

DEFENDING CHRONIC PAIN AND CHRONIC FATIGUE CLAIMS

by Richard Hayles

Assessing chronic pain claims appropriately is one of the most difficult tasks for disability claims adjusters. Chronic “soft tissue” pain is highly subjective, and therefore difficult to corroborate.

The International Association for the Study of Pain has defined pain as “an unpleasant sensory and emotional experience associated with actual or potential tissue damage or described in terms of such damage.”¹ This definition highlights the distinction between a stimulus from a nerve resulting from physical damage (actual tissue damage), and the subjective experience of pain (pain described in terms of tissue damage).

Most cases of chronic pain are related to recognized and objectively determinable musculoskeletal disorders such as rheumatoid arthritis, ankylosing spondylitis, and osteoarthritis. Since these conditions can be confirmed by medical tests and scans such as x-rays and MRI’s, and are known to have the potential to result in long-term, disabling pain, these cases do not normally result in disputed claims decisions and litigation. A smaller but growing category of chronic pain cases involve

¹ Merskey H, Bogduk N, eds. Classification of Chronic Pain Syndromes and Definitions of Pain Terms, 2nd ed. Seattle: IASP Press, 1994.

conditions that must be diagnosed primarily on the basis of self-reports of the pain symptoms experienced by the patient/claimant.

In this second category of chronic pain cases, the pain might originally arise from injury.² When the claimant complains of disabling pain long after the medically determinable injury has healed,³ the insurer may question whether the pain is legitimate or not. Many cases involving whiplash and lower back pain fall into this category, and it has been reported that there is no patho-anatomic or pathophysiologic explanation in 85% of low back pain cases.⁴ Sometimes the pain originates in a surgical procedure, but continues beyond the normal recovery period for the operation in question.⁵ Often chronic pain develops following an illness.⁶ Pain can also originate in a congenital condition.⁷ Many claims are based on a syndrome diagnosed on the

² Moore v. Prudential Insurance Co. of America, [1993] I.L.R. 1-2917 (N.S. T.D.); Young v. Saskatchewan (1991), 48 C.C.L.I. 193 (Sask. Q.B.); Bacon v. Saskatchewan (1990), 48 C.C.L.I. 166 (Sask. Q.B.); Budnark v. Sun Life Assurance Co. of Canada (1994), 92 B.C.L.R.(2d) 242, 1994 CarswellBC 239, [1994] I.L.R. 1-3097 (B.C. S.C.).

³ See, for instance, Wright v. National Life Assurance Co. of Canada (1987), 25 C.C.L.I. 1, [1987] O.J. No. 594, 1987 CarswellOnt 708 (Ont. S.C.).

⁴ White AA, Gordon GC Synopsis: Workshop on Idiopathic Low Back Pain, Spine 1982; 7:141-149. Spitzer WO, LeBlanc FF, Dupuis M. Scientific Approach to the Assessment and Management of Activity-Related Spinal Disorders, Spine 1987; 12:51-559.

⁵ For example, McCulloch v. City of Calgary (1985) 62 A.R. 209, 15 C.C.L.I. 222, 1985 CarswellAlta 359 (Alta. Q.B.); Walls v. Constellation Assurance Co. (1986), 17 C.C.L.I. 212 (Ont. H.C.); McCulloch v. City of Calgary (1985), 15 C.C.L.I. 222 (Alta. Q.B.).

⁶ Martin v. Mutual of Omaha Insurance Co., [1992] I.L.R. 1-2795(Ont. Gen. Div.); Harding v. Prudential Insurance Co. (1940), 7 I.L.R. 227 (Ont. S.C.); Fulton v. Manufacturers Life Insurance Co., [1990] I.L.R. 1-2620 (N.S. Co. Ct.).

⁷ MacEachern v. Co-op Fire & Casualty Co. (1986), 19 C.C.L.I. 189 (N.S. T.D.), affirmed (1987), 25 C.C.L.I. 168 (N.S. C.A.).

basis of a set of symptoms reported by the patient which meet the clinical criteria for fibromyalgia,⁸ myofascial pain syndrome, or repetitive strain.

Although insurance claims adjusters sincerely want to assist claimants who are legitimately disabled, they must balance this desire against their responsibility to keep claims costs under control so that the premiums for disability coverage remain affordable. In cases in which the determination of disability is largely based on subjective reports from the claimant, the adjuster must struggle with two issues: first, is the pain real, or is the claimant malingering? And second, is the pain so severe that the claimant is truly unable to work?

Claims based on chronic fatigue syndrome present similar difficulties. Although chronic fatigue cases often originate in a viral infection, disabling fatigue can continue for years after the patient has recovered from the initiating illness.⁹ Since this condition is diagnosed on the basis of the patient's reports of his or her energy levels and abilities, the insurer must struggle to determine whether or not the condition is real, and whether or not it is truly disabling.

⁸ See *Eddie v. Unum Life Insurance Co. of America*, [1987] I.L.R. 1-3598, 52 B.C.L.R.(3d) 69, 4 C.C.L.I.(3d) 223, [1998] B.C.J. No. 1266 (B.C. S.C.); affirmed [2000] I.L.R. 1-3742, 66 B.C.L.R.(3d) 1, 13 C.C.L.I.(3d) 1, 1999 CarswellBC 1956 (B.C. C.A.).

⁹ See for example *Milner v. Manufacturers Life Insurance Co.*, 2005 CarswellBC 2891, [2006] I.L.R. 1-4479, 32 C.C.L.I.(4th) 83, (B.C. S.C.).

The problems that insurers face in cases of subjective chronic pain and chronic fatigue are compounded by the fact that the medical understanding of the origins, progress, and treatment of these conditions is evolving.

Legal Recognition of the Subjective Nature of Pain

Patients often see a number of physicians practicing in different areas of medicine, and receive several different diagnoses, before being accorded a diagnosis of chronic pain. It may be that doctors are reluctant to reach a diagnosis of chronic pain because treatment options are limited. There may also be a concern that the use of the word “chronic” can give the patient the impression that nothing can be done about his condition, and the psychological effect of this is that the diagnosis becomes a sort of self-fulfilling prophecy. Nevertheless, this process can lead a claims adjuster to suspect that the claimant has been doctor shopping until he found a specialist who would provide a diagnosis that supports a long-term disability claim.

From a legal point of view, a specific diagnosis is not required in order to establish disability in most cases. In *Eddie v. Unum Life Insurance Co.*¹⁰, the claimant claimed to be suffering from fibromyalgia. At that time, there was still some controversy in the medical world as to whether or not this constituted a real condition. In addition, the insurer called expert evidence suggesting that the claimant did not meet the

¹⁰ *Supra*, note 5.

diagnostic criteria for fibromyalgia. The insurer took the position that the insured had failed to meet the policy requirement of proving that she suffered from a “sickness”. The court rejected this argument:

The fundamental misconception of the defence is that it is necessary to be able to identify the cause of a condition, before benefits under the insurance policy are triggered. One can recognize that insurers may be more comfortable when they have objective evidence of disease. But it is the fact of sickness, not its explanation, which must govern.

