

Beyond Pain and Suffering:
Best Practice When Addressing Chronic Pain
in Forensic Vocational Evaluation Reports

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The impact of chronic pain on an individual's vocational functioning can be significant. With no objective tool to measure chronic pain, an evaluator is left with forming an opinion based on his or her experience and the client's self-reported limitations when determining the impact of chronic pain on employment. This can present challenges when on the stand. A better understanding of the court's views on chronic pain in matters of personal injury and other disability will assist evaluators when considering how best to address chronic pain in forensic vocational evaluation reports.

Overview

From the patient's perspective, life with "Unseen chronic pain" is balancing with different realities. The individual reality is that the experienced pain is real. The second reality is that without any demonstration of pathology, the personal reality is speculative. The third reality is the scientific reality, in which all pain is invisible, immeasurable, and individual...¹

- *Tapio Ojala, Although unseen, chronic pain is real—A phenomenological study*

Chronic pain sufferers deal with difficult circumstances: to build their case, they have to rely on their own subjective reporting, which can be met with suspicion and denial. This is difficult from an evidentiary position because one of "the primary features of chronic pain is its invisibility, being real to the patient, but due to lack of physical findings it seems unreal to the others"². As a client's pain operates under invisibility, there is an inherent question of the plaintiff's credibility. Without objective measurements available, this stacks the deck against the client's claim of chronic pain, and presents challenges at trial.

One way that clients prepare their argument is through vocational evaluation and a vocational report. Vocational evaluation serves to augment the client's claim with an objective, independent assessment of their abilities in relation to their pain. However for vocational evaluators, this task is not without its own challenges. The aim of this discussion is to understand chronic pain, examine the court's view of chronic pain, and provide insight into how, in light of the court's understanding, vocational experts can best address chronic pain in evaluation and reporting.

¹ Ojala, T. et al. *Although unseen, chronic pain is real—A phenomenological study*, Scandinavian Journal of Pain, Volume 6, January 2015, Pages 33-40

² *ibid.*, pg 34

What is Chronic Pain?

Definition

The International Association for the Study of Pain (IASP) defines pain as “An unpleasant sensory and emotional experience associated with actual or potential tissue damage, or described in terms of such damage.”³

For chronic pain, the IASP states “[w]ith nonmalignant pain, three months is the most convenient point of division between acute and chronic pain.”⁴ And in regard to the IASP’s definition of pain, Drs. David Walk and Michelle Poliak-Tunis say “...this definition specifies that pain is an experience and, therefore, is both subjective and does not have an obligate correspondence with nociceptive stimulation. Pain can only be measured as it is reported.”⁵ Again, this further reinforces the position that chronic pain is a subjective experience, and so pain reporting by clients becomes an essential pathway to understanding the extent of their injuries.

What is also considerable for clients who have suffered multiple injuries is that the more severe the acute pain, and the greater the number of pain sites, the more likely it is that severe chronic pain will develop.⁶ While practitioners must further explore chronic pain to reach a better understanding, it is encouraging to note chronic pain is now acknowledged as a condition in its own right, underpinned by an agreed set of definitions for most chronic pain conditions.⁷

Effects of Chronic Pain

Chronic pain is costly to society. In a 2011 publication, *Relieving Pain in America*, the Institute of Medicine of the National Academies found common chronic pain conditions affect at least 116 million U.S. adults at a cost of \$560-635 billion annually in direct medical treatment costs and lost productivity.⁸ In Canada, it is estimated that the number of accepted time-loss injuries in Ontario alone in 2009 was 64,824.⁹ A further example is that in Canada, the direct

³ Merskey, Harold and N. Bogduk, eds. International Association for the Study of Pain, *Classification of Chronic Pain: Descriptions of Chronic Pain Syndromes and Definitions of Pain Terms*, prepared by the International Association for the Study of Pain, Task Force on Taxonomy 2nd Ed., 1994 (Reprinted 2002) 2nd ed.

⁴ *Ibid.*, pg 11

⁵ Walk, David and Michelle Poliak-Tunis, *Chronic Pain Management An Overview of Taxonomy, Conditions Commonly Encountered, and Assessment* Med Clin N Am 100 (2016) 1–16, pg 2

⁶ Chronic pain epidemiology – where do lifestyle factors fit in? *British Journal of Pain* 2013, 7(4) 209– 217

⁷ *Ibid.*, pg 214

⁸ Institute of Medicine of the National Academies. *Relieving Pain in America: A Blueprint for Transforming Prevention, Care, Education, and Research*. Washington, DC: National Academy Press, 2011.

