. The defendant called an expert who testified to the effect that "because there are no objective findings that can be made, he does not accept Fibromyalgia as a real disease." Cusinato, J., found that the plaintiff was totally disabled within the meaning of the policy. In reaching this conclusion, he noted, at paragraph 72:

> "This is not to suggest that in dealing with the position of the plaintiff as to total disability her position is not suspect. During the trial we have heard orally from a number of medical experts, as well as the medical views filed

> with the court. These all deal with Fibromyalgia, as a syndrome in which the visual observations do not identify the problem. The complaints are not examinable, and the term therefore used, is that the complaints are subjective in nature, but this does not mean a disease does not exist. It is only that science concerning the human body with all the advances made remains still imperfect as to the causes or basis for many of the human complaints with this disease. Fibromyalgia is classified as a syndrome, because science has not yet perfected an objective diagnosis for this disease."

The court also noted, at par. 73, that:

> "Suspicion of a person's employability is not enough where the evidence is to the contrary."

In summary, as will be discussed in greater detail below, the resolution of claims for chronic pain and fibromyalgia under disability policies ultimately do not turn on whether fibromyalgia and chronic pain are physical or psychological conditions, or whether there is "objective" basis for the plaintiff's "subjective" complaints of pain.

Rather, the courts appear to approach evidence of chronic pain and fibromyalgia from the perspective of resolving the particular factual and legal issues which arise in the particular case, whether the case involves Charter issues, the assessment of damages in tort, or the award of benefits under a disability policy.

In each case, the Court is not engaged in a quest for scientific or medical accuracy with respect to the nature of fibromyalgia or chronic pain. Rather, the Court is attempting to resolve a particular legal dispute, in which the issue is not the medical nature of fibromyalgia or chronic pain, but rather, whether the plaintiff's condition meets the particular test applicable to the particular legal issues before the court.

In the case of claims under a disability policy, the issue is whether the plaintiff's condition meets the test of disability, and the other requirements of the policy. This will entail an assessment of the entitlement criteria under the policy, typically, the concept of "total disability" arising from trauma, illness, or disease. Whether one acts for the plaintiff or the defence, the ultimate emphasis will be function, and whether the claimant meets the test of "disability" prescribed by the policy.

The issue is the proof and evidence required to meet the test of disability, or alternatively, to defend against such claims. Ultimately, the quantity and quality of the evidence govern the outcome. If credible evidence is led which establishes disability, the plaintiff will likely succeed. To defend against such claims, the defendant will seek to obtain admissions or adduce other evidence to establish that the plaintiff is functional and able to meet the demands of his or her occupation, or any other suitable occupation, as the case may be.

Proof of Claims Under Disability Policies Generally

Claims for fibromyalgia and chronic pain under disability policies must be considered against the precise wording of the policy in each case. Generally, this will involve a consideration of the entitlement criteria, the nature and extent of benefits available, as well as provisions governing the grounds for termination or loss of entitlement to benefits. Other provisions may affect the documentation or other proof which the claimant must make

Entitlement Criteria

The wording of each policy may differ, but in general, disability policies provide coverage where the insured suffers from "illness or injury" which prevents the insured "from performing the essential duties of his or her occupation", or "any occupation for which he or she is qualified or may reasonably become qualified, by training, education or experience".

Other policies may speak of “total disability”, which is similarly defined in functional terms, as the inability to perform at a certain level of activity, usually in connection with employment.

The insurer may require the insured to submit to a medical, psychiatric, psychological, functional, educational and/or vocational examination or evaluation by an examiner selected by the Company. In addition, there may be provisions whereby the insurer pays for the cost of rehabilitative services to assist the insured in overcoming the disability, and may arrange for vocational assistance to assist the insured in returning to work.

Benefits generally ceases upon the insured ceasing to meet the definition of “totally disabled” or otherwise failing to meet the entitlement criteria; or, if the insured fails to co-operate with the insurer, for example, by failing to attend a medical, psychiatric, psychological, educational and/or vocational examination by an examiner selected by the insurer.

Policies may also provide coverage for “partial disability”, where the insured is not completely disabled from working, but suffers a substantial reduction in income due to a partial inability to work due to injury or sickness for which he or she is receiving medical treatment.

"Total Disability"

The issue for determination in chronic pain cases is the level of resulting impairment to the sufferer. Once it has been established on the balance of probabilities that an individual is suffering from chronic pain, the issue to be determined is whether the pain meets the entitlement criteria in the policy, i.e., whether the pain causes the requisite degree of disability. For example, in *Ho v. General Accident Assurance Co. of Canada*, 2003 CanLII 43740 (ON S.C.), at

paragraph 32m, Justice Jennings put the question succinctly in the following terms:

> "The real question is whether the pain from which she suffers is an impairment, or whether it prevents her from engaging in any occupation or employment for which she is reasonably suited."

The test for total disability approved in *The Paul Revere Life Insurance Company* v. *Gershon David Sucharov*, [1983] 2 S.C.R. 541 at 546 (Man. C.A.) is as follows:

> "The test of total disability is satisfied when the circumstances are such that a reasonable man would recognize that he should not engage in certain activity even though he literally is not physically unable to do so. In other words, total disability does not mean absolute physical inability to transact any kind of business pertaining to one's occupation, but rather that there is a total disability if the insured's injuries are such that common care and prudence require him to desist from his business or occupation in order to effectuate a cure; hence, if the condition of the insured is such that in order to effect a cure or prolongation of life, common care and prudence will require that he cease all work, he is totally disabled within the meaning of health or accident insurance policies."

The plaintiff will have the burden of showing that their injuries prevent them not simply from engaging in their previous employment, but rather, that their injuries prevent them from engaging in any form of meaningful employment.

In *Wigle v. Royal Insurance Company*, [1996] O.I.C.D. 13 arbitrator Seife said at paragraph 49

> “[A]s indicated above, the primary focus of the test under s. 12(5)(b) is the applicant’s physical limitations. In my view, in discharging the onus of proof, the applicant is not required to prove the impossible:

> ie., that the applicant is unable to perform every employment or occupation for which he/she is reasonably suited. However, at the very least, the applicant must identify some sort of "suitable" employment, describe the physical demands of the work and demonstrate with credible evidence that his/her injuries continuously prevent him/her from engaging in such employment"

Strong medical evidence must therefore be adduced by the plaintiff in support of their assertion of a total disability. Additionally, it must be proven that the plaintiff has made all reasonable efforts to re-enter the work force, and that such efforts have been fruitless.

In *Caruso v. Guarantee Co. of North America* [1996] O.I.C.D. 71 arbitrator Manji, referring to *Wigle* at paragraph 81, maintained:

> "In my view, unless the applicant is able to adduce strong medical evidence that he or she is totally disabled, the applicant must present some evidence that he or she has made a *bona fide* effort to identify, try to find or attempt some sort of suitable employment but failed because his or her injuries continuously prevent him or her from engaging in such employment."