I conclude that the meaning of “sickness” in this disability insurance policy includes the condition of a person who genuinely wants to continue in his or her employment but, because of a perception, based on symptoms, that something is wrong with his or her body, genuinely and reasonably feels unable to do so. This is a substantially subjective test and depends on the credibility of the claimant.

This decision was upheld by the B.C. Court of Appeal, where Prowse, J.A. accepted that a precise diagnosis was not a bar to a disability claim:

If the insurer were correct that disability payments can only be triggered when a claimant is able to pinpoint the precise cause of disability, then situations could arise in which a claimant is clearly disabled by some kind of sickness, but is not eligible for benefits because the exact nature of the sickness cannot be determined.

The trial judge did not find it necessary to attach a specific label to Ms. Eddie’s condition in order to find that she suffered from a sickness that disabled her. In my view, he

correctly identified and addressed the two issues before him: was Ms. Eddie suffering from a sickness, and, if so, was she disabled by reason of that sickness within the meaning of the “any” and “own” occupation requirements of the policy. After a full consideration of the evidence, he answered “yes” to both of those questions. ...

The Eddie decision is consistent with earlier cases in which courts recognized that pain is subjective in nature,¹¹ and it has long been understood that recovery for total disability is possible even though there appears to be no substantial physical basis for the pain.¹² It is also well established in the case law that chronic pain cases often involve a psychological component, and the fact that disability arises primarily as a subjective reaction to pain is no bar to recovery.

The common approach to chronic pain cases was described by Mr. Justice O’Leary of the Alberta Court of Queen’s Bench in *McCulloch v. City of Calgary*:¹³

In my view it is not of any particular importance to determine the precise medical nature of the plaintiff’s pain. Pain is a subjective sensation and whether or not it has any organic or physical basis, or is entirely psychogenic, is of little

¹¹ *Willinsky v. Imperial Life Assurance Co. of Canada*, [1993] I.L.R. 1-2931 (Ont. Gen. Div.).

¹² *Bacon v. Saskatchewan* (1990), 48 C.C.L.I. 166 (Sask. Q.B.). In *Seer v. Royal Insurance Co. Ltd.*, [1980] I.L.R. 1-1241, a judge of the Ontario County Court held that “psychoneurotic” pain arising from a minor car accident constituted “bodily injury” under a standard automobile insurance policy.

¹³ (1985), 15 C.C.L.I. 222.

consequence if the individual in fact has the sensation of pain. Similarly, the degree of pain perceived by the individual is subjective and its effect upon a particular individual depends on many factors, including the psychological make-up of that person.

Frequently an individual experiencing chronic pain exhibits no mechanical impediment that would keep him from working, and the validity of the claim turns on the question of whether or not it is reasonable to ask the claimant to “work through” the pain. Provided the court is convinced that the pain is real and that it is so severe that the claimant is effectively work disabled, a finding of total disability is the likely outcome.¹⁴

The approach taken in *Eddie* may be contrasted with that taken in *Mathers v. Sun Life Assurance Co. of Canada*.¹⁵ In that case, as in *Eddie*, the policy required proof that the claimant was disabled due to injury or “sickness”. The plaintiff claimed to suffer from low back pain, but the trial judge, although seeming to accept that there was some mechanical back pain, concluded that the pain was of unknown origin, and that the

¹⁴ For examples in the earlier cases (ie, pre-dating *Eddie*), see *Renouf v. Standard Life Assurance Co.*, [1997] I.L.R. 1-3395 (Ont. Gen. Div.); *Richardson v. Great-West Life Assurance Co.*, [1996] I.L.R. 1-3376 (Alta. Q.B.); *Budnark v. Sun Life Assurance Co. Of Canada*, [1994] I.L.R. 1-3097, additional reasons at (1994), 27 C.C.L.I.(2d) 237 (B.C. S.C.) (a case in which the plaintiff was said to have a “dysfunctional pain system”); *Walls v. Constellation Assurance Co.* (1986), 17 C.C.L.I. 212 (Ont. H.C.); *MacEachern v. Co-operative Fire & Casualty Co.* (1986), 19 C.C.L.I. 189 (N.S. T.D.), affirmed (1987), 25 C.C.L.I. 168 (N.S. C.A.).

¹⁵ [1998] I.L.R. 1-3564, 5 C.C.L.I.(3d) 201, 1998 CarswellBC 492 (B.C. S.C.); affirmed 9 C.C.L.I.(3d) 151, [1999] I.L.R. 1-3706, 1999 CarswellBC 985 (B.C. C.A.); leave to appeal refused [1999] S.C.C.A. No. 334, 253 N.R. 399 (note), 2000 CarswellBC 582 (S.C.C.).

plaintiff had failed to establish any injury or sickness that would result in the pain that he claimed to be experiencing. This decision was upheld by the B.C. Court of Appeal in an oral decision rendered by Finch, J.A.:

In my respectful opinion, there is no basis on which this court can interfere with the trial judge's assessment of the evidence. The acceptance or rejection of all or any parts of the evidence and the weight to be given to those parts which she accepted were within her proper function as trier of fact. While it is possible that a judge could find such a claim to be proven on the plaintiff's own evidence alone, it is clear in my view that the test is not entirely subjective. Sucharov establishes that proof of total disability must be sufficient to satisfy the reasonable man, the traditional objective test. For that reason, acceptance by the trial judge of objective medical evidence of total disability will usually be required.

While this decision seems to admit of the possibility that a disabling condition can be established solely by the plaintiff's evidence, it also clearly states that "objective medical evidence" will be necessary in most cases.

Although the passage quoted above from the Court of Appeal decision in Mathers is often cited by defence counsel, courts tend to take a very permissive approach to the requirement of objective medical evidence of the cause of disability. In *Plouffe v. Mutual Life Assurance Co. of Canada*,¹⁶ for example, the court referred to both Eddie and Mathers

¹⁶ (2001), 92 B.C.L.R.(3d) 136, 31 C.C.L.I.(3d) 39, [2002] I.L.R. I-4034, 2001 CarswellBC 1803 (B.C. S.C.).

before concluding that a diagnosis of fibromyalgia met the “objective” requirement of Mathers even though it was based “largely on the subjective reporting of symptoms” by the plaintiff. In *Milner v. Manufacturers Life Insurance Co.*,¹⁷ the court outright rejected the idea that Mathers could apply in a chronic fatigue case: “...in a case such as the one before me, where the diagnosis is essentially founded on subjective complaints, I do not take Mathers to suggest that, accepting as I do that there is such a disability as chronic fatigue syndrome, that syndrome cannot be demonstrated in a court of law to be the basis for a long term disability claim just because there is no objective evidence.”

