

Dr. Benjamin Clark - Physical Medicine and Rehabilitation

[Guerrero v. Fukuda](#), 2008 CanLII 49158 (ON SC) — 2008-10-01

Superior Court of Justice — Ontario

Legislation

A. Section 267.5(5)

[1] [Section 267.5\(5\)](#) of the [Insurance Act R.S.O. 1990, c.1.8](#) (“the [Insurance Act](#)”) relieves defendants from liability for pain and suffering damages unless the plaintiff has sustained permanent, serious impairment of an important physical, mental or psychological function. By way of observation, I am uncertain as to what other functions might exist relating to the body.

[2] Whiplash may well incorporate all three of these functions to different degrees but the root cause is a physical one emanating from soft tissue, physical injury to the neck and shoulder.

[3] I think we have transcended the era when whiplash, due to the fact that it is often without objective findings, was equated with faking.

[4] A whole specialty in medicine now exists dealing with physical medicine and rehabilitation. This is sometimes referred to as physiatry. Experts in this field are relied upon by litigants often. They do not rely upon the expert for treatment or rehab but rather to determine whether or not the expert believes pain exists.

[5] Pain, and its degree of severity, are subjective and can exist without any objective finding. Calling an expert to say that no objective finding equals no pain is no longer acceptable. That same expert will often *treat* the pain that exists even though it is without objective findings.

The Physiatrist

[24] I reject Dr. Clark’s evidence outright. He was a physiatrist called by the defence. His evidence was a classic example of a highly qualified doctor with a pre-existing bias, appearing as a hired gun to discredit Ms. Montero.

[25] During his short (20 minute) physical examination of the plaintiff in 2005, he found no evidence of restriction nor genuine limitation of movement and noted no tenderness indicated on palpation and “no pain behaviour”.

[26] By the conclusion of his evidence, the existence of Ms. Montero’s pain was acknowledged by Dr. Clark. He attributed it to a pre-existing condition.

[27] While the plaintiff had some pre-existing arthritic condition and pain, Ms. Montero’s present symptoms are not in any way connected to the injuries sustained by her in the accident which was admittedly caused by the defendant driver.

.....
[Degennaro v. Oakville Trafalgar Memorial Hospital](#), 2011 ONCA 319 (CanLII) — 2011-04-26

Court of Appeal for Ontario — Ontario

[9] The appellants called two medical experts: Dr. Benjamin Clark and Dr. Michael Devlin, both physiatrists who treat chronic pain. Prior to the trial, Dr. Devlin examined Ms. Degennaro and reviewed the documentary evidence while Dr. Clark only reviewed the documentary evidence prior to providing his report. These two experts opined that the fibromyalgia was caused by the 2002 motor vehicle accident.

[21] As noted earlier, the appellants called two physicians, Dr. Clark and Dr. Devlin, to give expert evidence on the issue of causation. Both of these physicians were experienced and qualified to give expert evidence on the subject of chronic pain and fibromyalgia. Their opinion was that the fibromyalgia was caused by the 2002 motor vehicle accident.

[22] The appellants submit that the trial judge rejected their evidence and preferred the evidence of the respondents' experts on the basis that the respondents' experts were Ms. Degennaro's treating physicians. This, in the appellants' view, was an error of law. The appellants argue that the fact that an expert is a treating physician is not a proper basis to prefer that evidence and, in fact, should lead a court to assign less weight to that expert's evidence and not more. Cases such as *Williams (Litigation Guardian of) v. Bowler*, [2005] O.T.C. 680 (S.C.), and *Greer v. Horton* (1996), 38 C.C.L.I. (2d) 251 (Ont. Gen. Div.), stand for the proposition that a treating physician who has a relationship with the plaintiff may not have the same objectivity as an independent expert. The appellants maintain that rejecting the evidence of independent experts because they are not treating physicians, as the trial judge did in this case, creates unacceptable unfairness for defendants. Defendants are not permitted to speak with, let alone retain, a plaintiff's treating physicians. This places defendants in the position where they will always be at a disadvantage as they can never tender treating physicians as experts.