Plaintiffs often argue that, once the defendant accepts that the plaintiff is disabled and pays benefits on that basis, the onus shifts to the defendant insurer to disprove entitlement. This approach finds support in cases such as *Tarrant* v. *Manufacturer's Life Insurance Co.* (1995), 134 Nfld. & P.E.I.R. 91 at 110-1:

> "In the absence of a presumption [of disability in a policy] but where payments are made under a specific disability definition and the insurer subsequently terminates those payments, the burden of proof is on the insurer to disprove continuing disability: *Caisse Populaire de Maniwaki* v. *Giroux; Giroux* v. *Assurance-vie Desjardins* (1993), 147 N.R. 16 (S.C.C.) at p. 33. (This does not

involve, as was suggested by counsel for the defendant and in some cases, such as *Porter* v. *Metropolitan Life Insurance Co.* (1985), 23 D.L.R. (4th) 737 at p. 743, requiring the insurer to prove a negative since, in reality, what the insurer must do is prove positively that there are occupations which the insured, with his education, training and experience, and considering his medical condition, could perform. If evidence of such occupations can be given, then it will follow that the insured is not totally disabled.)

….

Even in a case where the legal burden of proof remains on the insured, the evidentiary burden may shift to the insurer if the insured is able to show a prima facie case of total disability: *Campbell* v. *Canada Life Assurance Co.* (1990), 45 C.C.L.I. 73 (Man. C.A.); leave to appeal to Supreme Court of Canada refused (1990), 128 N.R. 79, 72 Man. R. 80); *Young* v. *Saskatchewan and Mutual Life Insurance Co. of Canada* (1991), 48 C.C.L.I. 193 (Sask Q.B.) at p. 208. In such a case, although at the end of the day the ultimate burden of proof of total disability will remain with the insured, there may come a point where the nature of the evidence presented will require the insurer to present evidence of other work that the insured could do or face an adverse decision."

It may be questioned whether such a "reverse onus" exists in Ontario. In *Conte v Canada Life*, 2005 Can LII 28545 (ON. S.C.), Lax J., observed that the weight of authority in Ontario followed *Porter v Metro Life Ins. Co*, 1985), 15 C.C.L.T. 14 (N.S.C.A.), which rejected the "reverse onus". Justice Lax stated, at par. 5-6:

"While the defendant, having paid benefits, may have an evidentiary burden to explain why benefits were terminated, there is no presumption of continuing disability. It is the plaintiff who alleges breach of contract and it is

> she who has the ultimate or legal burden to prove that she is disabled from regular or modified work as described and defined in the Plan.
>
> The defendant relies on terms in the Plan that it describes as exclusionary clauses. It is the defendant's onus to prove that these apply."

<u>"Resulting from Illness… Injury … Disease etc"</u>

As outlined above, the policy generally requires that the inability to work results from "illness", "injury", "disease" or similar language. This provision may be expressed in many different ways in any given policy. For example, a policy may require that the disability occur "as a result of *illness* or *injury*", or may define "disability" as "a state of incapacity *resulting from bodily injury or disease*" which prevents the insured from working.

Some policies expressly define disability as including the mental state of the insured in the determination of disability. For example, the policy in *Vanderkop v. Personal Insurance Company of Canada*, 2008 CanLII 22926 (ON S.C.), specifically included "mental" fitness to work in the definition of disability:

> *"...*an employee is totally disabled when he is wholly and continuously disabled due to illness or bodily injury and, as a result, is not physically or mentally fit to perform the essential duties of:
>
> (A) his normal occupation; and
>
> (B) any other occupations, jobs or work:
>
> 1. for which he is or becomes qualified by his education or training or experience, considered collectively or separately; and
>
> 2. for which the current monthly earnings are 75% or more of the current monthly earnings for the employee's normal occupation.

The availability of such occupations, jobs or work will not be considered in assessing the employee's disability "

If the policy expressly provides for disability on the basis of psychological illness, then the question whether fibromyalgia and chronic pain are "physical" or "psychological" will not be relevant. Even where the policy does not expressly include "mental" or psychological conditions within the definition of disability, it has been held that terms such as "bodily injury" or "illness or disease", are not limited solely to physical conditions, but may include mental or psychological injury, illness, or disease.

Even where the policy does not expressly address mental disability, it appears that an insurer would have difficulty arguing that disability arising from mental, rather than physical, illness or injury that otherwise meets the relevant test in the policy is not covered. In *Battlefords and District Co-operative Ltd. v. Gibbs* [1996] 3 S.C.R. 566; [1996] S.C.J. No. 55; (1996) 140 D.L.R. (4th) 1, the Supreme Court of Canada considered a case where an insurance plan gave more extensive benefits to employees who were unable to work because of physical disabilities than those who could not work because of a mental disability. The Supreme Court ruled that the insurance provision violated the Saskatchewan Human Rights Code, which provided that no employer may discriminate against any person with respect to any "term or condition of employment" because of a disability. The Court further confirmed that human rights legislation is "fundamental" or "quasi-constitutional" and should be interpreted in a broad and practical or "purposive" manner that could override other legislation or policies in appropriate circumstances. Accordingly, it appears that so long as the test of disability is met, a policy could not discriminate between mental disability and physical disability in any event.

This approach is consistent with the approach taken to the meaning of "bodily injury" in liability policies. It is accepted that "bodily injury" may include purely psychiatric or emotional injuries: *Tammy W.-V. v. Kenneth Robert James W. et al*

(1996), 29 O.R. (3d) 277 (Gen. Div.). However, bodily injury at law generally connotes *serious* illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42. The law does not generally recognize upset, disgust, anxiety, agitation or other mental states, standing alone, that fall short of "injury". Accordingly, in the disability context, it appears that psychological injury or mental illness should meet the test, assuming that disability can be proven to result.

<u>Fibromyalgia, Chronic Pain and Proof of Disability</u>

As has been addressed above, the issue is not whether fibromyalgia and chronic pain are physical or psychological. Rather, the issue is whether the facts of the case meet the test of disability in the policy. Each case ultimately turns on its own facts, and as will be seen, the credibility of the insured, and whether his or her complaints are supported by the overall weight of the evidence, will also play a significant feature.

For example, in *McIsaac v Sun Life Assurance Co. of Canada*, 1997 Can LII 4155 (B.C.S.C.), the policy expressly covered disability arising from mental or physical causes. The insurer paid benefits for two years, and then terminated benefits when the test changed and required proof of disability from any form of employment for which the plaintiff was reasonable suited by her training and education. The plaintiffs' physicians were divided as to whether the plaintiff suffered from a form of lupus or fibromyalgia, but were agreed that she was not capable of working by reason of physical pain and associated mental issues. A functional abilities evaluation undertaken at the request of the insurer indicated that the plaintiff was totally disabled, but commented that:

> "… Ms McIsaac has a long standing chronic medical condition in which behavioural and psychological factors usually play a significant role and there is evidence of that in this assessment."

It was suggested that an Occupational Work Capacity Evaluation be undertaken, because the functional evaluation alone could not determine the issue of

disability in those circumstances. The work capacity evaluation, in turn, concluded that:

> "Ms McIsaac has no physical or mental impairment that would disable her from work of a Sedentary physical demand (lifting and carrying 10 lbs maximum, occasionally)… She has a total disability mindset which is preventing her from getting on with her life in any functional way."

