

Compensation Claims Relating to Chronic Pain

Part One: The Context of Litigation

Julian Benson^{1a}, Michael Spencer², Andreas Goebel³, Rajesh Munglani⁴

Keywords

Chronic pain, personal injury, compensation claim, causation, litigation

Introduction

This is the first of four articles designed to assist the layperson to understand the critical medical issues in compensation claims concerning ‘chronic pain’. This article provides an overview of chronic pain litigation and of the legal context in which compensation is awarded.

The second article will explain the context of medical evidence in greater detail, explaining the difference between experts of separate disciplines who are usually involved in chronic pain litigation. The third will explain medical terminology more specifically, commenting on pain syndromes (including complex regional pain syndrome (CRPS), myofascial pain, fibromyalgia etc.) and psychiatric pain disorders. The fourth article will comment on typical problems encountered in chronic pain litigation and how best to deal with them.

The aim of these articles is simply and neutrally to explain the nature and context of compensation claims relating to chronic pain. Our purpose is not to encourage individuals to make claims, but to explain to those who do what to expect and how best to participate in the claim in a way which is most likely to achieve a reasonable outcome (usually by settlement).

It must be remembered that the process of making a claim is in itself stressful, not least because one person is trying to recover a financial loss caused by another person (or organisation). The process inevitably involves, on one side, accusation (‘you caused my injury’) and demand (‘you have cost me ...’); and on the opposing side, rejection (‘I did not hurt you’ or ‘you were partly at fault’) and refusal (‘I will not pay you that much ...’ or ‘you would be as you are *anyway*’). Those issues inevitably give rise to disputes, many of which can be resolved, usually leaving a few more difficult issues to try to resolve by settlement.

¹ Barrister, Guildhall Chambers

² Honorary Consultant Psychiatrist, West Suffolk Hospital, Visiting Research Fellow, University of Cambridge

³ Honorary Consultant in Pain Medicine, Walton Centre Foundation Trust, Liverpool Senior Lecturer in Pain Medicine, University of Liverpool

⁴ Hon. Consultant in Pain Medicine

It must also be understood that the purpose of these articles is not intended to erect barriers between injured individuals and their own lawyers. However, it is important that the injured person understands what to expect of their lawyers.

Everyone recognises the importance of keeping insurance premiums down, which for insurers means trying to root out unreasonable claims and keep genuine claims to a reasonable level. If animosity or suspicion creeps in to the dealings between an injured person and the insurance company, the litigation will become significantly more stressful, and the claim will inevitably be more difficult to settle. These articles are also intended to help you to understand, and avoid contributing to, such difficulties.

Materials to accompany the articles

At the end of this first article is a series of ‘checklists’ to give an overview of the legal process:

- A list of questions for you to ask your first and/or replacement solicitor, so that you can maximise the prospect that you will be represented professionally. (It may be rather unusual for a representative to be asked questions of this type by a client, but they are providing a service to you and there is no reason why any lawyer should object to answering them.)
- A description of different lawyers – who they are and what they do.
- A list of the stages in a typical injury claim.
- A series of checklists of important information for you to consider during the claim.
- A glossary of terms you may encounter during the claim.

Finally, we have used the words ‘he’/‘his’ in this article for no better reason than all of us are males.

Overview of litigation

People get injured every day. Most injuries are simple accidents for which no one is at fault. However, some injuries are caused by fault, which gives rise to a possibility of compensation. The vast majority of such injuries arise from accidents on the road, in the workplace or on land (or property) owned by another ‘person’ (whether an individual, a company etc.). The majority of these injuries turn out to be either minor injuries or significant injuries from which the injured person recovers or substantially recovers (with some ongoing restrictions) within a matter of months.

It is rare for individuals to suffer more than one injury giving rise to a claim. Therefore, most injured individuals only experience being involved in a claim once, and the process can often seem stressful and mysterious. Injured individuals often simply rely on their lawyers to do the best for them while they try to cope and adapt to the unfamiliar, and disorientating circumstances in which they find themselves (often with reduced or no wages, pain which they are told ‘ought to have resolved’ and becoming involved in adversarial litigation). Although lawyers are experienced in

many aspects of the process, which are (understandably) unfamiliar to non-lawyers, the vast majority of the process is common sense.

Lawyers acting for people with ‘claims’ aim to provide assistance with the more technical and tactical aspects of the process. This is usually very straightforward (for example, in a short-lived ‘whiplash’ claim). However, in relation to injuries or conditions that are not ‘run-of-the-mill’, it is vital that the lawyers understand what they are dealing with, and are prepared (and sufficiently capable) to give the more specialist advice required.

