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TOPICS

1. The common types of psychological claims made to insurers
2. Signs to watch for when reviewing a claim
3. How to assess causation
4. Subjective component / assessing credibility of the claimant
5. Conducting surveillance
6. The different types of expert witnesses for psychological claims and when to use each one
7. Recent case law examples from across Canada

PSYCHOLOGICAL INJURY CLAIMS ON THE RISE

- History
- Societal and cultural trend/shift towards open dialogue re: mental health
- Role of 'cap' legislation – psychological claims may be unlimited

PSYCHOLOGICAL INJURY CLAIMS ON THE RISE

New “mental disorder claims” reported to WorkSafeBC:

- 2019 – 5,440
- 2020 – 5,402
- 2021 – 6,352

They include claims where psychological injury is the primary injury and claims where the psychological injury develops as a consequence of a physical injury.

Top industry subsector – Health care and social services (40% in 2021)



LINDSAY | LLP

BARRISTERS

GOALS OF THE PRESENTATION

- How to best defend
- Recognizing illegitimate / exaggerated claims

COMMON TYPES OF CLAIMS

May be accompanied by claims for physical injuries, or may form the entire basis of the claim [e.g. *Mustapha v Culligan*, 2008 SCC 27]

COMMON TYPES OF CLAIMS

Organic mental disorder

- Stemming from a head trauma, e.g. brain injury or concussion, leading to functional changes in the brain

COMMON TYPES OF CLAIMS

Psychological issues as a direct result of physical injuries/symptoms

- E.g. depression developing as a result of chronic pain

COMMON TYPES OF CLAIMS

Stand-alone psychological injuries in the absence of connected physical sequelae

- E.g. post-traumatic stress disorder, depressive disorders, anxiety disorders

COMMON SYMPTOMS PRESENTED IN PSYCHOLOGICAL INJURY CLAIMS:

- Dizziness
- Nausea
- Headaches
- Sensitivity to light and sound
- Tinnitus
- Concussion - used by physicians, occupational therapist, or physiotherapist etc.
- Anxiety

COMMON SYMPTOMS PRESENTED IN PSYCHOLOGICAL INJURY CLAIMS:

- Depression
- Nightmares
- Disturbed sleep
- Chronic pain
- Low mood
- Memory / brain fog
- Post-traumatic stress disorder

ISSUES TO CONSIDER

It is important to consider the cause of action pleaded by the claimant in order to:

1. assess the elements the claimant needs to establish; and
2. plan a successful defence of the claim.

TO PROVE NEGLIGENCE

The criteria that must be satisfied to recover for psychological injury in negligence law is the same as for other actions in negligence.

1. the defendant owed the claimant a duty of care;
2. the defendant's behaviour breached the standard of care;
3. the claimant sustained damages (i.e. psychological injury); and
4. the damages were caused, in fact and in law, by the claimant's breach.

TO PROVE NEGLIGENCE

“mental *injury* is not proven by the existence of mere psychological *upset*...Claimants must, therefore, show much more — that the disturbance suffered by the claimant is “serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears” that come with living in civil society...”

Saadati v. Moorhead, 2017 SCC 28 at para. 37
citing *Mustapha v. Culligan of Canada Ltd.*, 2008
SCC 27

TO PROVE NEGLIGENCE

As long as there is some evidence of symptoms and their effects, a specific psychiatric diagnosis (as found in DSM and ICD) is not required to establish psychological injury.

Saadati v Moorhead 2017 SCC 28 at para.31

GUIDING PRINCIPLES OF CAUSATION IN NEGLIGENCE CLAIMS

- If the defendant's negligence is one cause of an injury, or if it exacerbates an existing condition, then the defendant is liable for causing the resulting injury
- The primary test for causation asks “but for the defendant's negligence, would the plaintiff have suffered the injury?”
- Tortfeasors must take their victims as they find them, and are liable even if the plaintiff's injuries are more severe than they would be for the average person
- The general principles of causation in law apply to psychological injury just as they apply to physical injury

CAUSATION ANALYSIS – TWO DISTINCT INQUIRIES

1. The defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test.

Mustapha v. Culligan of Canada, 2008 SCC 27

- The plaintiff saw a dead fly in a water bottle. Following this, the plaintiff developed major depressive disorder, phobia and anxiety.
- The plaintiff sued the supplier of the water bottle for psychiatric injury.
- The psychiatric injury was found to have been caused in fact by the defendant's breach of duty but not in law.
- In *Mustapha*, the plaintiff failed to show that it was foreseeable that a person of "ordinary fortitude" would suffer serious injury from seeing the flies in the bottle of water he was about to install, so his claim failed.

