

DISABILITY AND THE NEWS

** On Feb. 20, the Ontario government announced it will introduce a new bill this spring to amend the Ontario Human Rights Commission(OHRC) with the aim of speeding up the enforcement of human rights. The government's bill, the details of which have not been made public, will remove the OHRC's lead mandate to investigate and prosecute discrimination complaints before the Human Rights Tribunal. The government says that discrimination victims will file and present their own cases to the Tribunal, which rules on these complaints. The government has made vague statements about providing legal advice and supports to discrimination victims. The AODA Alliance, a non-partisan grassroots coalition of people and community organizations from Ontario's disability community, believes that the government's planned changes are seriously flawed, and has released a discussion paper on the subject. For details, visit <http://www.aodaalliance.org> .

** Vancouver's Mayor a Guest on the Rick Mercer Report ** On the April 4th episode, Rick toured Vancouver with Mayor Sam Sullivan, who has quadriplegia, and chatted about politics, hiking and the closing ceremonies at the Turin Olympics. View the clip at <http://www.cbc.ca/mercerreport/> .

** Ottawa to Host National Wheelchair Marathon Championships ** Ottawa Marathon organizers recently announced that the first Canadian Wheelchair Marathon Championships will be held during the Ottawa Race Weekend, on May 28. Paralympian Jeff Adams has already confirmed his participation. For more info, visit http://www.ncm.ca/releases.html?page=releases&lang_id=1&page_id=66&page=1&news_id=357

** National Arts Initiative Begins in Calgary ** Many of Canada's leading presenters of disability arts and culture were in Calgary on Mar. 16 for the inaugural meeting of Canada's Disability Arts & Culture Network. Stage Left Productions hosted this gathering of artists representing Canada's disability community, including Catherine Frazee, director of Ryerson's Institute on Disability Arts and Culture; Geoff McMurchy, producer of Canada's first disability arts festival; David Roche, director of The Society for Disability Arts and Culture and an acclaimed solo artist, and many others. The purpose of the meeting was to create a national strategy through which disability arts and culture can continue to garner the respect it merits across Canada and internationally. For more info about Stage Left, visit <http://www.stage-left.org> .

** Ontario Government Announces Improved Supports for Adults with Developmental Disabilities ** In March, the McGuinty government announced that it plans to strengthen supports for adults with developmental disabilities by creating four Community Networks of Specialized Care. These are teams of professionals, such as behaviour therapists, social workers, nurses and psychologists. For more information, visit <http://www.cfcs.gov.on.ca/CFCS/en/newsRoom/newsReleases/060302.htm>

** Ontario Government Launches Mentoring Partnership for Young Adults With A Developmental Disability ** The Passport Mentoring Initiative is designed to offer guidance, skills and inspiration to achieve success in life after school.

Visit <http://www.cfcs.gov.on.ca/CFCS/en/newsRoom/newsReleases/060307.htm>

The information above originally appeared in the April 2006 issue of The EnableLinker (www.abilities.ca/Ezine/Main.html).

DISABILITY & THE LAW

Canada relaxes its policy on accepting immigrants with disabilities

By Martin Saidla

In December's *Hilewitz* and *De Jong* cases (heard together), the Supreme Court of Canada had to decide a difficult question, relating not only to disability rights, but to the broader issue (brought up in the recent *Chaoulli* case) of the unintended consequences of state funding of social services. The main question was: If our immigration legislation excludes people with disabilities based on the fact that they would have an entitlement to expensive social services, is it fair to deny them a chance to waive that entitlement? Should people with financial resources sufficient to pay for the care of their disabled children be able to get around the medical-inadmissibility criteria of the *Immigration and Refugee Protection Act* (IRPA)?

Both cases involved individuals, applying to immigrate to Canada under the "Independent investor" and "self-employed" categories respectively, who had developmentally delayed children. Under the IRPA, individuals who "might reasonably be expected to cause excessive demands on health or social services" are inadmissible, with the decision being made by a "medical officer". In both cases, the applicants' children were deemed to be inadmissible for this reason, and hence the applicants' applications were refused. This was done in spite of assurances by the parents that they would pay for private schooling and care for their children. Mr Hilewitz even promised to set up a small business in order to create a job specifically for his son. The reasoning behind the refusals was that the children, once admitted to Canada, would be *entitled* to social services. Given the lack of a means to disentitle them, the risk being run was that the parents would go back on their word (or fall on financial hard times) and avail themselves of those services.

On looking at how the decision was made, however, it looks to be more a result of flawed process than of a mistake by any one person. Medical officers in both cases were initially only asked to perform a medical exam. In both cases, they found that the children concerned would likely place excessive demands on social services (working under the assumption that government-funded services are always used). Given an opportunity to respond to this medical report, both parents sent letters explaining their respective financial situations, willingness and ability to pay for their children's private schooling. The visa officers forwarded these letters to the medical officers, who in turn claimed that they were only meant to look at medical criteria, not financial ones. Based on this view, both applications were refused by the visa officer, citing the medical officer's opinion, and the fact that the visa officers were only allowed to apply the medical officer's decision. In effect, it looks as if the Act intended that non-medical factors be taken into account, but the two people involved in the decision each thought it was the other's job to look at such factors.

