A Tangled Web – Credibility in Personal Injury Cases

Alison L. Murray, Q.C.
Murray Jamieson

> When a litigant practices to deceive, whether by deliberate falsehood or gross exaggeration, the court has much difficulty in disentangling the truth from the web of deceit and exaggeration. If, in the course of the disentangling of the web, the court casts aside as untrue something that was indeed true, the litigant has only himself or herself to blame.
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> *Le (Guardian ad litem of) v. Milburn*, [1987] B.C.J. No. 2690, para. 2

One of the key roles of a judge during a trial is to decide whether various witnesses are lying or telling the truth and, obviously, the outcome of a personal injury trial will turn on whether the plaintiff has been truthful in the presentation of their claim. We, as defence counsel, form our own conclusions about whether a particular plaintiff is speaking the truth. Sometimes our opinions differ from what our clients or fellow colleagues believe. I certainly have had the experience of a judge or jury coming to an entirely different conclusion about the truthfulness of a plaintiff or a witness from the opinion I held. It certainly seems that my opinions regularly clash with opposing counsel's thoughts on who will be believed. It would make the business of litigating personal injury claims much easier if there was some certain way of predicting what evidence will prevail as credible. It is not possible to untangle the complicated web that surrounds the assessment of credibility. This paper offers a review of some of the general principles applied to the assessment of credibility and a review of some of the more interesting recent decisions addressing credibility.

The Law Regarding How Credibility is to be Assessed

I will start with a brief highlight of some of the statements contained in the case law offering guidance in how a trier of fact is to assess credibility, generally, and in respect of personal injury claims.

Faryna v. Chorny [1952] 2 D.L.R. 345 contains the following classic statement for resolving issues of credibility (at paragraphs 8 to 11):

> …But the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted, or the circumstance that the judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time; see *In re Brethour v. Law Society of B.C.* (1951) 1 W.W.W.. R (NS) 34, at 38-39.

> If a trial judge's findings of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, see *Raymond v. Bosanquet Tp.* (1919) 9 S.C.R. 452, at 460. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent case in which a witness is caught in a clumsy lie.
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> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried the conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that pace and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again, a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth" is to come to a conclusion on a consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
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> The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to commend confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a court of appeal must be satisfied that the trial judge's finding of credibility is based on not one element only to the exclusion of others, but is based on all of the elements by which it can be tested in a particular case.

Madam Justice Dhillon recently summarized the factors to be considered when assessing credibility in a personal injury claim at paragraphs 186 to 188 in *Bradshaw v. Stenner*,

2010 BCSC 1398 as follows:

> Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.); *R. v. S.(R.D.)* [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
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> It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story in inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with the other witnesses and with documentary evidence. The evidence of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. V. Cornwall Developments Ltd.* (1993), 12 Alta. Lr. R. (3d) 298 at para. 13 (Alta Q.B.)). I have found this approach useful.
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> … The inability to produce relevant documents to support one's case is also a relevant factor that negatively affects credibility…

Findings of credibility and reliability require a comprehensive and critical examination of the evidence as a whole. A trial judge's findings of credibility must be based not on one element to the exclusion of others but based on all elements by which it can be tested in the particular case (see *Volzhenin v. Haile*, 2007 BCCA 317, paras. 37-43, *Schellak v. Barr*, 2003 BCCA 5, para. 20).

In *Mariano v. Campbell*, 2010 BCCA 410, the court of appeal overturned a judgment because the trial judge had made palpable and overriding errors in assessing the plaintiff's credibility. The court concluded that the reasons for judgement, when

compared to the trial transcript, did not suggest that the trial judge had "seized the substance of the critical issues" as she was required to do. The trial judge had failed to deal with important contradictory evidence and appeared to have misapprehended or ignored parts of the cross-examination of the plaintiff's evidence and witnesses.

The Supreme Court of Canada has recognized that assessing credibility is not a science and that "it is difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listing to witnesses and attempting to reconcile the various versions of events". (*R v. Gagnon*, 2006 SCC 17 at para. 20).

