

Compensation Claims Relating to Chronic Pain

Part Four: Particular Difficulties in Litigation Involving Chronic Pain

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Introduction

This final article deals with some of the particular difficulties involved in litigation involving chronic pain, and how best to approach them.

Pain is something that only you can feel. People's description of their pain may also be very different. One person may have a much higher 'pain threshold' than another, and one person may use language 'conservatively', and another more 'liberally' – so that those two individuals may both (accurately in their mind) describe the same level of pain as 4 out of 10 and 8 out of 10. Clearly, such ratings will also depend on the individual's past experience of pain, which inevitably will serve as their yardstick for describing their current pain.

Given that no one can feel someone else's pain, doctors have to try to evaluate how bad it is by assessing its impact on the individual's functioning. This may include looking at your facial expressions and mood reaction when you are asked to do things. It may also involve the parties scrutinising surveillance footage of you going about your daily life (see below).

Of course, in the context of a claim, when an insurance company (generally) is being asked to pay compensation it understandably wants to make sure that it only pays for the actual consequences of the accident injury. It does not have to pay compensation

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if a person was going to suffer the same problems (including chronic pain) *anyway*, or if a person is significantly exaggerating the impact of the accident injuries.

There is a wide range of factors, which means that claims involving chronic pain are often more complex, stressful and difficult than other cases involving serious injuries.

Diagnosis is difficult – there is often a range of opinion

As you have now seen, ‘chronic pain’ cases are rare, the diagnosis of is often difficult and complicated by an individual’s pre-accident experiences, as well as personality. There is often more room for a wide range of opinion than there might be, for example, between orthopaedic experts giving evidence about a complex fracture and a neurologist giving evidence about the severity of a brain injury.

Also, the precise diagnosis often requires input from experts with separate expertise, so that within a claim there may well be three ‘pairs’ of experts (usually orthopaedic, psychiatric, pain management), and each pair may disagree about what is causing symptoms, what treatment is necessary and what the future is likely to hold.

It is not unusual for one expert to think that all of the person’s symptoms are related to an accident, while another expert may think that the genuine effects of an accident (if any) were very short-lived.

The consequences of the expert’s opinion can be a huge difference in compensation

As frustrating as it may seem, individuals suffering from chronic pain are very often not best placed to explain why they are suffering. They may feel very strongly that all of their problems originated in an accident, but careful analysis of the medical records may suggest that there are other, or additional, potential causes for the symptoms.

For that reason, chronic pain cases depend very heavily on the skill and persuasiveness of the expert witnesses involved. The acceptance by the court of one or other ‘side’s’ expert is very likely to have a massive bearing on the outcome of the case. Given that claims for chronic pain can include future loss of earnings for years, and lengthy, costly treatment, the difference in outcome if one expert’s view (or, as often happens, one ‘side’s’ *team* of experts) is accepted by the court, can be enormous.

The insurer has limited means to evaluate the claimant

Insurers rarely meet a claimant, which makes it difficult for them to have a good understanding of what type of person he or she is. In a claim against an employer, the insurer may learn something about the person from the employer directly. In other claims, an employed claimant will often have occupational health or personnel records, which the insurer is entitled to scrutinise to see what the claimant’s health and work record was like before the accident. Many claimants will have Department

of Work and Pension (DWP) documentation (e.g. benefit applications and decisions), which the insurer is also entitled to see for the same reason.

The insurer will also ask the experts it instructs what impression they had of the claimant during the examination. If the insurer starts to think that the claimant's symptoms are out of all proportion to the initial injury, the insurer will naturally become suspicious and want to protect itself from offering compensation which is far higher than the actual losses fairly attributable to the accident it has caused to the claimant.

Of course, the claimant may have developed a rare pain syndrome and/or disorder. However, it is also *possible* that the claimant may (consciously or unconsciously) be exaggerating some or all of his problems.

Another factor complicating claims – identifying the truth?

It is sometimes a very fine line between the 'truth', an unintentional inaccuracy, an intentional (but modest) inaccuracy and a straightforward untruth or lie. For example, a person tells an expert he can walk 200 m, but has told a benefit assessor he can only walk 50 m. Is that a 'lie' and, if it is, does it matter?