CAUSATION ANALYSIS – TWO DISTINCT INQUIRIES

2. The breach must be the legal cause of the loss, meaning that the harm must not be too far remote.

The question:

Whether the occurrence of mental harm in a person of ordinary fortitude was the reasonably foreseeable result of the defendant's negligent conduct

Saadati at para 20 citing *Mustapha* at paras. 14-16

LAW ON CAUSATION AND PSYCHOLOGICAL INJURY

Yoshikawa v Yu 1996 CanLII 3104 (BCCA) provides a summary of the legal principles as follows:

1. The plaintiff must establish that the pain, discomfort or weakness is “real” in the sense that the victim genuinely experiences it.
2. The plaintiff must establish that his or her psychological problems have their cause in the defendant’s unlawful act.
3. The plaintiff’s psychological problems do not have their cause in the defendant’s unlawful act if they arise from a desire on the plaintiff’s part for such things as care, sympathy, relaxation or compensation.

LAW ON CAUSATION AND PSYCHOLOGICAL INJURY

4. The plaintiff's psychological problems do not have their cause in the defendant's unlawful wrongful act if the plaintiff could be expected to overcome them by his or her own inherent resources, or "will-power".
5. If psychological problems exist, or continue, because the plaintiff for some reason wishes to have them, or does not wish to end, their existence or continuation must be said to have a subjective, or internal, cause.

LAW ON CAUSATION AND PSYCHOLOGICAL INJURY

6. If a court could not say whether the plaintiff really desired to be free of the psychological problems, the plaintiff would not have established his or her case on the critical issue of causation.
7. Any question of mitigation, or failure to mitigate, arises only after causation has been established.
8. It is not sufficient to ask whether a psychological condition such as “chronic, benign pain syndrome” is “compensable”. Such a psychological condition may be compensable or it may not. The identification of the symptoms as “chronic benign pain syndrome” does not resolve the questions of legal liability or the question of assessment of damages.
9. It is unlikely that medical practitioners can answer, as matters of expert opinion, the ultimate questions on which these cases often turn.

LAW ON CAUSATION AND PSYCHOLOGICAL INJURY

10. There must be evidence of a “convincing” nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the recovery period, but the plaintiff’s own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.

11. The general principles which apply in relation to causation in law will apply to psychological injury as they apply to physical injury.

LAW ON CAUSATION AND PSYCHOLOGICAL INJURY

- Based on Athey principles, the concept of reasonable foreseeability is subject to a qualification when the injury is psychiatric in nature.

“...where the psychiatric injury is consequential to the physical injury for which the defendant is responsible, the defendant is also responsible for the psychiatric injury even if this injury was unforeseeable.”

Hussack v. Chilliwack School District, 2011 BCCA 258 at para.

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SUBJECTIVE NATURE

Psychological injuries/issues are usually not visible or readily apparent...

- Based largely on self-reporting of plaintiff/claimant
- Tendency of treating medical professionals to accept or validate patient without question

It is therefore important to assess the veracity of these claims, which includes not only assessing the existence of the issue/injury, but also the extent to which the individual is affected by same.

CREDIBILITY IS PARAMOUNT

- Gather information

- Consider totality of circumstances

CREDIBILITY IS PARAMOUNT

Look for:

- Consistency of reporting and accuracy of the plaintiff/claimant as a historian
- Inconsistencies with words vs. actions
- Reporting of symptoms vs. reporting of diagnosis
- Specific concerns noted in medical records
- Quality of medical evidence
- Quantity of medical professionals involved
- Malingering – classic exaggeration/theatrics
- Corroboration, particularly by objective measures
- Timeline of manifestation

CREDIBILITY IS PARAMOUNT

Also consider:

- Severity of accident and any physical injuries – substantiate minor nature by way of biomechanical analysis or engineering report
- History and situation of claimant/plaintiff
- Other explanations

