Why Soft Tissue Injury Claims Should Not Be Judged By A Higher Legal Standard

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From time to time BC Courts appear to scrutinize soft tissue injury claims more carefully than claims with objective injuries. When doing so a very familiar quote from Mr. Justice McEachern is cited where he said "*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…*"

This quote comes from the 1981 case *Butler v. Blaylo*ck. This quote is often advanced by ICBC defence lawyers in an effort to have a court dismiss soft tissue injury claims. I have seen this quote cited many times in recent judgements and just last week the BC Court of Appeal referenced this authority in Mariano v. Campbell.

However, what was not noted by the Court and should be next time a defence lawyer brings this quote to the Courts attention is that Mr. Justice McEachern's decision is Blaylock was overturned by the BC Court of Appeal in 1983 where the Court held as follows:

12 With the greatest respect, I am of the opinion that there is no evidence upon which one could reasonably conclude that the appellant did not continue to suffer pain as of the date of the trial. After careful consideration of the expert testimony and the evidence of the appellant and his wife, I have reached the conclusion that the only finding open to the learned trial judge was that as of the date of trial the appellant continued to suffer moderate pain and in the words of Dr. Lehmann, his symptoms "will gradually subside with further time. Having been present for approximately two and a half years, it is doubtful that they will disappear completely." (underlining mine).

13 There are three basic reasons which, in my view, support the conclusion that the plaintiff continued to suffer pain as of the date of trial. Firstly, the plaintiff testified that he continued to suffer pain. His wife corroborated this evidence. The learned trial judge accepted this evidence but held that there was no objective evidence of continuing injury. It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the Plaintiff is entitled to recover damages. There is no suggestion in this case that the pain suffered by the plaintiff did not result from the accident. I would add that a plaintiff is entitled to be compensated for pain, even though the pain results in part from the plaintiff's emotional or psychological makeup and does not result directly from objective symptoms.

14 Secondly, all of the medical reports support the view that the plaintiff continued to suffer pain and that it was not likely that his symptoms would disappear completely.

15 Thirdly, and of great importance, is the report of Dr. Lehmann, which was not before the learned trial judge for his consideration. In that report, Dr. Lehmann stated that there were degenerative changes in the cervical spine which pre-existed the accident. He said "they were probably asymptomatic before the accident but I think are probably contributing to his prolonged discomfort." (underlining mine). In my view, as this evidence is uncontradicted, these objective findings cannot be disregarded and should be given great weight.

In addition to the above, a subsequent case from the Supreme Court of Canada made it clear that all civil cases, regardless of the allegations or the nature of a lawsuit, need to be judged with the same civil standard. In F.H. v. McDougall the Canadian High Court stated as follows:

I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof…

[45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

I hope this 'history lesson' helps anyone confronted with an attack on Plaintiff credibility during a soft tissue injury trial.