Credibility is often at the heart of soft tissue cases chronic pain cases where, typically, there is a lack of objective evidence to support the plaintiff's complaints. We are all familiar with the case of *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131 and the following oft quoted passage:

> With respect to the evidence required in order to meet the onus lying on a plaintiff in such cases, Chief Justice McEachern (then sitting as a trial judge) in *Price v. Kostryba* (1982), 70 B.C.L.R. (2d) 397 (S.C.), repeating his observations in *Butler v. Blaylock*, [1081] B.C.J. No. 31 (B.C.S.C.), put it thus [p. 399]:
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> > I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.
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> > An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence – which could be just his own evidence if the surrounding circumstances are consistent – that his complaints of pain are true reflections of a continuing injury.
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> So there must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the normal recovery period, the plaintiff's own evidence, if consistent with the surrounding circumstances may nevertheless suffice for the purpose.

Initially some defence counsel may have believed that *Maslen* heralded that the court would take a more restrictive approach in assessing soft tissue injuries where there were purely subjective complaints. A search reveals that *Maslen* has been applied or

considered 187 times and in the overwhelming majority of those cases, the court has found there to be convincing evidence to support the plaintiff's complaints. The lesson I take from having reviewed many of the more recent considerations of *Maslen* is that judges are hard pressed to disbelieve a plaintiff complaining of chronic pain unless there is significant evidence demonstrating that the plaintiff is not credible. As outlined in further detail below, there are cases in which serious credibility issues are acknowledged by the court but, ultimately, the plaintiff still recovers substantial damages. At the end of the day, it often is the plaintiff's demeanour in the witness box that ultimately persuades.

The principles enunciated in *Price v. Kostryba* and *Butler v. Blaylock* were considered in a case that involved issues of credibility in a plaintiff who, as a result of MS, was not able to recall events and experiences accurately. In *Jacobs v. McLaughlin*, 2008 BCSC 483, the court said that untrue evidence occasioned by organic brain damage gives rise to as much difficulty, in disentangling the truth from the web of unreality, as does deceit or exaggeration.

Credibility versus Reliability

It is important not to confuse credibility with reliability. I believe that we, as defence counsel, make submissions that a plaintiff is not credible far too often when really counsel mean that the witness is not reliable. True credibility issues are relatively uncommon.

Credibility includes both a witness's honesty and the reliability of their evidence. A dishonest witness will rarely be reliable. The evidence of an honest witness may, despite his or her honesty, be unreliable (*Marois v. Pelech*, 2007 BCSC 1969, para.. 25, affirmed, 2009 BCCA 286).

As Mr. Justice Stewart said in *Van Den Hemel v. Kugathasan*, 2010 BCSC 1264:

> I have considered the whole of the defendants' attack on the plaintiff's credibility and reject it. I will explain. But I will do so in the terminology of testimonial reliability. This is not a mere playing with words. "Credibility" has become a confusing term as its elements are not particularized and whether it encompasses accuracy is in the eye of the beholder. (See *Reddoch v. Yukon Medical Council*, 2001 YKCA 13 para. 29 as opposed to *R.. v. Morrisey* (1995), 97 C.C.C. (3d) 193 at 205.) The more precise "testimonial reliability" and its elements – perception, recollection, narration and sincerity – offers up a better analytical tool (*R. v. Khelawon*, 2006 S.C.C. 57).

Eccleston v. Dresen, 2009 BCSC 332, is a good case to read for an understanding as to the difference between issues of reliability and credibility.

In *Eccleston*, the defendant alleged credibility issues based on evidence which included: the plaintiff's son had described her as pain focused and the plaintiff was able to recall all

of the details of her pains but had poorer recall on other matters; she had stopped taking medication before the trial and her pain had not changed; she told her counsellor that her doctor said it would take her two years to heal and a nurse said that she had fibromyalgia but the clinical records did not contain any such references; she described vehicle movements following the collision which defied common sense; she claimed to have briefly lost consciousness after the accident for the first time some months after the accident; she denied that her symptoms had improved; she sought a past income loss at trial when she had earlier answered interrogatories saying she had not suffered any such loss. The court agreed the plaintiff was a poor historian, but stated it did not follow that she lacked credibility, rather only that her reliability was suspect.

