Chronic Pain in Alberta: Know Your Case Before Going to Trial

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Alberta has very recently received another addition to the series of chronic pain cases which provides clarity on that particular type of injury and refines the scope of the *Minor Injury Regulation,* Alta Reg 123/2004 (the "MIR").In the very recent decision of *Jones v Stepanenko*, 2016 ABQB 295, the plaintiff Jessica Jones, sought compensation for the injuries she suffered in severe rear and front end collisions on August 18, 2009. The plaintiff was 19 years old at the time of the accident and generally healthy. There was severe damage to her vehicle following the impact, and liability was admitted before trial. The plaintiff sought damages for pain and suffering, loss of pre-trial income, loss of earning capacity, special damages, loss of housekeeping capacity and cost of future care in an amount ranging from $272,683.65 — $302,683.65.

Initially, the defendants argued that the plaintiff's general damages should be subject to the minor injury "cap" (pursuant to the MIR), however that position was changed throughout the course of the trial. Defence counsel later conceded that the plaintiff's injuries fell outside of the minor injury "cap" but argued for damages based on the lower end of chronic pain case law.

The court found that the plaintiff was a credible witness and accepted that she suffered from a significant impact that caused her debilitating soft tissue injuries to her neck, back, shoulder, jaw and hip; contusions and lacerations to her face, and both knees; and severe headaches. The court accepted the plaintiff's expert evidence that she was suffering from fibromyalgia, and this condition was caused by the collisions. The plaintiff had made significant progress towards recovery in the first year post-accident, but was still suffering from pain and headaches when she was seen by medical professionals in June 2010. The court relied particularly on the Alberta decisions of *Chisholm v Lindsay,* 2012 ABQB 81 and *McLean v Parmar,* 2015 ABQB 62, when assessing general damages. General damages in this case were awarded in the amount of $80,000. The plaintiff was also awarded a significant loss of earning capacity claim in the amount of $125,000.

Of particular interest to insurers and defence counsel in this case, is the court's comments with respect to expert evidence of the defence Certified Medical Examiner ("CME Expert"). On cross-examination, the Court found that the CME Expert based his opinion on a medical model —*not* the definitions in the regulations. The Court noted that in 15 years of assessing strains and sprains, he had *never* found someone who had

suffered from a "serious impairment". When the legal interpretation of the MIR definition was put to him, he noted he was aware of the definition in the regulations but he had a different way of conducting certified medical examinations.

The court ultimately rejected the opinion of the CME Expert. The court urged him, and other doctors performing Certified Medical Examinations pursuant to the MIR, to be educated on the law as it applies to them. The court noted that these types of medical legal reports are relied on by insureds and injured parties, and they need to be accurate due to the potential for significant financial consequences.

The court also found that the evidence of the other defence experts was seriously compromised on cross-examination, largely due to vague statements in the reports and a failure to consider the plaintiff's most recent medical records.

The total award granted to the plaintiff was $282,683.65, plus interest and costs.

This case is a prime example of the evolution of the chronic pain case law in Alberta, and the importance of independent and reliable expert evidence. It also highlights the importance of expert evidence in chronic pain cases and considering those risks before proceeding to trial.

By

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