In finding in favour of the plaintiff, the Court stated:

> "Whether she suffers from Systemic Lupus Erythematosus (as Dr. Kothari believes), fibromyalgia (as Dr. Jaworski and Dr. Yorke believe), or some other ailment is of no particular relevance. Rather, the significant facts are that because of her persistent pain, her continuing state of anxiety and the impairment of her tangential thinking processes, from the standpoint of the reasonable observer, common care and prudence require her to desist from working. The fact that she chronically and without warning will lose the strength in her hand and drop things; that she fatigues after a short period of time; that because of the reduction in tangential thinking such that she can no longer perform simple mathematical calculations or follow with any regularity simple instructions; and that she cannot remember things for any length of time, renders her totally disabled from any type of employment.
>
> In reaching these conclusions, I placed a great deal of reliance on the evidence of the Plaintiff. In my view, she was a straightforward witness who endeavoured to avoid exaggeration and to be fair. Her evidence was internally consistent. Her evidence of her symptoms was consistent with the observations made by others."

In addition to being awarded the benefits to which she was found to be entitled, the plaintiff was also awarded aggravated damages and damages for mental distress, an issue addressed in a later section of this paper.

Similarly, in *Chaplin v Sun Life Assurance Co. of Canada*, 2001 BCSC 310 (B.C.S.C.), the Court noted, at paragraphs 41-2:

> "The plaintiff… does have chronic pain, regardless of whether it fulfills the technical requirements to be categorized as fibromyalgia syndrome.
>
> The issue is not whether the plaintiff does or does not have fibromyalgia as opposed to chronic pain syndrome. The issue is whether she 'is in a continuous state of incapacity due to illness which… prevents her from engaging in any occupation for which [she] is or may become reasonably qualified by education, training or experience."

In that case, the court concluded that the plaintiff was not a credible witness; her claims of disability were not supported by the medical evidence, and the court dismissed her claim.

The issue also was addressed in *J.M. v Sun Life Assurance Company of Canada*, 2005 PESCAD 25 (P.E.I.C.A.), which cited *Chaplin* and concluded:

> "The appellant claimed to suffer from fibromyalgia, chronic fatigue syndrome and multiple chemical sensitivity. A good deal of time was taken up at trial with evidence about whether or not the appellant fit the medically recognized criteria for those conditions and whether the latter of them was even recognized by the medical community. However… the issue is not whether the claimant fulfills the technical requirements of some particular diagnosis. The issue is whether the claimant is in a continuous state of incapacity due to bodily injury, disease, mental infirmity, or sickness which prevents him or her from performing the duties of their job or from engaging in a commensurate one. It is the fact of illness that is important not its name, cause or explanation. It is true, as counsel for the respondent argues, that a person is not ill simply because they say so but, on the other hand, a person may be ill even though there is little or no objective evidence to prove it. That said, the fact that a person suffers from an illness, even a

> chronic one, is not in itself sufficient to qualify for total disability benefits under the policy. The additional requirements that the resulting incapacity be continuous and that it be to such an extent that it renders the employee unable to perform their ordinary duties set a very demanding standard that is not easily satisfied."

In *Conte v Canada Life*, 2005 Can LII 28545 (ON S.C.), the plaintiff was employed in a sedentary occupation. She claimed total disability following a motor vehicle accident which occurred in 1999, and which allegedly resulted in a number of complaints of pain and restrictions of motion throughout various parts of her body, including the neck, back, knees and elsewhere. One year following the accident, she met a man in the United States and was married but the marriage later broke down and she appeared to return to live with her parents in Toronto, although she apparently returned to Florida during a break in the trial.

The court characterized the issue as measuring the plaintiff's "subjective complaints against the strong body of medical opinion that does not support a physical disability rendering her unable to return to work at the Bank." The court noted that the plaintiff had been examined by a number of specialists, but apart from carpal tunnel syndrome, there was no objective evidence of pathology to account for the plaintiff's other complaints, and essentially, normal medical examinations. The court noted the plaintiff's bouts of travel with small children, and observed that:

> "The physical demands of travel require protracted standing, walking and sitting, as well as some bending and lifting. These are the very work activities that Ms. Conte claims she is unable to do. I appreciate that she did not travel on a daily basis, but during the years she claimed to be disabled from working, she was able to manage a baby and then a toddler through busy airports, lift luggage on and off carousels, sit for three-hour flights with Sonia on her lap, and stand in long lines to check in and clear security. I

> agree with the defendant that this is not a picture of a person who is physically disabled from working at a sedentary bank job…
>
> At its highest, the plaintiff has established that she has some functional limitations that my require accommodations if she returns to work. She has not established that she has a physical disability that prevents her from working at any of the customer service bank jobs. In view of the conclusion that I have reached, I do not find it necessary to address the defendant's submission that she was not under the continuing care of appropriate specialists for her physical injuries."

The court also rejected the argument that the plaintiff suffered a psychiatric illness that prevents or prevented her from performing the essential duties of her former job as a Customer Service Representative or any current bank job. The court accepted the opinion of the psychiatrist who examined the plaintiff for the insurer, who stated that by May 2000, the plaintiff was:

> "…interacting with others on the Internet, met her husband and started a new relationship with him. This is not behaviour that is found in a depressed person who is lacking in interest and disabled by symptoms of depression.

The court also found that the plaintiff had failed to attempt to return to work, and had failed to take recommended psychiatric treatment. The court concluded, at paragraph 89 to 90:

> "When an employee fails to co-operate in rehabilitation through recommended treatment and is not under the continuing care of an appropriate specialist for a treatable condition and refuses to try accommodated work in circumstances such as these, a long-term disability insurer cannot be expected to continue to pay benefits. This leaves the insurer without any ability to authenticate the claim. It leaves the Court in no different position. Chronic pain cases are difficult cases to adjudicate, particularly where there is little or no objective medical evidence of a

disabling condition. If Ms. Conte had made a concerted effort to rehabilitate herself and if she had made reasonable attempts to return to work, but had failed, this trial could have turned out differently. When this evidence is lacking, claims of this kind are unlikely to succeed.

Ms. Conte has come to believe that she is incapable of leading a successful or productive life. I think she can. She is a young woman. She is fortunate to have a supportive family. She has an employer who is prepared to offer her immediate work that she is qualified to perform. Through her employer, she has a benefits plan that will pay for physiotherapy or other treatment she may require. She can try to improve her physical condition through physiotherapy, conditioning and exercise. Her job can be accommodated if she needs this. She is able to obtain a good deal of assistance from her family and her employer. In my opinion, returning to work will help rather than harm her ultimate recovery and will lead her back to the fun and energetic person she was before her accident."

The court dismissed the action.

Issues of Proof

As indicated, the cases accepting or rejecting disability claims turn on their particular facts, and involve an assessment of the plaintiff's own evidence, the evidence of lay witnesses regarding their observations of the plaintiff's day-to-day activity level and capabilities, and the evidence of medical experts. In addition, the court is required to make an assessment of the demands of the plaintiff's pre-accident occupation, or other occupations for which the plaintiff is reasonably suited by training, education or experience, and make a determination as to whether the plaintiff is physically or psychologically disabled from performing that employment.

