Surviving Your Personal Injuries Insurance Claim and Litigation:
A Guidebook for
When Chronic Pain Lands You in Court

Second Edition

Mary E Lynch MD
Professor Anesthesia, Psychiatry and Pharmacology
Dalhousie University
Director of Research Pain Management Unit
Queen Elizabeth II Health Sciences Center
Halifax, Nova Scotia
Canada

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Preface

If you have picked up this book, chances are you or someone you care about is involved in an insurance dispute or is going through the process of personal injuries litigation. If this is the case you will need to know how the system works, and you will need a lot of support.

The intent of this guidebook is to help you, your loved one, or your friend steer a path through this challenging process—and emerge intact. I am a strong believer that knowledge is power, and that the more you know about the system and what to expect, the better off you will be. I have had 25 years of experience assisting people living with chronic pain conditions. In this work I have witnessed many people as they have navigated their way through this particular legal maze. At best it is frustrating and demoralizing. At worst it is re-traumatizing. In every case, it has added insult to injury.

Personal injuries litigation is, by its very nature, stressful. Lawyers call it an adversarial system. In practice this means it’s them (usually the insurance company and their lawyers) against you.

Stress is inherent in personal injuries litigation. The purpose of this guidebook is to equip you for the challenge ahead, and to help minimize the stresses and strains you will encounter along the way.
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Chapter One: Insurance Disputes

After the accident, everything seems to change. If your injury prevents you from doing what you want and need to do, if your injury prevents you from enjoying things you used to enjoy, then your injury has caused you losses.

This book presumes that you have suffered an injury which has left you with medical expenses and losses. Its purpose is to educate you about the system as you attempt to recover your losses from the insurance company. If you end up in a dispute with the insurer this guidebook discusses the process you will be faced with in pursuing legal action. This may include actions against a no fault insurer in the case of a motor vehicle accident, tort litigation against the individual responsible for causing the injury or actions against your disability insurer.

You can already see how complicated it can be. This guidebook will take you through the process, step by step. We will start with an overview of the insurance industry as it relates to personal injuries, and then move on to the nuts and bolts of opening a claim. If you are dissatisfied with how you are being treated by your insurer, the next sections will review your options. They include:

- negotiating with the insurer directly;
- pursuing alternative methods of dispute resolution outside the courts; and
- proceeding with a lawsuit or personal injuries litigation when other methods fail.

It is important for me to point out from the start that this is not a legal guidebook. It will not have all the details you may need if you do decide to pursue litigation. The focus of this book is to help you or your loved one to have a better idea of what to expect so that you are less likely to be taken by surprise. It is my hope that this book will also assist in decreasing the pain caused by personal injuries litigation and the claims process.

Case Study: Elizabeth

Elizabeth is an excellent emergency room nurse. She is accustomed to working twelve-hour shifts and providing state-of-the-art care to all comers in a busy tertiary care emergency room setting. Elizabeth loves her work. She has just recently completed a hands-on course in Aero-medicine because this emergency room is being outfitted to receive acutely ill patients via helicopter as well as ground transport.
Elizabeth and her husband Ben have two daughters aged nine and eleven. They have always shared childcare. Since Ben is self-employed, there is some flexibility in his schedule. Elizabeth has traditionally done the lion’s share of housekeeping and meal preparation. The girls are involved in several activities, both sports- and arts-related. Liz has made this a priority because she wants the girls to have the best chance at a great future.

Although Elizabeth and Ben share very little time together, both feel they have an excellent relationship. If you were to ask them they would say—without hesitation—that their lives are very rich and full.

That is, until Liz was nailed in a rear-end motor vehicle accident one fine summer day. The young fellow who ran into her was momentarily distracted when he spotted a friend on the sidewalk. He did not realize Liz had stopped in the inside lane and was waiting to make a left turn. His carcrunched into Liz’s sedan and—immediately—Liz felt a searing pain in her neck and face. Even though she felt very dizzy and somewhat nauseated, Liz was able to get out of her vehicle and call for help on her cell phone.

Accidents like Liz’s happen to thousands of Canadian motorists each year. Before investigating what recourse she has, we’re going to look through our wide-angle lens at the backdrop for this type of accident—the Canadian insurance industry.

Overview of Insurance in Cases of Injury

The Canadian insurance industry is regulated by both federal and provincial legislation. The federal government oversees the licensing of foreign-incorporated insurance companies operating in Canada. It also deals with the financial stability of federally and foreign-incorporated insurers. Provincial and territorial governments have jurisdiction over most other insurance matters.

There are some variations between provinces regarding automobile insurance but when it comes to the rights of the injured party and the dynamics of disputes, the process is much the same across the country. Except in Quebec, litigation generally follows similar rules of procedure and there are similar precedents across Canada.

However, there are some variations in the way that Alternative Dispute Resolution (ADR) is practiced. See Chapter Six for more information about ADR.

The Ins and Outs of No-Fault Insurance

Since automobile accidents are one of the greatest causes of personal injury, we’re going to look at this type of insurance claim in some detail.
Without insurance, you cannot legally drive. Therefore, the great majority of drivers in Canada have automobile insurance. In understanding what type of coverage is in force, there are important differences between provinces. The main variable is the extent of no-fault coverage. “No-fault” refers to coverage that is provided, regardless of who was at fault. No-fault insurance is provided by your own motor vehicle insurer; you buy it with your car insurance.

• (a) In a pure no-fault system, fault is completely eliminated as a consideration in providing compensation for accident victims. Both the innocent victim and the individual who caused the accident are compensated at some level by their respective insurance companies. In a pure no-fault system, typically the victim is not fully compensated for his/her economic loss. Claims for pain and suffering are either eliminated or they are severely restricted. In addition, the victim does not have the option to sue the individual who caused the injury. **Manitoba, Quebec,** have pure no-fault systems, in **Saskatchewan** the owner may choose to have no-fault insurance.

• (b) The next gradation in terms of no-fault coverage is the modified or threshold no-fault system. In this system, no-fault benefits are provided to all individuals injured in a motor vehicle accident. The no-fault benefits cover medical and rehabilitation costs, death benefits, and a small income replacement. Only the most seriously injured victims with more than a defined level (eg. $15,000) in general damages meet the so-called “verbal threshold”, and are allowed to sue, in which case they have the right to launch a civil suit for additional compensation. For more information about this, see Chapter Four. The modified or threshold no-fault system is available in **Ontario**.

• (c) The third and last type of no-fault coverage is the limited no-fault scheme. In a limited no-fault system, all accident victims are entitled to certain benefits regardless of fault. These benefits usually include some form of income replacement, and coverage for medical and rehabilitation expenses. The benefits are often lower than those available in a pure no-fault or modified no-fault scheme but the limited no-fault system preserves the right of the victim to sue for full recovery for pain, suffering, and monetary loss. This gives the victim the right to sue the person who allegedly caused the accident. This is the type of no-fault coverage that is used in the majority of provinces and territories including **Nova Scotia, New Brunswick, Prince Edward Island, Alberta, British Columbia, the Northwest Territories,** and the **Yukon.**
Mandatory Coverage

Insurance companies operating in all of the latter provinces [(c) above] supply the limited no-fault “mandatory benefits” through Section B of their policies. For example, in Nova Scotia, Section B benefits provide compensation for income loss to a maximum of $140.00 per week—less any other disability payments received and medical and rehabilitation expenses—to a maximum of $25,000.00 in the first four years following the accident. In British Columbia, the no-fault auto plan reimburses for loss of wages to a maximum of $300.00 per week, and medical and rehabilitation expenses to a maximum of $150,000.00 in total.

In addition to no-fault coverage, most provinces (see below) also provide protection against hit-and-run and uninsured drivers. In British Columbia this is provided by the Insurance Corporation of British Columbia (ICBC). In most other provinces special funds are set up for this purpose. For example, several provinces with a "fault" (limited no-fault—(c) above) system now require your own insurer to include Section D "Uninsured Motorist Coverage" in your policy. This provides compensation if the person at fault is not insured. The Yukon and Northwest Territories, and most US states, do not have such funds.

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<tr>
<th>PROVINCE</th>
<th>TYPE OF COVERAGE</th>
<th>DESCRIPTION</th>
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<tbody>
<tr>
<td>Manitoba</td>
<td>Pure no-fault</td>
<td>Both drivers are compensated by insurers.</td>
</tr>
<tr>
<td>Quebec</td>
<td>Pure no-fault</td>
<td>Pain and suffering claims are reduced or eliminated.</td>
</tr>
<tr>
<td>Saskatchewan*</td>
<td>Pure no-fault</td>
<td></td>
</tr>
<tr>
<td>Ontario</td>
<td>Modified/Threshold no-fault</td>
<td>All injured individuals receive benefits.</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Limited no-fault</td>
<td>All accident victims receive benefits-often lesser amounts than those provided under the two other no-fault systems.</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Limited no-fault</td>
<td></td>
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<tr>
<td>Prince Edward Island</td>
<td>Limited no-fault</td>
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<td>British Columbia</td>
<td>Limited no-fault</td>
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<td>Alberta</td>
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<td>Northwest Territories</td>
<td>Limited no-fault</td>
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<tr>
<td>Yukon</td>
<td>Limited no-fault</td>
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1 The expenses can go beyond the four-year period in certain circumstances if the $25,000.00 has not been exhausted. For example, if the expenses have been incurred within the four-year period and are ongoing, then one may still receive reimbursement after the four year period.

2 In Nova Scotia, prior to July 1, 1996, these claims were paid from a fund administered by Judgement Recovery (N.S.) Limited.
In Newfoundland and Labrador, the limited no-fault benefits provided by Section B are optional for drivers. Thus, Newfoundland and Labrador the injured party cannot assume that the other driver’s insurance company will automatically pay for damages. If the other driver has opted out of Section B, it will be necessary to sue for damages. Newfoundland and Labrador is therefore the province that is closest to a pure tort system. However, the majority of drivers in Newfoundland and Labrador do carry the optional no-fault insurance.

There are positives and negatives to Newfoundland and Labrador’s no-fault scheme, in comparison to the other provinces:

<table>
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<tr>
<th>POSITIVES</th>
<th>NEGATIVES</th>
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<tr>
<td>Injured party can sue and potentially collect more for damages that are only payable through insurers in other provinces.</td>
<td>Injured party cannot rely on any protection from the other driver’s insurance company.</td>
</tr>
<tr>
<td>If the other driver cannot pay the claim, there may be no reimbursement for expenses beyond one’s own insurance coverage.</td>
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There are variations across the provinces regarding insurance providers. In the majority of provinces automobile insurance is purchased from private insurers. British Columbia, Quebec and Manitoba, and Saskatchewan provide basic automobile insurance through a monopoly insurer. In some cases provinces with monopoly insurers (eg. British Columbia and Saskatchewan) allow additional coverage for vehicle damage and third party liability to be purchased through private insurers or the monopoly insurer. Many drivers opt for this additional coverage because the maximum third party liability coverage is often inadequate.

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As of Jan 2003 Saskatchewan residents have a choice between pure no-fault or “tort” insurance.

A “pure tort system” relies on the action of a civil suit (rather than insurance coverage) to resolve differences and award damages.
In provinces with limited no fault insurance such as Nova Scotia, coverage in excess of $200,000.00 is also available and purchased by many drivers.4

**Case Study: Elizabeth**

Since Rodney smashed into Liz’s sedan on Quinpool Road in Halifax, Nova Scotia, Liz had access to a limited no-fault insurance scheme. Theoretically, this system is supposed to provide her with coverage for the medical expenses arising out of the accident.

Liz was told she would probably get better in two weeks, but she didn’t. She didn’t get better in four or six weeks, either. In fact, three months later, even with the help of an excellent physiotherapist, Liz was still waking up every morning to an excruciating knotted, tight pain across the back of her neck. It felt as though her neck and shoulders needed a good stretch, but it was impossible to get the “kink” out. That kink would build up through the day and her jaws would start to ache to the point where her whole neck and head would throb. Liz went back to work but she lasted only two hours before she went home, nauseated by the severity of the pain.

**The Tort System**

Before no-fault insurance was introduced, the only way the victim of a motor vehicle accident could recover damages was by suing the faulty driver through the tort system. This system is also available to parties who are injured in non-automobile accidents. This is purely a third-party system where the accident victim must gather enough evidence to prove the defendant was responsible for the accident, and that the damages or losses were, in fact, caused by the accident.

To *litigate* is to pursue a lawsuit through the courts. Litigation is the act or process of litigating. Thus *personal injuries litigation* is the term used to refer to lawsuits involving injuries to persons. The law of personal injury is part of a larger body of law called *tort law*. In Latin “tortus” means twisted or crooked. A tort refers to a civil wrong (as opposed to a criminal wrong) which the law will redress by an award of damages. Individuals in our society have a duty to conduct themselves in a manner that does not cause injury to other persons. If someone’s actions are negligent (if someone fails to exercise the care that would be expected of a reasonable person), and if this results in injury to another person, the injured party has the option to sue for damages.

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4Most people have under-insured motorist coverage endorsements in their policies. This coverage provides compensation for losses occasioned by a negligent driver where the negligent driver does not have sufficient insurance to cover the claims. For instance in Nova Scotia, if the defendant has the minimum insurance coverage of $200,000.00, and there is a judgement that losses total $1 Million, and the amount of the injured party's insurance policy is $1 Million, coverage is provided for the difference between the $200,000.00 and $1 Million, i.e., $800,000.00.
A personal injury lawsuit is therefore precipitated by an event in which an individual suffers an injury that is allegedly the result of the wrongful actions of another person.

The law uses the term “allegedly” because—in the eyes of the law—the injured party, must prove that this individual was at fault and caused the injury. Until this is proven, it is not legally correct to say that the person “caused” the accident.

**Personal Injuries Litigation: The Basics**

To sue is to “start an action.” By initiating this process, you (the injured party) become the plaintiff. A plaintiff is one who brings suit in a court of law. Another definition is “the complaining person”. The alleged wrongdoer becomes the defendant. In actual practice, the insurer nearly always defends his/her action. Although the insured is called the “defendant”, oftentimes during the course of litigation, the insurance company deliberately tries to undermine the injured party’s credibility such that in the end, you (the plaintiff) often feel as though you are “on trial” and in need of defense!

Considering how emotionally demanding the litigation process can be, you might wonder: why even start? You’ve never been “a complainer”. The last thing you want to do is go to court, so why put yourself through it?

One reason to litigate is because the injury might be compromising your ability to do your job. This will no doubt involve a loss of income, or difficulty in performing homemaking activities. This circumstance has caused many injured parties to use up their life savings. Particularly vulnerable, are individuals who have families to raise and bills to pay. In provinces where no-fault insurance is available, it usually proves to be inadequate to cover the costs associated with the more severe injuries. Many injured parties are therefore forced to sue in order to recover lost income. Disability insurance will not necessarily protect you from this.

In a situation where your lost wages are being paid by a disability insurer, the disability insurer is considered to be a subrogated claimant. [This means that the disability insurer is also lining up to be a beneficiary of your insurance claim.] In Nova Scotia and in many other provinces you (the plaintiff) are obliged to advance the subrogated claim when you present your own claim. Depending on the wording of the policy, you may be required to repay, from your personal injuries claim settlement, disability payments made to you by the disability insurer. Subrogation is often not explicitly stated in the insurance policy. In the case of subrogation, the plaintiff automatically becomes involved in the litigation process.

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5 The area of law that deals with the issue of subrogation can be very complex. In practice, the plaintiff's counsel will negotiate with the subrogated claimant, i.e., the insurer, to arrive at the best compromise.
Opening a Claim with Your Insurance Company

If you are the injured party in an accident and would like to access your insurance coverage, take the following steps:

1. **If you are in a province with no-fault insurance**, call your motor vehicle insurer/broker to access your Section B benefits.
   
   Note: **If you do not have no-fault insurance** (that is, if you are in Newfoundland and Labrador and did not purchase no-fault coverage) your only option is to sue. (See pg. 8). Your insurance broker will either have your adjuster call you, or give you your adjuster’s contact information.

2. If you are unable to return to wage-earning work and have disability insurance coverage, call your disability insurer as well.

3. If you are in a province that provides the option to sue (see pg. 6) you have the option to start an action against the other motor vehicle driver. In this case you should call a lawyer.
   
   Note: Depending on your circumstances, you may do #1, #2, and #3.

You can expect your adjuster to provide you with access to your coverage after you supply certain basic information. Following a motor vehicle accident, the no-fault coverage for medical and rehabilitation expenses that both the insured and the insurer agree are appropriate, should be made available.

How to Handle the Other Driver’s Adjuster, for those in Provinces Where Suing is an Option:

In many cases, the other driver’s adjuster (the adjuster for the insurance company of the alleged "at fault" driver) will contact you wherever you are located—either in hospital or at home—to arrange an initial interview. The adjuster might say that the purpose of this interview is to ensure that the claim is dealt with in an efficient manner. He/She will collect information and make a visual assessment. As the injured party, it is important for you to remember that this adjuster is working for the other driver’s insurance company. Expect him/her to be sophisticated at taking statements that will benefit the other insurance company. Often the adjuster will put his/her observations in written form, and ask you to sign in acknowledgment. *It is advisable to seek expert counsel before signing any documents.* Whatever statement you sign can be used at a later date to minimize the amount of the claim, or to challenge you in some way. It is important to remember this so you can make an informed decision about whether or not to agree to the meeting, and whether to request the involvement of a lawyer at this stage.6

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6 There is no legal requirement to provide this interview to the third party adjuster.
Case Study: Elizabeth

Liz was very diligent in applying herself to the exercises her physiotherapist had prescribed. She was determined to overcome the pain, the same way she had overcome adversity all her life. Liz believes that if you just try hard enough, eventually, you will accomplish your goal. But this time, her philosophy didn’t work. Her sheer determination, persistence, and hard work did nothing to reduce the pain.