In order to determine legislative intent, Justice Abella made the interesting decision to look at the evolution of immigration legislation in Canada. In early legislation, certain classes of disabled people were prohibited, but an allowance was made in the case that the person's family made an undertaking to provide for them. This gradually shifted to a system whereby prohibited categories were removed, and a shift to holistic evaluations put in place. In the process, the specific wording regarding family support was removed. In the committee minutes discussing the making of regulations in 1977, it was specifically

mentioned that non-medical factors should be taken into account in medical evaluations. Unfortunately, this wording did not make it into the regulations, nor into the wording of the revised Act, leaving an unfortunate vagueness. The court ruled that the intent was clearly that the legislature intended for a holistic decision be made, and hence sided with the Appellants.

There is an interesting postscript to this story, as well. Worth noting is that the new version of this section (S.C. 2001, c. 27, s.38) does not feature the language specifying that a *medical* officer must make the determination of medical inadmissibility. Read with section 20 of the *Immigration and Refugee Protection Regulations* (SOR 2002-227), the implication now is that the onus is on the *visa* officer to make the final, holistic decision (presumably taking into account thorny questions such as the willingness/ability of the parents to pay for their children's care). The timing of this change (while the Hilewitz and De Jong cases were making their way through the courts) seems to indicate that the government realized their mistake rather early, and decided to quietly remedy it, while at the same time denying it in the courts.

Still, in the end, the Hilewitzes and De Jongs have scored a hard-won victory not only for immigrants with disabled children, but likely for disabled immigrants in general. That immigration officials are now obliged to look at the "big picture", and not merely the applicant's disability, is a certain progress in being a welcoming country to hard-working people who will certainly contribute to our economy. Vive la différence!

Martin Saidlaw is a second year law student at the University of Ottawa.

To sue or be sued as a disabled individual

By: Tate DeCaro

What is a "Person under a disability"?

For the purposes of this discussion, "persons under a disability" include minors (under the age of 18) and persons who are mentally "incapable of understanding proceedings and instructing counsel on an issue in those proceedings" (as stated in Rule 7 of the Rules of Civil Procedure).

Can these individuals initiate and defend lawsuits?

Under the common law, individuals who are not of "full age and capacity" have traditionally been excluded from the litigation process. They have been denied the right to initiate and defend lawsuits on their own. They are not, however, denied the right to sue and to be sued as long as they are assisted by a mentally competent adult or a public body (i.e., a government official). The reason for this is that children and individuals who are mentally disabled may not have the capacity to understand and engage in litigation on their own. Outlined in Rule 7 of the Rules of Civil Procedure are the guidelines to be followed by the individual, called a Litigation Guardian, who would assist such a person in a lawsuit. This Litigation Guardian has the power to do anything that a party in a proceeding would be required or authorized to do. It is also expected that they will "diligently attend to the interests of the person ... and take all steps necessary for the protection of those interests."

Who can be a Litigation Guardian for the plaintiff?

Any individual who is not under a disability may act as the Litigation Guardian of a plaintiff in a lawsuit, without receiving a court order appointing them. However, the individual who is seeking this appointment must file a certificate or a sworn affidavit (a written statement in which a person affirms

that the information they are presenting is true) in which they consent to act as guardian, set out the nature of the disability, and undertake to be responsible for costs awarded against him/her or against the party with a disability. They must also prove that they are the proper person to act as Litigation Guardian. A situation where an individual might not be appropriate is where there is a conflict of interest. For example, where the person seeking appointment as Litigation Guardian is a relative of the defendant in the lawsuit, or if they had something to gain or lose from the lawsuit itself, they could not be expected to properly represent the interests of the disabled plaintiff. The person seeking appointment may be a friend or relative who is looking out for the best interests of the disabled person. It may also be an existing representative who was already appointed or chosen to manage the affairs of the disabled person, such as a guardian or attorney. If, for example, the disabled person had previously appointed an attorney to manage his/her affairs under a power of attorney (POA), that attorney may act as Litigation Guardian, but in this case they may only do so if that power was included in the original POA document. In a situation where the Litigation Guardian is a relative or friend (i.e., not an appointed government official, to be discussed later) the disabled party must also be represented by a solicitor.

Who can be a Litigation Guardian for the defendant?

The rules for who may represent the defendant are stricter than for the plaintiff. This is because there is generally more at stake for the defendant in a lawsuit because the proceeding was brought against them to accuse them of some wrongdoing. The courts want to be sure that the individual representing the defendant is experienced with the court system and can help the disabled party defend against the allegations made. Therefore, the guardian for the defendant is generally appointed by the court, unless the defendant already has a guardian or attorney who is authorized to act on their behalf. The person who applies for the position can be a friend or relative, and must file a certificate or affidavit, as in the case of a guardian for the plaintiff. However, the person applying for this position for the defendant must also file a notice of motion to the court asking to be appointed. As is the case for the guardian for a plaintiff, they must show that they are the proper person to represent the disabled individual and that there is no conflict of interest.