[23] I would not give effect to this submission. The trial judge did not, as the appellants suggest, simply reject the appellants' experts solely on the basis that they were not the treating physicians. In reaching his decision to prefer the respondents' experts, the trial judge considered a number of factors. First, as the trial judge explained, the appellants' own expert, Dr. Clark, agreed on cross-examination that treating physicians were in a better position to make a diagnosis of fibromyalgia than a doctor conducting a paper review. Further, the trial judge found the qualifications of one of the respondents' expert on chronic pain, Dr. Ko, to be superior to those of the appellants' experts. Also, there were problems with the evidence of both of the appellants' experts. Dr. Clark acknowledged in his testimony that the hospital fall was a material cause of Ms. Degennaro's fibromyalgia and Dr. Devlin conceded on cross-examination that, when he prepared his opinion, he had not been aware that some of Ms. Degennaro's upper body symptoms had been observed before the car accident occurred. There was, therefore, ample basis for the trial judge's decision to prefer the opinion of the respondents' experts.

[24] Finally, I do not view the cases cited by the appellants as providing support for their position. These cases simply provide that where a treating physician has a personal interest in the outcome of the case or lacks the objectivity and independence essential to a medical expert, this may adversely impact the weight to be given to the expert's testimony. There was no suggestion that the experts who testified on behalf of the respondents lacked objectivity or independence.

.....

.....

S.H. and Dominion of Canada Arbitration, 2009-02-26

Dr. Benjamin Clark, a physiatrist who examined Mrs. H for an insurer's examination ("IE") on behalf of Dominion in October 2006, also felt Mrs. H should be capable of independent dressing. The purpose of Dr. Clark's assessment was to determine whether Mrs. H qualified for a non-earner benefit, which in turn required an opinion about whether she suffered an impairment as a result of the accident.

Dr. Clark testified at the hearing. He concluded from his review of documents provided and his examination of Mrs. H that she "possibly" sustained minor soft tissue injuries to her right upper trapezius and lumbar spine but had fully recovered, and did not suffer a complete inability to carry on a normal life as a direct result of the accident. I accept his opinion that Mrs. H had recovered to her pre-accident condition by the time he saw her and that she did not meet the non-earner test. However, I found Dr. Clark's characterisation of Mrs. H's soft tissue injuries as "minor" to be at odds with the opinions of Dr. Magliocco and Dr. Dobson, which were based on several visits over time and were contemporaneous with the accident. I also find Dr.

Clark ignored Mrs. H's reported pain complaints and failed to address the effects of new soft tissue injuries in someone already suffering from a stroke and previous disabling chronic pain. I find these factors undermined his opinion that Mrs. H was able to manage dressing herself.

Dr. Clark testified that, based on his examination of Mrs. H and his experience as a rehabilitation doctor, he felt she could use her right hand as an assist for light functional tasks, and she was capable, although with difficulty, of dressing and undressing herself, including getting into and out of a bathing suit. He felt she had been capable of this as early as June 30, 2003, based on a note documenting an assessment conducted by an OT and a physiotherapist on that date, at Oakville-Trafalgar Hospital, where Mrs. H received rehabilitation after her stroke. [See note 40 below] The note states Mrs. H was able, with minimal assistance but with direction, to "thread" her right upper extremity (into a sleeve, presumably), and that she was "independent to pull skirt over head with set-up" and was "independent to button using left upper extremity." She also required "supervision for clothing management." Dr. Clark testified that Mrs. H should have

been capable of even more after recovery and rehabilitation. The one-page "Physiotherapy Discharge Summary" by the same OT and physiotherapist dated August 8, 2003 [See note 41 below] does not mention dressing, but, unlike the first report, there is no heading on the discharge summary particularly for dressing...

...I do not agree that even someone with the experience and qualifications of Dr. Clark could confidently conclude from such sparse and cryptic information that Mrs. H could fully manage dressing and undressing without assistance.

..