In *Saunders v. RBC Life Insurance Co.*¹⁸ the court interpreted the “objective” requirement from Mathers as requiring nothing more than an assessment of the plaintiff’s credibility and that of the medical experts in cases in which a diagnosis is based on self-reported symptoms:

The Defendant argues that this statement [of Finch, J.A. in Mathers] requires objective medical evidence in order for the plaintiff to establish total disability. In my view, this statement does not exclude an assessment of the plaintiff’s own evidence. Nor does it preclude the possibility of the Plaintiff’s own evidence being sufficient to prove the claim. Nor does it equate the use of the word “objective”, that is, the reasonable person test for disability, with the use of objective medical evidence. Indeed, in describing the evidentiary criteria in the context of the above quoted

¹⁷ 2005 CarswellBC 2891, [2006] I.L.R. 1-4479, 36 C.C.L.T.(3d) 232, 32 C.C.L.I.(4th) 83 (B.C. S.C.).

¹⁸ (2007), 48 C.C.L.I.(4th) 275, 2007 CarswellNfld 173, 811 A.P.R. 260 (Nfld. S.C.).

statement, Finch, J.A., had quoted the Trial Judge's adoption of a physician's evidence that the alleged incapacity was not grounded in "a rational medical basis". ... Finch, J.A., had also quoted ... the Trial Judge's use of "objective" as descriptive generally of that physician's evidence preferring it over other medical evidence as being objective and unbiased in the sense of independent. In my view, it is in that sense and context that Finch, J.A., speaks of "objective medical evidence" as usually being required. ... That noted, however, it is important, where expert medical evidence is based solely on subjective complaint, that the plaintiff's credibility be assessed. ...

The prevailing view, then, is that disability is to be determined objectively in that the proof presented by the plaintiff has to be sufficient to convince a reasonable person that there is a genuine condition resulting in an inability to work, but that medical tests, scans, and even a diagnosis are not necessarily required. Cases involving chronic pain and chronic fatigue are therefore usually fact driven, and the result will turn on the credibility of the plaintiff and the medical and other witnesses.

It is interesting that the "objective medical evidence" requirement from Mathers was referred to in the dissenting opinion of Newbury, J.A. in Eddie, but that neither of the majority justices in Eddie mentions it. In the dissent, however, Newbury seems to accept the position that the "objective" requirement is satisfied by a thorough assessment of all the evidence.

It is also important to remember that policy wording is not uniform. Although most policies simply require proof of disability arising from sickness or injury, some policies contain more stringent language and impose a greater evidentiary burden on the plaintiff. In *Brown v. Mutual Life Assurance Co. of Canada*,¹⁹ for example, the policy requirement of a “Medically determinable physical impairment due to injury” was held to mean that the plaintiff had to provide a medical determination of a physical impairment of part of his body structure, and prove that the impairment was objectively confirmed on examination, or by investigations such as x-ray imaging.

The Importance of Secondary Factors

The courts recognize the fact that problems and impairments arising from the claimant’s pain often contribute to disability. Pain is frequently associated with a poor sleep pattern, and the resulting fatigue and poor concentration are obstacles to good work performance.²⁰ Distraction and an inability to concentrate on work tasks are also common problems when the insured has to direct energy and attention to coping with pain.²¹ The insured’s abilities may also be impaired by medications required to reduce the pain.²² In other cases, the disability

¹⁹ (2005) 30 C.C.L.I.(4th) 9, 2005 CarswellAlta 1491 (Alta. Q.B.).

²⁰ *Walls v. Constellation Assurance*, supra, note 14.

²¹ *MacEachern v. Co-operative Fire & Casualty*, supra, note 14.

²² *Corr v. London Life Insurance Co.*, [1984] I.L.R. 1-1757 (N.S. T.D.); *McCulloch v. City of Calgary*, supra, note 13.

arising from the insured's pain problems may be compounded by another illness.²³

In both chronic pain and chronic fatigue, the stresses of dealing with the claimant's condition and the loss of self-esteem and social status, as well as the financial worries associated with an inability to earn a livelihood, frequently trigger psychological problems such as depression and anxiety disorders. These problems naturally interfere with the insured's ability to work, and in some cases persist after the original medical problem of chronic pain or fatigue has resolved.²⁴

Proof of Disability

Although some early cases adopted a reverse onus rule, stating that an insurer that has paid disability benefits must prove a change in circumstances sufficient to justify a subsequent denial of further benefits,²⁵ and despite other cases suggesting that a "shifting" onus of proof might apply,²⁶ it is now established that the burden of proving

²³ *Saunders v. RBC Life Insurance Co.* (2007), 48 C.C.L.I.(4th) 275, 267 Nfld. & P.E.I.R. 260, 811 A.P.R. 260, 2007 CarswellNfld 173 (Nfld. S.C.); *Fulton v. Manufacturers Life Insurance Co.*, [1990] I.L.R. 1-2620 (N.S. Co. Ct.).

²⁴ For examples of psychological problems contributing to disability arising out of chronic pain, see *McCann v. Canadian General Life Insurance Co.* (1980), 27 A.R. 201, [1981 I.L.R. 1-1357, 1980 CarswellAlta 411 (Alta. Q.B.), *MacEachern v. Co-operative Fire and Casualty*, supra, note 14, *McCulloch v. City of Calgary*, supra, note 13, *Bacon v. Saskatchewan*, supra, note 12, *Seer v. Royal Insurance*, supra, note 12, and *Martin v. Mutual of Omaha Insurance Co.*, [1992] I.L.R. 1-2795 (Ont. Gen. Div.).

²⁵ See *Blackstone v. Mutual Life Insurance Co.* (1944), 10 I.L.R. 21 (Ont. S.C.) and *Fraser v. Maritime Life Assurance Co.* (1974), 52 D.L.R.(3d) 204 (N.S. S.C.).

²⁶ *LeFebvre v. C.N.A. Assurance Co.* (1978), 20 O.R.(2d) 37 (H.C.).

disability is always with the plaintiff, and does not move to the defendant simply because benefits have been paid.²⁷ Regardless of the particular wording of the policy definition of “total disability”, this term means a substantial inability to perform the duties of the occupation in question,²⁸ and that is what the plaintiff is called upon to prove on a balance of probabilities.