Defence counsel should never overstate their position on any witness's credibility. From a practical perspective, it can be just as effective to submit that a witness is not reliable rather than calling them an outright liar. You want the judge to discount their evidence and it matters not whether they do so became they only find the person to be unreliable. Judges are reluctant to find that any witness was lying. It is much easier to persuade a Judge that a witness is merely mistaken about a fact. For example, a more palatable approach is to suggest that a plaintiff's recollections have been influenced by the natural human tendency to remember things before an accident as being better than they probably were in reality and their experiences after the accident as being worse than reality and not that the plaintiff is lying about their life pre-accident and intentionally exaggerating their symptoms post-accident. Realistically, you have nothing to lose by soft peddling a credibility issue. Reasonable fair submissions are far more likely to persuade. I am not suggesting that there is never an occasion for counsel to argue that a plaintiff is not credible; just that you should carefully consider taking such an aggressive position and always only when you have solid evidence to back it up.

A good case to read which demonstrates an effective attack based on reliability rather than credibility is *Roeske v. Grady*, 2007 BCSC 15, affirmed on appeal, 2008 BCCA 88.

An overly aggressive position on credibility can backfire. You should be cautious in those "grey area" cases. The way you are experiencing the evidence and your interpretation of any particular witnesses' performance is probably not the same as plaintiff's counsel and may not be the same as the Judge. If it really is only a reliability issue, a Judge will tend to not react well to submission that the plaintiff is intentionally misleading the court.

There are some recent cases in which the court is critical of the defence for mounting an attack on credibility when really what was meant was that the plaintiff was unreliable (see, for example: *Zen v. Readhead*, 2010 BCSC 190 at paragraphs 6 to 10; *Edmonson v. Payer*, 2011 BCSC 118 at paragraphs 22; *Van Den Hemel v. Kugathason*, supra, see paragraphs 6-14).

How to Anticipate a Successful Challenge on Credibility or Reliability

As I have said, I find that it can be difficult to predict the outcome of some cases in which reliability and/or credibility are central. There are no rules or reliable guidelines available to defence counsel to determine when a credibility challenge to a personal injury plaintiff will succeed. Judges are humans and each bring to court their own experiences and biases. As the late former Chief Justice MacEachern said, litigation is a roller coaster ride and the complexion of a case can change dramatically during the course of a trial and even on the performance of a sole witness. It has certainly been my experience that plaintiffs commonly perform much differently at trial than on discovery; sometimes a previously poor performance on discovery is rehabilitated by good evidence in trial and it is just as easy for a plaintiff to, unexpectedly, fall apart in the witness box and present as much less credible than they had on discovery. The same goes for all of the witnesses walking into a courtroom. If you have done your ground work, as defence counsel, you have identified the collateral witnesses and so are not being taken by surprise when they take the witness stand. But no amount of preparation can guarantee that a witness will present credibly or that you will be able to successfully discredit a witness.

A plaintiff's credibility can be effectively impeached solely through cross-examination that reveals they have given inconsistent statements. One such case is *Lee v. Jarvie*, 2010 BCSC 1852, in which the defendant accepted that the plaintiff had been injured but argued that his claim was exaggerated, therby challenging the "authenticity" of the claim. As Mr. Justice Gaul put it:

> 46. Mr. Lee was vigorously cross-examined by counsel for the defendants. By "vigorous" I do not mean the questioning was improper or disrespectful of the witness. I find the extensive cross-examination of Mr. Lee successfully revealed a number of significant and illuminating facts that, but for their disclosure, the court would have been left with an inaccurate impression and understanding of Mr. Lee's situation and condition.
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> 71 In addition to eliciting important facts that have placed Mr. Lee's claim in a more fulsome context, counsel for the defendants was also able to expose a number of contradictions and inconsistencies in Mr. Lee's evidence, of which I will address but a few.
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> 89. It was only on account of detailed and probing cross-examination that a number of important and salient facts relating to Mr. Lee's claim were disclosed or clarified. These details placed Mr. Lee's claim in a markedly different light to the one based solely on what he said in his examination-

> in-chief. This, in conjunction with the inconsistencies or contradictions that were exposed in Mr. Lee's evidence, compels me to approach this evidence with caution and scepticism. In general, I am not satisfied with Mr. Lee's evidence. Unless I have indicated otherwise, in these reasons, where there is a conflict between Mr. Lee's evidence and that of another witness, I have given greater weight to the evidence of the other witness.