⁹ Hamer, H. et al., Predicting return to work following treatment of chronic pain disorder, *Occupational Medicine* 2013;63:253–259 March 2013, pg 253

health care costs for each patient with chronic pain is \$9,565 and the productivity cost is \$7,072¹⁰. These statistics show that chronic pain not only has a profound effect on the individuals experiencing the pain, but also on society as a whole.

Motor Vehicle Accidents have a large effect on those who suffer chronic pain. In a 2001 study, Mayou and Bryant found 36% of seriously and 20% of less seriously injured MVA victims suffered from pain 1 year after the accident.¹¹ In another study, Duckworth and Iezzi found that on average, chronic pain patients identified 3.4 injury sites immediately subsequent to the MVA, with 27.7% hospitalized and 28.8% having undergone surgical intervention to manage injuries. They also found the injury sites most commonly identified by participants included:

- The neck (76.3%),
- Upper back and shoulders (75.0%),
- Head (58.6%), and
- Lower back (45.0%).

In this study, participants reported pain as having persisted for an average of 30.5 months (SD 22.3; range 6–102).¹² There is no doubt that chronic pain plays a role in the lives of individuals who suffered injury in a motor vehicle accident. With the difficulties of assessing chronic pain in an objective, and measurable way, the court system has to adapt as best they can in their ability to assess the extent of a plaintiff's damage.

How do the Courts View Chronic Pain?

In as much as the medical profession grapples with diagnosing chronic pain, so do court systems grapple with assessing chronic pain. The stigma of chronic pain stems from the assumption that the plaintiff is abnormal or unusual in some way. Difficulties arise in chronic pain cases because “the opposing goals of the plaintiff and the defense pose problems for conditions that can only be subjectively validated.”¹³ This is because in most cases involving pain and suffering, not only is there a requirement to demonstrate the plaintiff's pain is real, there is a requirement to show that it was the result of a particular incident.¹⁴ As such, a client suffering from chronic pain must prove their pain is real, and that it was caused by the accident. This is particularly challenging when the court is more comfortable with objective measures.

¹⁰ Lalonde, Lyne et al. Costs of moderate to severe chronic pain in primary care patients – a study of the ACCORD Program. *J Pain Res.* 2014; 7: 389-403, pg 389

¹¹ Jenewein, Josef et al. Development of chronic pain following severe accidental injury. Results of a 3-year follow-up study *Journal of Psychosomatic Research* 66 (2009) 119–126

¹² Duckworth, Melanie P., PhD and Iezzi, Tony, PhD, *Chronic Pain and Posttraumatic Stress Symptoms in Litigating Motor Vehicle Accident Victims*, *Clin J Pain* 2005;21:251–261

¹³ Panel 1: Legal and Neuroscientific Perspectives on Chronic Pain, 18 *J. Health Care Law & Policy* 207 2015, pg 211

¹⁴ *Ibid.*, pg 212

Unfortunately, this is not an option for assessing chronic pain. As discussed in a chronic pain panel, Professor Hank Greely said there must be some additional evidence to back self reporting in order to determine if plaintiffs are exaggerating the pain or if they are lying about it.¹⁵ Professor Greely further noted "[w]e can't just accept people's self assessments.... if we did, we'd have a country which was entirely on disability payments, because getting paid to do nothing is, for some people, at least for many people, better than getting paid to work."¹⁶

In a second panel discussion the Honorable Morris Hoffman, 2nd Judicial District Court Judge, Colorado Jud. Branch, simply stated "[F]or some reason, I think most people don't believe in chronic pain."¹⁷ As well, the panel discussed that "[j]udges and jurors may be particularly inclined to doubt plaintiffs who raise...unusual or counterintuitive pain claims because of the prospect of financial gain from lawsuits."¹⁸ However, "the key form of variability that Judge Hoffman focused on...is the variability among decision makers in being able to understand the pain of others."¹⁹

Judge Hoffman also stated "most people don't believe in chronic pain. It's hard to believe that [this hand, which looks fine, and maybe works fine,] ... still hurts. It's hard for people to believe that when the stimulus is gone, the pain is still there."²⁰

A third panel discussion found that "[i]n tort law, courts evaluate physical disabilities in regards to what the "reasonable person" with those disabilities would or should be able to do."²¹ The panel also agreed that legal and medical communities seem to acknowledge physical pain, but downplay non-physical pain. As well, the panel suggests there is a common suspicion around plaintiffs who suffer from chronic pain, namely that they are motivated by secondary gain.

