

PSYCHOLOGICAL INJURIES

It can be challenging to examine a claim if it involves a psychiatric or psychological issue. An adjuster may need guidance from professionals with expertise in mental disorders and from court decisions on causation and foreseeability.

When faced with claimants who allege they are suffering from psychological or psychiatric injuries, it is important that adjusters understand the nature of such injuries and how they are dealt with by the courts.

Everyone knows what it is to be stressed, to lose sleep as a result of anxiety, to be upset and, perhaps, even depressed when an injury interferes with daily activities. For the majority of individuals, life resumes as normal once the stressor or circumstance passes. However, for others, this is sometimes not the case.

Arguably, adjusting claims that involve emotional or psychological issues can be difficult because

of one's own experiences with the issues raised by claimants. Adjusters may find themselves asking why payment should be made for stress and anxiety, when everyone in the world faces these. Or, otherwise, the question may be formulated as to why the person cannot simply move on with his or her life.

NATURE OF PSYCHOLOGICAL AND PSYCHIATRIC INJURIES

Recent years have seen a movement towards opening a dialogue about mental health. The insurance industry has experienced a commensurate increase over the years in claims for psychological and psychiatric injuries (hereinafter referred to as "psychological injuries"). The challenge, of course, is with assessing the validity and extent of the injury, as well as dealing with subjective reports, as opposed to an objective measure - such as an X-ray evidencing a broken bone.

The cause of a psychological injury can be organic, stemming from a head trauma, which leads to functional changes in the brain. Otherwise, it can result from a relationship with pain experience, such as where, for example, day-to-day activities are restricted, causing psychological distress, writes Statistics Canada's Heather Gilmour, in a study - Chronic Pain, Activity Restriction and Flourishing Mental Health - published in Health Reports, a journal of StatsCan's Health Analysis Division.

Of course, it is accepted that psychological injuries are also capable of standing alone, whereby a claimant may not experience any physical sequelae, but psychological injuries are apparent.

DEFINITIONS

The fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) provides a catalogue of disorders and the criteria for diagnosing them. Enlisting the DSM-V here, the following are often encountered by claims adjusters:

- **Post-Traumatic Stress Disorder:** PTSD may be identified where there is exposure to actual or threatened death, serious injury or sexual violation, whether directly experienced,

witnessed, or the exposure is to a close family member or friend. The individual will often suffer significant distress or impairment in social interactions, capacity to work, or other important areas of functioning, notes DSM-V.

- **Chronic Pain:** Referred to in the DSM-V as pain disorder, chronic pain is attributed to a combination of factors, including somatic, psychological and environmental influences. In 2011-2012, an estimated six million Canadians aged 18 or older (22%) reported that they were suffering from chronic pain, StatsCan's Gilmour reports. Corresponding with chronic pain reports are increased reports of mental health issues, which has been attributed to, at least in part, restrictions in day-to-day activities, she adds.

- **Depressive Disorders:** Depressive disorders can be caused by trauma. Among other things, these can lead to extreme anxiety, and psychoses, when untreated. Generally, for a major depressive episode, there will be significant distress or impairment in social, occupational, and/or other important areas of life.

- **Anxiety Disorders:** Anxiety disorders may be expressed as agoraphobia, specific phobias, social anxiety disorder, or panic attacks. This non-exhaustive list offers some insight into the manner in which anxiety may be expressed.

EXPERT REPORTS

The validity of a psychological injury can only be determined and diagnosed by enlisting a trained professional who can administer and interpret standardized assessment measures, and who can verify the presenting complaints and/or the claimant's self-reports. In most cases, an expert report will clarify the nature and extent of the psychological injury and, potentially, expose injury-amplification and/or malingering.

As an adjuster, determining if and when to retain an expert includes a consideration of the following issues: the stage of the proceedings; whether the claimant/plaintiff has already obtained a report that requires a rebuttal; the kind of expert to be retained; the instructions to be given to the expert; and the cost associated with obtaining the report. There may be other factors at play, but the analysis comes down to one of cost versus benefit, and will generally have the effect of either assisting with negotiations in the event that the result is unfavourable to the claimant, or otherwise assist the adjuster in properly assessing the claim.