All of her hard work did pay off in one area though: Liz became stronger. Very pleased with her progress, her physiotherapist said it looked as though she would avoid de-conditioning (a situation where the muscles become weakened and the individual becomes unfit). This, her physiotherapist explained, is the biggest enemy for everyone who suffers with chronic pain. In order to maintain her gains Liz needed further physiotherapy, but the no-fault insurer refused continued coverage. The company told her that the information they had on file was inadequate information to support the need for continued physiotherapy. Liz’s family physician, and her physiotherapist had provided prompt documentation supporting the need for further physiotherapy, but apparently, this wasn’t good enough for the insurer.

Liz considered herself a sensible, assertive woman. She possessed the skill of clear direct communication, in her view she had completed all of the forms the insurance company had requested. She had provided all of the medical reports requested. Liz had also contacted her physiotherapist and family physician and was informed that the reports had been sent to the insurance company a month ago. Liz thought there must be a misunderstanding so she called the person dealing with her claim. Yes, they had received the reports recommending continued physiotherapy but this was not enough and her physiotherapy would not be continued. Liz thought that if she could explain it clearly enough then the insurance representative would understand and continue the physiotherapy. Liz indicated that her goal was to get back to her wage earning work. The stalemate continued.

Pursuing Your Rightful Coverage

In the event that your insurance company refuses to cover medical treatment deemed necessary by your doctor:

1. Ensure that adequate medical information has been sent to your insurer. This will eliminate the possibility that your insurer simply does not have the necessary information to support continued coverage.
2. If your insurer still refuses to cover medical or rehabilitation expenses, *don’t waste your time in frustrating telephone conversations with the adjuster.*

3. In the event of a disagreement with your insurer, your options will vary from one province to another (details below). In most cases, you will choose between an in house (within the insurance scheme) review or appeal process, Alternative Dispute Resolution (see Chapter Six) or litigation.

   Note: If you would like to contact a lawyer and *if you can’t afford to pay a lawyer,* many lawyers are willing to represent clients on a contingency basis. This usually means that your lawyer will take his/her fee as a percentage of the claim, once it is settled.  

Liz’s dilemma shows how easy it is to end up in a dispute with your no-fault insurer and/or disability insurer. The business of pursuing your rightful coverage can become very muddy indeed. If the accident occurred in a province that does not have pure no-fault automobile insurance and if the other driver is liable or partially liable, you may be entitled to sue the other driver for your losses. Thus you may end up in several actions which could include an action against your own insurance company.

The rules governing this vary according to provincial jurisdiction.

**Province-Specific Rules Affect Your Claim**

In **Ontario**, *the government has established an office of the Insurance Ombudsman.* In addition, all insurance companies are required to employ an *ombudsman* on staff. (At the time of this writing, Ontario is the only province with insurance ombudsmen.)

1. If you are not satisfied with the way the adjuster is handling your case, ask the Ombudsman to become involved.

2. If you are not satisfied with the Ombudsman’s intervention, the next step is *mediation.* In this case you must contact the Financial Services Commission of Ontario (FSCO) for a referral to a mediator. You have two years to resolve the dispute with your/the defendant’s insurance company through the dispute resolution group at FSCO. Approximately 55% of cases are resolved at this stage.

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7 Regarding contingency fees in Ontario, outside of class proceedings, it is not legal for lawyers in Ontario to accept compensation by way of a contingency fee. Ontario is the only jurisdiction in North America where that is the case, lawyers are working to change the rule.
3. If your dispute remains unresolved, you can go to *arbitration*. This can be handled privately (find your own mediator) or through FSCO. If all attempts at resolution fail, you can then go to court.

**In British Columbia**

1. The first step is to approach the Insurance Corporation of British Columbia (ICBC). When you disagree with a claims decision, you can request that a claims manager review the adjuster’s decision.

2. If you are still not satisfied, the claims dispute may be eligible for ICBC’s *dispute resolution process*. Under ICBC’s dispute resolution process, you would be referred to a Dispute Process Advisor. After thoroughly reviewing the claims decision with you, the advisor may organize a hearing before a Dispute Appeal Panel. During this appeal, you and the adjuster present information to the panel, and are able to ask each other questions. Alternatively, if there is a discrepancy regarding the basic facts on which the decision was made, the advisor may try to bring some or all of the parties together to clarify the facts. This is called a Fact Assessment Meeting.

3. In addition, you can also take your dispute to Small Claims Court where both drivers can tell their story to a judge. If there is a change in the decision regarding liability, then ICBC will make the appropriate changes.

4. Finally, if you are not happy with (a) a claims decision with regard to benefits, or (b) compensation that’s due you, you can bring an action against ICBC. Such an action must be initiated within one year of the accident.

Previously the only kinds of disputes that are currently covered by ICBC’s internal dispute resolution process are: disputes concerning (a) a liability decision, and (b) the value of a vehicle which has been totally written off. The ICBC has now expanded the scope of this internal process so that any dispute can be expedited through the Fair Practices Review Department.

**In Manitoba**

1. All decisions regarding bodily injury compensation are made by the Manitoba Public Insurance Corporation (MPIC).

2. If you are not satisfied with the decision, you may engage an appeal and review process.

Note: Since Manitoba has a pure no-fault system, you cannot sue for additional damages unless you were injured in a province that has either modified/threshold no-fault or limited no-fault jurisdiction. See Table on page 7.

3. If you are a resident of Manitoba and were injured in another province, you may sue for the additional compensation available in the jurisdiction in
which you were injured, for an amount beyond what you would have received under Manitoba’s pure no-fault system.

4. If a Manitoban is injured elsewhere in Canada or the U.S., MPIC is entitled to recover the amount of compensation it must pay the injured resident.

Like Manitoba, Saskatchewan\(^8\) and Quebec have pure no-fault systems administered by a provincial monopoly insurer and the system works in much the same way.

Thus in Canada, depending on which province is involved, you (the injured party) may end up in disputes with more than one insurer. This could include a) your own no-fault insurer, b) your own disability or accident insurer, or c) the insurance company defending the other driver or any combination of these.

These disputes can sometimes be resolved without starting a court action. Increasingly in Canada, more and more people are exploring approaches that avoid the court-based adversarial system (see Chapter Six). However, if the dispute cannot be resolved, then you may proceed to litigation. To pursue this, you will need a lawyer.

\(^8\) At the time of writing Saskatchewan has completed a five-year review of the pure no-fault system; effective January, 2003, Saskatchewan residents have the option to choose no fault or tort motor vehicle insurance coverage.
Chapter Two:
Choosing a Lawyer

I cannot emphasize enough how important it is to get a good lawyer. Personal injuries litigation has become very complex. It is like an extremely involved game of strategy that is impossible to play unless you know the rules. But with these rules, you are going to need a law degree and a lot of experience. That's why a good lawyer with expertise in personal injuries is worth his/her weight in gold. Experienced personal injury lawyers will probably charge top dollar for their time, but they will usually save you money in the long run. Perhaps more importantly, they can also save you a lot of anguish by knowing how to play the game efficiently and effectively.

Case Study: Elizabeth

Without access to physiotherapy, Liz's condition deteriorated. She was unable to continue her stretching program, and when she tried to exercise her pain became worse. Fortunately, Liz’s family doctor was able to refer her to the department of physiotherapy at a local hospital, and after an eight-week wait she began a program that included acupuncture, transcutaneous electrical nerve stimulation (TENS), and a supervised exercise program. Liz worked very hard but she had lost a lot of ground and it took months to get her range of motion and strength back to where it was. Her pain levels were at an all-time high, but Liz was determined to get her strength back. She and her family had planned a camping trip for the following summer and she did not want to disappoint the girls.

It had been close to a year since the accident; Liz had hoped to be back to work by now. She missed her colleagues, the adult conversation, her work, the patients, and perhaps most of all, she missed the feeling of making a contribution. Liz's career was very important to her identity.

Ever since she had been a little girl she had been determined to find a career that would enable her to support herself. It was when she turned fourteen that she decided to become a nurse. Her best friend was in hospital for surgery to remove her spleen because she had developed a blood disorder that was not coming under control. Liz could remember how scared she was when she was finally allowed to visit Emma on the children's surgery ward. Her most vivid memory from that time was of the strong woman in the fuzzy white sweatshirt, with the magical twinkling eyes and gentle smile. She had told Liz that Emma couldn’t wait to see her, and was doing great. Emma spoke so glowingly of Nurse Shelbie that Liz was convinced she had been a big part of why Emma recovered so
quickly from the splenectomy. Ever since then Liz knew that nursing was her path. Now she was frightened she may never be able to go back to work. Her pain was so bad she could not even brush her hair. How would she manage to hang an IV bag, let alone help to lift a patient?

Although Liz continued to work hard on her exercise program, she found that her energy levels were quite low. The pain kept her up at night and she felt chronically sleep deprived. It took all of her energy to do one household task at a time, then there was her exercise program and she would have to rest if she was going to be able to spend time with Ben and the girls in the evening.

After eighteen months it was clear that Liz would not be able to return to her work as an emergency-room nurse. By this time she had seen three specialists: an orthopedic surgeon, a neurologist, and a rehabilitation specialist. The surgeon confirmed a diagnosis of cervical sprain or whiplash and said there was nothing that surgery could do for her. The neurologist told her there was no evidence of a pinched nerve or cervical radiculopathy, and the rehabilitation specialist told her to keep exercising and that she would have to learn to live with the pain. Liz was devastated to learn that there was no cure. She could not imagine how she was going to live with such excruciating pain. This was no life. She had tried the camping trip, and it was a disaster. Even with the luxury camp mattress, she was in so much pain after the first night that she could not lift the canoe paddle. Liz felt like a complete failure.

On top of it all, the disability insurer had sent her to a doctor of their choice for a medical examination. This doctor had been rude and his report contained many inaccurate statements. This doctor's report implied that Liz had been exaggerating her symptoms and it stated that there was no reason why she could not go back to work. Once the insurance company received this report, her disability insurance was immediately cut off. Since the family had relied on both incomes to pay the bills, this meant that one of the vehicles had to be sold, and household costs had to be cut significantly. Now there would be no extras for the girls. Liz felt tremendous guilt: guilt that Carrie had to give up horseback riding, guilt that she could not attend Jenna’s hockey games (due to the pain), guilt when she was short-tempered with the family, guilt that Ben and the girls had to do so much of the housework, and guilt that she was not setting a good example for the girls.

Liz was very thankful that Ben had risen to the occasion. In the face of it all, he was a solid rock of support. It was Ben who finally said it was time to call a lawyer.
The next logical question is: **how do you find a good lawyer?** I have asked many people—patients who have gone through the process, lawyers, and colleagues—and they all agree: it’s a challenging task.

**What the lawyers said**

Every lawyer I spoke with acknowledged that this is a difficult question to answer. Indeed, many said that they would not know the best way to find a good lawyer themselves if they did not know the legal community. Here are their suggestions:

**Word of Mouth**: Start asking people. If you know anyone who has been through this process and who was happy with their lawyer, that is an excellent lead. If you know anyone who is a lawyer and who does not have an interest in getting your business, ask their advice.

**Interview Lawyers**: Don’t just hire the first lawyer you meet. Interview at least a couple of different lawyers who are experienced in personal injuries. If the house needs painting or your car is in need of repair, you would not hire the first contractor or mechanic who comes along. You would get at least a couple of estimates, and preferably more. It is the same with lawyers. Lawyers expect that clients will “shop around” and interview a few lawyers before making a final decision. Most lawyers will agree to an initial meeting before charging a fee.

When interviewing a lawyer have a number of questions in mind. For example:

- What is the lawyer’s experience in personal injuries litigation, and what is their experience with (name your specific type of injury)?
- Will the law firm pay the disbursements that accrue in building the case, such as the fees for various experts, or will the client be expected to pay?

These are important considerations especially if you have little or no income. Ask about fees and options for payment of fees. Remember: with *contingency* arrangements, if you are awarded a big settlement, you may end up paying a lot more than if you pay by the hour.

**Consult a Specialist**: If you have been severely injured, consult a lawyer who has specific expertise in injuries similar to your own. This may require consulting a lawyer in an urban centre where there is a higher concentration of lawyers. Do not be intimidated by this; you can accomplish a lot by telephone. Telephone every law firm in the book if you have to, and ask them if they have a lawyer who has significant experience with your type of injury. It will save you anguish later on. Experienced lawyers know what has to be done, and which experts to hire. They also know how to minimize your involvement with the system in order to protect you, and how to save you from some of the stress.
Personality: Make sure you have a good feeling about the individual you choose as your lawyer. It is essential to develop a good working relationship with him/her. It’s important for you to feel comfortable asking questions, and instructing your lawyer as to how to proceed once they present you with the options. The process is stressful—there’s no way around that! But your stress will be reduced if you feel that your lawyer is on your side, and you trust that he/she will advocate strongly for you.

What Experienced Plaintiffs Said
People who have been through litigation all say the same thing when asked how they would advise someone on finding a good lawyer. They shake their head and say, “It’s difficult. There is no one good way to do it. Everyone agrees that the best approach is to ask around and find out through word of mouth, and then to interview lawyers. Don’t feel bad about having to interview lawyers. You may be working with this person for several years, and you will probably be paying them thousands or tens of thousands of dollars (or more if it is a big claim, paid on a contingency or percentage-of-damages basis). It is of utmost importance that you insist on a lawyer who has significant expertise, and with whom you feel comfortable.

Other Options to Assist with Finding a Lawyer
Lawyer Associations Can Help

Contact the law society in your province (see list below).

The law society:
• licenses lawyers,
• enforces the code of ethics,
• provides quality assurance,
• ensures that lawyers meet the law society’s criteria regarding education, post- law school apprenticeship (clerkship), and successful completion of exams,
• disciplines lawyers who are not abiding by the code of professional conduct, and
• employs individuals to deal with complaints from the public.

The law societies in several provinces (see below) will provide lawyer referral information, although they are limited as to what information they can furnish. They provide a list of names or firms, but do not supply information regarding the lawyer’s level of expertise, quality of work or reputation.

Some provinces have specific lawyer referral services as well as public legal education societies that provide legal information lines. Most law societies have
web sites, and many provide useful links to other sites. Since there is so much at stake in selecting a lawyer, it is worth investing time in research.

The law societies and lawyer referral services/public legal education societies in Canada, along with their web site addresses (where applicable) are listed in Appendix 1. We have tried to keep this list up to date but it is possible that numbers have changed, a little research should get you to the updated information.

For provinces where no-fault insurance is administered and mediated through an insurance commission or a monopoly insurer, these contacts are listed as well.

Replacing Your Lawyer
If you have lost confidence in your lawyer the best thing to do is to discuss it with him/her directly.

1. Write a letter to your lawyer in which you outline your concerns. Mail the letter, and keep a copy.
2. Meet with your lawyer and assert your concerns. Ask questions. If you are not satisfied with the answer…
3. Get a second opinion from another lawyer.

Note: At various points along the way as your lawyer builds your case he/she should provide you with a summary of your case. This should include a summary of the facts of the case and—once the economic and medical evidence is clear—your lawyer’s opinion regarding the value of your claim. Preferably, he/she should present this to you in writing. If not, it is reasonable to ask for it in writing. If, after reviewing all of the above, you remain unhappy with your lawyer you can submit all of the information regarding your case to another lawyer for a second opinion. Lawyers tell me that second-opinion requests are becoming more common, so bear in mind that this process is not out of the ordinary.

4. If, after reviewing the second opinion, you are still not happy with your lawyer, you don’t have to stay with him/her, just because you cannot pay the legal fees to date. You can retain the lawyer on a contingency fee basis. This means that the lawyer will take his or her fees as a percentage of the total settlement.
5. When you choose a new lawyer, if you cannot make other arrangements for payment, propose that your first lawyer’s legal fees be paid from the eventual settlement. Your new lawyer can and should help you with this. Lawyers have an ethical obligation to ensure that appropriate payment

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9 The original lawyer has a "solicitor's lien", meaning that he/she is not required to release the file material until satisfied with the payment arrangements regarding his/her legal fees.
arrangements have been made before accepting a file that has been worked on by a previous lawyer.\textsuperscript{10}

\textsuperscript{10} The transfer of a contingency fee can be complicated. There might be questions regarding the amount payable to the first lawyer. Should the lawyer submit an invoice for an unexpectedly high amount and demand the money immediately, there is recourse. You and your new lawyer can proceed to have the account "taxed" by either the taxation officer or a judge. This can cause the payment to be postponed until the claim is resolved and/or there is a reduction in the amount billed. In this case taxation does not refer to Revenue Canada but to a review of the fees being charged. The taxing officer is a lawyer or a judge who is designated to review the legal bills.
In Canada and the U.S., we use an adversarial system to resolve our legal disputes. In this system each party has an advocate (lawyer); each advocate puts forward the strongest possible case on behalf of his/her client. There are rules of procedure intended to ensure that both sides receive a fair hearing. While these rules are fairly consistent across the country, there can be slight variations between provinces. The process described below is true for most of Canada.