Consider the following passage of McEachern C.J.S.C. in *Price v. Kostryba*²²:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

The panel also cited *Mackie v. Wolfe*²³, where a Canadian trial judge said:

¹⁵ *Ibid.*, pg 234

¹⁶ *Ibid.*, pg 235

¹⁷ Panel 2: "Excess" Pain, Hyperalgesia, and the Variability of Subjective Experience" 18 J. Health Care L. & Policy 237 2015

¹⁸ *Ibid.*, pg 258

¹⁹ *Ibid.*,

²⁰ *Ibid.*, pg 261

²¹ Panel 3: Chronic Pain, "Psychogenic" Pain, and Emotion 18 J. Health Care Law & Policy 275 2015, pg 277

²² [1982] B.C. J. No. 1518 per McEachern C.J.S.C. at pg 4

The evidence in this case satisfies me that the symptoms diagnosed as fibromyalgia are a re-labelling of a condition by rheumatologists that has been with mankind for hundreds of years and represents a personality disorder. This particular disorder is often found in individuals who will not or cannot cope with everyday stresses of life and convert this inability into acceptable physical symptoms to avoid dealing with reality.

The panel went on to say “[w]hile perhaps a particularly unsympathetic example, this case demonstrates how society's biased sentiments toward particular types of illnesses seep into the courtroom.”²⁴ Indeed, Michael Finch has also said “Not surprisingly, chronic pain litigation often focuses on both the plaintiff's mental state and...credibility.”²⁵

The courts in Canada and the US have demonstrated a tendency to be cautious in their approach to chronic pain assessment. The courts also have different views. For example, Professor Jennifer Chandler “suggested that from the perspective of the philosophy of mind, American law tends to lean toward dualism, while Canadian law is in some (but not all) cases more materialist.”²⁶ Professor Chandler illustrated this difference in philosophy:

This is a rule called the doctrine of mitigation or the doctrine of avoidable consequences ... which essentially says that if you are a plaintiff and you're going to get compensation from a tortfeasor, you are expected to take reasonable steps to limit your harm In Canada, judges,.., including in the chronic pain context, will require plaintiffs/plaintiffs to do what is called psychiatric mitigation

In Professor Chandler’s view, there is less psychiatric mitigation occurring in the US, but the panel discussion highlighted that it is a useful exercise to consider differing perspectives, so as to assess the strengths and weaknesses that different viewpoints bring to similar problems.

Despite the relevant viewpoints where courts struggle to assess subjective pain without objective measures, the Supreme Court of Canada has recognized the validity of chronic pain. In *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*²⁷ the Court said:

There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic

²³ 21 Alta LR (3d) 11 at para. 222 per Madam Justice Rawlins

²⁴ *Supra*, note 21, pg 282

²⁵ Finch, Michael, *Law and the Problem of Pain*, 74 U. Cin. L. Rev. 285 2005-2006, pg 300

²⁶ *Supra*, note 21, pg 292

²⁷ [2003] 2 SCR 504 at para. 1 per Gonthier J.

pain patients are suffering and in distress, and that the disability they experience is real.

When the Court views chronic pain experience as real despite lack of objective findings, it is a first step in better assessing chronic pain cases. Where there is a gap in the court's ability to assess chronic pain, there is an opportunity to fill that gap with expert assessments. Particularly, vocational evaluators can make a meaningful impact in assisting the court in assessing chronic pain. In understanding the court's view on chronic pain, vocational evaluators will be in a better position to address chronic pain in forensic vocational evaluation reports.

How Can Evaluators Best Address Chronic Pain?