In order to be considered disabled, the insured must establish that his pain keeps him from working to the standard of a reasonable employer.²⁹ If the insured’s past employment has normally been full-time, this means that he will be considered disabled if he lacks the capacity to work a full day on a regular basis. Judges do not expect that the insured will be able to find an employer who can accommodate his need for flexible hours, frequent breaks, a specially designed workspace and equipment, and other variations in the normal conditions of full-time

²⁷ Porter v. Metropolitan Life Insurance Co., [1986] I.L.R. I-2043 (N.S. C.A.); Michaud c. Blue Cross Life Insurance Co. of Canada (1989), 41 C.C.L.I. 25 (N.B. C.A.); Rose v. Paul Revere Life Insurance Co. (1991), 85 D.L.R.(4th) 433 (B.C. C.A.); Campbell v. Canada Life Assurance Co. (1990), 45 C.C.L.I. 73 (Man. C.A.).

²⁸ Paul Revere Life Insurance Co. v. Sucharov, [1983] 2 S.C.R. 541, [1984] I.L.R. I-1732, 5 D.L.R. (4th) 199, 1983 CarswellMan 80 (S.C.C.); Renouf v. Standard Life Assurance Co., [1997] I.L.R. 1-3395, (1996), 30 O.R.(3d) 765, 1996 CarswellOnt 3547 (Ont. Gen. Div.).

²⁹ MacEachern v. Co-operative Fire & Casualty, supra, note 14; Walls v. Constellation Assurance, supra, note 14; McCulloch v. City of Calgary, supra, note 13.

employment, in the absence of evidence that such an employer actually exists.³⁰

Typically there is a “waxing and waning” character to both chronic pain and chronic fatigue, and the plaintiff will often testify that he has good days and bad days. Thus the insured may experience periods lasting days or sometimes even weeks in which he is able to function quite well. Given that the standard of the reasonable employer applies, however, the insured will still be considered disabled if he does not have the endurance and consistency required for full-time employment over an extended period of time.³¹

The Credibility of the Insured

The court’s impression regarding the credibility of the plaintiff is often the most critical factor affecting the outcome of litigation involving chronic pain and chronic fatigue. Thus plaintiff’s counsel will want to corroborate the plaintiff’s evidence so as to enhance his credibility as much as possible, and defendant’s counsel will try to undermine the plaintiff’s credibility by means of cross-examination and evidence that

³⁰ It should be noted, however, that a duty to accommodate disabled and handicapped employees is imposed by human rights legislation, and that many employers have programs in place to assist disabled workers to adapt the terms of work and the workplace environment so as to facilitate a return to work. As the claimant begins to recover, insurers should always inquire as to what the claimant’s employer is prepared to do in terms of accommodation.

³¹ *Martin v. Mutual of Omaha*, supra, note 23; *Fulton v. Manufacturers Life*, supra, note 22; *Harding v. Prudential Insurance Co.* (1940), 7 I.L.R. 227 (Ont. S.C.).

calls into question the plaintiff's description of his condition and limitations.

During the course of a trial, it is important for defence counsel to carefully observe the demeanor of the plaintiff in order to be able to comment on the plaintiff's courtroom behavior in closing argument. Counsel needs to watch for the usual and obvious things, such as argumentativeness, long pauses between question and answer, failure to respond to the question asked, and looking to plaintiff's counsel for assistance when a difficult question is asked. In addition, however, a display of engagement, energy, and endurance that is inconsistent with the plaintiff's alleged limitations can be used to suggest that the plaintiff is not as ill as he claims.³²

The plaintiff's credibility will be called into question where the court detects a tendency to exaggerate, or where there is a pattern of submitting false information in support of her claim to the insurer and to her doctors. In *Milner v. Manufacturers Life*, for example, the plaintiff falsely claimed that her chronic fatigue began when she caught

³² *Garand v. Mutual of Omaha Insurance Co.*, [2002] I.L.R. 1-4036, 2001 CarswellAlta 1091, (2001), 33 C.C.L.I.(3d) 77, 296 A.R. 257 (Alta. Q.B.), *Stronge v. London Life Insurance Co.*, [1993] I.L.R. 1-2931, additional reasons at (March 17, 1993), Doc. 1928/89 (Ont. Gen. Div.); *Johal v. National Life Assurance Co. Of Canada*, [1992] I.L.R. 1-2785 (Ont. Gen. Div.), affirmed (June 19, 1995), Doc. CA C8540 (Ont. C.A.); *Willinsky v. Imperial Life Assurance Co. of Canada*, [1993] I.L.R. 1-2903 (Ont. Gen. Div.); *Seer v. Royal Insurance Co. Ltd.*, [1980] I.L.R. 1-1241 (Ont. Co. Ct.); *Duguet v. London Life Assurance Co. of Canada*, [1990] I.L.R. 1-1234, 1980 CarswellQue 360 (Que. S.C.). But see *LaFlamme v. Bell Canada*, 1985 CarswellQue 78, 15 C.C.L.I 210 (Que. C.S.), in which the judge observed that the plaintiff, during the course of the trial, showed obvious signs of lethargy, stress, and a lack of vigour.

pneumonia at a nursing home where she was employed. Although her pneumonia was confirmed by her doctors, she went a bit too far in falsely claiming that several nursing home patients had died in an outbreak of pneumonia.³³ Further, although the plaintiff had written a dissertation and obtained her doctorate in nursing while claiming disability, on a vocational assessment, she demonstrated spelling and mathematical skills at the grade 8 level. Although she had complained of an inability to drive, shop, and go for walks in statements to the insurer and the Canada Pension Plan, surveillance demonstrated that she did in fact undertake these activities during the claim period. These facts were taken note of by the trial judge as undermining the plaintiff's credibility. Doubts raised by the plaintiff's tendency to exaggerate and dramatize during her testimony were discounted by the court, however, as being the result of medication she was taking at the time she gave her evidence, and her credibility was supported by corroborating and explanatory testimony from family members, friends, and academic colleagues.

False or misleading statements made to the insurer in the proofs of claim, or to the plaintiff's treating physicians, can be used to undermine his credibility.³⁴ Where the false statements are made outside the context of the disability claim, however, the court may conclude that they are not relevant to the plaintiff's credibility at trial.³⁵

³³ *Supra*, note 17.

³⁴ *Budnark v. Sun Life Assurance Co. of Canada* (1994), 92 B.C.L.R.(2d) 242, 1994 CarswellBC 239, [1994] I.L.R. 1-3097 (B.C. S.C.).

³⁵ *Richardson v. Great-West Life Assurance Co.*, 1996 CarswellAlta 648, [1996] I.L.R. 1-3376, 41 Alta. L.R.(3d) 152 (Alta. Q.B.).

