

December 03, 2018

ARTICLE

## BLG Successfully Defends Damages Award in Chronic Pain Case at Alberta Court of Appeal

In a decision released on November 29, 2018 (reported as *Petz v. Duguay*, 2018 ABCA 402), a majority of the Alberta Court of Appeal upheld the Trial Judge's finding that the Plaintiff's injuries, caused by the motor vehicle accident at issue, had resolved within four years of the accident.

BLG successfully represented the Defendant at trial and on appeal. The key issues were causation, and as a corollary to that, the Plaintiff's personal credibility. The Trial Judge was tasked with determining whether the Plaintiff's self-reported, ongoing chronic pain syndrome or somatic symptom disorder was actually caused by the accident.

At trial, the Plaintiff put forward multiple experts who opined that she suffered from a combination of chronic pain syndrome and somatic symptom disorder, which was ongoing at the time of trial and caused by the accident. As a result of her ongoing symptoms, the Plaintiff claimed damages in excess of \$1 million. However, the Trial Judge preferred the evidence put forward by the Defendant, finding that the accident in question had not caused the Plaintiff's ongoing injuries.

The Trial Judge found the Plaintiff not to be a credible witness. As a result, the Trial Judge accepted the unavoidable fact that the opinions of the Plaintiff's medical experts depended largely on the accuracy or inaccuracy of the Plaintiff's own self-reporting. The Plaintiff's personal credibility, or lack thereof, therefore undermined the reliability of those expert opinions.

Three years prior to the trial, BLG served the Plaintiff with a Formal Offer of Settlement, which the Defendant beat at trial. As a result, the damages award in favour of the Plaintiff (affirmed on appeal) was outweighed by the costs award in favour of the Defendant, resulting in a net sum payable to the Defendant (also affirmed on appeal).

The majority of the Court of Appeal did not find any error in the Trial Judge's handling of the allegations of chronic pain. As the majority stated, "[t]his is not a case about the legitimacy of a psychological condition such as chronic pain or SSD". Instead, it was a case about the Plaintiff's own believability, and whether the motor vehicle accident was the *cause* of any alleged psychological condition.

As a result of the high standard of review regarding a Trial Judge's finding of fact and weighing of expert evidence, the majority of the Court of Appeal deferred to the conclusions drawn by the Trial Judge. In particular, the majority found no error in the Trial Judge's decision to give little weight to two of the Plaintiff's key experts, Dr. Zabrodski and Dr. Giantomaso. Dr. Zabrodski failed to produce the testing data and other materials which formed the basis for his opinion, while Dr. Giantomaso was "overly invested" in the Plaintiff's case: "Based on our reading of Dr. Giantomaso's evidence, and specifically of his cross-examination, we cannot say it was unreasonable or unfair for the trial judge to suggest that Dr. Giantomaso seemed overly invested in the appellant's case."

Ultimately, the majority of the Court of Appeal had that the Defendant led ample evidence through BLG's case-in-chief and cross-examination to support each of the Trial Judge's conclusions, and declined to interfere with the Trial Judge's decision on the merits.

On the issue of costs, the Court of Appeal found that the Plaintiff was entitled to her costs up to the date of the Defendant's first formal offer, based on the judgment amount, while the Defendant was entitled to costs from that date forward, based on the amount claimed at trial.

For further detail on the background of the case, [the trial decision can be found here](#).

---

By: [Cory H.D. Ryan](#), Justine Blanchet, [Bradon Willms](#)

Services: [Insurance Claim Defence](#), [Appellate Advocacy](#)

---