The Client

Vocational Evaluators may begin addressing chronic pain by understanding that the client with chronic pain is more often than not, a more difficult client to deal with. Chronic pain has a multi-dimensional impact on a client's life. Chronic pain is usually accompanied by at least one psychiatric issue. Chronic pain can affect a person's quality of life, independence and mobility. It can affect the client's relationships with their family and friends. Chronic pain makes a client less desirable, less marketable and less able to perform their jobs. In short, chronic pain can have devastating consequences for a client, with the result that as the plaintiff's support circle gets smaller, the plaintiff's need for support and resources from the lawyer grows. The former president of IASP, Sir Michael Bond's message for those dealing with chronic pain patients was that "the optimal attitude and professional approach when dealing with 'difficult patients' is a responsibility of the leaders of our pain clinics and pain centers."²⁸ Vocational evaluators would be encouraged to adopt the same philosophy, as an optimal attitude will ultimately achieve the best assessment of the client, and for the court.

The Role of the Vocational Expert

The role of the vocational expert is as follows: "[t]he general function of the Vocational Expert in court is to assess and provide testimony regarding an individual's vocational assets and limitations, and furthermore to place an objective, monetary value on those residual assets relative to a competitive labor market."²⁹ Also, "[w]hether the VE is testifying for the defense or

²⁸ Breivik, H. Invisible pain – Complications from too little or too much empathy among helpers of chronic pain patients *Scandinavian Journal of Pain* 6 (2015) 31–32, pg 31

²⁹ Gordon C. M. Wallace and Joseph G. Hohmann, *The Role of the Vocational Expert in Personal Injury Litigation* 40 *Advocate Vancouver* 211 1982, pg 212

the plaintiff, the job is fundamentally the same: to provide the court with a clear, concise condensation of a great body of data about the client.”³⁰

In terms of an approach to take when creating a report for the court, Mr. Justice Walker’s comments in *Ruscheinski v. Biln*³¹ reflect further insight into what the court is seeking to address:

In my opinion, when dealing with cases where chronic pain is suggested or suspected, an examination of a patient that is designed to look for objective evidence of injury, such as muscle spasm, as opposed to feigned pain behaviour, coupled with an appropriate and thoughtful approach to taking a patient’s history, will lead to a diagnosis and prognosis that is much more reliable than a records review.

When tasked with writing an expert report, the vocational evaluator should provide an objective observation of the patient’s injuries. If done with a careful review of the client’s work and medical history, then the court will have a further opportunity to measure the plaintiff’s subjective pain with greater objectivity. There are also examples of errors that would hurt the vocational evaluator’s assessment when dealing with chronic pain. A few of them are:

- Omission of Information - Critical medical or vocational information is left out.³²
- Discounting Information - Medical information is ignored or not recognized as significant.³³
- Relying on Incorrect Information - A medical evaluation may be relied upon that is not valid.³⁴

The vocational expert’s role must be focused, because they are basing their assessment on a compilation of information from other evaluators, and “[b]ecause the vocational expert’s conclusions will be flawed if based on incomplete or inaccurate information, the vocational expert must probe deeply and look broadly to identify gaps, inconsistencies, and errors.”³⁵

As the court’s assessment of chronic pain largely pivots on the plaintiff’s credibility, it is essential that the vocational expert’s report present an accurate and objective reflection of the client’s capabilities. A review of the medical history and client’s work history is vital to understanding the client’s struggles with chronic pain. A thorough review of the client’s history

³⁰ Foote, William E. and Terry M. Word, *The Role of the Vocational Expert in Worker’s Compensation Cases* 14 N.M. L. Rev. 483 1984, pg 499

³¹ 2011 BCSC 1263 at para 86, per Mr. Justice Walker

³² Sargent, J. E. *Understanding the Role of a Vocational Expert*, 20 Prac. Litig. 41 2009, pg 42

³³ *Ibid.*,

³⁴ *Ibid.*,

³⁵ *Ibid.*, pg 43

will create a picture of their capabilities before and after their chronic pain. A report supported by such evidence will provide an objective perspective that will help the court assess subjective pain.