Evidence as to the plaintiff's motivation and dedication to work is often influential on the assessment of credibility. In *Eddie*, the insurer sought to establish, apparently unsuccessfully, that the plaintiff left work due to personal problems and not because of her medical condition.³⁶

In assessing a plaintiff's credibility, judges often take note of the fact that her physicians have found her subjective reports to be believable.³⁷ This is especially compelling evidence where the defendant's expert finds that the plaintiff is believable and is not malingering. In *Teskey v. Great-West Life Assurance Co.*,³⁸ the judgement of the court appears to have been strongly influenced by the medical evidence on the issue of credibility:

It should be said at the outset that Ms. Teskey's credibility has, throughout, never been questioned by any of the doctors. Even Dr. McDougall, an expert witness for the defence, testified that he was never of the view that she was malingering, feigning illness or being anything but above-board. I too found Ms. Teskey to be very credible and find as a fact that her belief and her evidence as to the effect CFS has had on her ability to work, and its effects on her life outside work, are credible and bona fide.

³⁶ *Supra*, note 10.

³⁷ *Richardson v. Great-West Life Assurance Co.* (1996), 41 Alta. L.R.(3d) 152, 1996 CarswellAlta 648, [1996] I.L.R. 1-3376 (Alta. Q.B.).

³⁸ 2001 CarswellAlta 1583, (2001), 37 C.C.L.I.(3d) 53, 304 A.R. 262 (Alta. Q.B.). See also *Bacon v. Government of Saskatchewan* (1990), 48 C.C.L.I. 166, 1990 CarswellSask 130, 88 Sask. R. 182 (Sask. Q.B.).

The credibility of Ms. Teskey bears emphasizing. CFS is a disease which has very few, if any, objective diagnostic criteria. It is diagnosed by exclusion of other causes of fatigue and by subjective self-report of the patient. CFS complainants' credibility can, accordingly, be a hot issue. Credibility is quite simply not an issue in this case. In my view, and in the view of all of the doctors, if anyone has CFS, Ms. Teskey has it.

As indicated above in the discussion of Milner, corroborative evidence from family members, friends, and work colleagues³⁹ is very helpful to a plaintiff seeking to establish credibility. Although the courts often advert to the possibility that these kinds of witnesses can be biased in favour of the plaintiff, the evidence is rarely discounted for this reason.⁴⁰ This type of evidence was cited, for instance, in *Bacon v. Government of Saskatchewan*:⁴¹

The plaintiff's husband, David Bacon, testified that his wife often cries out in her sleep, and on occasion needs his help to turn her over in bed or help her out of bed. Her relationship with the children and himself has been strained, and he now sleeps in another bedroom so he can get proper rest. The family lifestyle has been changed considerably in that his wife can no longer work, participate in sports, or socialize to the degree she did previously. As an example,

³⁹ *Plouffe v. Mutual Life Assurance Co. of Canada* (2001), 92 B.C.L.R.(3d) 136, 2001 CarswellBC 1803, 31 C.C.L.I.(3d) 39, [2002] I.L.R. 1-4034 (B.C. S.C.); *Budnark v. Sun Life Assurance Co. of Canada* (1994), 92 B.C.L.R.(2d) 242, 1994 CarswellBC 239, [1994] I.L.R. 1-3097 (B.C. S.C.).

⁴⁰ *Duguet v. London Life Assurance Co. of Canada*, [1980] I.L.R. 1-1234, 1980 CarswellQue 360 (Que. S.C.).

⁴¹ (1990), 48 C.C.L.I 166, 88 Sask. R. 182, 1990 CarswellSask 130 (Sask. Q.B.).

she was not able to attend their son's graduation, and can no longer ski, dance, or take holiday trips.

Linda McDonald, a friend of the plaintiff, testified that she worked for the plaintiff each week from 1982 to 1988 doing household tasks such as vacuuming, washing floors, laundry, etc. The plaintiff is no longer able to afford to pay her. She stated that, on occasion, the plaintiff, due to her pain, spent all day in bed except for 2 to 3 hours, and that sometimes she had to roll out of bed and crawl to the wall to pull herself up. She testified that she often observed the plaintiff to be in pain, and that it was evidenced on occasion by sweating, shaking and limping.

The passages quoted above demonstrate how effective this sort of evidence can be in "painting a picture" for the judge or jury, showing how the onset of the plaintiff's condition has effected not merely her ability to work, but also her home life, relationships, and recreational activities. This definitely enhances credibility, but perhaps more importantly, engages the sympathy of the trier of fact. It is extremely difficult for the defendant insurer to counter this kind of evidence, as friends, co-workers, and neighbours who may have information that undermines the plaintiff's claim of disability will be reluctant to cooperate.⁴²

It is very important for the insurer to obtain a thorough work history, including attendance records if available. This serves two purposes. First, the claimant's employment history forms an evidentiary basis upon which the insurer can suggest alternative occupations once

⁴² For an unsuccessful attempt on the part of an insurer to make use of the evidence of work associates of the plaintiff, see *Richardson v. Great-West Life Assurance Co.* (1996), 41 Alta. L.R.(3d) 152, 1996 CarswellAlta 648, [1996] I.L.R. 1-3376 (Alta. Q.B.).

the claimant enters the “any occupation” period – clearly, if the claimant has extensive, and relatively recent hands-on experience in a particular line of work, that constitutes an occupation for which he is qualified by reason of training, education, and experience.⁴³ Secondly, however, the employment history can provide the basis of an effective cross-examination. If the claimant has a history of changing jobs frequently, interspersed with periods of unemployment, defendant’s counsel can use this to suggest that the claimant is reluctant to work, or is someone who is inclined to get into conflicts with his supervisors and co-workers, and that is the true reason he left his most recent position.

A thorough review of the claimant’s attendance record in the period leading up to his last day on the job can also assist the defendant. If the claimant was frequently absent during this time, the insurer can argue that he was unhappy in his job, or just didn’t want to work anymore.⁴⁴ Of course, the claimant can try to explain absences by suggesting that the chronic condition that eventually led him to stop working was the cause of the absences, and he was doing the best he

⁴³ See *Wasnick v. Allianz Life Insurance Co. Of North America* (2002), 37 C.C.L.I.(3d) 228, 2002 CarswellBC 510 (B.C. S.C.), in which the insured, although likely disabled from her recent employment as a support worker in a group home, which involved lifting, transporting, and otherwise assisting quadriplegic and paraplegic patients, was nevertheless found to be capable of performing the less strenuous duties of a dental assistant, a field in which she had considerable experience.