Because each case is decided on its own facts, the cases involve an application of the principles to the facts of each case.

How does one prove, or disprove, the existence of fibromyalgia and chronic pain?

Courts decide cases on the basis of the evidence before them, and where there has been credible evidence to support a conclusion of fibromyalgia or chronic pain, the courts have been prepared to accept the existence of the condition, and reward damages accordingly.

Sources of Evidence

As indicated, the plaintiffs' case will largely turn on the plaintiffs' own subjective complaints of pain, and medical opinions which are largely based upon those complaints. As a result, the defence of the case will necessarily involve challenging and testing the accuracy of the plaintiff's version of events.

In addition, the defence will seek other potential causes of the plaintiff's complaints of pain and psychological injury.

Medical Evidence

Experts frequently encountered in chronic pain cases include general practitioners, physiatrists, psychiatrists, psychologists and others who may be directly involved in treatment, or who may be consulted solely for medical legal purposes by either the plaintiff or the defendants.

There may be little "objective" medical evidence of injury or illness. The plaintiff will not have fractures or visible soft-tissue damage, and diagnostic imaging may well be negative for any sign of injury. Other observations on examination—tenderness on palpation, and some forms of spasm, for example— may reflect the plaintiff's subjective experience or may be inaccurate or subject to interpretation for any number of reasons.

In addition, in general terms, the plaintiffs' physicians will tend to accept the plaintiffs' complaints as genuine, and may be reluctant to challenge their patients on matters of subjective experience. The plaintiffs' physicians may or may not encourage the plaintiff to return to work or engage in their usual activities, sometimes solely on the basis of the plaintiff's self-reporting of his or her condition.

As a result, the plaintiffs' medical opinions may directly or indirectly incorporate the plaintiffs' version of events, including descriptions of pain and other complaints, with little outright challenge or criticism. This may be the nature of the beast, so to speak, but in the end, the medical evidence is often no better than the plaintiff's own subjective evidence, and much will therefore turn on the accuracy and reliability of the plaintiff's history and reporting skills, and the extent to which the plaintiff's reported history is consistent with other known facts, which may be elicited by surveillance or other investigation.

As a result, the plaintiffs' credibility will be particularly significant in the assessment of such claims, an issue which will be addressed in further detail, below.

From the defence perspective, a complete, objective medical history of the plaintiff should be obtained. This will entail requests for production of clinical notes and records of all treating physicians, both before and after the accident in question. In addition, a copy of the decoded OHIP summary for as far back as possible should also be obtained.

Employment Records

All records of employment, both before and after the accident, should be obtained. These records may contain medical evidence, but should provide some information regarding the plaintiff’s job description and duties, the plaintiff’s attendance records, and performance reviews or other comments which may assist in determining whether the plaintiff’s injuries disable him or her from employment.

Insurance Records

In addition, efforts should be made to identify and obtain copies of any applications for insurance, or insurance claims files, on the part of the plaintiff at any relevant time, both before and after the accident in question.

Surveillance

Independent observations of the plaintiff should be undertaken and recorded. Is the plaintiff’s activity level consistent with the plaintiff’s evidence. In addition to traditional surveillance, using private investigators to observe and film the plaintiff’s activities, “on-line surveillance” of the plaintiff on social-networking sites such as “Facebook” and “Myspace” may also provide useful information. This evidence may either confirm, or contradict, the plaintiff's subjective complaints, and provide independent evidence of the plaintiff's activity.

The Importance of Credibility

The underlying factual assumptions and factual bases for a diagnosis of fibromyalgia or chronic pain must be carefully considered and where appropriate, challenged. In this respect, the plaintiff’s credibility and medical history will be particularly important.

A law suit is not a popularity contest, and accordingly, a case should not turn solely upon the “likeability” of a plaintiff or insurance claimant. However, in considering the strength of the plaintiff’s claim, one factor to consider is the impression a plaintiff will make as a witness. This factor, together with others, will contribute to the assessment of the plaintiff’s credibility, and to the strength of the case as a whole.

The assessment of credibility can be one of the more challenging tasks for the court. An often quoted summary of the factors relevant to credibility can be found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), where at 356-7, the Court writes:

> Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility…The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions…Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken.

To the extent that it can be shown that a plaintiff has not accurately described his or her condition and activity level to treating physicians and others, the medical opinions themselves may be less credible.

The plaintiffs’ credibility may be tested or challenged for internal consistency, but also for consistency with other known facts. The plaintiffs’ case will be much weaker if the plaintiff’s complaints of injury are not supported by, and are inconsistent with, other evidence in the case, and also with common sense and human experience.

The defence must seek other evidence with which to reasonably test the strength and accuracy of the plaintiff’s subjective complaints. Among the records to seek by way of production in litigation involving disability policies are: pre-accident and post-accident health records, including OHIP summaries reflecting treatment, and clinical notes and records of treating physicians; employment records; applications for insurance; and, information about previous claims. Other investigation may include observations of the plaintiffs’ activity level and functional abilities through surveillance; and, defence (or “independent”) medical examinations and functional ability evaluations.

The plaintiff’s complaints, and the opinions and conclusions of the plaintiff’s medical experts, can be compared with other evidence to determine whether the complaints are consistent with the other facts of the case, or otherwise credible. If so, there is a greater likelihood that the plaintiff’s assertion of disability will be accepted. If, on the other hand, the plaintiff’s assertions appear inconsistent with other evidence, then a court is more likely to exercise greater caution and skepticism before it accepts purely subjective complaints from an unreliable witness, or medical opinion based upon the self-reporting of such a witness.

The extent to which credibility is important with respect to findings of fibromyalgia and chronic pain is well established, and illustrated by a number of judicial decisions, in both tort and first party claims.

In *Olszynko v Cowtan*, December 6, 1999 (O.C.A.), the plaintiff claimed to suffer fibromyalgia and/or chronic pain as the result of a motor vehicle accident. At trial,

the jury rejected the plaintiff's claim and awarded no damages. The plaintiff's appeal to the Ontario Court of Appeal was dismissed on the grounds that the jury's decision turned on its assessment of the plaintiff's credibility:

> As to damages, the appellant Frima Olszynko's complaints were subjective and the diagnosis put forward was fibromyalgia or chronic pain syndrome. The validity of this syndrome is based largely upon the credibility of the patients and, in this case, the appellant's credibility was severely compromised by a surveillance video taken over a fifteen-day period. Accordingly, the jury's verdict in awarding zero damages was based on credibility and cannot be characterized as perverse. *(emphasis added)*

In *Chaplin*, supra, a disability action, the court noted, at paragraph 50:

> "Clearly, the circumstances make the reliability of the plaintiff's self-reported symptoms and assessment of ability of critical import in this matter. Her credibility has been challenged and is very much in issue."

