

**EFFECTIVELY LITIGATING PSYCHOLOGICAL  
DISABILITY CLAIMS:  
FINDING EXPERTS AND PROVING THE CLAIM  
(The Plaintiff's Perspective)**

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## INTRODUCTION

Despite a well-developed body of literature, academic research, and practical study in the area of psychological disability – all of which acknowledges how debilitating a psychological disability can be - the clients whom I represent still seem to face an extra rigorous level of scrutiny when their primary complaint relates to a psychological disability. There remains an underlying notion that a claimant with a psychological disability must suffer from a weakness of character, lack of motivation, or is otherwise personally responsible for not working.

While it has been my experience that psychological disabilities are just as disabling as serious physical disabilities - if not more disabling - the presentation of such a claim remains a tricky prospect. These claims certainly require the very best evidence if they are to succeed. This paper supplements the panel discussion and specifically focuses on the following areas:

- who is an expert
- finding an expert
- practice points
- red flags
- role of the family doctor
- communicating with medical experts

## WHO IS AN EXPERT – A BRIEF REFRESHER

With everything I do, I find it useful to go back to first principles, to truly understand why I do what I do. Anytime I involve an expert, including any psychological expert, I am engaging someone who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, whether such knowledge has been acquired by study, scientific works, or by practical observation.<sup>1</sup>

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. An expert's opinion is admissible to furnish the court with the scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary.<sup>2</sup>

An expert witness, like any other witness, may testify as to the veracity of facts of which he has first-hand experience, but this is not the main purpose of his or her testimony.

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<sup>1</sup> *Rice v. Socket* (1912), 27 O.L.R. 410 (C.A.)

<sup>2</sup> *R. v. Turner* (1974), 60 CR. APP. R. 80, at page 83

An expert is there to give an opinion, and the opinion, more often than not, will be based on second-hand evidence.<sup>3</sup> Nonetheless, because with many psychological complaints, it is necessary to believe the witness in order to believe the expert, I will usually ask the expert, as one of the questions to be answered:

Is there any reason to doubt the veracity of the plaintiff's subjective complaints, based on your examination and review of the available documentation?

I remain guided by the unanimous decision of the Supreme Court of Canada in *R. v. Mohan*<sup>4</sup>, in which it was clarified that the admission of expert evidence in any given case depends on the application of the following four criteria:

1. Relevance;
2. Necessity in assisting the trier of fact;
3. The absence of any exclusionary rule; and
4. A properly qualified expert.

The Supreme Court of Canada decision in *R. v. Abbey*<sup>5</sup> specifically dealt with the testimony of a psychiatrist and the introduction of hearsay evidence that was given during the testimony of the psychiatrist. The lessons from that case remain valuable to this day. *Abbey* stands for a number of propositions, which are summarized as follows:

1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence;
2. Hearsay is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based;
3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion;
4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

In *Abbey*, the psychiatrist called by the defence lawyer relied for his opinion on statements that had been made out of court to him by the accused. Many of those statements were related by the psychiatrist to the court.

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<sup>3</sup> Per Dixon J. in *R. v. Abbey* (1982), 138 D.L.R. (3d) 217

<sup>4</sup> (1994), 89 C.C.C. (3d) 402

<sup>5</sup> [1982] 2 S.C.R. 24

*R. v. Lavallee*<sup>6</sup> was another Supreme Court of Canada which dealt with the admissibility of expert psychiatric evidence, this time in relation to battered wife syndrome, which was a novel concept at the time. Madam Justice Wilson, for the court, decided that weight can be given to an opinion, even though all the facts that formed the basis of the opinion are not independently proved, on two provisos:

1. That some admissible evidence is proved to establish the foundation; and
2. A careful warning to the jury is given.

Most recently, the Ontario Court of Appeal seems to be pointing to a changing judicial vision with respect to the role of experts, in *Conceicao Farms v. Zeneca Corp.*<sup>7</sup> The Court of Appeal emphasized, although it has always been the case, that experts are expected to be neutral and objective when giving their opinion. The testimony of an expert is meant to assist the court, not to bolster the theory of the case presented by one of the two sides.

## **FINDING AND RETAINING THE RIGHT EXPERT**

While finding the right expert should certainly include reliance upon the claimant's primary treating doctor/therapist, whether that be the family physician, a psychologist, or psychiatrist, most successful claims require much more. Therefore, before a psychological expert is engaged, careful thought must go into the choice of the proper individual.