What if no one volunteers or applies to be Litigation Guardian?

If no one comes forward to seek the position of Litigation Guardian for a plaintiff or defendant, the court will appoint a government official, known as either a Children's Lawyer, in the case of minors, or a Public Guardian and Trustee, for a mentally disabled person. In this situation, the disabled person does not need to be additionally represented by a solicitor.

What if you want to remove someone as Litigation Guardian?

Being a family member or friend may not necessarily mean that the Litigation Guardian has the best interests of the disabled person at heart, or even that they are fully capable of performing the tasks of the guardian. In addition, a situation may change in which a previously mentally incapable person becomes capable of handling his/her own affairs. In these situations there are provisions for removal of the Litigation Guardian. If the court concludes that the Litigation Guardian is not acting in the best interests of the party or is not capable of representing that party, they may remove the guardian and appoint a Children's Lawyer, Public Guardian and Trustee, or any other person they see fit. If the disabled person regains capacity to act on their own behalf, the Litigation Guardian or the previously disabled party may make a motion to the court and ask to continue the lawsuit without the assistance of the guardian.

Settlement of the lawsuit...

A Litigation Guardian does not have the authority to settle a proceeding on behalf of the disabled party without the approval of the court. This ensures that the disabled parties are not taken advantage of. If such a settlement is made without the court's approval, it is not binding on the parties. Approval is obtained in two different ways, depending on whether settlement is reached before or after court proceedings for the lawsuit have begun. If proceedings in the lawsuit have not yet commenced, the parties will file an application with the judge to ask for approval of the terms of the settlement. If proceedings have commenced, the parties must make a motion to the court, accompanied by a.) an affidavit of the Litigation Guardian setting out the facts and reasons for supporting the settlement, and b.) an affidavit of the solicitor setting out their position with regards to the settlement. If the judge has reservations about approving the settlement, they may forward the information to a Children's Lawyer or Public Guardian and Trustee, who will investigate and report back to the court with recommendations.

Conclusion

Clearly, the system set up for disabled individuals is intended to protect minors or mentally incapable persons from entering into lawsuits that they may be unable to understand and execute. The job of the Litigation Guardian, Children's Lawyer or Public Guardian and Trustee is therefore to represent the interests of these individuals as plaintiff or defendant to the best of their ability.

-All information was gathered from the Rules of Civil Procedure, located in:
Carthy, J., Millar, W.A., and Cowan, J.G. (2005). Ontario Annual Practice 2005-2006: Student Edition,
Aurora, ON: Canada Law Book Inc.

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PERSONAL ESSAYS:

Myths my father told me: Growing up Hard of Hearing

By Michel David

When I was fifteen, I was diagnosed with a hearing loss that required me to start using a hearing aid. I now wear a Cochlear Implant and even though it has been three years since I received it, I am still getting used to hearing and understanding what I hear. It is a marvelous experience to learn to hear again. So much different than learning to adjust to hearing loss because, for once in my life I don't feel I have insurmountable barriers to cross.

As a teenager I faced two daunting tasks (not forgetting the third task of simply adjusting to being a teenager). The first was to make a personal adjustment to hearing loss that required technical equipment, supportive counseling and a certain amount of chutzpah.

The second task was even more forbidding, I had to learn the truth about the numerous myths that society as a rule accept simply because they are not aware of a better answer.

Gentle Readers, help me bury these myths:

Myth #1: Hearing impaired is the “politically correct” term to use. FALSE, though some people call themselves hearing impaired, the vast majority prefer to be called what they are based on their preferred mode of communication. If they use speech and hearing aids they call themselves hard of hearing. If they prefer sign language as their preferred mode of communication they call themselves Deaf (with a capital D). National and International associations for these two groups have endorsed this nomenclature and do not support the use of the term hearing impaired which has negative connotations.

Myth #2: Communication in employment, education and leisure situations is often impossible to overcome and expensive when it is. FALSE, there is hardly a situation today where communication difficulties cannot be resolved, in an efficient and economical manner. Hard of hearing persons avail themselves of the newest wireless, internet-based and desktop technologies such as Cell Phones, Web and Video Conferencing, Personal Data Assistants (PDAs), Email, Instant Messengers, Speech Recognition Technology, TTYs (specialty telephones) that can also be server based and last but not least Computer Assisted Realtime Translation (CART) which allows them to understand every word spoken in workshops, conferences and even teleconferences. Technology is evolving in leaps and bounds, and the hard of hearing is reaping the benefits.