The defendant relied on surveillance evidence of the plaintiff shopping and on a family outing to a game farm. In reference to the surveillance, the court stated, at paragraph 52-3:

> "I appreciate the nature of this type of evidence does not take into account the aftermath of pain and discomfort an activity may cause. I appreciate it also is but a snippet in time, and must guard against unfair editing.
>
> With due allowance for the shortcomings of this evidence, I found certain aspects of it contradicts the plaintiff's general evidence of her inability to perform certain tasks and her avoidance of certain activity…"

Further, at par. 62:

> "I conclude the plaintiff has exaggerated her difficulties on various occasions that must reflect the necessity for caution in acceptance of her reporting of symptoms, the degree and scope of her pain, disability, and her self-assessment of an inability to work."

The court noted that the plaintiff's evidence was supported by her family physician, Dr. Thomson, in respect of whom, the court stated:

> "I find Dr. Thomson's opinion coloured by loyalty to his patient and lacking in objectivity."

The court noted the absence of other medical evidence supporting her claim, and dismissed the action, stating, at par. 79-80:

> "I conclude that the plaintiff has not met the onus upon her to show total disability within the definition of the policy. In my view the plaintiff's evidence taken alone is to be treated with caution as there is reason to be suspect of her credibility. The only supporting medical evidence of her total disability from employment is that of Dr. Thomson which I have found suffers in the weight it should be accorded because of his almost total reliance on the plaintiff's self reporting without independent analysis or reasonably objective assessment.
>
> The plaintiff's claim is dismissed."

It is difficult, however, to predict how a court will approach surveillance evidence, or issues of credibility generally. While the Court in *Chaplin* discounted the evidence of the plaintiff's physicians views on the grounds they were "advocates", the court appears to have taken a very different view of matters in

Lalonde v London Life Insurance Co. (2002), 55 O.R. (3d) 26 (ON. S.C.). In that case, the court rejected the defendants' argument that certain of the plaintiffs' physicians were "advocates", stating, at par. 33:

> "In particular, I reject as unfounded, the suggestion that Dr. Owen and Dr. Reynolds are advocates for Lalonde. They both acknowledged candidly that they wanted to assist Lalonde in securing his long term disability benefits. Dr. Owen believes that the stress caused by financial worries has an effect on a person's well being. Knowledge of such stressors is, in his view, relevant to providing proper care for the patient. That seems to be a reasonable proposition. It was not seriously challenged by the defendant. In my view, Dr. Owen and Dr. Reynolds did not stray from their professional duties as medical advisors for Lalonde in order to do battle with London Life."

The insurer in *Lalonde* relied on surveillance of the plaintiff conducted over seventeen days, however, the court was not impressed, stating, at par. 35:

> "On the whole the videotape shows Lalonde to be moving at a slow pace and almost always with a dour or doleful expression on his face. It shows him doing very ordinary things like walking, mowing the lawn with a power mower, driving his cars, and shopping. In the written reports prepared by the private detectives, there are instances of editorializing and hyperbole. "

For example, the court noted, at par. 38 and 39:

> "What was referred to as 'running' appears to be no more than a fast shuffle as Lalonde moved from his driveway to the rear yard of his house, a distance of a few yards, to retrieve and answer a portable phone.

> Early one morning he is said to be seated on the front steps of his house 'enjoying' his toast and coffee. On viewing the videotape again it is difficult to discern any enjoyment.
>
> What was described by the private detectives and by London Life's counsel as 'washing' the cars is no more than Lalonde turning on the garden hose and spraying water onto them. There is no bucket of suds, no brush or sponge, no drying cloths—in short, it is stretching the point considerably to characterize the activity witnessed on the videotape as 'washing' the car."

The court found the surveillance did not support the conclusions sought by the defendant, stating, at par. 42:

> "It is a reasonable inference from these examples that, at least subconsciously, the private investigators see what they believe that they were sent to see. It is a 'where there is smoke, there must be a fire" mentality. To describe during a few seconds of spraying water on the car as washing the car is perhaps the most egregious example of this mindset. Simply saying that something is so, does not make it so."

In *Ho v General Accident Assurance Company of Canada*, 2003 Can LII 43740 (ON. S.C.), the plaintiff claimed ongoing income replacement benefits on the basis that she suffered injury which "continuously prevents the insured person from engaging in any occupation or employment for which she or he is reasonably suited by education, training or experience."

The medical evidence established that the plaintiff suffered chronic pain disorder attributable to injuries received in a motor vehicle accident, however, the "real question is whether the pain from which she suffers… prevents her from engaging in any occupation or employment for which she is reasonably suited."[18]

[18] Paragraph 32

In that case, there was “extensive video surveillance” carried out over 31 or more days from late 1998, including continuous days of surveillance from January 27 and February 2, 2003, shortly prior to trial. The tapes “show the plaintiff going about her normal daily routine: driving her car, shopping, pushing shopping carts, carrying parcels, talking to friends and the like.” The surveillance confirmed the plaintiff’s admission that she attended at her husband’s restaurant business on a daily basis and helps out while she is there. The court described the surveillance, at paragraphs 35-6, as follows:

> “She is shown behind the counter in the restaurant both at the cash register and taking orders. She is shown cleaning tables, moving tables and chairs, on occasion cooking on the grill, chatting to customers, serving food to customers at tables, and opening and closing the restaurant. Her attendances at the restaurant in the latter observations are for long hours, certainly in excess of eight.”

> Her doctor has prescribed the use of a cane for right-leg weakness, however, “there was no objective evidence that the plaintiff has right leg weakness. “In none of the videotapes does Mrs. Ho appear with a cane” although she was seen to use a cane on the day of her discovery. “On all the videotapes she appears to move easily and normally with no restriction of movements, albeit at a sedate pace.”

The court further observed, at par. 37-8:

> “From what I have seen on the videotapes it is obvious that the plaintiff is not totally disabled. Nor in fairness does she claim to be. What is clear however is the extent to which she is able to put in long hours in the restaurant. Those tapes seem to me to contradict the opinions of Dr. Ko and Dr. Lau as to the length of activity that the plaintiff would be able to maintain. I am driven to the conclusion that Drs. Ko and Lau would have wanted to revisit their opinions had they had the advantage of seeing the

plaintiff's activities as captured on the tapes. Both of these doctors in my opinion gave credible evidence and were doing their best to assist their patient. However, in their evidence, they relied on her own descriptions to them of what she could and could not do.

As well, because of the videotapes, I am driven to the conclusion that at least on some occasions Mrs. Ho is able to work long hours in the family restaurant without any evidence of significant breaks."

The video was also found to call into question certain other aspects of the plaintiff's evidence. In the result, the court concluded, at paragraph 46:

"There is obviously no evidence of total disability. The videotapes show that Mrs. Ho is far from being totally disabled."

The Court found that the plaintiff failed to discharge the burden of proving that she was totally disabled in the circumstances, and it was held that the insurer had no further obligation to pay benefits.

On the other hand, surveillance evidence may confirm, rather than contradict, the plaintiffs' complaints, and it can be difficult to persuade the court that weaknesses or contradictions in a plaintiff's testimony reflect credibility issues. In *Hartwick v Simser*, 2004 Can LII 34512 (ON S.C.), the defendant relied on surveillance evidence of the plaintiffs shopping. In that case, the court noted, at paragraphs 196-7:

"While the surveillance evidence was not of significant probative value, the footage depicting both Karen and Krista shopping for Easter Lillies and other small articles in March, 2004 clearly corroborates their testimony as to the use of compensatory strategies and pain management techniques such as the 'rest step', performed to relieve low back stiffness, and the stepping

back from displays of store merchandise to avoid flexion and extension of the neck while shopping.