The judge’s role is to act as an unbiased arbiter who reaches a decision based on the presentations of both parties. He/she considers the rights and obligations of both parties and decides which one is correct. This is not a search for the truth. *Keep in mind that the judge’s role is not to discover or investigate the truth,* but to come to a resolution between the two sides.

**Your First Meeting with Your Lawyer**

Once you have chosen a lawyer you will set an initial meeting. This is your lawyer’s chance to gather information about your case. During this initial meeting:

- Tell him/her as much as you can remember about the circumstances that led to your injury.
- Ask for an opinion on the case and what he/she thinks the probable outcome will be. (Your lawyer should be frank in telling you whether your case is strong or weak, and should tell you his/her reasoning and background leading to this conclusion.)
- Ask whether this is a case that should be tried by a judge alone, or by a judge and jury.
- Ask your lawyer to review what you can expect regarding the process, the sequence of events, and the cost of pursuing the case. (Lawyers have a professional obligation to provide you with information regarding the hourly cost of their services.)
- Ask for an estimate of the total cost. (The overall fee will depend on a number of factors. This may include the complexity of the case, the importance of the matter to the client, the degree of skill required, the results achieved, and the time spent.)

After the meeting your lawyer should begin preparing your case as soon as possible. It is in your best interest (as the plaintiff) to try to resolve matters as soon as is reasonably possible once your physicians have determined the
permanent consequences of your injuries. If the claim cannot be resolved by negotiating directly with the insurance company, press on to trial as swiftly as possible. This will save you money and anguish in the long run.

In building your case and preparing to make an insurance claim, your lawyer will interview relevant witnesses and obtain information from the doctors and other professionals involved in your treatment. The court calls these individuals expert witnesses. In personal injuries litigation, expert witnesses play a crucial role.

- The expert witness is different from the usual witness in that the expert is allowed the privilege of giving opinion evidence. In other words, the expert witness can provide an opinion to the court regarding such issues as the diagnosis, the cause of injury, and the expected prognosis regarding future suffering and level of function. The lawyer may decide that additional experts should be consulted in order to strengthen your case. In selecting experts, lawyers look for sound academic qualifications, practical experience in the field of expertise, courtroom experience, and impartiality.

Once these steps are completed, your lawyer can present your claim to the insurance company. In the ideal scenario, you will avoid trial. If you have good, clear medical documentation supporting your case, the insurance company may agree to settle the matter at this stage. You have the option to negotiate this settlement on your own, but this is not advisable. If a settlement cannot be reached, the next step is to initiate the action.

**Initiating the Action**

As you proceed through the process of litigation you will see that there is a great deal of paperwork. The lawsuit begins with an exchange of documents known as "pleadings".

- The purpose of the "pleadings" is to communicate the issues between the parties.

In the usual case, your lawyer begins by delivering what is called a "statement of claim" to either the defendant or the defendant’s lawyer. The statement of claim describes your version of the events and also states the "relief" or monetary damages you are seeking. In other words, it states how much money is required to compensate for your losses.

If the defendant decides to defend the lawsuit, which is usually the case, the defendant’s lawyer will then deliver a "notice of intent to defend". This will be

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11 In some provinces, such as Nova Scotia, there is no requirement to file a "notice of intent to defend".
followed by a “statement of defense” describing the defendant’s version of the situation and conclusions of law—results obtained in previous similar cases which have been decided at trial. The defendant may also deliver a “counterclaim” if he/she feels that he/she was not liable and wants to argue that their own injuries were caused by your negligence. The defendant has one month in which to respond.

Affidavits of Documents

Once the lawsuit is started by the exchange of pleadings it could be years before the case makes it to the courtroom. During this time, your lawyer continues to build your case. This will include interviewing witnesses and researching relevant case law.

The rules of procedure require that both sides comply with the pre-trial requirements. This includes:

- the exchange of Affidavits of Documents, and
- attending examinations for discovery.

This will be reviewed below.

An affidavit is a sworn statement. An Affidavit of Documents is a sworn statement which indicates that the party has produced all documents relevant to the issues in the case. In some provinces, instead of an Affidavit of Documents the lawyer files a list of documents. Although this is not a sworn statement it is important to ensure that it is complete and complies with the rules of the court.

- The discovery process allows each side to “discover” the other side’s case and gain access to their evidence. This process includes obtaining paperwork and interviewing witnesses for the other side.

Discovery of Documents

Accessing the defendant’s paperwork (and vice versa) is called the discovery of documents. Interviewing their witnesses is called examination at discovery.

- The discovery of documents requires that each party list all documents in its possession relating to all aspects of the case, whether or not the document is privileged.
- Each party must also produce those documents that are not privileged.

12 If the defendant files a counterclaim, the plaintiff’s insurance policy will provide for his/her defense with regard to the counterclaim. In this case, the plaintiff should immediately have his/her lawyer communicate with his/her own insurer so that a lawyer can be appointed to defend the counterclaim. In this way the plaintiff does not have to pay for the legal bills. This is one of the benefits of one’s own insurance policy.
Privilege
Traditionally, according to common law, only communications within the lawyer-client relationship are protected from being disclosed in a court proceeding (i.e. “privileged”). However, in 1976 in the case of Slavutych v. Baker, the Supreme Court of Canada established guidelines extending what may be considered privileged.

The court identified four principles that must be satisfied in order to recognize a relationship as privileged. (See Fig.1) In 1997 the concept of partial privilege was introduced. This means that if there is a compelling case for privacy, the plaintiff has the right to limit the disclosure of documents that are not considered necessary to dispose of the issue at hand. The Supreme Court therefore recognizes partial privilege for certain communications in particular relationships. For example, if it is thought that exposure of certain medical records might do the plaintiff or some other individual harm and these records are not believed to be relevant to the case, then you can try to argue that these are privileged communications and you may be successful.

Through this, your lawyer can try to limit “fishing expeditions” by defense counsel. Your lawyer, doctor or the hospital can object to turning over some of your medical records on the basis that certain entries and reports are privileged, and as such, should not be released to the lawyers on the other side.

Figure 1
Principles required in order for a relationship to be considered one of privilege, from the court’s perspective:

- When the communication begins, there must be a confidence between both parties that it will not be disclosed.
- In order for the relationship to continue, the parties must feel assured that this element of confidentiality will be maintained and respected.
- The relationship must be one which, in the opinion of the community, ought to be carefully maintained.
- The injury that would result from the disclosure must be greater than the benefit that would result from correct disposal of litigation.

(Adapted from Slavutych v. Baker [1976], 1 S.C.R. 254.)

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14 As a matter of strategy, a plaintiff may choose to frame the action so that certain aspects of the history are not relevant and cannot be used to harm him/her. For example, the plaintiff may forego a small claim for loss of income if that claim would make relevant a confidential (and unflattering) personnel file. In this way, the plaintiff prevents the defendant(s) from using the file to attack his/her credibility.
Aside from the specific exceptions noted above, most medical records are not considered privileged. This includes psychiatric records. However, documents prepared for the express purpose of litigation are considered privileged. For example, if a psychiatric opinion is requested for the specific purpose of the lawsuit, the plaintiff does not have to disclose this document unless he or she wishes to do so. Medical records regarding present or past treatment are not privileged and must be disclosed if they relate to any matter at issue in the action.

In most cases, the defendant’s lawyer will want to review all previous medical files showing any involvement you have had with the health care system at any time. This could include previous files regarding psychotherapy and psychiatric treatment, if information in these files is thought to be necessary, in order to resolve the issues before the court. If the case goes to court it then becomes a matter of public record.

The end result is that you risk losing confidentiality with regard to your medical records when you start an action. I have argued with lawyers about this and they respond that the plaintiff has the choice not to start the action. In many cases, this is not actually true. When there is no other way for you to recover your financial losses and you have to feed yourself and family, you have no reasonable choice but to proceed with the action.

However there is an implied undertaking of confidentiality, in other words documents produced in litigation cannot be disclosed to any other person or used for any purpose other than the litigation. This means that if the matter does not go to trial, the documents should not become a part of the public record.

If you have any concern regarding the collateral use of your private records for any purpose other than litigation, be sure your lawyer insists on an agreement that the implied undertaking of confidentiality will be honored.

Your lawyer is obliged to produce the medical, psychiatric or other expert reports that are requested regarding your injuries. Only documents which have been disclosed can be used at trial. The courts are very strict about this. In fact, if a document that is unfavorable has not been disclosed it may result in the issuance of a punitive order. This can lead to a new trial, at the expense of the side that did not disclose all relevant documents. An omission can be very expensive!

Examination at Discovery

Examination at Discovery is a formal meeting where the lawyers have the opportunity to examine parties to the litigation who are opposed in interest to their own client. The examination takes place under oath and the proceedings are recorded by a court reporter. The examination has several goals:
• It allows each side to assess the strength of the other’s case.
• It narrows the issues to be determined at trial.
• It allows each side to obtain admissions that can be used at trial that may prove the case or undermine the opponent’s case.
• It can be used to require that the other party produce further evidence, for example, documents not previously disclosed such as additional medical records and expense receipts.

In many jurisdictions, the discovery is the last formal step in the pre-trial process. In some provinces the plaintiff and defendant have the option to attend a pre-trial conference. This will be discussed later on in this chapter.

Preparing Yourself for Discovery
Your lawyer should meet with you and review the following:
• what sort of physical arrangements you can expect,
• who will be there,
• the general procedure to be followed, and
• what questions you might expect to be asked by the other side.

Remember: your lawyer is there as your advocate. This includes protecting you if opposing counsel behaves in an unreasonable manner. Most lawyers are very professional in their approach and this should not happen. If it does, your lawyer will protect your rights and will advise you as to which questions should be answered. The opposing party is entitled to be present at your discovery but in most cases, will not attend. In the event that they are present don’t forget that the most important issue is to focus on the questions to be answered.

It is helpful to keep the purpose of the discovery in mind. The discovery is not for your benefit. It is not to convince the other side that you are right. It is the opponent’s chance to assess the strength of your case. The lawyer for the other side will do his/her best to obtain information that will strengthen the defendant’s case and hurt yours.
The following guidelines may assist you in getting through the discovery.

<table>
<thead>
<tr>
<th>Guidelines for the Discovery</th>
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</thead>
<tbody>
<tr>
<td>• If your lawyer objects to a question, don’t answer it unless he/she tells you to do so, even if you want to answer. Your lawyer will probably not object unless a question is very improper or is totally irrelevant. You have nothing to hide and your lawyer will not wish to convey the impression that he/she is trying to protect you during the examination.</td>
</tr>
<tr>
<td>• Listen closely to the question and answer it as best you can.</td>
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<tr>
<td>• If you do not understand the question, say so.</td>
</tr>
<tr>
<td>• If you do not know the answer or cannot remember, say so. You are not expected to have total recall. Rather, you should have knowledge of the central points of the case. Your lawyer will review these with you prior to the discovery.</td>
</tr>
<tr>
<td>• Unless you have exact figures before you, give an estimate.</td>
</tr>
<tr>
<td>• Do not rush. Take time to think, if you need it.</td>
</tr>
<tr>
<td>• Sometimes lawyers will ask long-winded, complicated questions. If this happens, request that one part of the question be asked at a time.</td>
</tr>
<tr>
<td>• Be concise. Do not ramble. You will not convince the other lawyer that you are right by doing so. You will persuade the lawyer by being a candid, convincing witness.</td>
</tr>
<tr>
<td>• Do not argue with opposing counsel.</td>
</tr>
<tr>
<td>• Since the method of recording is usually audio, body language and sub-vocals like &quot;uh-huh&quot; and &quot;mm-mm&quot; are not effective responses, and should be avoided.</td>
</tr>
<tr>
<td>• Do not volunteer information. Keep to answering the specific question.</td>
</tr>
</tbody>
</table>

Opposing counsel has no right to treat you in a rude or overbearing manner. In the unlikely event that this occurs, do not put up with it. Your lawyer should protect you and stand up for you in this case. In extreme circumstances you always have the option to walk out. However, do not walk out unless the opponent has clearly gone over the line. Look to your lawyer for guidance in this.

If you have chronic pain or another condition that limits your sitting tolerance or ability to manage lengthy periods of questioning, it is reasonable to ask for a break. It is also reasonable to schedule the discovery for a specific time period that suits you. If there are further questions from opposing counsel, a further session can be scheduled.

After the discovery your lawyer should provide you with an opinion outlining the points that affect his/her view of the case. After discovery is a point at which settlement is often discussed. If a settlement between parties cannot be reached, one then proceeds to list the case for trial as soon as possible. (Settlement is discussed in further detail later in this chapter.)

**Listing the Case for Trial**

The next step is to list the case for trial. While either party may do this, it would typically be your lawyer. The procedure may differ from province to province, but usually the plaintiff’s lawyer delivers a document called a trial record.

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15 Adapted from Stockwood, 1996, p 239
The party must first “serve” the record upon the other party and then "file" it with the court. When these two steps have been completed, the trial record has been "delivered". This tells opposing counsel that you plan to proceed to trial.\textsuperscript{17}

When the opponent consents, the case can be listed at once. If consent is not granted there is a sixty-day delay, after which time the case is listed for trial. There is often a large backlog of cases leading to further delays before the case can actually be heard by a judge. Be prepared for quite a lengthy waiting period. This depends on how long the list is, and how much time the case will take. It is not unusual for personal injuries litigants to wait twelve to eighteen months for a case that will take seven days of court time. For longer cases the wait will probably be longer.

The moral of this story is: \textbf{Get your case listed for trial as soon as is reasonably possible.}

\begin{center}
\textbf{Case Study: Elizabeth}
\end{center}

Two years after the accident, Liz had been unsuccessful in getting back to work in the emergency room. She felt demoralized and useless. The pain interfered with her sleep; when she awoke in the morning she was already exhausted.

She had just survived the summer. The girls both played soccer and Liz tried to attend their soccer games. Before the accident Liz loved nothing better than to stand on the sidelines cheering the girls. She had previously helped out as an assistant coach. Now she found that all the hustle and bustle, getting in and out of the car, sitting on bleachers, even sitting in a lawn chair, led to increased pain in her neck and shoulders. At home Liz found she could not even peel the vegetables without increased pain. Months ago she had finally given up on her standard of fresh-prepared vegetables, and she switched to frozen. Liz did not feel good about this decision but she could see no other choice.

The headaches had gotten worse, and she was short-tempered when she tried to help the girls with their homework. At times Liz felt she was a burden to her family, she began to withdraw socially, her mood was low, and her energy was “the pits”.

\begin{flushright}
\textsuperscript{16} In some jurisdictions, "listing the case for trial" involves filing a Notice of Trial in which the lawyer certifies that there are no further steps required. This will preclude your side from taking any further discovery examinations or other pre-trial steps, such as making court applications.

\textsuperscript{17} The timing of expert reports may also be tied to the filing of a Notice of Trial. This varies from jurisdiction to jurisdiction. In some jurisdictions, the party filing the Notice of Trial will have to serve all expert reports. The opposing party then has 30 days to file any expert report. In other provinces, expert reports are not exchanged until 10 days before the trial, which adds an element of uncertainty. Discovery of experts usually takes place after filing of expert reports.
\end{flushright}
It was at about this time that Liz was asked to see another doctor for an Independent Medical Examination, this time for purposes of the insurance claim (initiated by the insurance company) relating to the motor vehicle accident. When this doctor asked her how she felt, she told him. In his medical legal report he concluded that Liz was suffering from depression. Liz had seen a psychologist when she was in her second year of university, feeling depressed after extracting herself from a difficult relationship. The doctor referred to this past history of depression and concluded that Liz had a predisposing depressive condition that would have eventually resurfaced even in the absence of the accident. This doctor’s prognosis was that once Liz’s depression was treated adequately, she would be fine and able to return to full-time work.

The Independent Medical Examination
In order to document your injuries and losses the court will look to information presented by physicians, psychologists, physiotherapists, occupational therapists, rehabilitation consultants, and others. As mentioned previously, your lawyer will request reports from your own doctors and other treating therapists. The lawyer on the other side will usually request the opinion of a physician or physicians hired by the defendant for purposes of providing a medical-legal assessment. This is called the “independent medical examination”. You may also be required to see other relevant consultants, for example, in the event of a question of head injury, you may be asked to see a neuro-psychologist. The defense will generally request the opinions of similar experts who will be called to give evidence with regard to your state of health.

This means that you (the injured party) may be asked to see a number of other doctors for examination. In a typical personal injuries case where there have been injuries to the soft tissues, bones and/or nerves, the patient will probably have seen orthopedic surgeons, physiatrists (rehabilitation medicine specialists), and neurologists. If there is a problem with chronic pain, an expert in chronic pain management may have been consulted. These individuals will be called to give evidence documenting the injuries and the impact that these injuries will have on your quality of life and level of functioning. The lawyers for the defense will wish to obtain opinions from their own experts.

Patient Blaming Strategies used by the Defense

As mentioned at the beginning of this chapter, disputes are resolved under an adversarial system. In this system each side has an advocate (lawyer) who builds the strongest possible case for his/her client. Therefore, the lawyer on the other side will attempt to present evidence that minimizes the injury or shows that the injury was not caused by the accident. There are a number of approaches that are commonly employed by the defense. All of these strategies can be classified as patient blaming and are reviewed below.
**Blaming the symptoms on a previous condition:** In most cases the lawyers for the insurance company will request copies of your entire medical file. This may include records dating back to your childhood. They will closely examine these records, looking for any evidence that might support that you have suffered similar symptoms prior to the accident in question. For example, if the injury in question involves a cervical sprain (whiplash), any previous history of neck, head, shoulder or upper back discomfort will be noted, regardless of how short-lived the symptoms may have been.