Myth #3: “Hard of Hearing? Oh they don’t need special groups, they can fit in anywhere”. FALSE, though many hard of hearing persons can function and participate in many mainstream activities, not all can or want to do this. It depends a great deal on the type and severity of their hearing loss and whether technology is provided to make the facility or group accessible. Some persons prefer to socialize with other hard of hearing persons because of their common, experiences, needs and communication methods. Hard of hearing groups go by many names but in most cases are NOT part of the Deaf community or Deaf Centres. To make it easier to find a hard of hearing club or support group, the Canadian Hard of Hearing Association (CHHA) has a webpage that lists dozens of groups all over Canada. <http://www.chha.ca/chha/projects-groups.php> . CHHA is a consumer-based organization formed by and for hard of hearing and deafened Canadians. It aims to provide information about issues relative to hard of hearing and deafened persons and to provide solutions to these challenges.

Myth #4: “If you need information about hearing loss ask your Doctor”. FALSE, most doctors can tell you all about the physiological aspects of hearing loss. What we in the trade call the “plumbing parts”. You will be hard pressed however to find one, even a specialist (ENT) who will be able to tell you: What support and counselling services are available in the community to help you adjust to hearing loss; What types of technical devices are available, their cost and where to get financial help to purchase them; What employment, educational and leisure accommodations you will require to continue to all that life has to offer. CHHA once again has answers for you. The CHHA website provides information that can be downloaded in PDF format for distribution to individuals by professionals such as Doctors, Hearing Instrument Practitioners and Audiologists or, by concerned family and friends.

The A to Z list (<http://www.chha.ca/chha/projects-atoz.php>) was published in response to a national survey conducted by CHHA in the summer of 2005. One (1) out of four (4) hard of hearing consumers

noted that they were not receiving the information they required to adjust to their hearing loss. The most frequently sought after information was funding for technical devices, aural rehabilitation and counselling services.

Myth #5: “Statistics about persons with hearing loss are non-existent”. FALSE, the Canadian Hard of Hearing Association (CHHA) has released two reports based on its national surveys from the summer of 2005.

The 2005 Canadian Hearing Health Care Professionals Survey Report, and
The 2005 Canadian Hard of Hearing Consumers Survey Report

The surveys were conducted to ascertain the type of information consumers with hearing loss received at the early entry points into the rehabilitation stream, and the gaps and obstacles consumers faced dealing with Hearing Health Care Professionals. The reports can be read or downloaded as PDF versions at <http://www.chha.ca/chha/projects-surveys.php>. Other statistics covering everything from the attitude and beliefs about persons with hearing loss to the price of assistive devices are also available at: <http://www.chha.ca/chha/projects-mathematics.php>.

Hearing loss is a challenge; don't make it harder by spreading myths.

Michel David was born in Ottawa and acquired a hearing loss at the age of 15 of unknown etiology. He became profoundly deaf at the age of 20. In 2002 Michel received a Cochlear Implant. Over the years he has worked for the Line 1000 Employment Services, Vocational Rehabilitation Services (MCSS Ontario) and the Canadian Hearing Society where he held various positions including social service, employment, mental health and vocational rehabilitation counselor. Michel was also Regional Director of the CHS office in Ottawa. Currently, Michel is Project Coordinator at the Canadian Hard of Hearing Association and managing their project, Hearing Awareness – A Cornerstone in Canada's Social Fabric.

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Not my kid, thanks.

By Caroline Schulz

In a fast paced society like ours, goods and services are expected to meet a certain standard of quality: the ipod must play music; the latte must be foamy. But how far can we stretch this mentality? Are our children commodities to be chosen and regulated?

The New York Times magazine ran a story last month about Donna Branca, a young healthy woman who gave birth to a severely disabled child, and is now suing her obstetrician for negligence for having deprived her of the right to abort her fetus.

Prenatal testing has allowed doctors to determine with some certainty, whether a fetus will be deaf, blind, have Down syndrome, cystic fibrosis, Tay-Sachs, fragile X- the list goes on. Mrs. Branca had an unusual pregnancy: she bled when she was in the first trimester and a sonogram revealed that her fetus was considerably underweight. Still her doctors insisted that there was no reason to worry, no reason to do any prenatal testing. As affirmed by the Brancas, had they known beforehand that their child was likely disabled, they would have aborted.

The troubling part of this scenario is not the question of abortion in general, but rather the fact that these parents wanted to abort a *specific* child, their *disabled* child. And they are not alone. Medical professionals admit that there is an “automatic assumption” to abort when a fetus is found to have a disability. Why?

Of course, every parent wants what’s “best” for his or her child. A healthy baby seems likely to lead an easier and therefore happier life. But how much of that impression is accurate, and how much is a result of prejudice? Studies have shown that families with disabled children are not more stressed than the average family. What’s more, countless persons with so-called disabilities have gone on to lead very happy and successful lives; consider Galileo (visually impaired), Gustave Flaubert (epilepsy), Henry Ford (learning disability), Carrie Fisher (bipolar), just to name a few. It is difficult to say whether *severely* disabled persons enjoy their lives. However, that probably varies from individual to individual, as it does for persons without a handicap.

The Brancas have two other children now, and they have institutionalized A.J, their child with Wolf-Hirschhorn syndrome, a rare condition that results in severe mental and physical handicap. However, they visit him often and, as the New York Times writer Elizabeth Weil said about them, “they love the child they wish they hadn’t had”.