Perhaps the most useful portion of the videotaped surveillance was that taken of Krista in November of 2003 sitting down to rest in the middle of an aisle in a Wal-Mart store. Krista… presented as a very shy young lady at trial, and I accept the argument that she would never draw attention to herself by doing something similar, unless she felt unwell."

The defendants argued that the plaintiffs were less than forthright in disclosing their pre-accident health and otherwise manipulated information to gain a financial advantage. The court rejected all of these arguments, finding that the plaintiffs did the best they could to be accurate, and that none of the experts considering them to be lying or malingering, and concluding that "the weight of the evidence does not make the Harwicks out to be liars."

Mitigation

Mitigation of damages remains an important principle for claims in both tort and contract. In the disability context, once it is established that the plaintiff meets the entitlement test for benefits, mitigation may be one of the few available defences. As fibromyalgia and other chronic pain disorders are largely subjective, reductions in the overall award is improved through an objective and well-presented marshalling of the facts relating to failure to mitigate.

The concept of mitigation requires a plaintiff, notwithstanding the defendant's breach of contract or tort, to attempt to minimize the resulting damages by taking reasonable steps to avoid or minimize the loss. That is, a plaintiff affected by a breach of contract cannot simply allow the damage to unfold, but must take reasonable steps to avoid or minimize the damage. The test is an objective one based on the court's assessment of what a reasonable person would do in the circumstances. The onus is on a defendant who asserts that a plaintiff has failed

to mitigate his damages: see *Janiak v. Ippolito,* 1985 CanLII 62 (S.C.C.), [1985] 1 S.C.R. 146.

In *DeYonge v Liberty Mutual Insurance Company*, 2003 Can LII 42935, the plaintiff succeeded in establishing that she was disabled from approximately December 1999 onwards. In addition, however, the court found that the plaintiff had failed to mitigate her damages, stating, at paragraphs 41-2:

> “On more than one occasion, the plaintiff was advised to seek psychiatric help and once to seek a neurological consultation…
>
> It is my view that the plaintiff had a duty to mitigate her damages by seeking additional medical care in the form of psychiatric assistance as recommended by more than one doctor, and neurological help, to expedite relief from the consequences of the fibromyalgia. In fact, Dr. Sokoluk assumed in September 2000 that the plaintiff was in the care of a psychiatrist. I believe it is a fair inference that she would have recovered earlier if she had done so. In light of her past medical history, December 31, 2000 would be a reasonable projected date for such recovery.”

In cases where plaintiff is rendered impecunious by the defendant’s conduct, it may be argued that the plaintiff should be relieved of its duty to mitigate, or alternatively, that the defendant ought not to be relieved from its obligations by reason of the plaintiff’s inability to mitigate. In *Russell v. Turcott* [2009] A.J. No. 144, the judge held that the plaintiff was unable to mitigate as a direct result of the defendants’ tort, and held that “the Defendants are, in essence, the effective cause of any lack of mitigation, from a health perspective." Similarly, it was held that the plaintiff’s inability to travel to a far-away clinic for treatment did not constitute failure to mitigate in the circumstances, because the plaintiff would not have required the treatment, but for the negligence of the defendants causing the accident. Arguably, similar considerations may also apply to mitigation of damages in contract.

Mitigation was considered in a tort action involving chronic pain and fibromyalgia in *Pedherney v. Jensen* [2008] A.J. No. 787 (Q.B.). In that case, the Plaintiff received injuries in a relatively significant collision that caused moderate to severe whiplash and exacerbated a pre-existing psychiatric condition. The court found that the Plaintiff was not a credible witness-- her testimony was often contradictory; she had lied on a resume; video surveillance caught her lying; she incorrectly attempted to collect for expenses that were not caused by the accident; and, additionally, she claimed as expenses the costs of treatments that were already repaid by Alberta Health Care. The court noted that the plaintiffs' experts put forward contradictory diagnoses, ranging from Somatoform Conversion Disorder, to Fibromyalgia and Chronic Pain Disorder.

In *Pedherney*, counsel for the defendant put the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) 4th Edition to one of the plaintiff's experts, including a passage to the effect that:

> "…[the] essential feature of Malingering is the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as …avoiding work, obtaining financial compensation…"

The DSM-IV suggests that malingering should be "strongly suspected" when any combination of the following is noted:

1. Medicolegal context of presentation (e.g., the person is referred by an attorney to the clinician for examination)

2. Marked discrepancy between the person's claimed stress or disability and the objective findings

3. Lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen

4. The presence of Antisocial Personality Disorder.

On this basis, it would be reasonable to at least suspect malingering in any case involving a claim for fibromyalgia or chronic pain, simply on the basis of the "medicolegal context of presentation", let alone the other factors identified, some or all of which may also be present in cases of alleged fibromyalgia and chronic pain.

With respect to mitigation, the defendant in *Pedherney* argued that the plaintiff failed to mitigate her damages by gaining weight, in the "half-hearted" pursuit of exercise, and a less than full pursuit of physiotherapy.

In stating the principles with respect to mitigation, the court stated:

> "The onus to prove there is some degree of avoidable loss lies with the defendant…in order to determine that some or all of the appellant's losses would have been avoided had the appellant engaged in exercise, there must be evidence from which the court can estimate the efficacy of the treatment. Only when this element is proven can the court correctly conclude that the appellant failed to mitigate her damage, and on that finding, make the appropriate reduction."

On the other hand:

> "Where the plaintiff elects not to follow her medical practitioner's advice and fails to use drugs, therapies or treatments that are recommended by her practitioners as being helpful to her recovery, there is good evidence that the plaintiff has failed in her obligation to mitigate her losses…"

In the result, the court found that the evidence was not clear as to the extent to which the plaintiff's damages could have been avoided, and while it was found that the plaintiff could have done more, in the result, mitigation played little role in the final result, which saw the plaintiff recover damages in excess of $390,000.

Where permanent disability is established and no useful purpose would be served by regular attendance on a physician, the law will not compel the performance of futile acts: *Kirkness v. Imperial Life Assurance Co. of Canada*, [1993] 99 D.L.R. (4th) 391, 12 O.R. (3d) 285 (O.C.A.).

Accordingly, it must be shown that the plaintiff would have benefited from further medical treatment before the failure to pursue such treatment constitutes failure to mitigate. For example, it must be shown that the plaintiff had some prospect of returning to work had he or she followed recommended treatment. If the proposed treatment would not have materially improved the plaintiff's condition, mitigation may not be established.