Many patients have experienced various muscle strains with symptoms lasting days to weeks, possibly requiring physiotherapy, with little or no time lost from work. Such short-term muscular strains do not constitute a pre-existing deteriorating condition. However, I have read the reports of independent medical examinations which have made reference to previous muscular strains as evidence supporting such a pre-existing condition. Thus it is very important that your lawyer be well prepared and ready to challenge any attempts to mis-represent your past medical history.

**Blaming the symptoms on psychological causes:** The typical situation is that of a soft-tissue injury, such as a cervical sprain (whiplash), where the X-ray, CAT (computerized axial tomography) scan or MRI (magnetic resonance imaging) is reported as normal. In this case the assumption is made that the neck pain must therefore be “psychogenic”, or all in the patient’s head. This is inaccurate and overly simplistic thinking. Medical science cannot image all pathology relevant to chronic pain. In addition we now know that the pathophysiology, or cause of chronic pain, is often due to abnormalities in the functioning of nerve systems conveying pain-related and sensory information. (See Chapter Seven).

These abnormalities are microscopic and cannot be imaged or tested using currently available clinical techniques. Fortunately the courts will generally avoid endorsing such simplistic reasoning and are showing a trend towards listening to evidence presented by experts in chronic pain management. However in pre-trial maneuvering I have seen lawyers for the defendant use such arguments as tactics to decrease settlements awarded to plaintiffs.

If you have ever seen a mental health professional, those records may be requested. If you refuse to produce these documents they can be subpoenaed. This means that the court can order you to give copies of your records to the other side for review. This may include copies of confidential files pertaining to psychotherapy. Most individuals (rightfully) find this disturbing. As reviewed in the section on privilege, the physician can argue that the files were created in the context of a confidential relationship and that certain entries and reports are
privileged, and on these grounds should not be released. The judge makes the final decision after hearing arguments presented by both sides. In practice I have seen patients with legitimate injuries who have sustained significant losses, make the decision not to pursue the action further because the idea of having the details of their personal lives reviewed is repugnant. Defense counsel will take advantage of this in pre-trial maneuvering.

**Blaming the symptoms on malingering or exaggeration:** In this case the plaintiff is portrayed as exaggerating the symptoms or faking the disability for financial gain. For most people it is very difficult to tolerate behavior and lines of questioning that imply or state outright that one is lying or exaggerating. In coping with this process it may help to remember that this is the usual routine in the adversarial system. It is part of defense counsel’s strategy to discredit the plaintiff. It is not personal; they would do it to anyone else in the same situation. Thus you should not take it personally. Just because you are being treated as if you are psychologically causing your own suffering, exaggerating or lying does not mean that you are nor do you deserve to be treated this way.

If you see it as the maneuvering of lawyers and do not take it personally, it will help. In making these comments I want to make it very clear that I am not agreeing that it is OK to treat plaintiffs in this way. In my opinion, this type of approach is very unfortunate. However, it is the current reality, and the better prepared you are, the less it will hurt you.

This procedure is intended to allow the insurance company to identify individuals who are attempting to fraudulently obtain money, pretending that they are injured when in reality they are not. It is important for you to be aware of this process so that you can prepare for it psychologically.

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**Case Study: Elizabeth**

Liz had finished her morning stretching routine and decided to walk Sheeba before the girls arrived home from school for lunch. She and Sheeba headed down Jubilee Road across Oxford and made their way toward Conrose Field where Liz planned to let Sheeba off the leash for a run. Her upper back and right shoulder were especially painful and she worried this may herald a bad headache. She thought she had better take a pain pill when she arrived home after their walk. They came to the corner of Beech Street and waited to cross. A green sedan stopped allowing them to proceed along the crosswalk. Sheeba was her usual high-energy self and began whimpering with anticipation because she could see her buddy Bailey down at the Field leaping after a bright green tennis ball on the baseball diamond. Liz and Sheeba made their way across the dirt parking lot to enter Conrose field and Liz stooped carefully to free Sheeba. At that moment she heard a car pull into the lot. As Sheeba dashed toward Bailey,
Liz noticed the car that pulled in was the same green sedan she had seen moments ago. Liz carried on and greeted Bailey’s human, Jim, and they watched as the dogs chased and played with great vigor, a vigor Liz recalled she had possessed before the accident.

It was soon time to get back to the house to meet the girls. Liz called Sheeba who submitted to the leash with only a little reluctance, and they headed back up to Jubilee Road. As they approached the parking lot Liz noticed the driver of the green sedan was still in the car. She was alarmed to notice the driver turning away from her rapidly with what had looked like a small video camera. Liz found herself very frightened and did not know what to do. Quickly, she turned back to find Jim and Bailey, and she took another route home, arriving home quite shaken. Fortunately she’d had the presence of mind to get the license plate number of the green sedan and she immediately telephoned the police. The police were very helpful.

After the girls returned to school for the afternoon, two officers came to the house to interview Liz. They investigated the incident and telephoned Liz that evening with the information that this individual was a private investigator who had been hired by an insurance company to follow Liz and videotape her activities. Both Liz and Ben were very upset by this. Liz could not understand why she was being treated like this; she knew she had done nothing wrong, yet the system was treating her as if she had. Liz knew she had been following the rules of the road when she was rear-ended. She had done everything she knew how to do, and everything the doctors and physiotherapists had instructed her to do in order to get better, and now she was being kept under surveillance by a complete stranger!

How long had she been followed? How long would this go on? Would they follow her when she was out with the girls? Liz had done her level best to keep the girls out of everything having to do with this horrible accident. All discussions regarding the litigation were held when the girls were not around. And although she failed sometimes, she tried to put on a good face when she was with them. Liz could not bear the thought of being followed by a stranger; she could not bear the thought of a stranger in a green sedan following her in such a sneaky, surreptitious manner.

Over the next few months, Liz found herself watching for this green sedan. One day she thought she saw it parked around the corner, barely in sight. Liz no longer felt she had any privacy. She would close all of the curtains when she was home alone during the day, worried that someone may have a camera trained on the house.
Videotaped Surveillance in Canadian Courtrooms

In building the case for the defense, opposing counsel will sometimes hire a private investigator to videotape the plaintiff’s activities. The aim is to try to catch the plaintiff in inconsistencies. For most people, the idea of being followed by a stranger is disturbing and creepy. The thought of being surreptitiously videotaped by a stranger is even more troubling. For individuals who have been traumatized in the past, the notion of being kept under surveillance by a stranger can be frightening. It is legal. Reasonable video surveillance is considered to be a legitimate method of gathering evidence to defend a lawsuit or impeach a witness. The defense has the right to investigate the case. As long as the investigator does not do anything illegal or malicious, or with the intention to frighten, he/she may proceed.

In order for video surveillance tapes to be admitted as evidence in court, it must be shown that the material is relevant to the issues and “probative” in value. Probative means proof value, or containing information that will help to prove the case. The material must aid rather than confuse, mislead, or prejudice the jury. As a general principle the courts must be careful to avoid situations where videotaped or other audio or visual materials might have misleading or prejudicial impact.

In some provinces the defense does not have to reveal that they are planning to use videotaped surveillance at trial, as long as the tapes are only being used for cross-examination purposes in an effort to impeach the plaintiff. If surprise videotaped surveillance is to be used at trial, the defense must introduce this evidence when the plaintiff is on the stand so the plaintiff has an opportunity to explain. However, the court has been fairly forgiving when the defense has not followed these procedural rules. In a recent case in Nova Scotia [Clark v. O’Brien (1995), 136 N.S.R. (2d) 237 (S.C.)] the trial judge did not allow the defense to use surprise videotape evidence because the tapes had not been introduced at cross-examination. The defendant appealed the case and was successful in having a new trial ordered. In this case the plaintiff would then have to endure two trials (and potentially the costs of two trials), or settle the case out of court.

Privacy

“But how far can videotaping go? Don’t we, as citizens, have a right to privacy?” This seems like a simple question but the answer is not so simple. In fact, in the end, the answer is quite complex and disturbing.

An American lawyer writing on the topic of videotaped surveillance in civil cases wrote that “although the wrongful invasion of a person’s private activities is usually recognized as a tort for invasion of privacy, videotape surveillance is not per se a wrongful invasion of a person’s privacy” (Ney, p 13). The author goes on
to state: “The videotape surveillance of a personal injury claimant may not be an actionable invasion of privacy even though the same surveillance on a non-claimant would be actionable”. In other words, if you are the plaintiff in a civil case private investigators can do things that they might not be allowed to do under normal circumstances. This is the situation in the US where the right to privacy is specifically stated.

In Canada there is no such stated right. However, the courts have interpreted privacy rights under various provisions of the Canadian Charter of Rights and Freedoms. “The Charter” does not directly apply to purely private litigation such as personal injury actions. Nevertheless, the Supreme Court of Canada has indicated that it is important for the common law to develop in accordance with “Charter values”. In this case the most that a private litigant can do is to argue that the common law that allows this practice is inconsistent with Charter values. [M.(A.) v. Ryan, (1997) 143 D.LR. (4th) 1 at (S.C.C.)] This type of litigation would be quite costly, the results would be dubious, and, in practical terms, would not be a viable option in most circumstances.

It has been argued that the right to privacy is not one tort*, but a complex of four separate torts, including:

1. Intrusion on the plaintiff’s seclusion or private affairs;
2. Public disclosure of embarrassing private facts about the plaintiff;
3. Publicity that places the plaintiff in a false light in the public eye; and
4. Appropriation of the plaintiff’s name or likeness for the defendant’s advantage.

Although there has been some litigation in this area with limited success, this can be quite costly, and there is no guarantee of success. {Linden, A. M., Canadian Tort Law, 6th ed. Butterworths Canada Ltd. Toronto & Vancouver, 1997 p55}.

A number of provinces have passed privacy legislation in an attempt to deal with these issues. These “Privacy Acts” have generated further litigation but the invasion of privacy has to be considered substantial and the courts insist that due regard must be given to the lawful interests of others. A recent Canadian text on tort law summarizes developments in this area:

“According to the courts, the nature and degree of privacy to which an individual is entitled is that which is reasonable in the circumstances, due regard being given to the lawful interests of others. Therefore the actions of a “peeping Tom” and a person listening to and recording a telephone conversation with the consent of only one of the participants may be violations of privacy, though the inadvertent showing of a topless photo and the publication of a list that identifies a person as a carrier of a
communicable disease for internal hospital use are not”. [Linden, A.M., Canadian Tort Law, 6th ed., Butterworths Canada Ltd., Toronto, Vancouver, 1997, p 58]

Where does this leave a Canadian plaintiff? What is stepping over the line? What would be considered unreasonable? These are very good questions that I suspect even the experts would argue about. The article written by the U.S. lawyer that I quoted earlier is instructive and provides guidelines. This author suggests that the investigation must be conducted in a “reasonable manner” and makes the following recommendations.

- There must be reasonable restrictions on time, place, and duration of the surreptitious surveillance. The investigator should not trespass on private property;
- The videotaping should be carried out from a public vantage point;
- The investigator should avoid intrusive surveillance such as the use of special lenses that allow the camera to peek between the curtains into the plaintiff’s house; and
- Illegal wiretapping and wrongful eavesdropping should be avoided.

According to the American lawyer cited above, “A person exposing himself to public observation cannot reasonably expect to enjoy the degree of privacy that he would enjoy within the confines of his own home.” The author also suggests: “If your photographer is able to remain undercover so that the plaintiff is not aware of her presence, you should be able to avoid claims of harassment and intentional infliction of emotional distress.”

In summary, the defense has the right to investigate your case. If they believe that you are malingering or exaggerating your symptoms, they may elect to have a photographer videotape you, but this surveillance must be carried out in a reasonable way. If it is not, your lawyer can point this out at trial and raise the ire of the judge and jury. If your privacy has been invaded in a substantial way, and if you live in a province with a Privacy Act, you may have a remedy. Even so, there is no guarantee of success and the return for the money you will spend on the action may well not be worth the effort.

If there is no Privacy Act in your province, the situation is quite bleak indeed.

Pretrial Conference

In some provinces a pre-trial conference will be held. Depending on the jurisdiction, this will either be mandatory or voluntary. A pre-trial conference is a formal meeting with a judge presiding.
The judge present at the pre-trial conference is a different judge from the one who will be present at the trial. The lawyers for each party attend. In many cases the clients do not attend. The goal of the conference is to attempt to settle or resolve the case. If settlement is not possible, an attempt is made to eliminate unnecessary issues before the actual trial. The judge is present to provide the lawyers with some idea of what direction the case might take. The course of the conference varies depending on the style of the individual judge.

The judge may discuss settlement, or he/she may stick to expressing a view of the merits of the case. This view is not decisive but it is helpful in that it indicates the reaction of one judge to the views presented by both sides.

**Settlement**

Most cases will settle either before or during the trial. *More than 90% of personal injury cases settle before trial.* Ideally, the possibility of a settlement should be considered early on in the process. A decision to settle should rest on the strength of the case. If you have a strong case, you are best advised to settle for just a modest discount, equal to the sum that will be saved by not going to court. According to experts in this field there are few, if any, 100% winners. One must weigh the estimated chance of success against the cost of proceeding to trial.

Although settling at an early stage is best, you need to have sufficient information before you can make a decision. Once your long-term prognosis has been established, it is in your interest to press on to trial or settle as swiftly as possible in order to save on legal fees. The defendant will often try to do the opposite—doing nothing unless forced to act. They hope you will become discouraged and abandon the case, or settle for a small amount. In my experience I have watched many patients use all of their savings, and most if not all of their assets, as they wait for these matters to proceed. Often, financial desperation leads the plaintiff to settle for a low figure. In this case it is important to be aware that *if the defendant or the defendant’s insurance company or lawyers act in a manner that is harsh or reprehensible then “aggravated or exemplary damages” may be an option* (see Chapter Four).

You will have to rely on your lawyer’s experience and judgment when it comes to a decision to settle. Your lawyer should inform you about the process and the factors to be considered, along with his/ her estimation of the probability of success. Your lawyer should also tell you what you are likely to achieve in financial terms based on recent case law. The bottom line is that it is your decision whether or not to settle.

Settlement may occur at any time before or during the trial, or after the trial, if there is an appeal. Under the rules of civil litigation a party can offer to settle any
time as long as the offer is made at least seven days before the hearing. As long as the offer is made at least seven days before the hearing, refusal to settle can have significant cost consequences for both sides. For example, if you make an offer that is refused by the defense, and then you recover as much or more at trial, you will be awarded additional money for costs.\textsuperscript{18} If the defendant makes an offer and you recover that or less, then the defendant is awarded additional costs after the date of the offer. This is how the courts encourage settlement in an effort to keep the huge backlogs of cases to a minimum.

**Chapter Four:**
**Putting a Dollar Figure on Your Losses**

How does the law determine what you have lost as a result of your injury, and how to compensate you for this? This is the $64,000 question, so to speak.

In the medical world we know that if an individual is left with a permanent condition such as chronic pain, numerous losses result including loss of enjoyment of life, and loss of ability to function in one’s many roles in life. The onset of chronic pain, paralysis, or the loss of a body part or function is a profoundly life-altering event. The group for the study of women with chronic illness and disability at the Stone Center, Wellesley College describes it best: “All that one has come to know is no longer the same.” You know that your whole life has changed, but in the eyes of the court, you must describe these losses in detail and try to determine a financial value for them. This chapter will review how the courts approach this complex task.

The law describes the losses caused by an injury as *damages*. These include both financial losses (which are relatively easy to describe) and non-financial losses. In legal terms, non-financial losses are called *non-pecuniary losses*. This includes such things as loss of enjoyment, loss of ability to do non-wage earning activities previously enjoyed, and loss of ability to have children. For purposes of describing these losses in clear financial terms, the law applies a number of principles and rules.

In addition, in order to simplify what is quite a complicated process, damages have been divided into a number of categories. Following is a brief review of the main principles and rules in this area.

**The Compensatory Principle**

\textsuperscript{18} The court can always award costs based on a settlement offer, whether it is made seven days before trial or not. In Nova Scotia, if the plaintiff makes a settlement offer at least seven days before trial and receives a court award more than the amount of the offer, he/she is entitled to double costs.
The dominant principle in the assessment of damages is that of compensation. This principle is “restitutionary” in nature. In other words, an attempt is made to restore you (the plaintiff), as fully as can be accomplished with money, to your pre-accident condition. According to this principle, damages are awarded for both past (from the date of injury to the trial) and future pecuniary and non-pecuniary losses.

In Canada, you must be fully compensated for pecuniary or financial loss and fairly compensated for non-pecuniary loss. It is recognized that no amount of money can make up for the loss of enjoyment of one’s life, or for pain and suffering. What is referred to as “fair compensation” for non-pecuniary loss is an attempt to provide solace. It is an effort to provide money that may enable you to improve your physical arrangements to make life more endurable.

The legal system considers financial assistance in three areas:

- health care expenses due to the accident,
- substitute homemaking when the individual can no longer do this for themselves, and
- global compensation or solace for the injury itself.