⁴⁴ *Strong v. London Life Insurance Co.*, [1993] I.L.R. 1-2931, additional reasons at (March 17, 1993), Doc. 1928/89 (Ont. Gen. Div.); *Johal v. National Life Assurance Co. of Canada*, [1992] I.L.R. 1-2785 (Ont. Gen. Div.), affirmed (June 9, 1995), Doc CA C8540 (Ont. C.A.). In *Lalonde v. London Life Insurance Co.* (2001), 33 C.C.L.I.(3d) 108, 2001 CarswellOnt 3816, 55 O.R.(3d) 26, [2002] I.L.R. 1-4106 (Ont. S.C.J.), the plaintiff’s good pre-disability attendance record was mentioned in a discussion of the credibility of his claim.

could to continue working. Defendant's counsel can attempt to counter this by checking the insured's medical records to see if there is any correlation between absences from work and visits to the doctor.

Defendant's counsel should also request a copy of the plaintiff's personnel file as part of documentary discovery. If criticisms of job performance or problems interacting with management and co-workers are documented, the defendant is in a position to argue that the plaintiff's decision to stop working arose from problems in the workplace rather than from health problems.⁴⁵ On the other hand, plaintiff's counsel can make good use of evidence showing that the plaintiff, prior to encountering health problems, was an enthusiastic and dedicated employee, as this passage from *Lalonde v. London Life Insurance Co.* illustrates:⁴⁶

The evidence is uncontradicted that Lalonde performed all of his duties with the airline admirably in the 15 years between 1981 and 1996. A fellow worker, Yohan Cherrier described Lalonde as a bundle of energy, a hard worker who encouraged his crew to work hard, and who was well-respected. His wife described him as full of life, animated, and outgoing. Nothing was too much for him. He was a high energy, "can do" person who enjoyed golfing, skiing, and camping. Lalonde summed up his attitude towards his work succinctly with the words "I love my job".

⁴⁵ *Chaplin v. Sun Life Assurance Co. of Canada* (2001), 27 C.C.L.I.(3d) 70, 2001 CarswellBC 369, [2001] I.L.R. 1-3978, [2001] B.C.J. No. 350 (B.C. S.C.)

⁴⁶ (2001), 33 C.C.L.I.(3d) 108, 2001 CarswellOnt 3816, 55 O.R.(3d) 26, [2002] I.L.R. 1-4106 (Ont. S.C.J.).

On discovery, defendant's counsel should explore changes in the plaintiff's domestic life and relationships during the period leading up to his or her departure from work. The birth of a child, for example, or the breakdown of a marriage, or the need to care for an aging parent, can provide a basis for suggesting that the plaintiff stopped working for personal rather than for medical reasons.⁴⁷

The work history and job attendance records can also be helpful to the plaintiff. If the plaintiff was successful and steady in his work up to the point that he began to complain of chronic pain or chronic fatigue, that evidence can enhance the credibility of the disability claim. If the plaintiff made a sincere but unsuccessful effort to return to work after the initial onset of disability, this is very strong evidence suggesting that the claim is legitimate.⁴⁸

Similarly, the plaintiff who can show that he has aggressively pursued medical treatment, and has followed his doctor's advice, is better positioned to convince the court that his claim is legitimate.

It may also be useful for defendant's counsel to determine whether or not the insured is in receipt of recoveries from disability insurance and other income support programs which equal or exceed the insured's pre-

⁴⁷ See *Chaplin v. Sun Life Assurance Co. of Canada* (2001), 27 C.C.L.I.(3d) 70, 2001 CarswellBC 369, [2001] I.L.R. 1-3978, [2001] B.C.J. No. 350 (B.C. S.C.) (birth of a child).

⁴⁸ *Nicholas v. Metropolitan Life Insurance Co. of Canada* (2003), 1 C.C.L.I.(4th) 239, 2003 CarswellBC 1268, [2003] I.L.R. 1-4248 (B.C. S.C.).

disability employment income, thereby providing a motive to prolong or exaggerate a claim.⁴⁹

Medical Evidence

Although the insured need not produce a clear diagnosis or provide lab tests, x-rays, and MRI reports to confirm the medical condition that is causing his chronic pain, the statement of Finch, J.A. in Mathers, to the effect that medical evidence will be required to establish disability in most cases, is only common sense. Where the plaintiff claims to be suffering from a chronic condition that has completely altered his life and prevents him from working, the court will expect that he has sought medical treatment, and will want to know what his physicians say about his condition, treatment, and prognosis.

Insurers will want to obtain confirmation of the nature and severity of the insured's medical condition by means of one or more independent medical examinations conducted by an appropriate specialist or specialists. At trial, the judge will expect that the insurer's position was supported by a credible medical report at the time benefits were denied,⁵⁰ and failure to arrange an examination can be a factor in awarding punitive damages for bad faith.

⁴⁹ Willinsky v. Imperial Life, supra, note 32.

⁵⁰ Nicholas v. Metropolitan Life Insurance Co. of Canada (2003), 1 C.C.L.I.(4th) 239, [2003] I.L.R. 1-4248, 2003 CarswellBC 1268 (B.C.S.C.).

For insurers, it can be helpful to send a complete set of the claimant's medical records to a specialist in pain management or rehabilitation, asking for review and comments, as well as suggestions as to what kinds of specialists should be retained to conduct independent examinations. Chronic claimants often suffer from multiple medical problems, and although a rheumatologist may be able to deal with the fibromyalgia, she cannot credibly comment on the claimant's psychological state in a case where the claimant's doctors indicate that their patient is depressed as well.

In any discussion of expert medical evidence, it is important to take note of the changes to Ontario Rule 53 that came into effect in January of 2010. These changes effect the time for service of reports. Under new Rule 53.03(2.2), the parties are to agree on a schedule for the exchange of expert reports within 60 days after the action is set down for trial. Whereas previously an expert report had to be served 90 days prior to trial, the Rule now requires service of a report 90 days before the pre-trial conference. A responding report is to be served 60 days before the pre-trial. A supplementary report can still be served 30 days before trial. These changes are clearly the result of frustration among the judiciary and practitioners with last-minute service of expert's reports, and the frequent adjournments that resulted. Although there is not much case law on the new time periods at this point, it would not be surprising if judges were fairly strict in enforcing the time limits.

A more significant change in the Rule is the addition of Rule 53.03 (2.1) 7, stating that the report must contain an acknowledgment, signed by the expert, of the expert's duty to the court. The acknowledgment is to use Form 53, which describes the expert's duty of fairness and impartiality in the following terms:

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
 - (a) to provide opinion evidence that is fair, objective and non-partisan;
 - (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and
 - (c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.
4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Even before the Rule changes came into effect, there was precedent for the proposition that experts must be neutral and objective, and that experts can be disqualified from giving evidence for a lack of impartiality.⁵¹ The court can order production of communications between counsel and the expert, including e-mails, and conduct a voir dire on the issue of impartiality.⁵² In the future, we can expect that communications between counsel and expert witnesses will be produced as a matter of routine, and the expert's objectivity will be questioned

⁵¹ *Carmen Alfano Family Trust v. Piersanti*, [2009] O.J. No. 1224, 78 C.P.C(6th) 88, 2009 CarswellOnt 1576 (Ont. S.C.J.).