PSYCHIATRIC INJURIES AND THE COURTS

Permanent, serious and important impairment

In the context of motor vehicle accidents, as with physical injuries, Ontario's Insurance Act stipulates that a psychological injury must constitute a permanent and serious impairment of an important function(s) in order to entitle a claimant to claim for damages. It was not until the mid-1990s that, in Ontario, psychological injuries were expressly recognized in the Insurance Act and incorporated into the "threshold" question as to whether or not a plaintiff will be entitled to recover damages.

Where prognosis is poor and improvement unlikely, the element of "permanence" will usually be established. "Importance" is generally considered in light of the circumstances of the claimant, including a consideration of the impact upon his/her way of life.

Finally, "seriousness" is generally given its literal meaning, and will be established where the permanence and importance of the injury are found to seriously impact upon day-to-day activities.

Causation and Foreseeability

The Supreme Court of Canada's decision in *Mustapha v. Culligan of Canada Ltd.*, released May 22, 2008, remains the seminal case that

deals with psychological injuries and, specifically, nervous shock. There, no car accident was to blame for the plaintiff's psychological injuries, but he suffered immensely when he found a dead fly in the bottle of water he had just opened.

The Supreme Court of Canada held that the psychological injuries were not reasonably foreseeable in a person of ordinary fortitude, otherwise known as the "average Joe/Jane". Therefore, the highest court found that the plaintiff was not entitled to collect damages.

The essential elements of negligence require that the damages sustained be causally linked to the breach of a duty of care. These elements are as follows:

1. the defendant owed the plaintiff a duty of care;
2. the defendant's behaviour breached the standard of care;
3. the plaintiff sustained damages; and
4. the damages were caused, in fact and in law, by the defendant's breach.

Once it is established that the defendant owed a duty of care, such that he/she/it would be obliged to avoid doing anything that would unreasonably

risk danger to the plaintiff, and the conduct fell below the standard of care in the circumstances, the inquiry turns to the damages sustained by the plaintiff. Of course, psychological injuries are recognized and compensable, but do not come without their challenges when it comes to proof - as the average adjuster, lawyer and judge will say.

In *Mustapha*, the Supreme Court of Canada stated the following with regard to psychological injuries:

...[P]sychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness...The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. ...Quite simply, minor and transient upsets do not constitute personal injury, and hence do not amount to damage.

Once the fact of the injury is proven, the final element is to determine whether damages have

been caused by the breach in fact and in law, each of which require distinct analyses.

To determine causation in law, the question is whether it was foreseeable that a person of ordinary fortitude ("Joe/Jane", as above) would suffer the same injuries, that is, was it a "real risk". This is referred to in the case law as "remoteness", and is determined as a matter of law, on an objective basis, the Supreme Court of Canada noted in *Mustapha*.

Causation in fact is a question to be determined by enlisting the "but for" test. As suggested by Ontario's Superior Court of Justice in *Chin-Sang v. Bridson* and by the Court of Appeal for Ontario in *Frazer et al. v. Haukioja*, the "but for" test consists of asking oneself whether but for the tortious conduct (the bad stuff the defendant did), would the injury have occurred in any event? If not, then the "but for" test is made out, and it has been confirmed that the defendant's tortious conduct is a source of injury.

Once a court has ruled that the psychological injuries were foreseeable, meaning that even the average Joe/Jane could reasonably be expected to have sustained them following the bad stuff the

defendant did but should not have done, then the defendant is on the hook for damages.

It is important to note that - as the Court of Appeal for Ontario found in *Frazer v. Haukioja* - the exact injuries sustained by the plaintiff need not be foreseeable, but only that some compensable psychological injury could reasonably follow in the circumstances.

Taken altogether, it is seen that psychological injuries can be tricky to navigate, and are likely to require the input of an expert to be sure of what is being dealt with. Incorporating medical authorities and court rulings may make it easier for adjusters to determine the direction in which they should steer their files.

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