Theoretically, the civil action strives to restore the victim’s losses. In reality, compensation often falls far short of this mark. Firstly, only a small proportion of those entitled to a claim actually recover damages. In fact, according to experts in the field, very few disabled people and fewer of those who suffer illness are able to benefit from civil litigation. In a scholarly review of the subject, Kenneth Cooper-Stephenson states: “Even when victims successfully launch an action, the amount received is a far cry from what the system theoretically promises.” (pg 13) This author adds that even in the most successful cases, the compensation amount is decreased significantly by the legal costs. As the case inches its way closer to trial, the costs go up. In the event of an appeal, the legal costs go up significantly.

Scholars also point out that the system continues to function in a discriminatory fashion. Studies reveal that only 12% of personal injury victims receive damages, and that women fare quite a bit worse than men. Even in the 1990s, only 8% of injured women received damages. (E. Gibson, The Gendered Wage Dilemma, Tort Theory). Thus, while in theory the objective is to compensate the victim, this is very infrequently accomplished, and this is particularly true in the case of women.

**The ‘Extent of Harm’ Rule**

According to the extent of harm rule, you should recover for the full extent of harm suffered from the wrongful act. As one legal textbook described it, “Once a
foreseeable or contemplated consequence occurs, all damages are recoverable.” (Cooper-Stephenson p 849). According to the law, the result of the harm depends on the characteristics and constitution of the victim. This will become clear below.

The ‘Thin Skull’ Rule

The development of the thin skull rule dates back to the early 1900s. In essence this rule states that the defendant is liable for the full measure of damages suffered. This includes cases where a greater harm is caused due to the plaintiff’s susceptibility to trauma.

The thin skull rule recognizes that all personal injuries victims are different. Some people will suffer a greater loss than might normally be anticipated. For example, someone with pre-existing degenerative disc disease in the cervical spine may be at higher risk for developing long-term problems due to a cervical spraining injury (whiplash), compared to someone with healthy neck bones.

The thin skull rule also applies when devastating consequences develop following a minor injury. For example, let’s say an individual with a bleeding disorder such as haemophilia is involved in a side-on motor vehicle accident where he/she sustains a cut to the shoulder. For anyone else, this would result in a minor laceration that may require a few stitches. In the case of the haemophiliac, however, one possible scenario is that in order to save the victim’s life a tourniquet has to be applied. By the time this person is stabilized, the arm has been irreversibly damaged and it has to be amputated. In this case, the plaintiff would have to be compensated for the full extent of harm suffered; in other words, for all the losses, including the amputation, as well as any losses resulting from the amputation.

This rule applies to any aspect of the plaintiff’s pre-accident state which can affect the extent of damages. This includes:

- biological make-up,
- intellectual capacity,
- socio-economic status,
- family make-up, and
- cultural heritage.

According to Cooper-Stephenson, sometimes the individuals who are most susceptible to loss are those who were relatively advantaged prior to the accident. For example, a “shabby millionaire” or high-earning plaintiff would likely suffer larger-than-average financial losses. This rule can work both ways. An individual with a strong constitution or a thick skull may experience very few
losses following an injury which would have caused major losses for someone else.

In the battle that ensues between the lawyers, often the object is to determine whether it is a situation of a thin skull or a crumbling skull. In the crumbling skull scenario, the plaintiff’s condition was already deteriorating and the trauma merely accelerated the deterioration.

In order to make a case for the crumbling skull, the defendant’s lawyer must show that the plaintiff’s condition would have deteriorated anyway, even in the absence of the accident. If this is successfully proven, the plaintiff’s damages will only reflect the extent to which his/her losses are now greater than they would have been without the accident. The legal tug-of-war is therefore between establishing the thin skull or the crumbling skull. In the case of the former, the plaintiff was in a stable condition before the accident and “but for the accident” (as the lawyers phrase it), would have remained so. In the latter instance, the plaintiff was in a state of continuing or progressive deterioration, and the accident has served to accelerate the process.

In the above example of haemophilia, the plaintiff was susceptible to physical injury. For obvious reasons, this condition can increase the damages. Other examples of physical susceptibility include a previous heart condition or severe lung disease. It can also include individuals who have undergone various transplant procedures requiring drugs that suppress their immune systems. This limits their ability to fight infections following physical injury. With any of these conditions, a relatively minor accident could potentially lead to catastrophic results.

In yet another twist, the accident can exacerbate a disease or condition that had not been causing the patient problems prior to the accident. Examples include: Parkinson’s disease and asymptomatic arthritic or degenerative disc disease. These are examples of a thin skull physical susceptibility that was stable before the injury.

Emotional susceptibility to greater injury is another variety of thin skull susceptibility. The court will award damages for emotional injury whether this is due to a predisposition or a reaction.

Predisposition: If the individual has a predisposition to an emotional reaction, the thin skull rule will be applied in the same way as described above for physical susceptibility. If the emotional suffering is a reaction to the accident, the court will award damages. For example, mental harm or nervous shock will almost always be considered a consequence of the physical injury, unless the injury is thought to be minor. The courts are clear in their willingness to award damages for
psychological suffering caused by the accident. This includes extensive mental or emotional consequences resulting from a particular sensitivity. Following are some examples:

- A young woman with a predisposition to anorexia nervosa due to personality and family problems experiences a worsening in her eating disorder after the accident.
- Due to her emotional makeup and pride in her sexuality and femininity, a plaintiff suffers particularly detrimental impact as a result of an accident that results in cosmetic consequences.
- Other conditions include: post-traumatic stress disorder, depression, and schizophrenia.

In essence, the court must determine what the individual’s symptoms and situation would have been without the accident and how much worse it is after the accident. Damages can then be determined accordingly. 

Intellectual aptitude and personality are also considerations to which the thin skull may be applied. When these qualities are impacted, an individual's job prospects can be affected. This, too, can go both ways. For example, while an educated, accomplished victim may have had more to lose, he/she may be in a better position to adapt to a different career. By contrast, an individual with a learning disability who has only been capable of physical labor may have no remaining options for wage-earning work as a result of the accident.

Religious, cultural, socioeconomic, and family factors may also lead to increased harm suffered by the plaintiff.

Your Duty to Mitigate

The court expects that you (the plaintiff) will do your best to minimize the extent of the damage. This refers to the sequence of events between the injury and the loss. You must take all reasonable steps to avoid the loss, if possible. In other words, one cannot just sit back and let losses accumulate.

The plaintiff must lead a healthy lifestyle, follow through on treatments recommended by physicians and other treating professionals, and minimize financial loss as much as possible. The plaintiff must, therefore, do everything he/she can reasonably do to get better. The victim has the right to decline medical treatment but this must be a reasonable decision in the eyes of the court. Determining what might be reasonable can become quite complicated. What might be reasonable to one person may not seem so to another.

In this case the court will consider your subjective attributes as they relate to your capacity to decide on treatment. For this and in all areas of damages assessment, the court's attitude is that “defendants take their plaintiffs as they
find them.” (p 877 Cooper-Stephenson) These subjective attributes include
religion, culture, socio-economic setting, intellectual, and psychological makeup.

For example, the court does not expect individuals to pursue treatments or
activities that they cannot afford or might think inappropriate due to their religion
or culture. If a mental illness such as schizophrenia or depression affects your
decision not to pursue treatment that may have been beneficial, the court may
absolve you of any failure to mitigate. In other words, if a person’s judgment
regarding appropriate treatment is clouded because of mental illness, the court
will not penalize you.

The question of mitigation regarding medical treatment can also be complicated
by differences of opinion regarding what is thought to be the appropriate
treatment in any given situation. For example, your damages may be reduced
because of an unreasonable refusal to have surgery. In other circumstances, the
court might consider that your decision not to undergo certain tests or procedures
is justified. In assessing what is reasonable, the court balances risks and
benefits: the perceived risks and costs of treatment, versus the probability of
success for the treatments being considered. As the risks increase and the
probability of benefits decrease, it becomes less necessary, from a legal point of
view, to take these steps. In other words, the court does not expect individuals to
agree to high-risk treatments that have a poor chance of helping the condition.
The court will also examine your decision in light of the medical advice they have
received. The important issue, therefore, is your perception of the potential risks
and benefits at the time you made the decision to have or not to have the
treatment. In this way, the court attempts to put itself in your shoes at the time
you made the decision regarding medical treatment.

*When the court finds that there has been a failure to mitigate, you can still
recover damages representing the probability that the loss would not have been
reduced.* For example, if the refused treatment had a 70% chance of success,
the plaintiff can still be compensated for 30% of the resulting losses in the chance
that the medical treatment would not have helped.

Non-medical mitigation is also important. This includes all of the other steps that
the injured person is expected to pursue in order to get better. These are
generally the kinds of things that individuals would do naturally. For example, an
injured self-employed business person might be expected to hire a replacement
to help run the business. It may be argued that he/she should seek alternative
employment or retraining. A number of factors will be taken into consideration,
including: residual disability, type of job available, retraining, potential
remuneration, disruption to family and home, and whether and when it was
reasonable to return to work.
You are entitled to any reasonable cost of mitigation (the expenses incurred in attempting to avoid loss). This includes both medical expenses and non-medical expenses such as the loss of earnings accumulated in the pursuit of reasonable retraining. Another example is the cost of rental accommodation when temporary relocation is necessary for mitigation purposes, such as medical treatment or retraining. Costs to third parties helping you—such as parents, spouses, and friends—can also be considered. The court will also award damages if the insurance company delays payment, resulting in your inability to undertake retraining.

Non-Pecuniary loss in the cost of mitigation will also be considered. For example, if one is obliged to lose weight and exercise in order to avoid surgery for a spinal fusion, the court will compensate you for the loss of enjoyment caused by your struggle to diet and to cope with the intrusion of a regular exercise program.

In summary, the court expects that you will do whatever is necessary to get better, and to minimize the loss. As discussed earlier, this could involve proceeding with medical treatments, hiring other individuals to run the business, or pursuing appropriate rehabilitation or retraining. These are actions that most individuals (depending on their financial means) would undertake in any case. However, the court will award these costs once they are shown to be legitimate.

**Classification of Damages**

For the sake of simplicity, the court breaks down damages into several categories. The first major category is that of financial vs. non-financial loss. You will hear lawyers speak of pecuniary vs. Non-Pecuniary losses. Pecuniary simply means financial, and Non-Pecuniary means non-financial.

Next are a number of subcategories which essentially divide financial losses into pre- and post-trial losses, recognize the different types of financial loss, and describe the types of non-financial loss that are eligible for compensation. I will describe this in more detail below.

Damages can also be distinguished as positive or negative.

- **Positive losses**, or “the acquisition of undesirables”, refers to the addition of unpleasant aspects that you would not have had to endure had the accident not occurred. Again, this can include financial issues such as the cost of medical care, or non-financial aspects such as pain and suffering.

- **Negative damages** refers to “deprivation of desirables”, or enjoyable elements of life that have been taken away from you because of the accident. These negative damages can be pecuniary, as in earnings
lost or homemaking skills compromised, or Non-Pecuniary, as in participation in enjoyable activities or expectation of a longer life.

Pretrial Losses
The quantifiable losses that occur between the accident and the trial include loss of working capacity and expenses.

Pre-trial loss of working capacity refers to the loss of wage-earning work and the loss of homemaking capacity or “valuable services”. This latter category includes such activities as housecleaning and meal planning, childcare, mowing the lawn, gardening, and home renovations that individuals would normally have done themselves.

“Expenses” includes all pre-trial expenses necessitated by your injuries including the cost of care, as well as expenses not directly related to your medical care. For example in the case of the self employed business person described above, the cost of hiring replacement workers to do the work or the costs of re-training in an effort to get back to wage earning work when the injured party is unable to get back to their previous work.

To sum up, before the trial, if the injury has caused you to lose time at work—whether that be wage-earning work, housekeeping or childcare—you should be compensated for the loss. If you have also required treatments for the injury, these will be covered too. Reimbursable treatments include—but are not limited to—the following:

- physiotherapy,
- massage treatments,
- drugs,
- wheelchair,
- prosthetic devices,
- TENS unit (transcutaneous-electrical nerve stimulator), and
- assistance from an attendant or nurse.

Non-Pecuniary pretrial losses are also considered along with future Non-Pecuniary losses. Future losses refers to both pecuniary and Non-Pecuniary losses that will continue after the trial.

Future Loss of Working Capacity
The loss of future work capacity is a very important area. If an injury has left an individual unable to function in his/her work (especially wage-earning work), and if this lost wage is calculated over the rest of that person’s working life, the dollars add up!
In the past few years, the way the courts deal with pecuniary loss has changed dramatically. Previously, this category had been referred to as *loss of earnings*. Naming it in this way failed to take into account the valuable, yet unpaid, work that is traditionally carried out by women in our society. This includes homemaking and child-rearing. It also set the stage for alarmingly low awards to injured and disabled women.

The present terminology recognizes that your loss of the ability to work can have diverse consequences. Three areas are considered:

- *loss of earnings, earning capacity, and profits*,
- *loss of homemaking capacity and valuable services*, and
- *loss of shared family income*.

The main issue is the inability to work, whether the product of that work would have been wages, homemaking, business profit, gains from spare-time activity, or access to a joint family income. If you suffer a financial loss that can be shown to derive from the accident, you must be compensated. The amount of compensation must equal the best estimate of that loss. Because the damages are financial in nature, the principle of *full compensation* applies. This is defined as the sum of money that will put you in the same position you would have been in, had the accident not occurred.

“Loss of earnings” refers to loss of income from work.

“Loss of homemaking capacity” refers to impairment in your ability to perform manual and management tasks in the home. This includes tasks such as: cleaning, cooking, and grocery shopping. It also includes homemaking management tasks such as meal planning and scheduling of family activities.

“Loss of shared family income” considers circumstances that arise when there is a diminished possibility that you will form a *permanent interdependency relationship*. “Interdependency relationship” is the politically correct way of referring to a marriage or permanent relational partnership where the two individuals live together in relationship and share expenses. Thus the loss of the chance of a permanent interdependency relationship involves the loss of benefits deriving from a joint income and shared expenses. This category of loss is meant to compensate individuals who would have expected a higher standard of living in a long-term interdependency relationship, compared to what they will now experience as a single person.\(^\text{19}\) This presumes that there is a diminished chance that they will attract and keep a partner, as a result of the accident.

\(^{19}\) Although, theoretically, the category of loss of shared family income is available, this is a developing area and it remains to be seen how this will be applied.
The court will also consider additional losses such as *loss of future opportunity*. Examples include an elite athlete’s loss of opportunity to play in the National Hockey League, or a tennis pro with an injured shoulder who loses the chance to win prize money.

**Future Cost of Care**
This category considers the costs of future treatment or care required due to the injury. This may include:

- nursing care,
- orthotics or prosthetic devices,
- technology for pain control such as transcutaneous-electrical nerve stimulators (TENS),
- physiotherapy, and
- health club or pool access costs.

In short, whatever is necessary for ongoing care related to the accident-induced injury may be included. The *risks of future deterioration* will also be considered as long as there is a reasonable probability that this will occur. For example, the court will award damages when there is a 37% risk of developing future arthritis, but will not award damages if there is only a 5% chance of developing epilepsy.

Future costs of care also include:

- the possibility that you will require surgery in the future,
- the possible interference with your ability to bear children, and
- further expenses related to attempting a cure.

Your loss at the time of trial includes your loss of opportunities, prospects, and chances, as well as the risk of future detriment and expense.

**Damage Awards to Women**
The topic of damage awards to women deserves special mention because inequities still exist in the system and it is important that female plaintiffs are aware of this.

In the past, prior to the *married women’s property laws*, a woman could not sue in her own name. When a woman was injured and had suffered losses, any recovery would become her husband’s property. In this case—unbelievable as it may seem—the primary action was the husband’s claim for lost services and the loss of consortium (i.e., loss of sexual relations). There was a double standard, however, since a married woman could not make a claim for the loss of her
husband’s services. In addition, when a woman’s husband claimed for her injuries, she could claim nothing for herself.

Under married women’s property reforms of the nineteenth century, married women eventually gained civil rights. Women can now pursue their own actions. However, significant bias remains. Cassels reviews (Women and Children Last, 1992) the numerous ways in which this occurs, including:

- the systematic devaluation of women’s capabilities and talents,
- special deductions from awards to women which are not applied to men,
- failure to properly value work in the home, and
- reliance on labor market data which reproduces in court the discrimination against women that occurs in the workplace.

Experts point out that the court’s reliance on the marketplace to measure value or loss leads to significant problems. This approach excludes or depresses the value of activities which occur outside the marketplace. Thus, housework and other homemaking activities are rendered invisible. The courts rely on statistics regarding levels of employment and wage rates for women in order to project future financial losses. Even though progress has been made in terms of employment equity, women are still less likely to be employed than men, and they are paid less. According to one scholar, “Even recent cases show alarming gender bias in the assessment of loss of working capacity for young women. The level of earnings projected for women has continued to be low, still responds to outdated data, and is affected by a number of prejudicial considerations” (Cooper Stephenson, 1997 p268) It is further pointed out that some cases show a genuine attempt to correct this, but “the tort system eventually comes face to face with discriminatory patterns in society, and is forced to ask whether it will reflect them in damages awards.” (P268)

There are other discriminatory assumptions which have contributed to the reduction of damage awards to women. An example of this is the marriage contingency deduction, which assumes that women will leave the workforce for periods of time. The award is therefore reduced in order to reflect this. Cassels notes that no such deduction has ever been made from a man’s award. (Women and Children Last 1992).