⁵² *Carmen Alfano Family Trust v. Piersanti* (February 27, 2009), Doc 02-CL-4568, 2009 CarswellOnt 1199 (Ont. S.C.J.).

before he or she testifies. Lawyers should be careful in the preparation of retainer letters to experts. These letters should explicitly set out the duty of impartiality in the language of Form 53. It is a bad idea to communicate with experts by means of e-mail. This form of communication is too informal, and it is easy to put something in an e-mail that could later be construed as an effort to influence the expert's opinion.

The most convincing medical evidence is a report from an expert retained by one side in the dispute that favours the position of the other side: "Judges are not bound to follow medical opinions but they are very reluctant to reject a medical opinion of a doctor called by the defendant which is in favour of the plaintiff."⁵³ Given the Rule changes and case law imposing an explicit duty of impartiality on experts, in the future we may see more instances in which a specialist retained by the defendant provides an opinion supporting the plaintiff, and vice versa.

Judges often favour the plaintiff's treating physicians on the grounds that they know the patient better, and the family doctor, although lacking specialist knowledge regarding the plaintiff's condition, can be a most effective witness.⁵⁴ Where the testimony of the family doctor is contrary to the opinions of all the specialists, however, the court

⁵³ Wright v. National Life Assurance Co. of Canada (1987), 25 C.C.L.I. 1, 1987 CarswellOnt 708 (Ont. H.C.J.).

⁵⁴ Plouffe v. Mutual Life Assurance Co. of Canada (2001), 92 B.C.L.R.(3d) 136, 31 C.C.L.I. (3d) 39, 2001 CarswellBC 1803, [2002] I.L.R. 1-4034 (B.C. S.C.); Walls v. Constellation Assurance Co. (1986), 17 C.C.L.I. 212; [1986] I.L.R. 1-2078, 1986 CarswellOnt 725 (Ont. H.C.J.).

may conclude that the family physician has “become an advocate for the plaintiff’s position”, and disregard his evidence.⁵⁵ Specialists retained by the defendant are at a disadvantage in that they usually see the claimant only once, and they can be criticized for conducting a brief, perfunctory examination.⁵⁶

Where the plaintiff claims to be disabled by a syndrome that has to be based on a set of symptoms, it is important for the insurer to verify that the examining physician has conducted the examination in accordance with established protocols, and that the plaintiff does in fact meet the clinical criteria for fibromyalgia, or chronic fatigue syndrome, as the case may be.⁵⁷ As indicated above, it is not necessary for the plaintiff to establish any particular diagnosis. Showing that the plaintiff’s specialist provided a diagnosis that was not justified by the results of the testing protocols, however, or that the physician failed to administer the protocols properly, undermines the credibility of the doctor and weakens the support that the doctor’s evidence might otherwise provide to the plaintiff’s case.

⁵⁵ *Chaplin v. Sun Life Assurance Co. of Canada* (2001), 27 C.C.L.I.(3d) 70, 2001 CarswellBC 369, [2001] I.L.R. 1-3978, [2001 B.C.J. No. 350 (B.C. S.C.).

⁵⁶ *Willinsky v. Imperial Life Assurance Co. of Canada*, [1993] I.L.R. 1-2903, 1992 CarswellOnt 743 (Ont Gen. Div.). In *Willinsky*, the defendant’s expert was also criticized for exhibiting a negative attitude towards the plaintiff, and for having a limited understanding of the nature and demands of the plaintiff’s professional practice.

⁵⁷ Even if the patient does not meet the clinical criteria for fibromyalgia, doctors will often testify that she “probably” has this condition (see, for example, *Richardson v. Great-West Life Assurance Co.* (1996), 41 Alta. L.R.(3d) 152, 1996 CarswellAlta 648, [1996] I.L.R. 1-3376 (Alta. Q.B.). Defence counsel should challenge this kind of assertion in cross-examination.

Any controversy that may have existed at one time as to whether or not fibromyalgia is a real medical condition has now been resolved, and the courts have acknowledged that fibromyalgia is recognized as an illness by a consensus of medical opinion. In the words of Watson, J. of the Alberta Court of Queen's Bench:⁵⁸

Because of the substantial amount of time and effort spent in this trial on the controversies relating to the subject of fibromyalgia, I wish to make plain that I find on the evidence that fibromyalgia, whether called fibrositis or myositis, is a recognized state or condition of being which may, depending on the facts, have disabling characteristics for the person suffering it. It is for a Trial Judge to decide if limitations are compensable disability.... I therefore proceed on this record that there is no debate on the reality of fibromyalgia as a form of illness.

Although a detailed examination of the medical evidence often becomes the focus at trial, counsel should bear in mind that direct evidence as to the effect of the plaintiff's illness on his activities and abilities often has greater influence on the final decision of the court. This is illustrated by the following statement of Matlow, J. in *Willinsky v. Imperial Life Assurance Co. of Canada*:⁵⁹

Despite my lengthy review of some of the medical evidence, it is my view that medical evidence is of limited value in a case such as this. I think that the plaintiff's alleged disability must be assessed primarily on the evidence of the plaintiff

⁵⁸ *Garand v. Mutual of Omaha Insurance Co.*, 2001 CarswellAlta 1091, (2001), 33 C.C.L.I.(3d) 77, [2002] I.L.R. 1-4036.

⁵⁹ [1993] I.L.R. 1-2903, 1992 CarswellOnt 743 (Ont. Gen. Div.).

himself in the context, of course, of all of the other evidence. Only the plaintiff can experience the pain that he described and, if that pain persists as he claims, it is his unique response to that pain that determines the extent to which it might constitute a disability. We all know of heroic stories of persons with severe physical limitations who are able to rise above those limitations and function with virtually no disability. There are others, however, who succumb to only minor physical limitations and are rendered totally disabled literally. It is always a challenge for a court to determine where, on this spectrum, someone like the plaintiff falls. For me, the medical evidence is only one side of the total picture. The remaining evidence of all of the surrounding circumstances is the other side and, in a case such as this, it may be of even greater significance.

Surveillance and Other Investigations

Surveillance can be a very effective tool for the insurer. Due to the “waxing and waning” nature of chronic pain and chronic fatigue, it is necessary to obtain observations and video of the claimant on a number of days, and also to repeat surveillance at intervals while the claim is pending; otherwise, the claimant can explain the activities recorded on video by saying the investigator caught him on one of his good days.