‘Chronic pain’-related problems are rare, which is why few lawyers have experience of them. Regrettably, that often means that they do not understand the injury, or the symptoms, and that can lead to many different problems arising between them and their clients, and between their client and the other party to the claim who will pay the compensation.

This is especially the case when (at a law firm dealing with large numbers of modest injuries) a junior lawyer, or even someone with no legal qualifications at all (often called a ‘paralegal’) encounters an unfamiliar or confusing medical problem. All too often, it seems, the injured person does not receive the quality of advice that they need in the medical-legal process to drive it forward to a reasonable negotiated settlement if at all possible.

Even in an uncomplicated legal claim, the process often seems to be taking place ‘around’ or even ‘above’ the injured person, and to take an inexplicably long time to achieve progress. This can have worse consequences in cases involving chronic pain.

There might be sensible reasons why progress is slow (for example, arranging medical examinations or awaiting the outcome of treatment). In a typical case, the individual can be given a clear idea of the timescales involved and reasons which prolong aspects of the claim. But in chronic pain cases, it often takes a long time for the diagnosis to be made (usually some time after experts in other disciplines, typically orthopaedics, have indicated that there is ‘no more they can do’). Often, a period of two years after the injury has usually past before it is considered appropriate to consider instructing a consultant in pain medicine.

Given that in the vast majority of cases a person has three years to start a claim, it is often the case that a diagnosis of ‘chronic pain’ is only made towards the end of that period, when the parties to the claim (the injured person and the ‘defendant’ to the claim, represented by an insurer) have exchanged offers to try to settle without the need for court proceedings. That can also mean that a person with an unusual diagnosis feels (and/or is) pressured by their own representatives to accept what seems a modest sum in compensation, when they remain suffering significantly and have no idea when (or if) they may be able to return to some kind of normality (in their social, family and working life).

The other classic way in which chronic pain claims become particularly difficult is when the diagnosis itself is unclear, or controversial, or significantly influenced by events in the injured person’s life other than the accident. These issues are discussed in the fourth article in this series.

Overview of chronic pain

What is 'chronic pain'?

To the layman and lawyer, chronic pain sounds like 'bad' pain, but it is in fact the phrase used to describe pain lasting longer than three to six months – and contrasting with acute pain, which is short-term, most often suffered in the immediate aftermath of an accident.

In the vast majority of road accident claims and injuries at work, injured individuals make a relatively predictable recovery, even if they are sometimes left with restrictions in what they can manage, or 'nuisance' levels of pain.

However, a small percentage of those injured⁵ continue to suffer more significant or intrusive levels of pain and related symptoms. Often, their treating clinicians, typically GPs or orthopaedic surgeons, cannot understand what is wrong, and the person may be referred to other clinicians for second or third opinions. For example, a patient with a relatively 'straightforward' fractured ankle, which continued to give pain for many months, might well be referred to a rheumatologist, whereas someone suffering persistent headaches after a whiplash injury might be referred to a neurologist.

In many cases, the physical cause of chronic pain can be readily identified. However, in some cases the original physical damage can heal or improve substantially, but the individual may still be left with the experience of pain. If a physical cause can be found it will generally reassure the patient, because they can be told and can understand what is wrong. It is also reassuring for the clinicians because if they can identify an original source of the pain, it is easier (although still often not easy) to treat. In particular, where no continuing physical cause is found, consultants in pain medicine have expertise in understanding the relationship of past (but seemingly healed) trauma in generating ongoing symptoms and can share their clinical and scientific understanding of well-described mechanisms and syndromes to explain to the individual (and, indeed, to the court) what may be going on. Some of these will be explored in the following articles.

The reasons why significant pain may continue without an apparent persisting physical cause will be discussed in the third article in this series, but a useful illustration is the formation of 'pain memories'. It is well recognised that the experience of pain is actually the product of the painful stimulus itself (i.e. the sensation of the cut, burn, tear etc.) in combination with the emotional label that the conscious mind attaches to it. Sometimes, for various reasons, the physical injury causing the pain settles but the nervous system develops changes and continues to function as if the cause of pain continues. That, in combination with the person's memory of the original pain, can lead him to experience pain that feels almost identical to the original pain, long after it 'ought' to have stopped.