This is illustrated by the recent tort case of *Watts v Donovan*, 2009 Can LII 26931 (ON S.C.). In that case, the plaintiff sought damages for chronic pain as the result of a 1999 motor vehicle accident. The defendant argued that the plaintiff had failed to mitigate her damages, on the basis she failed to return to hospital for active treatment, received no treatment whatsoever while in the U.S.A. for 5 years, and failed to follow treatment recommendations of one of the medico-legal experts who assessed her. The court rejected these arguments, stating, at paragraph 22:

> "… I find there is no evidence that the 2008 Velikonja medical legal recommendations to counsel were in fact ever communicated to her. More importantly, Dr. Velikonja testified, and I find, that her ongoing condition is chronic and permanent with or without any treatment… I find Dr. Velikonja's

> medical recommendations would help Ms. St. Laurent be more comfortable but would not make her whole. An Ontario plaintiff has the burden of proving both the fact she has suffered damage and the quantum of that damage. Ms. St. Laurent has met that burden. The burden of proof then comes to the defendants to prove circumstances whereby her loss could have been diminished… She testified, and I find, that when she left Canada for the United States, she thought that she'd done all she could medically. I accept the evidence of Drs. Velikonja, Mermigis and Fulton that her ongoing condition was and is chronic and permanent—with or without any treatment. I am not satisfied on these facts that the defendants have met their onus."

It might be argued that, if the proposed treatment would have made the plaintiff sufficiently "more comfortable", it might help her become comfortable enough to overcome her pain and return to work, however, it is not clear whether the evidence would have supported such an argument in that case in any event.

Another illustrative disability case on mitigation is *Andreychuk v RBC Life Insurance Company*, 2008 Can LII 286 (B.C.S.C.), aff'd 2008 Can LII 492 B.C.C.A., in which the facts supporting the failure to mitigate were closely tied to the dismissal of the claim as a whole. In that case, the plaintiff was a lawyer who claimed disability due to depression and anxiety. The claim was marked by distrust and misunderstandings on both sides. After some time, the plaintiff's claim was substantiated by an independent medical evaluation, but the plaintiff failed to provide meaningful monthly updates to the insurer (as required under the policy). After the further passage of time, during which the insurer paid benefits, the insurer requested updated clinical notes from the plaintiff's physician, and ultimately, a second IME.

The physician performing the second IME concluded that he did "not see any symptomatology of a Major Depressive Disorder or a Generalized Anxiety Disorder or a Panic Attack Disorder". He suggested the stress was "situational"

and “an adjustment disorder with anxiety and possibly depression”. In addition, the second IME further indicated that the plaintiff admitted that she could likely work in law-related activities which were not adversarial in nature.

The insurer terminated benefits on the basis of the second IME, and the plaintiff’s admission that she could work in other law-related pursuits. The plaintiff sued, seeking reinstatement of benefits, damages for negligent investigation, plus aggravated and punitive damages. Other evidence showed that the plaintiff had improved since the IME, and was no longer actively receiving treatment.

The court dismissed the plaintiff’s claim on the basis she did not meet the test of disability in the policy, which required the plaintiff to be under the regular care of a physician. In addition, the court found a failure to mitigate, stating:

> “The plaintiff failed to take steps to engage in any return to work program that might have assisted her to use her talents as a lawyer in a non-adversarial setting, or in a law-related occupation that would not aggravate her condition. The policy provides residual disability benefits. Thus, there is an expectation that an insured person will return to work. Pursuant to her insurance policy, it is not open to the plaintiff to not work at all where her condition is so greatly improved.”

The plaintiff’s appeal was dismissed for the reasons given by the trial judge.

<u>Peace of Mind, Bad Faith and Aggravated and Punitive Damages</u>

An insurer facing a claim from its own insured is in an altogether different legal relationship than a tort defendant defending a claim for chronic pain in tort.

A tort defendant may put the plaintiff to strict proof a claim in tort. However, a contract of insurance is a contract of utmost good faith, in which a reciprocal duty

is imposed on both the insurer and the insured to ensure they act towards each other with clean hands and integrity.

The insured owes a duty of full and honest disclosure; however, the courts have also recognized that the insured, having suffered a loss, is in a vulnerable position and largely dependent upon the insurer to provide relief.

Hence, the obligation to act in the utmost good faith requires an insurer to act promptly and fairly at every step of the claims process. The obligation of good faith is separate from the specific obligations of the insured and the insurer under the policy: see *Whiten v. Pilot Insurance Co,* 1999 CanLII 3051 (ON C.A.).

The leading case on the issue of bad faith in the handling of claims for fibromyalgia and chronic pain under a disability policy is *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3, 2006 SCC 30. In that case, Connie Fidler was insured with Sun Life Assurance for long-term disability benefits through her employer. She became ill when she was 36 years old, and was subsequently diagnosed with chronic fatigue syndrome and fibromyalgia. In 1991, the plaintiff began to receive long-term disability benefits.

Under the terms of the policy, she was entitled to continued benefits after two years only if she was totally disabled, i.e. unable do any job. According to the insurer, its video surveillance detailed activities inconsistent with her claims that she was incapable of performing light or sedentary work, and in 1997, the insurer discontinued her benefits. Despite medical evidence that the plaintiff was not yet capable of doing any work, the insurer, relying on its own consultants and experts, confirmed its decision to terminate benefits.

One week before the trial was scheduled to start, the insurer reinstated the plaintiff's benefits and agreed to pay all arrears with interest. The only issue at

trial was the plaintiff's entitlement to aggravated and punitive damages related to the insurer's handling of the claim.

The trial judge awarded aggravated damages in the amount of $20,000 on the basis that the contract was one for "peace of mind", but found that the insurer's conduct did not constitute bad faith so as to warrant punitive damages.

The British Columbia Court of Appeal upheld the trial judge's decision on aggravated damages. With respect to the issue of punitive damages, the majority held that the conduct of the insurer did constitute bad faith and must be denunciated and deterred.

The Supreme Court of Canada (unanimously) allowed the appeal in part. The Court of Appeal's award of punitive damages was set aside and the trial judge's order restored, with costs to the Ms Fidler throughout.

The Supreme Court of Canada held that damages for mental distress for breach of contract may be recovered where they are established on the evidence, and shown to have been within the reasonable contemplation of the parties at the time the contract was made. The fact that the contract was one for "peace of mind" supported the award of damages as being within the contemplation of the parties.

These principles were applied in *Rowe v Unum Life Insurance Co. of America*, [2006] O.J. No. 1897. At first instance (decided prior to the Supreme Court of Canada decision in *Fidler*) the court found that the insured had wrongfully terminated benefits, and ordered reinstatement of benefits during the plaintiff's period of disability; however, the court dismissed the plaintiff's claim for aggravated or punitive damages, on the basis that the insured had applied a principled approach in response to a difficult case and was not in breach of a duty of good faith. Following the release of the Supreme Court of Canada's decision in *Fidler*, however, the plaintiff was permitted to amend the claim to seek consequential damages, including damages for mental distress, and was

ultimately awarded damages of $30,000.00 for mental distress arising from the breach of contract: see [2007] O.J. No. 474 (ON. S.C.). See also *Lumsden v The Government of Manitoba*, 2007 M.B.Q.B. 227, in which damages were also awarded for mental distress as the result of the insurer's wrongful termination of benefits, on the basis of the principles enunciated in *Fidler* and *Rowe*.