In fact, the courts have made the opposite assumption in the case of men. In the case of Lang v Porter, for example, the court found that marriage enhanced the assessment of the male plaintiff’s earning capacity. While his income history had been poor, the judge determined that now that this young man had taken on the responsibilities of a wife and family, he would exhibit a more consistent work history.
Even if there is no specific deduction for the contingency for marriage, this deduction may already be built into the plaintiff’s own calculations if the estimate of pre-accident earning capacity is based on statistics. If the statistics are gender specific, there may already be a discount for marriage. Thus, there is a double deduction (discount for marriage, i.e., the marriage contingency deduction, as well as a lower wage-earning capacity for women, based on statistics).

Where a woman is a full-time employee at the time of the accident and is beyond childbearing years, marital status may lead to a decrease in the award because of presumed early retirement. These cases illustrate how assumptions about conventional social roles have worked against women and in favor of men in the assessment of damages. When Cassels wrote this article in 1992, she called for significant reform.

Since the early 1990s, an attempt is being made to eliminate past inequities. As reflected above, the courts have moved in a direction that acknowledges that the assessment of damages must blend all aspects of income loss and work capacity, including loss of earnings, loss of homemaking capacity, and loss of a shared family income. More progress needs to be made in this regard.

Corrective vs. Distributive Justice
Our courts must often struggle with philosophical issues in attempting to come to a just decision. Tort law is generally concerned with the correction of isolated wrongs. This is known as corrective justice. It has been argued, however, that the principles of distributive justice should be applied in the case of damages assessment in personal injuries to women (see Gibson, The Gendered Wage Dilemma in Tort Theory 1993).

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20 Cooper-Stephenson has reviewed a trilogy of cases which have highlighted these developments. A significant advance was made in the area of claims for lost earnings in the case of Tucker (Guardian ad litem) v. Asleson in 1993 [1993,102,D.L.R. (4th) 518 at 528-36 (B.C.C.A.)]. In this case, after surveying the literature and considering a range of points that have tended to decrease the awards of women, the learned judge sent the case back for re-trial in order that the trend towards equal treatment for women be given proper attention. The claim for lost homemaking capacity was reviewed in detail in the case of Fobel v. Dean in 1992 [1992,83 D.L.R. (4th)385 at 395-407 (Sask.C.A.)]. In this case, a substantial award was given for lost homemaking capacity in addition to an award for lost earnings. The claim for loss of shared family income was given attention in the case of Reekie v. Messervey in 1989 [1989,59 D.L.R. (4th)481 at 494-500 (B.C.C.A.)]. In this case the court recognized that when a person loses the opportunity to enter a "permanent interdependency relationship", there may be a pecuniary loss due to loss of a share in joint family income.
Distributive justice is concerned with the just allocation of entitlements within society; it aims for equality and fair treatment. The argument for distributive justice in this case suggests that the evaluation of lost earnings should not be based on information where earnings were illegally or immorally depressed. The principle of distributive justice would allow the courts to try and determine damages awards in a way that was not based on discriminatory statistics and assumptions. As described by Cooper-Stephenson, “This simply permits the concerns of equality (distributive justice) to ‘trump’ the concerns for formal compensation (corrective justice).” (p295) Gibson argues that “the use of gender based actuarial tables... is in clear contravention of the spirit of human rights legislation.” (P204, Gendered Wage Dilemma in Tort Theory).

Cassels observes that reliance on market valuation “simply introduces into the court the systematic inequalities faced by women in the workforce”. Scholars have also reviewed that it may not be within the province of tort law to tackle this problem. Cooper-Stephenson states that, on the one hand, “It is said that tort law cannot and should not ignore pre-existing maldistribution of wealth and opportunity...(and)….must pay attention to the broader concerns of equality and fair treatment of the disabled.” (p295) On the other hand, this author states: “Tort law gives greater focus to the relatively discrete correction of individual injustices rather than to the reform of systemic social problems” (p297).

This latter view is confirmed by Justice McEachern in the case of Tucker v. Asleson [1993,102 D.L.R.(4th)518 at 533 (B.C.C.A.)] in which he states:

“We while we may strive for social justice, as it is perceived from time to time, the courts must deal with the parties who are before them, plaintiffs and defendants, on the basis of realistic predictions about the future, and not just in accordance with understandable wishes that society, in some of its aspects, were different from what it is.”

Cooper-Stephenson concludes that the solution of giving full and optimistic consideration to the trend toward equality may be the best answer for now. Thus at the very least the compensatory principle must be used, as far as is possible, to put an injured woman back into the position she would have been in had the accident not occurred.

To review, this assessment must blend all aspects of income loss and work capacity including loss of earnings, loss of homemaking capacity, and loss of shared family income. This assessment should give full and optimistic consideration to the trend and laws ensuring equality. Contingency deductions that are discriminatory—whether overt or covert—should be abolished. Female plaintiffs should insist that their lawyers represent their interests in this area.
While this section has focused on a discussion of damages assessment as it pertains to women, there are obvious implications for members of other disadvantaged groups such as individuals of color, First Nations peoples, and others.

**Non-Pecuniary Loss**

Non-Pecuniary losses consist of non-financial losses, such as pain and suffering, loss of amenities (loss of things you enjoy doing), loss of expectation of life, and aggravated damages, as described below.

The approach to Non-Pecuniary loss in Canada is very different from the approach taken in the US. Canada has taken the more conservative approach that it is very difficult to determine the financial value of a Non-Pecuniary loss, and that high awards present a social burden. *The Supreme Court of Canada has capped the amount for Non-Pecuniary loss*. The cap in 1978 was $100,000. This has increased slightly so that in the mid-1990s the amount was approximately $250,000. This maximum amount would apply only in the most extreme kinds of injury, such as quadriplegia.

**Aggravated or Exemplary Damages**

Aggravated or exemplary damages are an attempt to compensate the plaintiff for the defendant’s misbehavior. The general common law rule is to compensate the injured, rather than to punish the wrongdoer. The goal of aggravated damages is to compensate for injured feelings.

*Exemplary damages*, also called *punitive damages*, is intended to punish and deter the wrongdoer, as well as others.

Aggravated damages are obligatory as long as the plaintiff’s distress is proven. In other words, if it is shown that the plaintiff suffered additional hardship because of the defendant’s behavior, aggravated damages must be awarded. *Exemplary damages* are a matter of *judicial discretion* which means that the judge decides whether to award it or not.

In personal injuries litigation, damages for pain and suffering compensate the plaintiff for the distress caused by the actual physical injury. Aggravated damages compensate for distress caused by the character of the defendant’s wrongdoing. Aggravated damages are awarded in cases where the defendant’s behavior is harsh, vindictive, reprehensible, malicious, or extreme.

In the case where there is an insurance company acting on behalf of the defendant, the behavior by the insurance company can be considered as well. If the insurance company acts in a harsh or reprehensible fashion toward the
plaintiff, aggravated or punitive damages may be awarded. In some cases, these awards can be quite significant.

**Bad Faith**

If you are making a claim against your own insurer, whether this be your own motor vehicle insurer for your no-fault benefits or your disability insurer, the principle of "good faith" applies. A contract of insurance is one of *uberrimae fides*, or a contract requiring the utmost good faith. This obligation is reciprocal. The insured is bound to disclose facts material to the risk of the insurer. In other words you have to tell the truth when you apply for the insurance. On the other hand, the insurer has an obligation to act fairly and in good faith towards the insured. The insurer’s adjustment of the claim is also subject to the duty of good faith. The insurer must behave in a way that is fair, prompt, and thorough and cannot refuse or discontinue benefits without good grounds.

Historically, bad faith claims for breach of an insurance contract have been an American phenomenon, and have resulted in multimillion-dollar awards. Recently, Canadian courts have shown a willingness to award aggravated or punitive damages against insurers. In January 1996, an Ontario jury awarded plaintiffs one million dollars in punitive damages. It was the largest punitive damage award ever made against an insurer in Canada. The case involved a claim against Pilot Insurance Company, a fire insurer who denied the claim because they suspected arson. The fire had started in the early morning hours on a very cold night when the temperature was approximately minus 20 degrees Centigrade. The plaintiff was barefoot and was severely frostbitten during the incident. The fire marshal had not been concerned about arson. In spite of evidence to the contrary, the insurance company still insisted that it was a case of arson and refused to pay. The insurer maintained it's stance for over two years and throughout a four-week trial. In the end, a jury assessed damages of $287,300.00 for fire loss and $1 Million in punitive damages.\(^{21}\) [Whiten v Pilot Insurance Co.(1996)132 DLR(4th)568 (Ont. Ct. Gen. Div.)]

In another case, [Ferguson v National Life Assurance Company of Canada [(1996)36 C.C.L.I. (2d) 95 (Ont.Ct.Gen.Div.)] the insurer discontinued disability benefits on the theory that the insured was malingering. The insured suffered from anxiety and depression that worsened when the benefits were discontinued. At trial, the court found no reasonable grounds for discontinuing coverage. The insurer was ordered to pay all back benefits and the insured was awarded punitive damages in the amount of $7,500.00 because the insurance company had not acted in a fair manner.

\(^{21}\) When Pilot Insurance Co. appealed the award of punitive damages, the Ontario Court of Appeal held that Whiten was entitled to punitive damages because the insurer breached its duty to act in good faith, and found the insurer’s conduct was reprehensible. However, the Court reduced the amount of punitive damages to $100,000.00, which was still a substantial award for punitive damages in this country. [Whiten v. Pilot Ins. Co. (1999), 117 O.A.C. 201(CA)]
In a third case, [Warrington v Great West Life Assurance Company (1995)C.I.L.R. 3208 (BCSC). (1996)39 C.C.L.I. (2nd)116 (BCCA)] the insurer discontinued disability benefits on the basis of a surveillance video and the theory that the insured was malingering. There was no justifiable medical evidence for discontinuation. The insured had strong medical evidence supporting the fact that there was significant disability. At trial, the court awarded payment of the combined outstanding benefits and aggravated damages of $10,000.00.

In an article which appears in a Canadian Bar Association publication, the author reviews the above cases and presents twelve guidelines for lawyers who are advising insurance companies. He suggests that in order to avoid claims of bad faith, insurers should follow these guidelines. (See Fig. 2)

**Figure 2**

**Guidelines Insurance Companies Should Follow in Order to Avoid Bad Faith Claims**

1. Conduct a prompt and thorough investigation before reaching a claims decision.
2. Be able to explain and justify each step in the investigation and handling of a claim.
3. Evaluate all the facts and the policy provisions fairly and objectively.
4. Keep the investigation within reasonable bounds.
5. Pay a claimant promptly. Unreasonable delay, if found to force the claimant to compromise a legitimate claim, can be evidence of bad faith.
6. Be direct and never misrepresent anything.
7. Keep speculation and gratuitous comments out of internal memoranda, e-mail, etc.
8. Investigate all material facts, keeping in mind the interests of both the insured and the insurer.
9. Do not ignore the insured.
10. Establish proper reserves.
11. Pay or deny the claim based on specific objective facts and analysis. If denying a claim, identify the reasons in specific terms, using specific policy language. The denial should be unequivocal.
12. Settle claims within policy limits, in order to protect the insured from exposure.

(Flanagan, 1998)

If the insurance company or its representatives are not following these guidelines in your case, aggravated or punitive damages may be awarded. It is advisable to:
• Document your claim from the start.
• Keep photocopies of documents.
• Take notes regarding what takes place during meetings or in telephone conversations with the insurance company or its representatives.

Case Study: Elizabeth

Although Liz continued to experience severe pain each day, she was desperate to get back to some form of work outside the home. It was clear she could not return to emergency room work or, indeed, any form of inpatient nursing, because of the physical labor involved.

Liz met with her previous employer on numerous occasions. She had been an excellent employee for fifteen years and the hospital had a duty to accommodate in trying to find her a suitable position. After months of searching and negotiating, a position was found in the Teaching Unit which is a special unit at the hospital dedicated to educating patients and families about home care.

Teaching Unit nursing staff teach patients self-care tasks such as how to administer their own intra-muscular or subcutaneous medications, test blood sugars, care for their own colostomies, self-catheterization, and many other self-care skills so that individuals with chronic illness can live more independently. Liz was very enthusiastic about the position. The plan was for Liz to return for three hours per day, two days per week. She would gradually work up to five days per week, and then progressively lengthen her work day.

Liz completed the first two days of work. She was in more pain, but had expected this. She spent the weekend pacing her level of activity so that she would be ready for the next week. Unfortunately, after the second week, her pain was at even higher levels and she was unable to progress beyond the two days of three-hour shifts.

First her neck and face would throb, and then the headache became overpowering with associated nausea. All she could do was shut the curtains and go to bed with an icepack. Liz continued working on this basis for two months. She managed to increase her time to four three-hour shifts per week, but her quality of life at home deteriorated. On her days off it took her all day to recover in order to get back to work the next morning.

Liz was involved in fewer family activities than ever and found that with the increased pain, she was shorter with the girls and Ben which in her mind was completely unacceptable. She tried taking pain medications more regularly, but
could not find a dose that provided pain relief without side effects. Liz's family
doctor told her that sometimes this happens. She indicated that unfortunately the
medical world did not have specific enough "smart bombs" to target the pain
without any side effects, and it is a case of trying to balance the benefits with the
side effects but that for some people there is no satisfactory medication.

Liz discussed the work situation with her family doctor and physiotherapist and
finally had to decide to leave the job. When Monday arrived the following week,
Liz felt like a complete and utter failure. It took her months to recover from what
her family physician had called a normal grief reaction to the loss of her career.

In assessing damages Liz's lawyer put in a significant claim for loss of future
earnings and loss of homemaking capacity. There were also significant Non-
Pecuniary losses so a claim was made for pain and suffering, and loss of
amenities. Liz's lawyer also claimed aggravated damages for two reasons. First
he argued that Liz's physiotherapy should not have been cut off. Her doctors had
recommended continued physiotherapy, the benefits of the physiotherapy had
been well documented, and it was clear that Liz's condition deteriorated when the
physiotherapy was discontinued. Secondly, he argued that the disability insurer
had added undue hardship by cutting off Liz's disability payments. It had clearly
upset Liz a great deal that this latest loss of income would place an additional
hardship on the girls.

**Summary**

In summary, the assessment of damages is quite an involved process. The goal
is to compensate you, as fully as money can do it, to your pre-accident state. In
theory, the principles followed are laudable and just. Unfortunately, in practice,
the actual damages awarded to most plaintiffs fall far short of what is theoretically
available. In addition, while the past decade has seen some progress, significant
inequities remain with regard to damage awards to women.
Chapter Five: The Trial

The Setting

Most people have a TV image of what will happen in court. This picture may involve highly articulate and aggressive lawyers who will badger and intimidate the witnesses on the other side, or counsel who, addressing the court with a dramatic flourish, are able to convince anyone and everyone of their point of view. On TV, the courtroom is always packed to the rafters with observers who listen with rapt attention to the proceedings. If it is a recent production, the judge will often be presented as a woman of colour.

In real life, the scene is often quite different. On TV, the judge sits on an elevated dais at the end of the room and this is the highest seat in the room. The next highest perch is the witness stand, which is usually situated to one side of the judge. Below and in front of the judge sits the court clerk or registrar who calls out the names of upcoming cases, organizes the judge’s papers, and performs administrative tasks. In most cases there is also a court clerk who records the proceedings. The lawyers sit at tables near the front of the courtroom. If a jury is present they sit in the jury box to the side. In civil trials there are fewer jurors, not the twelve that are often present in the criminal trials seen on TV. The number may vary but is generally about seven. The remaining seating is the public gallery which, for most personal injuries cases, is practically empty.

All lawyers, parties, spectators, and court officers are in the courtroom when the judge enters the room. Typically, witnesses are present only when they are called to testify. When the court clerk announces the judge’s arrival, everyone must stand until the judge is seated. Watch your lawyer’s behavior for a cue as to when it is appropriate to stand, or sit.

You will notice that the lawyers will refer to one another as “my friend” or “my learned friend”, the judge is addressed as “My Lord” or “My Lady”, “Your Honour”, “Sir”, or “Madame”, depending on the level of the court or the preference of the judge. In most cases it is inappropriate for witnesses to address the judge directly; witnesses are generally limited to responding to the questions posed by the lawyers. However, if the judge asks you a direct question you are expected to respond. Therefore, it is a good idea to ensure you know the appropriate title, just in case. Ask your lawyer.

The microphone in the witness box is usually for recording purposes--not for amplification, so there is no need to lean forward in order to speak into it.
However, it is important to speak up so the judge and lawyers can hear what you say.

The Course of Events\textsuperscript{22}

The Plaintiff’s Opening: This is your lawyer’s chance to outline the key facts and issues that are central to your case. At this stage, your lawyer may proceed with your case or the trial judge may decide to hear the defendant’s opening as well. After presenting the opening statements, your lawyer will then call your witnesses one by one. Each witness will be examined by your lawyer, cross-examined by the other lawyer, and may be re-examined on certain issues by your lawyer.

The Examination-in-Chief: This is your lawyer’s opportunity to get you to present a concise description of the facts required to establish your case. After asking you to identify yourself, your lawyer will then ask you to relate the history of events as you remember them, usually in chronological order. It is normal to be nervous; don’t forget your lawyer is there to advocate for you. If you get off track or miss the point, he or she will ensure that you are guided back on track.