ROLE OF THE TRIER OF FACT – SOLANKI V REILLY, 2021 ONSC 6694

44 Mr. Solanki was a pleasant and cooperative witness. However, his presentation was marked by notable, even theatrical, pain-focussed behaviours over the two days of his testimony. He made frequent changes between sitting and standing, leaning on the back of his chair as though he needed support to stand. There was facial grimacing and gasping. He held his back at times as though to express and demonstrate pain. This pain behaviour and limited function was emphasized by the defendant in questioning the validity of his presentation. **The court acknowledges this is relevant when considering the credibility of subjective complaints of physical and psychological disability in the context of a low speed collision with minor property damage.**[Emphasis added]

ROLE OF THE TRIER OF FACT – PISANI V MCDANIEL, 2022 ONSC 224

31 I found Ms. Pisani herself to be a largely credible witness. **She was appropriately emotional** when detailing some of the difficulties she faces and **was fair in conceding that she is still able to undertake many of the activities she enjoyed before the accident.** She obviously has a stake in the outcome of this litigation, but **it was not my sense that she was deliberately overstating her injuries or impairments.** It would not be fair to expect from her a completely objective assessment of her situation when her perception is necessarily subjective. [Emphasis added]

TOOLS TO ASSESS CREDIBILITY

- Surveillance and social media investigation
- Helpful investigation is very different than when dealing with a physical injury
 - Compare specific complaints with what claimant is observed to be doing
 - A brief video of someone smiling does not mean they are not depressed

IMEs

- Choice of expert between psychologist, psychiatrist, neurologist, neuropsychologist and vocational psychologist is important
- Sometimes you need more than one of the above and your choice can be dependent on which experts are available in your jurisdiction

IMEs

- Neurologist or neuro-radiologist can diagnose the physical findings of brain injury but not typically the impact the injury will have on function
- Neurologists also address headaches and other neurological issues such as numbness and tingling

IMEs

- Neuropsychologist addresses the functional impact of brain injury after series of tests and interview usually carried out over course of two days
- To a limited degree can address vocational expectations of someone with brain injury

IMEs

- Psychiatrists and psychologists both use the DSM-5 to diagnose and treat psychological conditions
- Psychiatrist is a medical doctor who can prescribe medication
- Many psychiatrists do not conduct therapy as that tends to be the purview of psychologists

IMEs

- Vocational psychologists opine on a claimant's ability to work both in the absence of the injury and with the injury based on series of tests and historical and educational records
- Often rely on occupational therapists for physical abilities of the claimant

IMEs

- **From the defence perspective choose:**
 - **Neuropsychologist** to address whether there is **brain injury**, ongoing impact of brain injury and its impact on day to day function (should wait until at least two years post-accident)

IMEs

- **From the defence perspective choose:**
 - **Psychologist** or **psychiatrist** to address **psychological disorders** such as PTSD, depression, anxiety, somatoform disorder

IMEs

- **From the defence perspective choose:**
 - **Neurologist** to address whether **brain injury physically happened**, headaches and neurological complaints such as numbness and tingling

IMEs

- **From the defence perspective choose:**
 - **Vocational psychologist** to assess what claimant's **employment** was likely to be without the accident and with the accident related injuries

IMEs

Most of these specialists are the least likely to agree that a virtual appointment is appropriate and many will insist on in-person assessments

You Be The Judge

Case Law Examples

MASON V. THOMPSON, 2020 ABQB 76

- Damages assessment arising out two MVAs resulting in mainly neck complaints leading to chronic pain and one neck surgery
- Started weekly psychological counselling five years after the first accident for depression

MASON V. THOMPSON, 2020 ABQB 76

- Counselling focussed on childhood and upbringing which Justice Macleod noted is consistent with evidence that “chronic pain syndrome usually has with it considerable psychological overlay that involves complex issues which emanate from a person’s childhood”

MASON V. THOMPSON, 2020 ABQB 76

- Court notes symptoms were mainly subjective meaning credibility was paramount
- Defendants argued Plaintiff was a “victim of his own personality”
- Court disagreed and found the Plaintiff credible

MASON V. THOMPSON, 2020 ABQB 76

Audience Poll – What did the Court award in general damages inclusive of loss of housekeeping?