An example of where an expert report assisted the court's ability to find chronic pain debilitating is in *Morlan v. Barrett*³⁶. In this case, the expert report stated:

[34] The following excerpts are from the "Conclusions and Recommendations" section of her report:

1. In summary, during this Functional Capacity Evaluation, Ms. Morlan did not meet the physical demands of her job as an Executive Secretary (NOC # 1241) as per her description of her past position. Ms. Morlan does meet the demands of her current occupation of Program Coordinator (NOC #) as she describes this position, if she is able to utilize pacing strategies (working at her own pace - at times below average pace or below industrial standards), if she is able to alter her position as needed (Ms. Morlan is constantly shifting position or stretching) and with the ability to control her pain to a level that allows her to continue working (medications). At the present she has found a balance with controlling her work environment to suit her capacity and utilizing pain medications and muscle relaxants to get through her day. If she continues to work she will continue to experience pain. Her pain increased significantly to 5/10 on the functional pain scale with simple handling tasks and short intervals of sustained activity during this assessment indicating reduced tolerance to activities relevant to her occupation and occupations similar to her current position.

...

6. She has increased pain up to 4/10 to 5/10 in response to tasks similar to those required at work, including sustained postures, reaching and handling or grasping on the left and typing. She finds that her pain is cumulative and by the end of a typical day she is 'quite bad.' She states she feels 'finished' at the end of the day. Her competitive employability is certainly affected by her productivity level and her need to employ pain coping and pacing strategies. She expresses concern over her long term ability to stay in her current job and this is a justified concern. If her condition worsens over time or her employer becomes less tolerant of her needs, she may find that she is not able to continue at her current level or place of employment. Her condition will limit the types of administrative jobs that she is able to work at (need for self pacing, breaks, position changes, etc) now and in the future.

...

³⁶ 2012 BCCA 66 at paras. 34 and 41 per Mr. Justice Frankel

[41] *Accepting that, to use the expression used at trial and at the hearing of this appeal, Ms. Morlan’s condition had “plateaued”, the fact remains that she would forever suffer from debilitating chronic pain along with headaches, symptoms that could be reduced, but not eliminated, by medication. In other words, throughout each and every day of her life, Ms. Morlan would have to cope with some level of discomfort. In my view, it was open to the trial judge to find—essentially as a matter of common sense—that constant and continuous pain takes its toll and that, over time, such pain will have a detrimental effect on a person’s ability to work, regardless of what accommodations an employer is prepared to make. Indeed, with regard to Ms. Morlan, this is reflected in Ms. Craig’s report: see para. 34 above.*

The expert’s report offered a clear, concise, and objective understanding of the plaintiff’s pain in relation to her job/evaluation. This gave the trial judge confidence to assess the subjective pain reported. As a result, the court relied on the expert’s report, and the expert’s assessment made a meaningful impact on the plaintiff’s case.

Conclusion

Vocational evaluators have an important role to play in a client’s trial process. As seen, chronic pain is real, debilitating, and costly. It affects individuals in their claims where an accident has caused their chronic pain condition. As chronic pain is subjective, there is an inherent question of the plaintiff’s credibility when it comes to assessing their pain and suffering. As also seen, chronic pain is a difficult concept for the courts to address, both in Canada and the US. Courts struggle with the question of how to assess subjective pain in a fair manner. One way the court can find assistance is in the report of a vocational evaluator. Through their observations and reporting, vocational experts can make a difference in the court’s ability to assess chronic pain. A better understanding of the court’s views on chronic pain will help a vocational evaluator in addressing chronic pain in their report. Three ways to do this are:

1. Understand the client’s difficulties with pain – In understanding the difficult challenge client’s face, an optimal attitude will help to elicit as much information as possible. The more information known about the client will better equip the evaluator in understanding how chronic pain relates to their abilities.

2. Thoroughly review the data of information available – A comprehensive understanding of the client’s history will provide a broader range of facts to present clear objective observations about the client’s chronic pain. By avoiding the omission and discounting of information, and relying on accurate reports, the evaluator’s report will provide a clear and concise understanding of the client’s chronic pain.

3. Understanding the court's struggle with chronic pain – In understanding the court's difficulty assessing chronic pain, the evaluator can best address chronic pain in knowing what will aid the court in making an assessment. As stated in *Ruscheinski*, objective observations coupled with a thoughtful approach to a client's history will lead to a far more reliable indicator of the client's chronic pain.

The task is not simple, but in keeping these concepts in mind, the vocational evaluator can make a meaningful impact when addressing chronic pain, and make a meaningful impact in the client's trial process.