Another, more recent illustration of the potential risks associated with a wrongful denial of first party benefits following the *Fidler* decision is *McQueen v Echelon*, 2009 Can LII 50865 (O.S.C.), a claim for housekeeping benefits under the statutory accident benefits schedule. In that case, Harris, J., awarded damages for mental distress as a result of the insurer's "adversarial" approach to the claim. The Court noted cited *Fidler v. Sun Life Assurance Co. Ltd*. and noted that the insurer owes a duty to act in good faith in all its dealings with the Insured, and has an additional duty not to inflict unnecessary mental distress. In this respect, the court in *McQueen* observed, at par. 57 to 62:

> "Some internal notes of the Defendant were brought out in the evidence:
>
> - "the claimant is expecting great things from her claim"
>
> -"she has retained a lawyer"
>
> -"the lawyer is not the easiest to deal with."
>
> These expressions connote an outmoded attitude that was, regrettably, common before the present legislation. Moreover, these sentiments certainly run against the settled case law of *Whiten v. Pilot Insurance Co.* 2002 SCC 1 (CanLII), 2002 SCC 1, *Fidler* supra, and the accompaniment of *Hadley v. Baxendale*. I find that the Echelon file notes are evidence of an adversarial approach to the Plaintiff ab initio and in behaving in this manner, the Defendant has breached its contract of insurance with the Plaintiff.

The Echelon notes based on communication with the Plaintiff's physicians reveal that the claimant has serious injuries requiring treatment and that she has hired a lawyer to assist her. Unfortunately, in light of the fact that the Plaintiff was injured, the approach that the Defendant's took with the Plaintiff is troubling. Echelon's adversarial position poisoned the process very early on, notwithstanding that it owed the Plaintiff a duty of good faith throughout. Early on there was a negative pre-disposition toward the Plaintiff by the Defendant and these "notes" were the clarion call to the file going forward.

I am satisfied that an object of the contract between the Plaintiff and the Defendant Insurer, Echelon, was to secure psychological benefits to the Plaintiff in the form of peace of mind. The nature of the contract was such that its breach would bring about mental distress and this was within reasonable contemplation of the parties.

As well, there was mental suffering caused by the breach, which was of a sufficient character to warrant compensation.

The plaintiff entered into her relationship with the Defendant already carrying a longstanding previous diagnosis of bi-polar disorder and started her relationship with the Defendant in a vulnerable state.

The court further noted, at par. 71 :

I find on the medical evidence and on the balance of probabilities that the Defendant created an adversarial relationship with the Plaintiff that was likely to create mental distress and did so. The Plaintiff has been unable to access some medical assessments due to the Defendant's refusal to fund the requested assessments. I find that the Defendant's approach to the Plaintiff is counter-productive to the well being of the Plaintiff. She has reported her mental distress along the way and it has not abated. Her distress is palpable and I accept her evidence that the change in her

> emotional and psychological conduct has come about through her relationship with the Defendant insurance company, keeping in mind that the Plaintiff has had 21 denials of 16 separate benefits over a three year period.

In that case, aggravated damages in the amount of $25,000 were awarded (by comparison, the housekeeping benefits at issue were valued at $7,800).

Reasonable persons might disagree as to whether the “editorial comments” which concerned the court were sufficiently egregious on their own to lead to aggravated damages. In any case, such comments give the impression that the insurer is unreasonably suspicious and is giving consideration to matters which are extraneous to the good-faith determination of whether the plaintiff meets the test for disability. This case, among others, reinforces the need for professionalism and focus on relevant considerations only in the handling of insurance claims.

Nevertheless, an insurer may be wrong in its decision to deny a claim, without necessarily acting in bad faith and being subject to punitive damages. In *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd’s of London*, at paragraph 29, Justice O’Connor elaborated upon the explanation of good faith as follows:

> In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim.

Simply put, so long as the insurer acts reasonably and fairly, solely on the basis of the available evidence, it should not attract an award of punitive damages, even in the case of a policy intended to provide "peace of mind". To the extent that an insurer engages in speculation, or considers irrelevant factors, it is exposing itself to additional damages.

This is illustrated by the result in *McIsaac*, discussed above. In that case, the court found a Work Capacity Evaluation undertaken at the request of the insurer was unreliable due to internal inconsistency, and that the insurer was therefore wrong to deny benefits. The court awarded aggravated damages and damages for mental distress, on the basis that the plaintiff experienced ongoing concern regarding her ability to meet living expenses and a material change in her intended life-style (she could not afford to move to Arizona and moved to Mexico instead, where she felt isolated and could not secure the medical assistance she required). She could no longer afford to give her nieces and nephews presents, which had been a great source of pleasure to her. On this basis, the plaintiff was awarded damages for mental distress in the amount of $8,500.00.

The court declined to award punitive damages, however, on the basis that Sun Life had conflicting medical reports, appeared to consider all information forwarded by the plaintiff, and consulted with medical experts and followed their recommendations:

> "Given these circumstances, the fact that Sun Life chose to rely on the opinions of their own medical consultants rather than [the plaintiff's physicians] does not render their conduct harsh, vindictive, reprehensible, malicious, high-handed, or as showing a wanton and reckless disregard of the Plaintiff's rights. Moreover, the evidence does not show that Sun Life had embarked on this course to deliberately starve the Plaintiff into submission."

It appears that fundamentally, the issue resolves on issues of fairness. An insurer facing a claim with a substantial psychological component runs the risk of

damages for mental distress if a claim is denied on the basis of suspicion, or on the basis of a limited view of the evidence-- for example, by relying upon defence medical opinions only, without giving due consideration to the evidence as a whole. In addition, the *McQueen* case illustrates the need to maintain professionalism and unnecessary or ill considered comments which might be perceived as unfair to the insured, or which otherwise reflect negatively on the insurer and its employees.

While one may in good faith suspect and guard against malingering by claimants, the insurer must act fairly and in good faith throughout its assessment and adjustment of the claim.

Conclusion

From the defence perspective, the goal is to identify and resolve valid claims, and contest those which are not valid. Achieving this goal is not always straightforward, and there is risk associated with the wrongful denial of valid claims. The key is to assess the available evidence in a dispassionate manner, to determine whether the plaintiff's allegations of disability are consistent with the overall weight of the evidence, including the plaintiff's own behaviour, decisions and conduct. Decisions to deny a claim should be made on the basis of evidence, and not suspicion, and the evidence itself must be carefully weighed to determine whether it supports or contradicts the plaintiff's allegations of disability. These comments apply to all claims, and not solely to claims for chronic pain or fibromyalgia, although the "invisible" nature of chronic pain and fibromyalgia makes the goal of separating legitimate and illegitimate claims more difficult, and in some respects, introduces greater risk. As in the case of all claims, great care must be taken to gather as much relevant evidence as possible, in order to understand whether the plaintiff truly meets the test of disability under the policy. If the test of disability is properly met, it does not matter whether the plaintiff's disability arises from "visible" or "invisible" illness or injury. If, on the other hand,

the totality of the evidence suggests that the plaintiff is able to work, then the claim should likely be denied, regardless of whether the plaintiff complains of visible or invisible injury or illness.