However, a trial judge is not obliged to find that someone is not credible or that their evidence at trial is unreliable because of inconsistencies between evidence at trial and on other occasions *(C.(R.) McDougall*, 2008 SCC 53, para. 70).

The cases reveal that credibility challenges must be mounted on substantial evidence and not mere speculation or intuition. The more concrete the evidence, the more likely a plaintiff's credibility will be successfully challenged. Documentary evidence which squarely contradicts a plaintiff's testimony is particularly compelling. For example, pre-accident clinical records that demonstrate a history of similar complaints which the plaintiff outright denies. The court seems to be less concerned with what could be suggested are just failings of memory. For example, a plaintiff's recollection that he or she recovered very shortly after a previous accident and only underwent a few physiotherapy treatments when the records show the recovery took years and necessitated many months of regular physiotherapy.

Collateral witness evidence is often key to credibility. A plaintiff can overcome what you might believe to be questionable credibility with compelling lay evidence. Judges are impressed with witnesses that can paint a clear before and after picture of the plaintiff (see *Meghji v. Lee*, 2001 BCSC para. 144). The more independent the collateral witness the more likely the evidence will persuade. For example, evidence from an employer who does not have a social relationship with a plaintiff is likely hold more weight than evidence from the plaintiff's spouse or best friend. There are no hard and fast rules and many a case has been won on the evidence from a spouse. It is clear that a plaintiff's credibility can be seriously damaged when his or her evidence directly conflicts with that given by an uninterested witness.

In fact, it is clear that the lack of collateral lay witnesses is not fatal to a plaintiff's claim when their evidence is challenged. For example, in *Sandher v. Hogg*, 2010 BCSC 1152, the court accepted the plaintiff's ongoing complaints in the absence of objective evidence and rejected the defence's arguments that the plaintiff was exaggerating her symptoms to advance the personal injury action. The court relied upon the plaintiff's own evidence of pain and that of the doctors. At paragraph 67 Madam Justice Dardi wrote:

> The absence of objective physical findings is not determinative of whether Ms. Sandher continues to suffer from chronic pain. Since pain may well be a subjective phenomenon not easily measurable by independent objective indicia, the assessment of Ms. Sandher's soft tissue injuries to a certain extent turns on the assessment of her

subjective complaints and reported symptoms: *Szymanski v. Morin*, 2010 BCSC 1 (B.C.S.C.) at para. 106; and *Shapiro v. Dailey*, 2010 BCSC 770 (B.C.S.C.).

We know that surveillance is often not particularly persuasive in front of a trial judge unless the video evidence demonstrates activities which the plaintiff squarely denies (see for example, *Madill v. Sithivong*, 2010 BCSC 1848, paragraphs 70 to 73).

We also know that the absence of any or minimal damage sustained in the accident is not determinative of whether any injury was sustained (*Gordon v. Palmer*, (1993), 78 B.C.LR. (2d) 236 (B.C.S.C.); *Robbie v. King*, 2003 BCSC 1553, paragraph 35; *Gignac v. Rozylo*, 2010 BCSC 595).

The failure to file any or false tax returns may have an impact on credibility. In *Kelly v. Dick*, [1989] B.C.J. No. 1491 (B.C.C.A.), the plaintiff had only disclosed UIC income on her pre-accident tax return, falsely claiming to be unemployed. In reality, she had worked full time and so had also been collecting UIC fraudulently. She filed accurate tax returns for each of the years after the accident. The court of appeal agreed with the trial judge's finding that if a plaintiff puts forward one story when it benefits her financially to do so, and then presents a different and contradictory version of the facts when it is in her financial interest, little reliance can be put on her evidence. *Iannone v. Hoogenraad*, (1992), 66 B.C.L.R. (2d) 106 (B.C.C.A.) established that falsely reporting income on tax returns (i.e., under reporting) was not a bar to claiming and recovering an income loss. Ultimately, a review of the case law shows that this kind of evidence negatively impacts some judges' views of the plaintiff's evidence as a whole; while appearing not to have any impact upon other judges' views. For example, see *Polson v. C. Keay*, 2008 BCSC 908, outlined in further detail below as a case of negative impact and *Wepruk v. McGarva*, 2005 BCSC 508, affirmed 2006 BCCA 107, leave to appeal to the Supreme Court of Canada refused, where such evidence appears to have had little or no impact.