In addition, a range of psychological and psychiatric factors (including earlier emotional trauma such as abuse, and psychiatric conditions such as depression) can contribute to the development and the expression of the pain, making it more

⁵ The percentage is only about 10%, but that is still a large number of individuals.

difficult to make an accurate diagnosis, to determine the cause(s) – and most important – to recommend appropriate treatment and provide a prognosis (which most typically involves answering the key questions for any patient: what does the future hold in terms of work, leisure activities and pain).

In such cases, the physical examination of a person may suggest that there are factors influencing the pain which do not appear to have a purely physical origin. For example, a person might experience ‘pain’ as being generated in one part of their body during an examination, whereas the movement or touch of the examiner cannot explain the pain on purely anatomical or neurological grounds. In such cases, it may be appropriate to seek a psychiatric opinion to determine whether the physical experience of pain – *none the less genuine to the sufferer* – could be influenced by psychological factors.

It is important, however, to note that the origin of chronic pain is not completely understood, even by experts. The formation of ‘pain memory’ is not the only cause – and it is likely that there are causes which scientists have not yet discovered. Therefore, the absence of known anatomical or neurological causes does not mean that there is no biological cause – it just means that we don’t know of one. These issues are discussed in greater detail in the third article in this series.

The context of compensation claims

Is anyone likely to be legally responsible for your injury?

Legal responsibility for injuries and consequential losses (e.g. earnings) depends on proving that another ‘legal person’ (typically a car driver, employer etc.) is at ‘fault’. (In some cases, fault may be shared because the injured person may have contributed to their injuries.)

Proving fault depends on demonstrating that certain actions (e.g. driving or providing training at work) fell below the standard required by law. Common sense is often a very useful guide to what will and will not amount to ‘fault’, but in workplace claims, in particular, you are best guided by a lawyer on the employer’s precise duties and whether they have been breached.

How do I prove what I have lost as a result of the accident?

The law requires the injured person to prove the losses caused by the fault. This is called having ‘the burden of proof’.

When the law requires that something is proved in compensation claims, the ‘proof’ only has to be ‘more likely than not’ (i.e. just over 50%).

It is generally simple to prove that certain losses were caused by an accident injury: loss of earnings if a person in full-time employment is off work for a month, the cost of physiotherapy or medication etc. It is also generally easy to negotiate the value of a straightforward fracture injury.

Proving loss – an easy case

So, in a typical minor road accident claim, when one person (the defendant) drives his car into the rear of a car in front of him, injuring the driver (the claimant), the losses may be:

- neck pain for four weeks;
- modest vehicle damage;
- a few days off work;
- three sessions of physiotherapy; and
- travel/parking costs for physiotherapy.

It ought to be quick and straightforward to ‘prove’ that it was ‘more likely than not’ that the defendant ‘caused’ the accident, the injury and the financial losses.

Proving loss – more difficult situations

Of course, many cases concern more complicated events, both relating to the accident and to the losses. Take, for example, a situation in which a man is unable to return to work for six months because of his injuries. He claims six months’ earnings loss, which on the face of it seems a very easy claim to prove. But what if he was likely to be sacked or made redundant *anyway* (for reasons unrelated to the accident) or if his employer went into liquidation during that period?

If he was not going to be able to earn any wages for some of that period regardless of the accident, *then the accident did not cause that loss*. Of course, it may not be nearly as clear-cut as that, and there may be a spectrum of possibilities for what the future had in store. A person who is laid off may have found another (or even better) job or may not have found any other work. (The important issues for you to consider are set out in the ‘Valuation/Loss of Earnings or Income Checklist’.)

A more detailed look at proving losses – the ‘*but for*’ test and ‘causation’

Given that you need to ‘prove’ that it is ‘more likely than not’ that each of the losses you are claiming for was ‘caused’ by the defendant, it is always important to keep your eye on ‘cause and effect’. Lawyers have another way of asking the same question about each element of a claim: ‘What, *but for* (meaning ‘in the absence of’) the accident, was likely to have happened in the future?’ This is the ‘*but for*’ test.

As you can see, because the claims (e.g. lost earnings) concern events (going to work and being paid) which would have happened after the date of the accident *if the accident had not happened*, there is very often scope to argue that the future may have been different – perhaps a person could have been sacked or laid off, the employer may have gone into liquidation etc.

Lawyers and their clients in injury claims have to focus on proving, ‘on a balance of probability’ (meaning ‘more likely than not’), *what the future would have been* if the injury had not happened, compared with *what the future now holds* (given the impact of the accident injuries).

A slightly different way to consider the whole issue of what losses the accident actually caused is called, very simply, ‘causation’. At every stage of the claim, from establishing fault for your accident, to proving the losses which you have suffered, your lawyers, and you, will keep coming back to causation.