I try to look at the underlying psychological problem so that I can ensure that I have the right person giving me advice and examining my client. For example, if my client witnessed a particularly horrific accident, and has been left with debilitating symptoms of post-traumatic stress disorder, I seek to find an expert with solid credentials in that particular area, someone who is authoritative, balanced, and yet persuasive. This would be contrasted with an individual who suffers from severe depression, a personality disorder, or an organic mental disorder such as a bipolar disorder. In those cases, I would need to engage very different experts. Consequently, my first task is to sort out, based on the existing treatment, what the nature of the primary psychological complaint is, and from there seek to find the best individual to comment upon the diagnosis and prognosis.

Whenever possible, I like to think outside of the box, to find expert evidence that best enables me to "connect the dots" for the trier of fact. From time to time, I have had good success using a psychosocial counsellor who actually goes to the home of my client in order to complete a type of talk therapy. Usually, this kind of expert ends up spending much more time with the patient than a psychiatrist or psychologist could do in his or her office setting. I once had a psychosocial counsellor come to a mediation to describe how my client kept a hangman's noose slung over one of the rafters in the

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6 [1991] S.C.R. 852

7 see the decision of Justice Gillese at (2006), 82 O.R. (3d) 229, dated July 26, 2006, and the decision written by Lang J.A. released July 6, 2007, leave to appeal to the Supreme Court of Canada declined, and the decision found at (2006) 83 O.R. (3d) 792 of Justices Gouge J.A., Blair J.A., and Juriansz J.A.

garage because of his severe depression and despondency. I would never have known about that if I hadn't involved a roving counsellor who saw my client in his own home and developed sufficient rapport that this information was revealed.

I tend to think that neuropsychologists are under-utilized in psychological claims. The neuropsychologist helps not only to identify head injury, but also other cognitive impairments that might be caused from a variety of other sources, such as depression, inadequate sleep, side effect of medications, or other psychological/psychiatric disorders. On the basis of cognitive impairment alone, secondary to psychological or psychiatric complaints, you may well find that you are able to adduce clear evidence supporting an inability to work.

## **PRACTICE POINTS**

Not only do I want to engage neutral, unbiassed, and well-qualified experts, I also want to do what I can in order to ensure that the expert's evidence is held in high regard by the trier of fact. A couple of practice points include the following:

### **A. Letters of Instruction**

I would recommend that you take care when summarizing the facts as you present them to your expert. You must be accurate. Do not overstate the situation. Do not create an inaccuracy by omitting to reveal important information. Provide actual evidence such as statements, transcripts, medical reports, or photographs. If a summary of the evidence is provided, understand that it could be produced. I always tell my experts to rely on the actual evidence and not my summary, as the summary is not evidence and is just provided to help focus the inquiry. Pose the question to be asked of the expert in a neutral manner, so that the question itself does not force a particular response.

### **B. Meeting with Experts**

You want to strive for transparent communication with the expert. I was always taught to assume that any communication could well be divulged before the court and, accordingly, I would never wish to do or say anything that could be a cause of embarrassment for the expert, my client, or myself.

### **C. Reviewing Reports**

Many experts simply send me their final report and I must leave it at that. Occasionally, an expert will send a report that has been prepared in draft, with the request that I review it. My review should be restricted to the following:

- Any actual misinterpretation of the law
- Is the analysis consistent with the accepted principles of expert testimony, ie. is it a novel area of law or have such theories been tested in court in the past?
- Are there any errors in fact?

- Are there any spelling or grammatical errors that should be tidied up?

I make it clear to any expert that any changes that I suggest are my suggestions only, and that none of the suggestions are meant to alter the expert's opinion. That being said, if there has been a misunderstanding about a key fact, then it serves no one to leave that misunderstanding uncorrected. If there are significant problems, an addendum is preferable, as it is the most transparent of corrections.

#### D. The First Time Engagement

Most of us have a group of experts who we engage on a semi-regular basis, who are familiar to us, and who need less background checking as a result. New experts are always being drawn to my attention, however, and, when I consider whether the expert has the right credentials for my case, I do the following:

- I request a copy of the expert's C.V. and examine it to see if the publications authored by the expert are compatible with the area in which I am requesting an opinion.
- I may do an on-line computer search to see whether that expert has testified before, in order to determine whether the expert was qualified and the opinion was accepted.
- Of course, working at a larger firm, I have the benefit of asking my colleagues, both for the plaintiff side and for the defence, whether they have heard any comments, good, bad or otherwise, about the proposed expert.
- I try to determine what the expert will be like in court. I do not want an aloof, egg-headed expert, who cannot develop a rapport with a jury. No matter how solid the report is in writing, it must stand up to cross-examination.