Cross-Examination: After your testimony, the opposing lawyer is given an opportunity to ask you questions. Remember: His or her purpose is to 1) destroy or weaken the evidence, and/or undermine your credibility; 2) bring out evidence that will support his or her case; and 3) bring out evidence that hurts your case. In answering, keep your answers concise, polite, and to the point. Do not ramble. If you do not understand a question, say so. If the question is long-winded or contains multiple parts, answer one part at a time. It is reasonable to ask the lawyer to repeat the question. Take your time and be as clear as you can. The cross-examination is much like the questioning you have already been through in the discovery. However, in this case, the judge is present, so the lawyers have to be on their best behaviour. In many ways, it is much easier than the discovery.

Examination of Expert Witnesses: In litigation, the role of the expert witness has become more prominent in recent years. Often, an entire case can hinge on the court’s acceptance of one expert’s evidence over that of another. In personal injuries litigation, experts are asked to give opinion evidence on issues of pain and suffering, level of disability, and causation. Expert witnesses are also asked to predict future prognosis and cost of care.

After the plaintiff’s lawyer has finished calling witnesses, he or she may read in transcripts from the defendant’s examination at discovery. Once the plaintiff’s

\textsuperscript{22} While this is a description of the usual course of events, there may be minor exceptions. For example, in some cases before a judge alone, where there are extensive pre-trial memoranda and pre-trial conferences, no opening is used by either side.
case is over, the defendant’s lawyer presents his or her case, following the same process.

**Closing Statements:** The trial ends with closing statements or arguments presented by both lawyers. Which side presents closing statements first may vary depending on the civil procedure rules of that particular province, whether it is trial by judge or jury, and whether the defendant has called evidence in defense.

**The Judgment**

When the lawyers have finished the closing arguments, the outcome is determined by the judge or jury. In the case of a jury trial the judge will “charge” the jury; in other words, he or she will summarize the evidence and explain the appropriate legal tests that should be applied. The jurors must then determine what version of the facts they believe. If it is a trial by judge, only the judge determines legal and factual issues. The judge may either deliver the judgment on the spot, or “reserve the decision for consideration” (will make the final decision at a later date). There is usually a limit as to how long the judge can take to render a decision. In Nova Scotia, for example, the judgment must be delivered within six months of the close of the trial.

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**Case Study: Elizabeth**

The lawyers for the insurance companies made a last-minute offer to settle. Their offer was unreasonably low, and Liz decided to go to trial. It was a 14-day trial with eight expert witnesses. Liz found it very difficult to sit through the trial and on three occasions she had to leave due to severe headaches. Liz had read the reports written by the doctors for the defense and so she was not shocked or surprised by what was said at trial. She was angry. Angry that the defense’s psychiatrist claimed that a good deal of her pain was due to a predisposition to depression, and angry that the orthopedic surgeon contended that she had no objective findings and that there was no reason why Liz could not go back to work. Liz’s family doctor told her that it was healthy that she was angry. Her doctor explained that this was justifiable anger that indicated Liz knew herself and had enough self-confidence so that these negative opinions were not leading her into self-doubt.

Liz was thankful that she was not too sick to hear the testimony of her family physician and her pain-clinic doctor. Her family physician was able to clarify that she had known Liz for years and there had been absolutely no evidence that Liz had exhibited an inclination toward somatization (developing physical symptoms because of psychological stress). The psychiatrist that Liz’s lawyer had asked her to see in order to build her case supported this opinion.

The pain specialist stated very clearly that many of the causes of chronic pain cannot be seen on imaging studies. She elaborated further, describing that just
because abnormalities cannot be demonstrated on X-rays, CAT scans or MRIs, this does not mean that there is no physical cause for the pain. She clarified that pain is a subjective experience similar to love or grief, and is no less powerful. She asked the question: “Love or grief are subjective and difficult to validate externally. Does that mean that they do not exist?”

This specialist also reviewed many studies demonstrating the causes of chronic pain. She described that subsequent to spraining injuries, most people will heal but a small group will go on to experience continuous pain. She indicated that once the chronic pain-generating (pathophysiological) changes take place, there is no cure. She pointed out that treatment consists primarily of educating people about how to try and live with the pain and pursue health in spite of continued pain. She indicated that often medications can help but that side effects can be a big problem, as had been the case with Liz. She emphasized the importance of therapeutic exercise--not because it will decrease the pain, but because it will prevent de-conditioning, which she explained is the biggest enemy for people with chronic pain conditions. The doctor also indicated that Liz had exhibited a high level of motivation in pursuing all appropriate treatment approaches.

After hearing the final arguments on both sides, the Judge thanked everyone and indicated that she would be submitting a written decision within three months.

Chapter Six:
Exploring Alternatives to Trial

Litigation is only one way to resolve a dispute. It is the most expensive and confrontational method, and should be avoided whenever possible. There are a number of alternative approaches to resolving personal injuries disputes that do not involve the courts. As an aggregate, these options are often referred to as Alternative Dispute Resolution (ADR) (see Fig.3). Proponents of ADR prefer to speak of these approaches as simply dispute resolution. Due to the growing backlogs of cases in the courts, the high cost of litigation, and dissatisfaction on all sides, these alternatives are becoming more popular.

In Canada, due to a number of initiatives and projects across the country promoting such options over the last several years, there has been a dramatic increase in the use of these techniques. The alternatives that are most relevant to personal injuries cases include: negotiation, mediation, and pre-trial conferences., Chornenki and Hart define these options in their handbook on dispute resolution, “Bypass Court”. I will summarize.
**Figure 3**

**Alternative Dispute Resolution: Methods of Resolving Disputes**

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<tr>
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<td>Mediation</td>
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<td>Advisory Board or Dispute Review Board</td>
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<td>Neutral Evaluation or Expert Evaluation</td>
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<td>Valuation</td>
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<td>Mini-trial</td>
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<td>Fact-finding</td>
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<td>Arbitration</td>
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<td>Pretrial Conferences</td>
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<td>Litigation</td>
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**Negotiation**

Negotiation occurs when two or more parties in dispute communicate and engage in behaviour to see whether they can arrive at an outcome to resolve the dispute that would be superior to the outcome they expect would occur from litigation.

In personal injuries, the injured party can attempt to negotiate a settlement with the insurance company at any stage—from initial discussions with the adjuster, all the way up to the appeal. Parties can negotiate in person or through representatives.

**Mediation**

Mediation occurs when two or more parties in dispute permit an outsider (mediator) to assist them in negotiations. The mediator does not tell them how their dispute will be settled and has no authority to impose a solution. The mediator analyzes the dispute and gives the parties the benefit of this analysis. The mediator will use various approaches and techniques but it is the parties themselves who must consent to any deal. In essence, mediation is just assisted negotiation. You would choose mediation if negotiations are stuck or if one or both parties won’t come to the table to try and bring about a resolution. Mediation is often safer in that there is a referee managing the process.

**Pretrial Conference**

As discussed in Chapter Three, a pretrial conference can occur as part of the litigation process when the lawyers for both parties—and sometimes the parties themselves—are present in court and discuss with the judge whether and how the lawsuit can be settled.
Alternative Dispute Resolution Across Canada

As mentioned, a number of dispute resolution initiatives are currently underway across the country. In many jurisdictions, a recently-enacted provision in legal ethics mandates that lawyers consider ADR options in all cases of civil litigation. The Department of Justice is pursuing a project that trains lawyers in dispute resolution skills. Many provinces are teaching dispute resolution techniques in bar admissions courses which are required before lawyers can be licensed to practice law. Several provinces are now diverting cases to mediation or other dispute resolution options on a voluntary basis. Ontario is the only jurisdiction with mandatory mediation for civil matters.

The Insurance Corporation of British Columbia (ICBC) has been involved in mediating cases for a number of years. Since 1986, the ICBC has jointly sponsored a pilot project with the Canadian Bar Association in mediating personal injury files, and is currently implementing a dispute resolution process as reviewed in Chapter One.

Ontario is the most aggressive province in pursuit of alternative approaches. (See Chapter One re: the steps one pursues through FSCO.) Other initiatives have included an “Alternative Dispute Resolution Centre” which was set up as a two-year pilot project. This centre focused on early intervention assistance in settlement of disputes to parties and their lawyers. The project was launched in an effort to decrease the cost and time spent litigating civil disputes. Civil cases in Toronto were randomly referred to the project. As a result of this pilot, Ontario now has a Mandatory Mediation Program that is gradually being rolled out across the province in connection with the introduction of Case Management.

This program is governed by a Rule of Civil Procedure (24.1) implemented as a regulation under the Courts of Justice Act. It is similar to the pilot project in that there is a requirement to come to the table early and mediate immediately after the close of pleadings (a formal statement of the cause of the action). Unlike the pilot, there is no ADR Centre. The mediators must be qualified to be placed on the roster and the parties have a certain number of days to choose a mediator and hold a mediation. It is a private sector transaction; the parties pay for the mediator.

Saskatchewan has legislated the introduction of mediation with “The Queens Bench Mediation Amendment Act” (S.S.1994, c.20). This act requires all parties to civil disputes and family cases to attend mediation orientation sessions at the close of pleadings before any further step can be taken. The main objective is to improve access to justice services and to find more satisfying and less adversarial ways for parties to resolve their disputes.
In Nova Scotia, a joint committee on insurance and tort reform sponsored by the Nova Scotia Barristers Association and The Canadian Bar Association made a number of recommendations encouraging increased use of alternate approaches to dispute resolution. Although it is voluntary, if the Ontario experience continues to be a positive one, mandatory measures are expected to be put in place in the near future.

**ADR Getting Started**

In an ideal world, injured parties with a claim should have a good advocate who can assist initially in negotiation and mediation. Failing this, the dispute is then moved to litigation. It is highly desirable to avoid the adversarial process of litigation because not only is it the most stressful psychologically, but it is also very expensive.

How does one access good mediation services? Mediators can be found in the yellow pages in most Canadian cities. Also the Federal Department of Justice Dispute Resolution Office has compiled a national list and every program in connection with a court maintains a roster. Although there are no generally recognized standards for mediators in Canada, since the courts are becoming involved in mediation, they have set their own standards which must be met in order to be a member of their rosters.

If the mediation is conducted in good faith with the insurance company, they will often pick up the tab. Otherwise it will be split equally between the parties. The cost depends on the duration of the mediation.

In summary, in Canada there are a few enlightened centres where there are a number of options for resolving disputes. This is a rapidly developing area and it is hoped that in the near future Canadians in all provinces will have easy access to options other than litigation in order to resolve personal injuries disputes.

**Chapter Seven:**
**The Aftermath: Living with Chronic Pain**

While chronic pain and its relationship to personal injuries litigation has been discussed in previous chapters, we are now going to focus on this very visceral reality that plagues many survivors of automobile accidents. In trying to come to terms with chronic injury or illness of any kind, many of the principles are the same. Thus, the observations reviewed below can be generalized to most situations where there has been an injury leading to a chronic condition.

After the verdict, the pain does not go away. The stress of the litigation may have passed, but the pain remains. In my experience, I have found that many patients
go through a post-litigation depression. This often occurs even in the face of reasonable financial settlements. There are probably many reasons for this. The injured party often develops the mindset that once the stress of litigation is over life will be easier; once the court case is over one can get back to a more "normal" life. Although it is usually a negative experience, the litigation is a focus and in some ways a distraction that can sometimes assist the patient in not having to face the years of pain yawning open before them. In addition, in spite of the fact that the prognosis of continued pain is discussed, sometimes patients fool themselves or deny it, not facing this fact until after the litigation is over. Responses may range from disappointment to depression.

What follows are examples of the day-in-day-out experiences of patients who have been stricken with chronic pain following an injury.

**Examples of Chronic Pain**

“It feels like my legs--the crotch, the foot, the toe--are being pulled apart; it is as if there is a numb lead line being pulled through the leg and toe. At other times there is a tremendous heaviness, as if there is a big steel bar rolling over my leg.”

**Diagnosis:** Sciatic nerve damage and pelvic fracture caused by a motor vehicle accident

“It feels as if the muscles in my neck and shoulders want to explode; the skin is so supersensitive I cannot shower. I cannot stand to be touched.”

**Diagnosis:** Whiplash

“It is a feeling of expanding pressure so intense it feels as if my skin cannot contain my body. At other times it is like a knife shooting down my leg.”

**Diagnosis:** Lumbar radiculopathy/lumbar sprain caused by a motor vehicle accident

“It is a constant burning sharp pain: stiff, swollen, and numb like fire.”

**Diagnosis:** Soft tissue injury to shoulder sustained in a side on collision
Imagine being told that you have to go home and live with this pain every day for the rest of your life. Patients with incurable pain are told “you have to go home and live with it”, all the time. This is not a case of the physician being cruel. It is a statement of fact. Until pain scientists are able to eradicate chronic pain, when pain persists for more than three to six months after an injury, this is a strong indicator that the pain is probably going to stay.

‘Patient Blaming’

Because pain is invisible, because pain is not obvious, a whole mythology has been built up about the people who suffer from chronic pain. There are many myths but they can all be described as "patient blaming". People with chronic pain are blamed for their pain in many ways. This may include saying that the pain is there because they have a predisposing personality to develop pain after an injury. It may include accusing them of exaggerating the symptoms in order to get sympathy or of faking the symptoms in order to get out of working, or for financial gain. For the people who have to live with chronic pain, living with the pain is bad enough. The last thing they need is to be blamed for having it.

In fact there is not a shred of evidence to support that there is a personality type that predisposes individuals to develop chronic pain. Also in studies regarding pain outcome after personal injuries litigation is resolved, it has been found that the pain is not cured by a verdict. The patient's disabilities continue following the resolution of the compensation claim.

The Denial of Pain

Robert Teasell, a specialist in chronic pain, physical medicine, and rehabilitation, has described a "current disconcerting trend towards dealing with chronic pain and its subsequent disability by denying its reality." 23 Teasell and Merskey have written an article that refutes many myths about chronic pain. This article identifies that psychosocial explanations of chronic pain are often over-inferred in situations where it is costly to consider chronic pain a potentially disabling condition. They argue that such a trend will disproportionately harm those who can least afford to be harmed, namely the poorer, older, and less well-educated individuals who lack transferable skills and are least able to find alternative work. The words of Arthur Kleinmann, a medical anthropologist at Harvard University, summarize the situation regarding compensation and chronic pain beautifully:

“Because most workers disabled by chronic pain earn considerably less from disability support than from their job, because many have taken years to grudgingly receive even the limited stigmatized compensation they do win, and because many are seriously depressed by their condition, it is

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hard to accept the standard claim of political conservatives that rewards for illness behavior directly encourage malingering.”  

Pain Without Evidence

In cases where chronic pain persists beyond the point where, traditionally it is thought that normal healing should have taken place, and in cases where the doctors cannot find evidence of abnormality on current imaging studies and tests, it has been difficult to answer the question: Why is the pain there? Only in the past decade have we begun to understand the answer to this question. This is the modern age of pain research and there has been an explosion of work in this area. Clifford Woolf, a scientist who has studied the causes of pain for years, describes the current situation most clearly:

“This pain field is in the midst of a revolution driven by the application of modern molecular, cellular, and systems neurobiological techniques. The success of this surge in basic science work is such that we have easily achieved more in the last decade in terms of understanding how pain is generated than in the last hundred years.”

We now know that when pain persists it often means that neural changes have taken place such that now the nervous system has become sensitized. The nervous system can become sensitized and reorganized in a way such that pain messages are perpetually generated and responses to stimuli such as touch, pressure, and pinprick are processed abnormally.

Under normal conditions the body is equipped with nociceptors, or nerves, that respond to tissue-damaging stimuli such as a burn or cut that would normally signal pain. The nervous system is a living, dynamic, highly sophisticated network that can change and grow. Under certain conditions, it can change and grow in ways that are pathological and result in producing pain. In other words, following an injury, the system can go awry.

The nerves that convey sensory information are full of many branches, similar to the branches on a maple tree (a figure could be inserted here). The branches between nerves form many points at which they can communicate with one another. The branches come very close to each other but do not quite touch. They are separated by a very small space called a synapse. The nerves communicate across this space through chemical messengers called neurotransmitters.

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The nerve itself decides when it will communicate with the neighboring nerve based on its own internal state. Its internal state is affected by numerous chemical reactions that allow it to develop a certain electrical charge. When the nerve charges up to a certain threshold level it fires and sends neurotransmitters to the next nerve. This then initiates a series of chemical reactions in the next nerve and in this way, the message is conveyed along the system. The system is not a straight-line system; there are millions of nerves with millions of branches communicating together. The system is highly organized.

Much of the pain-related information is transmitted along a part of the spinal cord called the *dorsal horn*, the dorsal horn is located toward the back part of the spinal cord. For illustration purposes, if the spinal cord is cut into horizontal slices there is a central darker area shaped like a butterfly. The dorsal horn is in the upper part of the wings (*a figure could be inserted here*). The wings are divided into layers. Each layer contains nerves and branches that convey certain types of information. Under normal conditions, the pain-related information is transmitted in the outside layers, and information related to mechanical stimuli such as light pressure on the skin is conveyed in the deeper layers. Following an injury, the branches of the deeper touch related nerves can grow into the more superficial layers, and begin to communicate with the nerves that carry information related to tissue damage, called nociceptors. This situation is called “structural reorganization”. It has also been shown that after injury, nerves can become more sensitive to stimuli, firing at lower thresholds than they normally would, or firing spontaneously instead of firing in response to a stimulus. When nerve cells become more sensitive and twitchy like this we call it “sensitization”. These changes in the nervous system can lead to chronic pain and abnormalities in sensation. For example many people experience areas of super-sensitivity where they cannot stand to be touched in areas of pain, even the feeling of the bed-sheets or the water of a shower can become painful experiences.