Ultimately, the question of prenatal testing and choosing to abort one’s disabled fetus is too complex an issue to resolve—perhaps ever. However, some things are clear. The world is an interesting place because of the diverse people that inhabit it--different cultures, different ages, different abilities. We learn from one another’s varying experiences and become more empathetic and perceptive as a result. Our culture needs to get over its obsession with “perfectly” packaged goods, and realize that children are not manufactured with a warranty. And thank goodness for that, because we don’t want to live in Gattica.

Caroline Schulz is a second year law student at the University of Ottawa.

DISABILITY AND EMPLOYMENT

Finding of discrimination toward truck driver with cerebral palsy will stand

By Deana Driver

Regina

Although the City of Regina has concerns about a Saskatchewan Court of Appeal decision that upheld a finding of discrimination against a truck driver with cerebral palsy, there will be no further appeal of the matter, said the city's counsel.

One of the two major concerns for the City has to do with the accommodation of workers with disabilities, "accommodation to the point of undue hardship on the employer," said Gail Wartman, counsel for the City of Regina in this case.

"The other big area is the law around resignation that has developed over many years of arbitral jurisprudence ... Now with this finding of discrimination, the whole previous understanding of the law around resignation has been, I think, changed," she said.

"Where the tribunal and the Court of Queen's Bench and the Court of Appeal have basically said that because discrimination was established, the remedies in the Human Rights Code set in to restore the person to remove the harm that's been done, to where he would have been but for the discrimination, and that in this case includes undoing an otherwise legitimate resignation."

However, the City will not be seeking leave to appeal to the Supreme Court of Canada. "Now we have some issues in terms of quantification. We're going to have to go back before the (Human Rights) tribunal to discuss those," she said.

The Saskatchewan Court of Appeal in Regina (City) v. Kivela ([2006 SKCA 38](#)) ruled that a human rights tribunal and lower court made no errors in determining that Gary Wayne Kivela was discriminated against on the basis of his disability after being unable to attain a permanent truck driver position. The appeal by the City and CUPE was dismissed except for one narrow point that the Queen's Bench judge erred in not instructing the tribunal to re-determine its award for injured feelings in light of the finding that it should not have taken into account any allegations of harassment.

The tribunal cited the SCC's Meiorin" decision, to determine that Kivela had established a prima facie case of discrimination "in that the seniority system embedded in the collective agreement worked to Mr. Kivela's disadvantage because of his disability," said court documents.

Appeal Court Justices Gene Anne Smith, Nicholas Sherstobitoff and Gary Lane concluded that the tribunal was correct in ruling the City and CUPE Local 21 had a duty to act, at the time the discriminatory effect of the seniority system was discovered, to correct the situation that then existed, and ensure that the workplace standards in the collective agreements did not adversely affect Kivela based on his disability.

The City had made several accommodations for Kivela including offering him other jobs but he declined those saying he was a professional truck driver. Kivela was receiving medical treatment for depression and stress when he was denied benefits under The Workers' Compensation Act, 1979 for his stress and decided to resign in May 1999 so that he could access a portion of his locked-in pension. He filed his complaints under Part II of The Saskatchewan Human Rights Code, S.S. 1979, against the City of Regina on November 3, 2000 and against the union on September 21, 2001.

The tribunal which heard the case in 2003 said that the city's efforts of accommodation "were 'too little, too late' to reverse the systemic discrimination experienced by Mr. Kivela over the years..."

The courts disagreed with the appellants' view that they were ordered to implement a 'retroactive' accommodation. The remedies implemented by the appellants in 1996 were only "a partial remedy[...]one which would prevent future erosion of his position, but did nothing to repair the damage already done."

The appeal court did not accept the appellants' argument relying on arbitral law dealing with the effect of a voluntary resignation to a claim for relief, including the remedy of reinstatement, under a collective bargaining agreement.

Although the court had sympathy for the appellants' argument that the chambers judge should have considered the overall reasonableness of the tribunal's large award to Kivela based on the circumstances of the case, the appeal court said that "Section 31.3 of the Code gives the tribunal wide discretion to rectify or compensate any injury caused by discrimination."

Peter J. Barnacle was counsel for Canadian Union of Public Employees Local 21 and Milton C. Woodard represented the Saskatchewan Human Rights Commission.

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[STUDIES IN DISABILITY](#)

By Martin Saidlaw

Introduction

Chronic Fatigue Syndrome (CFS) and its close cousin Fibromyalgia (FM) are both debilitating conditions about which very little is known. As such, they present particular legal challenges in comparison with other diseases and disabilities. In this article I will briefly describe CFS, and then describe a few cases that highlight the legal issues surrounding this condition.