#### **SPOTTING RED FLAGS**

We have all seen experts who hold themselves out to be experts in all areas. Certainly, in London, where I practice, there are a couple of psychologists with massive advertising campaigns in the Yellow Pages, on billboards, and elsewhere, who are self-reportedly experts in marriage and family counselling, attention deficit disorder, pain management, evaluation for head injury, work stress, psychovocational assessment, smoking cessation, weight loss, and enhanced sports performance. I don't feel comfortable getting an opinion from someone with so many professed areas of expertise, and would prefer to focus on an expert whose practice is restricted to fewer areas. The generalist, professional expert, who so vocally wears too many hats, is definitely a red flag for me.

Another red flag is an expert who is only known to work for plaintiffs. Expecting that the expert I engage is not just someone who is writing a report, but rather someone who must come to court, testify, and defend his or her opinion, I must involve someone in the case who is impartial, unbiassed, and whose opinion can be readily accepted by the court. In this age of ADR and settlements on the courthouse steps, it can be easy to

forget that, when push comes to shove, the expert who is selected must ultimately be someone with unimpeachable credentials and credibility before the court.

## **ROLE OF THE FAMILY PHYSICIAN**

In my experience, the family physician is a key witness in any type of action where the claimant puts his or her mental, physical, or psychological health in issue in the litigation. Generally, but not always, the family physician has a longstanding relationship with the individual claimant that spans a number of years, giving the family doctor the unique ability to comment on the claimant's condition when he or she was not disabled, contrasted with the state of disability.

It is necessary to obtain the clinical notes and records of the family physician, for as far back as seems reasonable, given the specific issues at work in the litigation. Unlike a tort action, the specific cause of the disability is not relevant, so, whether the claimant is grappling with issues that stem back to past incidences of sexual abuse, whether there are home and workplace stressors, or whether there are unrelated physical problems, so long as the person is disabled from the psychological condition, coverage under the LTD policy can be triggered. You do not want your expert overlooking an aspect of the claimant's condition. Many claimants will incompletely recall their entire past psychological profile. If you do not send your expert all of the relevant clinical notes and records, which would certainly include the family physician's records, there is a risk that the expert may miss a vital piece of information. For that reason, if the family physician's notes are illegible or just very difficult to read, it is worth the time and expense to pay for a full transcription so that no small detail will be missed.

The family physician also plays an important ongoing treatment role. Many LTD policies contain a very important caveat, which is that the claimant must demonstrate that he or she continues to remain under the ongoing care of a specialist for the disabling medical condition. Many family physicians provide ongoing psychotherapy and pharmacotherapy which would fulfill the ongoing treatment requirement. Moreover, if an expert who is engaged, say for example a psychiatrist, makes particular recommendations about a prescription medication regime, you will want to ensure that the family physician receives a copy of the expert's report, and that your client and the family doctor together work towards satisfying the treatment recommendations. Failure to complete the treatment recommendations that are commonly made by an expert can create an argument that the claimant has failed to mitigate. You don't need to be fighting anymore battles than necessary, and so you will want to remove any possibility that the defence can argue that the claimant has failed to try the treatment that has been suggested.

## **COMMUNICATING WITH MEDICAL EXPERTS**

Once I find an expert in whom I have confidence, who is unbiassed and professional, and with sound credentials, obviously I will want to use that expert in future cases. I get to know the expert and the expert gets to know me and, like any relationship, that mutual familiarity can be helpful to the process.

There are times, however, when I need to hire an expert who I have never engaged before. In those instances, I send along a letter outlining my expectations and my understanding of the role of an expert, so that the individual who I am engaging is left with no doubt as to his or her role in the process. Attached to this paper at **Tab A** is a copy of my standard form letter to an expert, which I use when engaging someone for the first time.

Attached to my paper at **Tab B** is a letter to a psychiatrist, with the personal information about my client redacted in order to protect client confidentiality. This illustrates a fairly standard approach that I would adopt when trying to engage a psychiatrist to offer an opinion to me.

## **CONCLUSION**

Because claim adjudicators, juries, and judges alike seem to require greater proof, or more objective proof, of a psychological complaint which is alleged to be disabling than they do for physical complaints, your choice of expert is even more critical when advancing the psychological claim, than it is with claims that arise due to purely physical injuries. There is no scan or x-ray or visible indicator that will automatically establish the psychological disability. The claimant's own credibility assumes a heightened importance because the plaintiff will have to be believed for the expert to be believed. Your expert must be confident, compelling, well-spoken, and unbiased. If you can find such an expert, you are well on your way to properly advancing your client's case.

