

CHRONIC PAIN: WHAT LEGALLY MATTERS

PRESENTED AT CIRA MEDICAL SERVICES SEMINAR:
CHRONIC PAIN A MULTIDISCIPLINARY APPROACH
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LINDSAY |
LLP

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Introduction

1. Statutory legal requirements of expert opinion
2. Cases in the past year showing how the court has treated expert medical witnesses
3. Take away messages for your practice

Legal Requirements of Expert Opinion

| Supreme Court Civil Rule | Summary of Rule |
|--------------------------|---|
| Rule 11-2 | <i>Duty to assist the court and not to be an advocate for any party</i> |
| Rule 11-6 | Expert report must include: <ol style="list-style-type: none">1. Expert's name, address, area of expertise2. Qualifications and experience3. Instructions provided to expert4. Nature of the opinion sought |

S.R. v. Trasolini, 2013 BCSC 1135

- Facts: 51 year old plaintiff developed chronic pain/fibromyalgia, emotion and cognitive difficulties. Pre-existing chronic physical pain and/or psychological maladies.
- Dr. Romaine Gallagher – Rehabilitation Specialist (Plaintiff)
 - Found pain in classic fibromyalgia trigger-point locations throughout plaintiff's body
 - Dr. Gallagher predicted over 50% chance that fibromyalgia would be lifelong chronic affliction
 - Did not review plaintiff's medical records nor did plaintiff tell her of any pre-accident medical complaints or treatments
 - When presented with pre-accident records at trial, Dr. Gallagher maintained that it did not alter her opinion
 - Deferred to physiatrist's opinion on assessment of plaintiff's work capacity
 - Court: Extremely informative and balanced expert witness, considerable weight given to her opinion

S.R. v. Trasolini, 2013 BCSC 1135

Dr. Viem Nguyen – Psychiatrist (Plaintiff)

- Diagnosed plaintiff with fibromyalgia
- Pre-existing injuries were not revealed to Dr. Nguyen until a day before he testified
- Defined chronic pain as “fairly constant pain for duration beyond three months”
- In cross-examination, Dr. Nguyen was asked to hypothesize on whether a grouping of symptoms within three month window strongly suggest an emergence of a pre-existing chronic pain condition
- Dr. Nguyen emphasized that the nature and underlying cause of symptom had to be considered, as well the symptoms must have persisted throughout three month timeline and be active at time of the accident
- Court: Accepted Dr. Nguyen’s diagnosis of fibromyalgia

S.R. v. Trasolini, 2013 BCSC 1135

Dr. Donald Werry – Orthopaedic Surgeon (Defendant)

- Opinion: plaintiff would have likely been diagnosed with fibromyalgia at some point, even if the accident did not occur. Injuries from MVA would have healed within several months
- Court expressed concern about Dr. Werry's opinion on pre-existing chronic pain.
- Dr. Werry noted that plaintiff had “persistent left shoulder pain”, whereas the full notation read “persistent left shoulder pain x 4 days”
- Plaintiff's chart only recorded one complaint of back pain, which was not suggestive of pre-existing chronic back problem
- Two references to emotional symptoms, each 2 ½ years apart. Symptoms were related to plaintiff's childhood sexual abuse, not to chronic pain condition
- Court held that Dr. Werry focused more on the musculoskeletal aspect of fibromyalgia rather than non-physiological symptoms
- Court: No weight given to opinion except that which was consistent with the other experts. Concern expressed with the interpretation of pre-accident clinical records.

Werner v. Ondrus, 2013 BCSC 100

- Facts: First accident, 17 years old, hit concrete barrier at 60km/h. Second accident, a year later, rear-ended.
- Dr. Le Nobel – Psychiatrist (Plaintiff)
 - Diagnosed plaintiff with diffuse myofascial pain and mechanical spinal pain
 - Defined chronic pain as “symptoms which persist for longer than 10-12 months”
 - It had been 3 years and 11 months since first accident
 - Plaintiff considered partially disabled with respect to her current work and prognosis was guarded
 - Court: Found Dr. le Nobel’s expertise, evidentiary consistency, and frankness under cross-examining to be convincing

Werner v. Ondrus, 2013 BCSC 100

- Dr. David Boyce – Orthopaedic Surgeon (Defendant)
 - First exam: soft tissue injury to back and neck with promising prognosis. Second exam: diagnosed ongoing neck pain, upper and lower back discomfort, and discomfort in both hips.
 - Reluctant to agree in cross-exam that pain persisting for more than 18 months qualifies as chronic pain
 - Court: Preferred evidence of Dr. Le Nobel

Ladret v. Stephens, 2013 BCSC 1999

- Facts: 27 year old involved in T-bone collision. Mid-thoracic back pain persisted for almost four years.
- Dr. David Koo – Psychiatrist (Plaintiff)
 - Ongoing persistence of pain for more than two years suggest chronic soft tissue injuries
 - Defined chronic pain based on timeframe longer than three months
 - Although plaintiff did not follow treatments recommended, Dr. Koo testified that treatments were only palliative, not curative
 - Performed objective assessments such as myofascial trigger points and tension on testing range of motion
 - Did not mention plaintiff's psychosocial stressors in affecting plaintiff's experience of injuries as he found it constituted a relatively small contributing factor
 - Court: Good and impartial witness

Ladret v. Stephens, 2013 BCSC 1999

- Dr. Reebye – Psychiatrist (Defendant)
 - Diagnosed mild-to-moderate soft tissue injuries to face, neck, back and knee
 - Agreed that pain persisting for more than two years will likely be permanent
 - Plaintiff counsel requested a copy of Dr. Reebye’s draft report but the doctor did not keep any copies of it
 - Court: As Dr. Reebye agreed that back pain persisting more than two years is chronic pain, court ruled in favour of the plaintiff

Take Aways

1. Review pre-accident medical records
2. When analyzing pre-existing chronic pain, consider the underlying cause of the symptoms and its persistence throughout a significant period of time
3. Define what qualifies as chronic pain (3 months? 2 years?)
4. Identify which areas you may have to defer to other expert's opinions and note it in your report
5. An expert need not conduct a physical examination of the patient in order to diagnose chronic pain (although it is recommended)
6. Outline your findings
7. Consider whether patient's life stressors will impede recovery and whether any treatments have been recommended but not yet taken

Thank you for your time



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