Everything I have described above has been demonstrated in experimental studies carried out in laboratories all over the world. This research has helped us to understand why pain persists beyond the point where normal healing should have taken place.

Pain is a subjective experience. Like an itch, or love, it is experienced inside. Unlike vision or hearing it cannot be externally validated by producing the object or sound that is seen or heard. Thus pain is invisible. The only way we know if someone is in pain is by what they tell us or by how they behave. In some cases there is a limp or some other obvious manifestation of the pain but in most cases

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26 The terms nociceptors and nociception are used, rather than pain receptors and pain transmission, because at the spinal level these impulses in nerves are not pain. Pain is actually a higher level of subjective experience that occurs in the brain, and is the end result of patterns of nerve impulses that have involved multiple areas and levels of the nervous system.
there is not, the pain is invisible to the external observer. The invisibility of chronic pain makes things more difficult in many ways. First of all there are the judgments of others: “What is the matter with you? You don’t have anything wrong with you. Why aren't you working?”

In the case of personal injuries litigation or disability insurance disputes, there is the need to prove that the pain exists. This is a very difficult thing to do. In an adversarial context it is especially difficult because the other side is doing its best to minimize or deny the pain. As reviewed above many of the causes of chronic pain are related to abnormalities in nerve function that cannot be imaged or picked up by any currently available clinical test. *There is no test for the presence of pain.*

“It is a constant pulling, cracking, burning, itching feeling and then stabbing. It is so tight I feel like I cannot breathe. My forehead and face are numb; I am dizzy. There is a buzzing in my ears and my eyes feel such a penetrating pressure, I am sure they will pop out.”

**Diagnosis:** Cervical, thoracic, and temporomandibular joint sprain caused by a rear-end motor vehicle accident

This young woman’s pain is excruciating. When she came to me she had already been examined by several excellent doctors all of whom ordered appropriate investigations and prescribed the latest treatments after the accident. The patient herself had already pursued numerous active approaches in an effort to get better. This included exercise, pacing her levels of activity, positive self-talk, and meditation. In spite of it all her pain persisted. I had to tell her that there was no cure. I indicated that we would try to help her with medications and that her bite plate might need to be reassessed. We reviewed her exercise program, but bottom line was that she had a life of chronic pain ahead of her. In my view this just isn’t good enough. That is why we need more pain research. We need new treatments for pain.

In the case of chronic pain and other disabling conditions there are a host of losses that individuals must adjust to (see Figs. 4 & 5). In this case I am referring to non-monetary losses.
Figure 4

Pain and Loss:
The Obvious

- Loss of a pain-free body
- Loss of energy, sleep, appetite, sex drive
- Loss of ability to function (job, housekeeping, childcare, physical play, fun activities)
- Loss of self-esteem and confidence
- Loss of relationships, social life
- Loss of income, shared family income, socioeconomic status
- Loss of financial security

Figure 5

Pain and Loss:
The Not-So-Obvious

- Integrated healthy body image
- Ability to be spontaneous
- Predictability (having to cancel engagements)
- Ability to process information (attention, concentration)
- Confidence in own judgment (second-guessing oneself)

Chronic Pain is Life-Changing

The onset of chronic pain or other chronic conditions is a profoundly life-altering event. The Study Group on Women with Chronic Illness and Disability at the Stone Center, Wellesley College, have identified a framework that I believe has significant relevance to individuals who are trying to come to terms with a diagnosis of chronic pain or, indeed, any disabling condition. First of all, they stress the importance of access to a reliable income and quality health care. The Stone Center group then identifies a three-stage process through which one comes to terms with chronic illness and disability. These steps include: recognition, re-negotiation and regeneration.

Recognition is the conscious awareness of a serious change in health status along with an understanding that this may profoundly change one’s life. Recognition can take many forms. It is a lifelong process that involves mourning and loss. Recognition addresses the existence of the illness and its impact on one’s relationships. The Stone Center emphasizes that the quality of
relationships is central to one’s ability to live successfully with illness. At the same time, it is acknowledged that the traumatic impact of chronic illness can lead to disconnection in one’s relationships. Many people will isolate themselves out of fear or shame, and significant others may withdraw in response to the patient’s own reactions. A key point is that the denial of illness from a loved one can challenge one’s own recognition of the condition which, in turn, delays the process of adaptation.

On the other hand, support and affirmation can facilitate a coming-to-terms with the chronic condition. The ideal scenario is to maintain connection with others who can assist through their willingness to hear about the experience, and then reflect back their own reality. This does not mean that loved ones should listen to a litany of descriptions about the pain. Most people with pain will say they do not want to hear it themselves, they are so sick of living with the pain, and they do not want to subject their loved ones to it. More often than not, what I see is patients doing their best to protect others from their pain by not talking about it. What needs to happen is an open sharing of feelings and experience, so that connection can be maintained.

This may mean partners sharing their disappointment and sense of loss in the face of your social isolation, and your expression that the withdrawal comes from a fear of being a burden. This may then lead to an exchange where your partner expresses that it is not what you can do that they love, but you: your capacity to love, your sense of humor, or your valuing of them.

**Re-negotiation** is the process of integrating the experience of illness into one’s identity; in other words, “Who am I now?” You are not your illness; you are a person with a chronic condition and perhaps there is a component of disability related to this. The integrative process involves new learning in all relationships. It involves re-negotiation of one’s own needs as well as one’s response to the needs of others in each relationship.

**Regeneration** is the process of creating or finding meaning and connection in one’s life. During this phase, ongoing relationships will change and grow in ways reflecting adaptations forced by the condition. In addition, new relationships will develop. Sometimes these new relationships develop in the context of a support group. In this setting, many people finally receive the affirmation and validation of their experience. This an essential ingredient needed in order to acknowledge the pain and initiate the process of recognition, re-negotiation, and regeneration.

The writings of Viktor Frankl are helpful regarding the issue of finding meaning under conditions of adversity. Viktor Frankl was a famous German psychologist who survived three years in a German concentration camp where he lost his entire family except for one sister. Frankl writes that “striving to find meaning in...
one’s life is the primary motivational force in man” (p154). Frankl considers “man is a being whose main concern consists in fulfilling meaning and in actualizing values rather than the mere gratification and satisfaction of drives and instincts” (p164) After three years in a concentration camp Frankl writes: “there is nothing in the world... that would so effectively help one to survive even the worst conditions as the knowledge that there is meaning in one’s life”. He quotes the philosopher Neitzsche: “He who has a why to live can bear almost any how”. Frankl continues: “man’s main concern is not to pursue pleasure or avoid pain but rather to see a meaning in his life” (p179). Viktor Frankl’s words may be very helpful when one is trying to come to grips with the experience of chronic pain.

In 1955, Edith Weisskoph –Joelson, a Professor of Psychology at the University of Georgia, wrote: “Our current mental-hygiene philosophy stresses the idea that people ought to be happy, that unhappiness is a symptom of maladjustment.” Her words are as true today more than four decades since they were first written. Society has pathologized unhappiness and the pharmaceutical companies have exploited this, attempting to convince us that an antidepressant can cure our sad feelings. With chronic pain, sad feelings and grief related to loss are normal. But one is not relegated to a life of unhappiness it is possible to come to terms with the injury in order to carry on.

This is a lifelong process. As one proceeds along this path, priorities and values change. What may have seemed lost at first can be rediscovered, this may include the capacity for joy, to learn, adapt, evolve and grow, and the capacity to contribute meaningfully to family and society or the ability to foster growth in others. The capacity to foster growth in others is especially important for injured parents of young or adolescent children.

Figure 6

What is Not Lost but Seems So at First

- Capacity to be in loving relationships
- Capacity for joy and spirituality
- Capacity to contribute meaningfully to family & society
- Capacity to learn, adapt, evolve, grow
- Capacity to foster growth in others

The medical profession can assist with this process by providing clear unambiguous information regarding the diagnosis as soon as possible after the injury. For example, follow-up studies of cervical sprain have indicated that if individuals still have pain at three months, they are likely to have chronic pain two years later. If pain continues for six months, then the prognosis is that of continued pain. Thus in most cases of cervical sprain, physicians can provide a
prognosis within the first year. Once the long-term prognosis is known, counsel should proceed to negotiate the claim toward a rapid resolution. The sooner this can be resolved, the better, to avoid excessive legal costs. In addition, resolving the litigation as soon as possible enables individuals to get on with their lives.

**Case Study: Elizabeth**

It took Liz a good five years to accept the fact that she would not be able to return to nursing or indeed any form of wage-earning work. Liz kept her nursing license paid up for four years until she realized there was no chance of getting back to work. Her pain levels were too unpredictable. Sometimes she would experience a good string of days where she would wake up in less pain. During these times Liz would start to hope she could go back to something, then out of the blue, she would get nailed with a severe flare-up of pain in her neck and head which would take days to resolve. Liz had come to the point where she had cancelled out on so many meetings with friends she was afraid to schedule anything for fear of disappointing them. When she let her nursing license lapse, Liz found herself feeling very down; her sleep was even worse than usual. When she went to see her family physician thinking she may be depressed, her doctor told her that she was experiencing normal human emotion in response to the final event symbolizing the loss of her career.

Liz was surprised by her own reaction because many tears had been shed over this issue, and she thought she had already dealt with it. Also, as Liz described it, she was blessed in so many ways. She did not have cancer or a life-threatening disease. She would, she hoped, be around to see her girls through their adolescence. Anything after that would be an additional bonus.

In fact, Liz always made an effort to see how the glass is half full, rather than half empty. She missed nursing but she was glad to get more time with the girls. Liz missed her colleagues but had connected with an excellent group of women through a reading group. Two of the other women in the group had health conditions and they all understood a last-minute cancellation if you could not make it. Liz said she would never wish the experience of chronic pain on anyone, but that in some way, meeting this challenge had made her a better person. Liz stated that she could not describe it any better than that. If you asked Liz how she had done it, how had she managed to get to a point where she could live a meaningful life even with severe chronic pain?, she would have said she could not have done it without strong faith and the support of those close to her.
References

Chapter One

Chapter Two

Chapter Three

Chapter Four

Chapter Five

Chapter Six

Chapter Seven
Appendix 1

Law Societies, Referral Services, and Public Legal Education Societies*

Alberta

Law Society of Alberta

Calgary office (Main)                Edmonton office
Tel: 403-229-4700                   Tel: 403-429-3343
Toll free: 1-800-661-9003            Toll free: 1-800-272-8839
Fax: 403-228-1728                   Fax: 403-424-1620
URL: www.lawsocietyalberta.ab.ca    www.law.ualberta.ca/lawsociety

Public Legal Education Network of Alberta (PLENA)

Tel: 403-343-3712
Fax: 403-340-2890

URL: www.plena.org
Email: info@plena.org

Lawyer Referral Service (through Law Society)

Tel: 1-800-661-1095 (in Alberta only)
Tel: 228-1722 (Calgary)

British Columbia

Insurance Corporation of British Columbia (ICBC)

Head Office Tel: 604-661-2800
For reporting new claims:
Greater Vancouver Tel: 520-8222 outside of Greater Vancouver 1-800-910-4222

Fairness Processes and How to Dispute

Tel: 661-2800
Toll Free: 1-800-663-3051

Law Society of British Columbia

Tel: 604-669-2533
Public Legal Education

Law Line - offers legal information line and lawyer referral service
Tel: 604-601-6100
Fax: 604-601-6296
Email: eduardo_aragon@lss.bc.ca

Law Line
Tel: (604) 601-6100
Law Line offers legal information line and lawyer referral service

Manitoba

Manitoba Public Insurance Corporation (MPIC)
Automobile Injury Compensation Section
Superintendent of Insurance Branch
Tel: 204-945-2542
Fax: 204-948-2268
Autopac Line
Tel: 985-7000 (Winnipeg)
Outside Winnipeg (Toll Free) 1-800-665-2410
Deaf Access TTY/TDD: 985-8832
URL: www.mpi.mb.ca

Automobile Injury Compensation Appeal Commission
Tel: 204-945-4155
Fax: 204-948-2402
Email: autoinjury@gov.mb.ca
URL: www.gov.mb.ca/cca/autom/index.htm

Law Society of Manitoba

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Community Legal Education Association (Manitoba) Inc.

Tel: 204-943-2382
Fax: 204-943-3600
Email: info@communitylegal.mb.ca

Law Phone In and Lawyer Referral Service

Tel: 943-2305 (Law Phone In Line)
Tel: 943-3602 (Lawyer Referral Service)

New Brunswick

Law Society of New Brunswick

Tel: 506-458-8540
Fax: 506-451-1421
Email: general@lawsoociety.nb.ca
URL: www.lawsociety-barreau.nb.ca

Public Legal Education and Information Seminars of New Brunswick (PLEIS-NB)

Tel: 506-453-5369
Fax: 506-457-7342
Email: pleinsnb@web.ca
URL: www.legal-info-legale.nb.ca/mainframe_en.html

Newfoundland and Labrador

Law Society of Newfoundland

Tel: 709-722-4740
Fax: 709-722-8902

Public Legal Information Association of Newfoundland (PLIAN)
Tel: 709-722-2643
Fax: (709) 722-0054
Email: info@publiclegalinfo.com
URL: www.publiclegalinfo.com
Also has Lawyer Referral Service which can be contacted through PLIAN

**Nova Scotia**

**Nova Scotia Barristers' Society (NSBS)**

Tel: 902-422-1491  
Fax: 902-429-4869  
Email: dpink@mail.nsbs.ns.ca  
URL: www.nsbs.ns.ca  
www.home.istar.ca/~nsbs/

**Legal Information Society of Nova Scotia (LISNS)**

Tel: 902-454-2198 (Main number)  
Fax: 902-455-3105  
Email: lisns@attcanada.ca  
URL: www.legalinfo.org

**Lawyer Referral Service and Information Line**

Tel: 902-455-3135 (in Metro)  
Tel: 1-800-665-9779 (outside Metro)  
Nova Scotia also has website for “Coalition Against No-Fault Insurance in Nova Scotia”.  
URL: www.nscoalition.ca

This site has links to similar coalitions in other jurisdictions such as New Brunswick, Saskatchewan, and British Columbia

**Northwest Territories**

**Law Society of Northwest Territories**

Tel: 867-873-3828  
Fax: 867-873-6344  
Email LSNT@TheEdge.ca

URL: www.lawsociety.nt.ca

Also has Lawyer Referral Service - telephone number same as Law Society's number.

**Nunavut**

**Law Society of Nunavut**

Tel: (867) 979-2330  
Fax: (867) 979-2333
Ontario

Financial Services Commission of Ontario (FSCO)
Motor Vehicle Accident Claims Fund
In person: 16 floor, 5160 Yonge Street, North York
By phone: 416-250-1422
Or: 1-800-268-7188
Fax: 416-590-7076

Law Society of Upper Canada (LSUC)

Tel: 416-947-3300
Toll free (for Ontario outside local calling area) 1-800-668-7380
Fax: (416) 947-5263
URL: www.lsuc.on.ca

Public Legal Information

Lawyer Referral

Main Number
Tel: 1-900-565-4577

This number can be dialed from any PRIVATE phone in Ontario. There is an automatic $6.00 charge billed to the dialer’s monthly phone bill.

Tel: (416) 947-3300 (in Metro Toronto)
Toll Free: 1-800-268-8326 (outside Metro Toronto)
TDD: (416) 971-1294

These numbers are for callers who are incarcerated, under age 18, or are in crisis (domestic abuse).

Prince Edward Island

Law Society of Prince Edward Island

Tel: 902-566-1666
Fax: 902-368-7557

Community Legal Information Association of Prince Edward Island, Inc. (CLIA)

Tel: 902-892-0853
Quebec

Societe de l'Assurance Automobile de Quebec (SAAQ)
For bodily injury accident claims for accidents occurring in Quebec
Quebec City  Tel:  514-643-7620
Montreal  Tel:  514-873-7620
Rest of Quebec  Tel:  1-800-361-7620

TDD numbers
Montreal  Tel:  514-954-7763
Rest of Quebec  Tel:  1-800-565-7763

For bodily injury accident claims for accidents occurring outside of Quebec
For Canada and US  Tel:  1-800-463-6898

Barreau du Quebec (Quebec Bar Association)
Tel:  514-954-3400
Toll free 1-800-361-8495
Fax:  514-954-3407
URL:  www.barreau.qc.ca
Also has Lawyer Referral Service through Barreau du Quebec (French only service).

Saskatchewan

Saskatchewan Government Insurance (SGI)
Tel:  306-751-1200
Toll free:  1-800-667-8015 (calling from anywhere in North America)
URL:  www.sgi.sk.ca

Law Society of Saskatchewan

Tel:  306-569-8242
Fax:  306-352-2989
Email:  reception@lawsociety.sk.ca
URL:  www.lawsociety.sk.ca

Lawyer Referral Service

Tel:  306-359-1767
Toll free (in Saskatchewan) 1-800-667-9886

Public Legal Education Association of Saskatchewan (PLEA)
A website sponsored by injured parties of potential interest: www.againstnofault.com

Yukon

Law Society of Yukon (YLS)

Tel: 867-668-4231
Fax: 867-667-7556
Email: lsy@yknet.yk.ca

Also has Lawyer Referral Service which can be contacted through the Law Society.

- Please note this list is a work in progress. If you find any inaccuracies or it is not up to date, please let us know and if you are able, send us the updated information at mary.lynch@dal.ca.

Thank you