## TAB "A"

Andrew C. Murray  
Direct Line: 519.640.6313  
amurray@lemlers.ca

October 6, 2008

FILE NUMBER ●

●

Dear ●:

Re: ●

Thank you for speaking to me about this matter. I confirm your advice during our preliminary telephone conversation that you did not have any conflicts that would preclude your assisting this firm with this assignment.

### **BACKGROUND**

●

### **ISSUES**

●

### **MATERIAL AVAILABLE FOR REVIEW**

To provide you with a further background and to help you in forming an opinion, we are forwarding the following documentary material for your review:

1. A complete set of all of the pleadings that have been exchanged in this action;
2. The transcript from the Examination for Discovery of ●;

To assist you with your review of the transcripts from the Examinations for Discovery, I am also sending you along a brief summary that I prepared of the evidence that was taken. You should govern yourself by the transcript itself, but my hope is that the summary would help you to identify those portions of the transcript that are most relevant to your analysis. Accompanying the summary is a list of the numerous undertakings given at the Examinations for Discovery. I would appreciate it if you could let me know which, if any, of the numerous undertakings would further assist you with your review of this matter.

## **QUALIFICATIONS**

Our ability to present you as an expert qualified to give opinion evidence in this matter will be dependent on our ability to qualify you as someone having expertise in the field of ●. For that purpose, we ask that you attach to your report, as an addendum, a detailed personal resume providing as much information as possible under the following general headings:

1. Education
2. Relevant Work Experience
3. Professional Designations, Affiliations, and Awards
4. Publications
5. Previous Court or Tribunal Attendances as an Expert Witness

Insofar as this material will be necessary for the Court to evaluate your ability to provide opinion evidence in this area, this is not an occasion for undue modesty or brevity. You should be as thorough as possible.

## **INDEPENDENCE**

From the perspective of the Court, as important as your qualifications, is your independence in arriving at an opinion with respect to the issues. It is likely that each party involved in this litigation will retain expert witnesses to assist them in the preparation and presentation of its case. Although you are being retained by one party in particular, it is your best opinion with respect to the various issues identified that we are seeking. The Court will be looking for an objective unbiased opinion in relation to matters within your expertise. You are not to view yourself as an advocate for any interest or outcome. To the extent that your written or spoken words result in your being perceived as an advocate for the party retaining you, your credibility and the value of your evidence will be diminished. To this end, we ask that you do your work in as independent a manner as possible. Consider all aspects of the matter and, to the extent that you may come into contact with others involved in the case, consider their views, but at all times maintain your independence.

## **THE REPORT**

Ideally, your report will deal with each of the aforementioned issues in a thorough and comprehensive manner that will serve as a summary of the testimony that you will give, if called as a witness at trial. It should be written as clearly as possible with a minimal use of highly technical terminology or professional jargon. Please bear in mind that the reader will not have expertise in your field. To the extent that you must use technical terms, please try to provide user-friendly explanations that will be helpful to the lay reader. Any necessary calculations, tables, charts, photographs, plans, measurements, survey reports, or illustrations should be included in the body of the report or as exhibits. Your ability to testify at Court hinges upon the contents of your

written report. While you will be permitted to explain or expand upon material raised in your report, you will not be permitted to testify about opinions or issues not dealt with in your report.

Strictly, in terms of style, a traditional legal report would set out five basic headings as follows:

1. What was the assignment that you were asked to do?
2. What material did you review?
3. Synopsis of case/overview of facts.
4. Discussion.
5. Conclusions.

Most legal reports follow this general format or expand upon it in some fashion.

#### **PRIVILEGE**

Insofar as you are being retained in consequence of actual or contemplated litigation, your communications with us are privileged. Under the *Rules of Civil Procedure*, we may be required to provide certain information concerning your identity and your findings, opinions, and conclusions to the other parties. At least 90 days before trial, we shall be obliged to provide a copy of your report to opposing counsel, if we wish to rely upon your evidence at trial. Despite all of this, you should treat all communications regarding this matter as privileged and confidential, unless otherwise instructed by us or by the Court.

Yours truly,

Andrew C. Murray

ACM/kh

TAB "B"

Andrew C. Murray  
Direct Line: 519.640.6313  
amurray@lemers.ca

FILE NUMBER 48393-00001

**BY COURIER**

●

Dear Dr. ●:

**Re: Our Client: ●**  
**DOB: ●**

Thank you for agreeing to see my client, ●, on Friday, August 17, 2007 at 9:00 a.m.