To take things one simple stage further, lawyers also refer to ‘the chain of causation’. This really does mean a ‘chain’ – with the ‘accident’ at one end and the losses caused by the accident all connected together. The idea of a ‘chain’ reinforces the fact that events can be affected by more than one factor (one link in the chain). Some claimants find it helpful to think of a ‘chain’ for each element of their claim (e.g. an earnings chain), to enable them to keep in mind how to maintain the ‘chain’ between the accident and the losses which are said to have resulted.

The medical context of causation

So far, we have looked at causation in a factual context. An equally important aspect of maintaining the chain is to establish medical causation.

It is obvious, but nonetheless important, to remember that every person injured in an accident has their own medical history. Some have seen their GP infrequently over the years, whereas some are regular attendees. Some have had a single back complaint a decade or more ago, whereas others have had repeated problems over many years. Some have short episodes of pain after a fall or a fracture, whereas others have longer periods of illness, sometimes including such potentially complex problems as long-term fatigue, difficulties sleeping, nausea and the like.

The task of the medical expert is to explain to the lawyers and the court (which has no medical expertise) the relationship – if there is one – between the person’s symptoms (and restrictions etc.) and the accident on which the claim is based.

Proving medical causation – an easy case

A fracture injury to a bone in the arm or leg very often recovers without any long-term consequences (in terms of ongoing pain, restriction or likelihood of early osteoarthritis). Providing the claimant would probably not have suffered such an injury if the accident had not happened, an orthopaedic expert is likely to be able to say with some certainty that the accident caused the injury, which will enable the lawyers to calculate the level of compensation (for the injury, time off work etc.).

Proving medical causation – a more difficult case

In some cases, the injured person might have had a history of problems with, for example, back pain or knee pain. The medical notes and/or x-rays or MRI scans may reveal that even before any accident, one person’s back or another person’s knee,

would probably have caused them pain and restrictions in the future even if the accident had not taken place.

In such cases, many experts explain the causative effect of the accident in terms of ‘acceleration’ and/or ‘exacerbation’ – in other words, suggesting that *but for* the accident, the person *was likely* to have suffered some symptoms in any case, but that the accident has made those symptoms arise earlier (‘accelerated them’) or worse (‘exacerbated them’), or both.

Proving medical causation – a difficult case

Having considered the possible complexities of proving a loss of earnings in a recession, with borrowing squeezed, and workforces being cut, it should also be possible to see how difficult it can be to prove that symptoms suffered by a person (especially those which only commence some time after an accident) were *caused* by the original injury.

There are many ways for the defendant/insurer (i.e. the party paying compensation) to try to break the chain of causation. They may argue that the ‘onset’ (or start) of symptoms is inconsistent for it to relate to the original injury. They may suggest that the person’s medical history means that they were likely to suffer chronic pain of the same (or a similar) sort even if the accident had not occurred. They may argue that the claimant is not suffering from a chronic pain condition at all, perhaps because treating doctors have misdiagnosed symptoms, or because the injured person’s account of symptoms is unreliable (or in rare cases, simply untruthful).

It is easy to see why it is vital in any chronic pain case for a claimant to instruct high-quality legal advisors, and for those advisors to obtain medical evidence from excellent experts. In the second article, we will explore the context of medical evidence in greater detail.

Conflict of interest disclosures

Disclaimers and conflict of interest policies are found at: <http://bit.ly/1wqiOcl>

Article submission and acceptance

Date of Receipt: 30.05.2014

Date of Acceptance: 13.07.2014

^a Julian Benson is a personal injury barrister, based at Guildhall Chambers in Bristol, specialising in chronic pain, brain injury and catastrophic injury cases for claimant and defendant clients. He is the author of *A Barrister’s Guide to your Personal Injury Claim*, which is free to download (<http://www.abarristersguide.org.uk>), and is also available from the website of the leading brain injury charity, Headway UK.

Contacts/correspondence:

Dr Rajesh Munglani: rajesh@munglani.com

Mr Julian Benson: julian.benson@guildhallchambers.co.uk

Intellectual property & copyright statement

We as the authors of this article retain intellectual property right on the content of this article. We as the authors of this article assert and retain legal responsibility for this article. We fully absolve the editors and company of JoOPM of any legal responsibility from the publication of our article on their website. Copyright 2014. This is an open-access article distributed under the terms of the Creative Commons Attribution Licence, which permits unrestricted use, distribution and reproduction in any medium, provided the original work is properly cited.