Symptoms and possible causes

There are various definitions used by doctors to define CFS. The main common factor is severe debilitating fatigue lasting at least six months, although other symptoms can include swollen lymph nodes, sore throat, headache, generalized muscle pain, sleep disorders and cognitive impairment. As well, CFS patients who are allergy sufferers display a 25-50% higher rate of reactivity than the general population¹. The other common factor is that the above symptoms must not be explicable by some other, better understood disease; Psychiatric and physiological Diseases with similar symptoms, such as hypothyroidism, anemia², major depression and substance addiction³ exclude a diagnosis of CFS. Therefore, CFS is by definition a catch-all for *unexplained* severe chronic fatigue.

This fact might explain why so many different causes have been attributed to CFS; It may in fact be a definition that encompasses several different underlying conditions, some psychiatric, some physiological and some mixed⁴. As well, dozens of causes have been postulated, from viral infections to immune disorders to neurological abnormalities⁵. As we will see below, these ontological problems, especially given the fact that CFS can emerge after an accident or traumatic event, can make for very difficult legal issues in employment, insurance, and criminal law.

CFS is also very commonly associated with Fibromyalgia (FM), a generalized chronic pain disorder. Although they are diagnostically two different diseases, they often occur together. The majority of CFS sufferers also have FM, and conversely, 70% of FM sufferers could be said to have CFS⁶. Fibromyalgia, for its part, presents similar difficulties in terms of diagnosis, and both prompt similar accusations that they may be at least partially psychiatric or psychosomatic⁷

Whatever the controversy about the causes of CFS, whether it's psychiatric, physiological, or (most likely) some combination of the two, the important part is that the suffering of those afflicted with CFS is very real. As well as being often unable to work or even leave the house, CFS sufferers report significantly diminished quality of life, as well as exhibiting depressive symptoms⁸. What's more, in one particularly severe case, CFS was listed by a coroner as a cause of a death-by-dehydration (albeit with other complicating factors)⁹.

Cases

Because of controversy over diagnoses of CFS, it presents some particular legal challenges, specifically relating to proof of disability. This has led to several interesting cases in recent years. Here I will review a few prominent ones.

*Smyth v Gill*¹⁰ – The plaintiff in this case developed Fibromyalgia (FM) after a motor vehicle accident, and was subsequently fired from her job because of absenteeism. The plaintiff had a previous medical history of various complaints. One of the major issues to come out of this was whether the accident constituted to the development of FM, or whether her previous medical history implied that FM would have developed anyway. The court found that this was a “crumbling skull” case with respect to the FM, as opposed to a thin-skull case. Still, the evidence for either side was very ambiguous. Given the difficulty of diagnosis and lack of knowledge about causation with regards to FM and CFS, cases such as this one have the potential to be, as in this case, questions of one doctor's word versus another's, with some expert witness openly admitting that they simply can't help.

*Fidler v Sun Life*¹¹ - This case, for which an appeal to the Supreme Court was heard in December (judgement forthcoming), is just one example of a string of cases¹² in which insurers have used the lack of knowledge around CFS to deny disability benefits to sufferers. In this particular case, Fidler had been diagnosed with CFS after a kidney infection, and had been unable to work for several years. Sun Life, which had been providing disability benefits, ceased to pay them after seeing surveillance showing her engaging in errands over several days. Sun Life denied such benefits for five years during a legal and administrative struggle, and then finally capitulated a week before the trial was to commence. Sun Life's

behaviour in this regard was found to merit punitive damages. What's more, the court found that the lack of knowledge around CFS, and the difficulty of diagnosis, did not mean that the insurer could simply place the onus on the insured to prove her disability. The duty of good faith owed to Ms Fidler, in effect, meant that Sun Life should have been open about their reasons for their withholding of benefits, and given her clear guidelines on what kind of evidence they would accept. As I mentioned, though, the story is not over: The judgement from Sun Life's appeal to the Supreme Court should be coming out very soon; stay tuned!

*R v Newby*¹³. In this slightly more dubious case, Newby, a once-successful Calgary oil-and-gas lawyer, plead guilty to a charge of perpetrating a fraud worth \$870,000 on the Alberta government. He argued that CFS (which he and his doctors described as a “virus”¹⁴) had reduced his mental functioning to that of a seven-year-old, and that he simply did not have the capacity to exercise good judgement or plan for the future. In addition, he argued that he had been undergoing successful treatment in California and would be likely to commit suicide if sent to prison. The result: A suspended sentence.

Conclusion

CFS is a devastating condition for those who suffer from it, and the prognosis is often not good. It can be very long-lasting, and the various treatments tried have achieved only limited success¹⁵. Furthermore, the lack of knowledge about nature, causation, and diagnosis can pose some difficult legal problems. That said, there is a significant amount of research ongoing into CFS, and a growing public awareness about it. Hopefully these will combine to produce some more legal clarity.

Martin Saidlaw is a second year law student at the University of Ottawa.