Any conscious lie matters, because it harms the credibility of the individual and, if a claim ends at a trial, the judge will soon start to lose faith in a person who has not told the truth. The more untruths/inaccuracies and/or the more serious the untruths, the more likely it is that the judge's inclination to believe that person will crumble and be replaced by scepticism and criticism. In the example above, and assuming both individuals did record the information given to them accurately, there are plenty of innocent and less innocent explanations:

- The benefits assessor might have told the person (but not recorded telling him) to answer 'as if it was your worst day'.
- The expert might have asked the person to answer 'as if it was an average day'.
- The benefit assessment may have been in the middle of winter; the doctor's examination in summer.
- The symptoms may have changed between the assessments.
- The individual may have felt that they should over-emphasise their symptoms to the benefits assessor because, if not, that person might score them unfairly too low and beneath the threshold at which they would receive any benefits.
- The individual may have over-emphasised their symptoms to an expert (often the defendant's expert) to make sure he understood how bad the symptoms could be.
- The individual may (in a very rare case) have felt considerably improved, but decided not to acknowledge that improvement, so that anyone assessing him continued to believe that his symptoms were bad.
- The individual may (in a rarer still case) have decided to mislead his family, friends, treating and medico-legal clinicians and his legal representatives, to maximise the compensation from a modest (or recovered) injury. This person deserves, and will very often find themselves, at a very high risk of being

discovered (it is very difficult indeed to ‘get away with’ such a plan) recovering very little in the claim (and being liable to pay the defendant’s costs out of any sums awarded in compensation), and in a serious and clear case, and facing criminal investigation.

Covert surveillance

We have explained that insurers (and their legal representatives), unlike those of the claimant, do not have an opportunity to meet and evaluate the injured person during a claim.

One very effective tool for the insurer is to have the claimant filmed going about their daily lives, then to compare what they see with the accounts the claimant has given to the experts, benefits assessor or others. If there is a very obvious difference, the insurer will want to rely on the surveillance to undermine some or all of the claim.

Sometimes, surveillance footage is entirely consistent with what the claimant has said, and sometimes there are modest inconsistencies which can be explained because it was a ‘good’ day (with less pain than normal), or perhaps that the claimant suffered much more than usual *the day after the footage* was taken (when he was shown managing more activity than usual). In such cases, the explanation has to be balanced against all of the other evidence in the case. If there are ‘too many’ inconsistencies, the claim will be badly harmed, but if there are very few, then the defendant – and ultimately the court – may well accept the claimant’s word.

On other occasions, the surveillance can appear very damaging, but may not be. A real example is a case in which a man (whose hobbies had been ruined by his pain) told his solicitor he had been encouraged at the pain clinic to try fly-fishing to help his mobility and mood. Shortly after, a DVD of him fly-fishing crossed in the post with a letter from his solicitor explaining that was what he had tried to do. The defendant understandably thought the surveillance was very damaging to the claim but, in fact, it was nothing of the sort. Indeed, the fact that the claimant had thought to tell his solicitor that he had managed to go fishing (and that had been communicated immediately to the insurer) meant that the insurer considered him a truthful person for *having volunteered the information to them without knowing he was being filmed*. That case, which had been very hotly contested on various causation issues to that point, settled successfully for both parties shortly afterwards.

The message in every case is absolutely clear. If you volunteer any significant improvements in your condition to your solicitors, you do not have to be worried about being ‘caught out’ by surveillance.

Final messages about litigation concerning chronic pain

Litigation is stressful but it will usually provide reasonable compensation

The process of making a claim for chronic pain is often stressful, but with good quality advice, clear information and a desire to compromise, many issues can be

resolved, and the vast majority of cases concluded with a settlement which is satisfactory to the injured person and insurer alike.

Involvement with the legal process will not make you better. Indeed, in chronic pain cases, for the reasons explained above, it is usual for there to be a much wider gulf between the positions of the two parties than in other types of claim.

The vast majority of personal injury claims settle. The *vast majority* of chronic pain cases settle. Provided you are well advised and you play an active part in your claim (asking questions and making sure they are answered) there is a good chance that your claim will be concluded with a reasonable settlement.

If inconsistencies in the evidence do arise and/or the experts strongly disagree about the case it will become significantly more stressful, and the claim will inevitably be more difficult to settle. However, the process is worthwhile and ought to enable you to achieve reasonable financial protection against the consequences of your injury.

From the start, however, you will need to be as calm, patient and resolute (and, it goes without saying, as *honest*) as possible.

It is very important that you provide information which is as accurate as possible at all times – to your legal representatives, treating doctors and to the experts in the claim. *That does not mean that the claim is an impossible memory test.* Most people (perfectly reasonably) cannot remember lots of things that have happened years earlier. The simple point is to do your best, explain when you cannot remember something and don't just guess an answer because you think you should.

Accuracy is particularly important in chronic pain cases, and both parties (and the court) will rely on all of the information (statements, medical records, your account to the experts, benefit applications, employment files etc.) in coming to a decision about what is the cause of a person's symptoms. No one is expected to remember all the details of their treatment, and there are almost always loose ends in every claim. The key is to be as accurate as you can, so that the experts and the court have the best opportunity possible to assess your claim. In that way, you are likely to emerge from the process with a fair, reasonable award of compensation to enable you to look to the future.

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