1. \$75,000
2. \$100,000
3. \$165,000
4. \$200,000

MASON V. THOMPSON, 2020 ABQB 76

- Predisposition to depression did not matter as Court found he would not have suffered from depression “as he has” had the accidents not occurred
- Court noted Plaintiff may have nonetheless developed depression and pain at some point when assessing general damages at \$165,000 inclusive of housekeeping

PISANI V MCDANIEL, 2022 ONSC 224

Ms. Pisani was involved in a motor vehicle accident, as a result of which she claimed to suffer from constant chronic pain in her neck, back and right shoulder, anxiety, disrupted sleep, fatigue and exhaustion, impaired mood, depression, anger and irritability.

- The Court heard evidence of various lay witnesses
- Also presented with evidence of the Plaintiff's Family Physician, Chronic Pain Specialist and Psychotherapist
- Defence medical Experts attempted to cast doubt as to the seriousness and extent of the Plaintiff's injuries

PISANI V MCDANIEL, 2022 ONSC 224

The Court accepted that the Plaintiff suffered from chronic pain, and that this pain made it difficult for her to sleep and affected her mood, and that she was therefore more irritable, less able to concentrate and suffered from intermittent depression and anxiety.

It was further specifically accepted by the Court that she had sustained adjustment disorder with mixed anxiety and depressed mood, with symptoms of post-traumatic stress disorder.

PISANI V MCDANIEL, 2022 ONSC 224

Audience Poll – **What did the Court award?**

1. \$40,000.00
2. \$80,000.00
3. \$110,000.00
4. \$140,000.00

PISANI V MCDANIEL, 2022 ONSC 224

In arriving at a conclusion regarding general damages, the Court highlighted that the plaintiff's life was "not the same as it once was", and that the impact of the impairments on her life were "not insignificant."

However, the Court also recognized that the plaintiff continued to do many of the things she did before.

General damages of \$80,000.00 were awarded.

BOON V MANN, 2016 BCCA 242

Facts

- A fire broke out in a rental suite in a house. The tenants lost property in the fire, sustained moderate physical injuries and allegedly sustained psychological injury caused by the frightening escape from the fire.
- The tenants sued the owner of the property, alleging that their losses were caused by his negligent failure to install smoke detectors.

BOON V MANN, 2016 BCCA 242

At Trial

- The trial judge determined that the owner was negligent in failing to install the smoke alarms.
- However, the trial judge held that the tenants had failed to establish the owner's negligence caused the losses claimed.
- The evidence of the plaintiffs failed to address the issue of when the smoke alarms, if present, would have alerted the inhabitants to the fire.

BOON V MANN, 2016 BCCA 242

At Trial

- There is no evidence of when the fire started, the length of time it had been burning before being discovered when [the plaintiff] awoke in relation to the fire's stage of growth
- There is no evidence other than mere conjecture that the presence of smoke alarms would have awakened [the plaintiffs] or the other occupants of the suite.
- There is no basis to conclude that had smoke alarms been present, the fire would have been extinguished, or the fire department would have sufficient time to prevent the loss.

BOON V MANN, 2016 BCCA 242

Audience Poll - **Was the plaintiff successful in their appeal?**

1. Yes
2. No

BOON V MANN, 2016 BCCA 242

On Appeal – plaintiff failed

- Issue 1: Did the trial judge apply the wrong legal test on causation?
NO

[16] ...As noted, the appellants say that a trial judge should take a robust, pragmatic approach to determining causation, and that “scientific proof” is not always required: *Clements* at para. 46.

[20] In this case, there was no evidence as to the precise cause of the fire...In my view, [the trial judge] did not err in his articulation of the “but for” test. As the Court stated in *Clements*, “but for” causation should not be relaxed where to do so would allow for recovery in the absence of evidence creating a nexus between the injury and the loss.

BOON V MANN, 2016 BCCA 242

On Appeal – plaintiff failed

Issue 2: Did the trial judge misapprehend the evidence or misapply the causation test: distinct from their property loss? **NO**

[24] The appellants say that symptoms of post-traumatic stress disorder (alleged by Ms. Douglas) are highly specific, and that they developed because of the close call they had in escaping the fire. It follows, they say, that had the fire been discovered at an earlier stage, they would not have had such a frightening escape, and Ms. Douglas would not have developed symptoms...

[31] ...[The plaintiffs' fire investigation expert] testified that flashover could occur in minutes. There was evidence that the occupants of the house were difficult to rouse. There was no evidence as to the cause of the fire or the exact location of its origin, and importantly, no opinion evidence that a smoke alarm would probably have woken the occupants and allowed them to escape before the fire progressed beyond the smoke stage.

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