1 Merck Manual of Diagnosis and Therapy, 18th edition, S.21, Ch.287

2 Afari, Niloofar and Dedra Buchwald, “Chronic Fatigue Syndrome: A Review” (Am J Psychiatry 2003; 160:221-236 at 221)

3 Ibid at 222

4 Ibid at 223

5 Ibid At 224

6 “A Review of Fibromyalgia”, *Am. J. Manag Care* 2004;10:794-800 at 795

7 See, for example, “Psychosocial Factors in Chronic Disability”, *Med Sci Monit.*; 2002; 8(12):RA275-281 at RA278

8 Rakib, A. et. al. “Subjective Quality of Life in Patients With Chronic Fatigue Syndrome”, *Qual Life Res* (2005) 14:11-19

9 <http://www.newscientist.com/article/dn9342-first-official-death-from-chronic-fatigue-syndrome-.html>

10 [2001] B.C.C.A. 650, Appeal from Vancouver Registry No. B942264 – [1999] B.C.J. No 983 (QL)

11 (2004) 239 D.L.R. 4th (547) – Appeal judgement from SCC is forthcoming.

12 See, for example, *Keays v Honda Canada Inc* 138 A.C.W.S. (3d) 93; *Gerber v Telus Corp* 123 A.C.W.S. (3d) 747

13 (1991) 84 Alta.L.R. (2nd) 127

14 “‘Chronic fatigue syndrome’ gets Alta.lawyer suspended sentence “, *The Lawyers Weekly* 11:31. December 13, 1991

15 Rimes, K.A. and T. Chalder “Treatments for Chronic Fatigue Syndrome”, *Occupational Medicine* 2005;55:32-29

DISABILITY AND THE ARTS

The Ottawa Fringe Festival is fast approaching, June 15th-25th! Catch some interesting performances like “Broken Project Hope”, “Smashing Stereotypes”, and “Nevil”. For more information on the Ottawa Fringe Festival check out <http://www.ottawafringe.com/>

For more information please contact admin@ottawafringe.com or (613) 232 6162

Broken by Juhnun Oh

Drama | 40min | 13+

A dark drama about a young man who struggles with his past and inner demons of paranoid schizophrenia. Throughout the play the voices haunt him with visions of the past while he seeks help from his psychiatrist.

Alumni Auditorium, 85 University, University of Ottawa

FRIDAY June 16 2 for 1 19:00

SATURDAY June 17 22:00

SUNDAY June 18 15:00

WEDNESDAY June 21 23:00

FRIDAY June 23 21:30

SUNDAY June 25 18:30

Time To Put My Socks On by Alan Shain

Comedy/drama | 60min | Mature Audiences

A year ago, Alan impressed Linda, dragging his walker and himself up two flights of stairs to dance with her. In the sequel to Still Waiting for That Special Bus, Linda wants to talk- about love, sex, passion and where to put the couch. Will Alan impress her now?

Alumni Auditorium, 85 University, University of Ottawa

FRIDAY June 16 2 for 1 20:30

SATURDAY June 17 17:30

TUESDAY June 20 21:30

FRIDAY June 23 16:00

SATURDAY June 24 13:00

SUNDAY June 25 20:00

Nevil by Monika Schneider

Comedic Drama | 90min | 13+

Nevil is a lively character who comes to grips with his life despite his mental disability. Animal loving Nevil works at Dr. Blair's Veterinarian clinic looking after the cats. Nevil explores themes of love, loss, and forgiveness.

Arts Court Library, 2 Daly Avenue

SUNDAY June 18 2 for 1 13:30

MONDAY June 19 17:30

WEDNESDAY June 21 21:00
THURSDAY June 22 22:30
FRIDAY June 23 16:00
SATURDAY June 24 20:00

DISABILITY AND TRAVEL

Summer Tips

By Justin Werb

As the schools come closer to the summer recess, Ontario's children can barely wait for the freedom that awaits them. Some have plans to go to camp while others will be going traveling to exotic locales with their parents. With the ever-increasing excitement of children at this time of year, some parents will be experiencing a parallel increase in stress due to a lack of planned programming. To help these parents just a little, below are two ways to fill a child's day.

1. Amusement Parks

Often amusement parks appear off-limits to disabled children. Many rides may be restricted to able-bodied participants and the environment may not at first appear conducive to the accommodation of the disabled due to the large crowds. In recent years, two parks within Ontario have started providing specialized services for young people with disabilities.

The Toronto Zoo recently launched tours for the sight and hearing impaired. They have actively recruited volunteers with sign language skills and offer tours for individuals with sight impairment which involve behind the scenes opportunities and hands on experiences. Those interested in accessing these services should contact the Toronto Zoo's education branch ahead of a visit at (416) 392-5942. Another opportunity for parents seeking educational entertainment for their children is found at the King Waldorf Stadium and Aquarium Dome Shows located in Niagra Falls. Special viewing areas are provided for guests in wheelchairs at both these shows. The interactive beluga whale and killer whale habitats (Arctic Cove and Friendship Cove) are both wheelchair accessible as are the other animal displays.

One restriction is that the lower level of the Aquarium building is not wheelchair accessible. However most rides are accessible depending on the capabilities of individual guests. Disabled guests must be able to support themselves in a sitting position in order to ride and must meet all height requirements. Please note that Marineland staff will provide assistance however they are not permitted to lift guests. A companion is welcome to accompany a disabled guest for the purpose of providing assistance.