Please find enclosed a Direction signed by ● which will permit you to discuss your findings with me, following your consultation with her.

### **BACKGROUND**

While I know that you will take an oral history directly from ● (through the Polish interpreter that I will have accompany her to the appointment), and that you will rely upon the information that you glean directly from her, and the information contained in the Medical Brief that I am forwarding to you, I thought, nonetheless, in order to focus your inquiries, it might be helpful if I gave you a bit of an overview.

● was born ● in Poland.

On ●, ● was a front seat passenger in a 2000 Ford Focus that was being driven by her son, ●, who was born ●. The ● vehicle was involved in a head-on collision with a 1994 Pontiac mini van, causing the airbags to deploy and leaving ● with various physical complaints.

● had worked for approximately four years prior to the ● collision as a cake decorator and general bakery person at ● in ●. She had, however, been on a sick leave from that position, with complaints of depression, anxiety, and high blood pressure, from ● through to the ● collision.

I enclose a copy of the Statement of Claim that has been issued in ● case, which outlines some of the other background information that you may need to review. In particular, you should refer to paragraph 7 of the Statement of Claim which outlines the following complaints that ● has made:

- A closed head injury;
- Severe occipital headaches;
- Severe pain and stiffness in her neck radiating into her thoracic-lumbar spine;
- Grade III whiplash of the cervicothoracic spine;
- Musculoligamentous strain in her cervical, lumbar and thoracic spine;
- Soft tissue injuries to her shoulders and back in the upper lumbar to sacral area;
- Abdominal and rib pain;
- Numbness in her upper limbs;
- Disc bulging at C4-5;
- C5-6 central herniation with mild thecal sac impression anteriorly;
- L4-5 and L5-5, disc bulging with thecal sac impression anteriorly and bilaterally; and
- A general tearing and straining of her muscles and ligaments.

## **DOCUMENTARY PRODUCTION**

In addition to the Statement of Claim, I am enclosing the following further documents which may be of assistance:

1. The Self-Reporting Collision Report;
2. A copy of ● Medical Brief, as assembled so far; and
3. ● Rehabilitation Brief.

Of particular note in the Medical Brief, I would specifically direct your attention to the report of Dr. ●, dated May 25, 2007 (but which was only recently received in my office). ● is a physiatrist who conducted a comprehensive assessment on May 25, 2007. On the last page of his report, he has noted:

Further psychiatric evaluation is certainly warranted and I think that every effort should be made to restore her sleep, improve her mood through medications, and monitor her progress thereafter through active exercise programs.

On page 13 of his report, he indicates:

Further psychiatric evaluation is mandatory with appropriate guidance for medication withdrawal and perhaps modifying her anti-depressant medications to more effective drugs. Her sleep patterns remain disrupted which can only further accentuate her overall lost resiliency and inability to cope with the discomfort and hence, it should be addressed appropriately as well. We have traditionally used tri-cyclic anti-depressant drugs in low dose format, either Nortriptyline and/or Amitriptyline and 10 to 30 mg. in most patients is adequate but we have had patients as high as 75 mg. at bedtime.

Because of Dr. ● strong recommendation for a psychiatric evaluation, it has prompted me to seek an opinion from you, with the hope that you might have recommendations that would be helpful in improving ● quality of life.

### **REQUESTED OPINION**

With that background in mind, I would be obliged if you could provide me with a narrative report that addresses the following questions, following your detailed review of the documents and your examination of ●:

1. I would appreciate your opinion concerning ● general medical condition at this moment in time, within your area of expertise to offer such opinion, including your opinion as to whether the problems from which ● suffers are causally connected to the ● car collision.
2. Concerning the collision-related injuries, impairments, and disabilities, I would appreciate your recommendation for any treatment that might be appropriate for ● to consider, in order to improve her overall quality of life. In this regard, it is my intention to share a copy of your report with ● accident benefit insurer, with the request that it fund any of the suggestions you might offer.
3. Do you share Dr. ● view that ● is at an occupational disadvantage, as a result of her collision-related impairments? Please outline any restrictions or limitations by which ● ought to govern herself, from a psychiatric perspective, should she at some point attempt to re-enter the workforce.
4. Lastly, could you please provide me with your prognosis for the future, given that more than two years have now elapsed since the date of the collision?

Your account should accompany your report and will, of course, be promptly honoured.

Thank you for your assistance with this matter.

Yours very truly,

Andrew C. Murray

ACM/kh

Encl.