Video surveillance showing the plaintiff engaged in an active life is particularly effective if it contradicts statements that the plaintiff made to the insurer in the proofs of claim, or to his physicians during the course of treatment, or on examinations for discovery once litigation is

underway. In *Stronge v. London Life Insurance Co.*,⁶⁰ for instance, surveillance showed the plaintiff loading dressers and mattresses into a van in Toronto, and unloading these items in Cambridge, with the assistance of only one other person. The next day he was taped removing a car tire and wheel from a motor vehicle. These activities contradicted statements he had made to his doctors, to the claims adjuster, and on discovery.

In *Ritch v. Sun Life Assurance Co. of Canada*,⁶¹ the insurer became concerned about the legitimacy of the plaintiff's claim after an investigator interviewed her neighbours about her activities. The insurer then commissioned surveillance over a four day period, which showed her driving her car and taking grandchildren to school and the playground. In a "lifestyle questionnaire" she had completed for the insurer, she said she left the house only rarely, and used taxis to get around as she couldn't drive. Subsequent surveillance showed the plaintiff shoveling compost into bags and loading them into her car. The court concluded that the plaintiff had deliberately exaggerated the extent of her difficulties.

⁶⁰ [1993] I.L.R 1-2931 (Ont. Gen. Div.).

⁶¹ (1998), 8 C.C.L.I.(3d) 228, [1998] I.L.R. 1-3574 (Ont. Gen. Div.).

The plaintiff in *Chaplin v. Sun Life Assurance Co. of Canada*⁶² claimed that she could no longer function as a homemaker or parent, and that she could not perform even sedentary work as she was unable to sit for extended periods of time. These statements were contradicted by surveillance evidence, and this undermined her credibility to the extent that the court concluded that she did not suffer from a disabling condition.

In *Flewelling v. Blue Cross Life Insurance Co. of Canada*,⁶³ the plaintiff misled her employer and her physicians about the extent of the therapy she was receiving. In addition, the court found that she had misrepresented her medical history to the doctors. Videotape evidence undermined the factual assumptions on which the expert medical evidence was based.

Where the defendant presents surveillance evidence that is consistent with the plaintiff's description of his abilities and activities, however, it can almost enhance the claimant's credibility with the court. In *Lalonde v. London Life Insurance Co.*,⁶⁴ the insurer conducted video surveillance on 17 days over a period of several years. After viewing the tapes, the court commented that "On the whole the videotape shows

⁶² (2001), 27 C.C.L.I.(3d) 70, 2001 CarswellBC 369, [2001] B.C.J. No. 350 (B.C. S.C.), additional reasons at 2004 CarswellBC 159, [2005] I.L.R. 1-4448, 7 C.C.L.I.(4th) 277 (B.C. S.C.); leave to appeal refused 2004 CarswellBC 1443, [2004] B.C.J. No. 1310 (In Chambers), affirmed by 2004 CarswellBC 3073, 206 B.C.A.C. 251 (B.C. C.A.), additional reasons at 2005 CarswellBC 1866, 2005 BCCA 397 (B.C. C.A.).

⁶³ [1999] A.J. No. 381 (Alta. Q.B.).

⁶⁴ (2001), 33 C.C.L.I.(3d) 108, 2001 CarswellOnt 3816, 55 O.R.(3d) 26 (Ont. S.C.J.).

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.” He had admitted to engaging in these kinds of activities, and in fact walking was recommended to him by his doctors as part of his therapy. The court was clearly unimpressed with what it characterized as “instances of editorializing and hyperbole” in the investigators’ written reports, which made it sound as if activities that required minimum effort were actually quite strenuous.

Similarly, in *Saunders v. RBC Life Insurance Co.*,⁶⁵ surveillance videos showed the claimant engaged in ordinary and not especially strenuous activities such as going on a walking trail, shopping at the drug store, getting out of his car, and climbing a ladder to do some light repair work around his home. In assessing this evidence, C.R. Thompson, J. stated: “I cannot attribute any significance of capacity or incapacity based on these activities. He was apparently able to walk and climb on these occasions. It has not assisted in raising concerns for me as to Mr. Saunders’ credibility.”

The courts have upheld the right of insurance companies to obtain surveillance in appropriate cases, privacy legislation notwithstanding. In *Milner v. Manufacturers Life Insurance Co.*,⁶⁶ the insurer obtained surveillance on the plaintiff and, incidentally, on members of her family.

⁶⁵ 2007 CarswellNfld 173, (2007) 48 C.C.L.I.(4th) 275, 811 A.P.R. 260 (Nfld S.C. T.D.).

⁶⁶ 2005 CarswellBC 2891, (2005), 32 C.C.L.I.(4th) 83, [2006] I.L.R. 1-4479 (B.C. S.C.).

In addition to seeking disability benefits, the plaintiff claimed damages against the insurer for breach of privacy. The court affirmed that the insurer had a lawful interest in conducting surveillance on the plaintiff considering the nature of her claim and allegedly untrue statements she had made in her application for CPP benefits. Although legitimate surveillance of the plaintiff also taped her sons playing soccer, the court held this was no violation of their privacy as they were in a public place at the time. Another segment of tape accidentally caught the plaintiff's daughter while partially undressing inside the family home. The court held that this was a breach of the daughter's privacy, but declined to award damages as the daughter was not a party to the action.

In *Pontillo v. Zinger*,⁶⁷ a recent decision of the Ontario Superior Court of Justice, the plaintiff in a motor vehicle accident case launched a second, separate action claiming abuse of process and conspiracy after learning that the insurer of the other driver had retained a private investigator to interview her neighbours. On a motion, the court struck out the statement of claim as revealing no cause of action. Mr. Justice Ramsay had this to say about the right of insurers to conduct surveillance:

Insurance companies are entitled to conduct surveillance of plaintiff's if they do so within the confines of the law. They cannot trespass on private property and they cannot intercept communications electronically. They cannot threaten witnesses or litigants. They cannot commit the tort

⁶⁷ 2010 ONSC 5537 (Ont. S.C.J.).

of defamation. The plaintiff does not claim that they did. The fact that a private investigator is conducting an investigation is not defamatory. Anyone who is involved in a car accident or a divorce might be investigated by a private investigator.

Insurance companies do not need grounds to believe that the plaintiff is making a fraudulent claim before they conduct an investigation. They can conduct surveillance to refute a claim, to confirm a claim, or to see whether a claim is valid or not. They can photograph a plaintiff in places open to public view. They can identify themselves to the neighbours, and ask them for information about the case. Stripped of bald assertions and fanciful conclusions, the statement of claim alleges no wrongful acts and nothing from which improper motivation could be inferred.

This case affirms the right of insurance companies to make use of surveillance and other investigative techniques so long as no laws are broken.

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