2. Sailing

When Rick Hansen traveled the United Kingdom in his around the world "Man in Motion" tour, Queen Elizabeth offered him funds to begin a disabled sailing program in Canada. Since this time, there have been many technological improvements and volunteer training programs that have made this sport accessible and safe for the disabled to take part in.

Special access lifts and boat harnesses have been added to sailing boats. Particularly impressive inventions have been the “Sam” suit (named after the mayor of Vancouver – Sam Sullivan) which helps regulate the core body temperature of individuals with spinal cord injuries and “sip and puff” devices that allow quadriplegic sailors to steer and adjust sails.

In Ontario, the best method to organize sailing courses or day trips for disabled individuals is through the Disabled Sailing Association of Ontario, which is based in Toronto. Their contact telephone number is (416) 214-0358.

Justin Werb is a third year law student at the University of Ottawa.

The Air Out There

Surviving Heightened Airport Security

By Ken Davis

When my wife, Pam, and I took a trip to Vancouver Island, we discovered things had changed since the last time we flew.

We got to the Winnipeg airport early, only to stand in a line longer than the ones at Disney’s Splash Mountain. We inched along like good little lemmings, and then were greeted by an overly bubbly check-in girl.

Yes, we packed our own suitcases. No, nobody else touched, tampered or fondled them. Yes, I would like to check my wheelchair. Yes, they are gel cell batteries. No, I don’t think your eye liner makes you look cheap. No, I’ve never been to Aruba. Yes, I do think you’re attractive, but the woman standing beside me here, with the vein throbbing in her forehead, is my wife and I think it would be best if – OOWW! Sorry, gotta go.

Next, came the security check. As I can’t go through the metal detectors with my chair, this means a hand search – always a great source of amusement. As the only male on duty was busy intimidating a rabbi, I was to be searched by a woman resembling Alanis Morissette, except with better hair.

She started by patting my left foot and moving up my left leg, and then moved to my right foot and leg. She stopped and slowly looked at me. “Leg bag,” I said with my winningest smile. You would have thought that I had just explained Einstein’s theory of relativity to her. Her brow knitted and she patted the half-full sack again. She then did something that in 15 years of air travel no one has ever done before: she followed the bag up to the connecting tube, and followed that to its end. She then knitted her brow quizzically, and while she held what she thought was the end of the tube, I said, “Penis.”

Pam found me 20 minutes later at the end of the line again. I tried to explain that I wanted to be searched by Alanis again, but Pam said that Alanis had probably had enough excitement for one day, and we had more important issues at hand.

It seems that my battery-operated nose hair clippers were causing quite the commotion. An overly exuberant security guard was trying to convince his supervisor that the owner of the nose hair clippers could easily disembowel the entire flight crew with them.

To the boss’s credit, he appeared dubious. “Would you mind if a member of the flight crew held onto these until after the flight?” he asked us sheepishly. “Not at all,” I replied. “In fact, I noticed a couple of stewardesses who could use them.”

Now, I don’t want to complain about any airline in particular, nor do I want to be sued, so let’s just say that we traveled on a fictional airline called Nair Wanada, and the service was horrendous. Suffice to

say, that in this era of cutbacks, when you fly make sure that you pack food, because airlines believe they are hauling camels.

It seemed that we had just landed for our holiday, when we were heading back to the airport to go home. Check-in went quickly. Then, disaster struck: several people were gathered around my carry-on bag and they were treating it as if it was full of cobras. Initially my surgical scissors were deemed a national security threat, and then they really hit paydirt. The leader of the Keystone Cops was a small, weather-beaten man, with a head like a withered potato and whose only English word appeared to be “No.” He had discovered my Skin Bond, a glue-like substance used to hold my catheter on. Unfortunately, the words “extremely flammable” appear on the can, with a picture of a roaring fire.

Potato-head looked at me, then looked at the can and said, “No.”

“I need it to attach my catheter,” I replied calmly.

“No,” said Potato-head.

“Listen buddy,” I said a little too loudly, “I need that stuff to attach my catheter to my penis.” The two ladies from Nair Wanada who were assisting us slid a little to the left, pretending to assist someone else.

“No. No. No,” squealed Potato-head.

Pam stepped in and tried to reason with the man, as I attempted to stand and strangle him, which is no easy task for a quadriplegic.

After ten minutes of heated discussion between Nair Wanada officials, Potato-head and Pam, during which I heard my penis mentioned several times, we were finally allowed to keep the scissors and the Skin Bond. This deal was contingent upon us promising not to attack the crew and glue them together. As the plane lifted off, Pam had a great idea. To make security’s job much easier, all passengers should travel nude, with no carry-on. Makes sense to me.

(Ken Davis lives in Winnipeg, Manitoba.)

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Thank you for reading this Summer 2006 newsletter. We thank all the volunteers who worked on it and look forward to sharing our Fall 2006 with you.