Since it is impossible to provide any kind of formula as to how judge's assess credibility, I will review a sampling of recent cases in which credibility/reliability issues were successfully raised for a variety of reasons. The common thread is that, in addition to serious contradictions in the plaintiff's own evidence, their evidence was inconsistent with documents and with other witnesses.

In *Polson v. C. Keay Investments Ltd.*, supra, the plaintiff was found to have exaggerated her symptoms and lied about her work hours. Mr. Justice Chamberlist identified three factors that negatively impacted upon the plaintiff's credibility:

- The plaintiff's employment records (which were not produced until after she testified) contradicted her testimony that she was unable to work additional hours that she had worked prior to the accident and that she had wanted to work fewer hours because of pain;

- her allegation of continuing high levels of pain was inconsistent with only one attendance at her GP's office in the 13 months after she had returned to work; and,
- her evidence regarding her level of pain at work including having to rub her neck, use an exercise ball, roll her ankle and limp was inconsistent with the observations of fellow employees.

In *Willing v. Ayles*, 2009 BCSC 2048, Mr. Justice Parrett was asked to address issues of credibility in a case where the defence argued that the husband and wife plaintiffs had intentionally misled the court. It was also a "somewhat unusual situation" in that there was no evidence called, viva voce or by way of report, from the parties' general medical practitioners who assessed them immediately after and for the first two years after the accident. Instead, the only medical opinions were from doctors that had seen the plaintiffs for the first time two years after the accident (see the court's comments at paragraphs 71-72 regarding the frailty in such medical evidence).

There were greater credibility issues arising in the wife's claim. She had, *inter alia,* in reporting to her later retained doctors: exaggerated the severity of the collision and the damage sustained by their vehicle; wrongly stated that the severe pain required that she seek medical attention the day after the accident (it was not until three days later); and, inaccurately stated that she had gained 40 pounds because she could not exercise due to her injuries. She had not filed tax returns from the year of the accident. Cross-examination revealed contradictions including: the assertion that she had been very physically active before the accident and could not longer be so causing increased weight was not true; she had not disclosed a course she taught in the week after the accident; she had included as part of her lost income a period of time she could not have worked due to a strike; and, she attributed the accident injuries as the cause for leaving a job when other unrelated medical issues were the cause.

The defence argued that the plaintiffs were "claims conscious", had tailored their reporting of symptoms and activities to the doctors to inflate the value of their claim, had exaggerated the nature and severity at trial and had attributed symptoms to the accident that they knew or ought to have known were not caused by the accident. Mr. Justice Parrett acknowledged that while there was some validity to the submissions and some evidence to support them, he preferred to approach the "troubling issues" differently.

Instead, Judge Parrett found that the adverse credibility findings went to the heart of the factual underpinnings of the medical evidence and that the absence of medical evidence from the treating GP left the court without any medical assessment during the relevant time. Applying *Price v. Kostryba*, the court was left with "little in the way of objective evidence, let alone convincing evidence of any significant injury". The court also drew the adverse inference from the failure to call evidence from the wife's GP at the time of the accident; that his evidence would not have supported her assertion that she had completely recovered from pre-accident history of back pain before the accident.

The wife was awarded $20,000 in general damages assuming a moderate soft tissue injury and which had continued to cause her some pain to the date of trial but the remainder of her claims were dismissed.

Van Halteren v. Willhelm, [1997] B.C.J. No. 1959, affirmed, 2000 BCCA 2, leave to appeal to SCC refused, September 21, 2000 involved a claim for significant damages as a result of ongoing headaches, neck and back pain, nausea and depression sustained in a car accident that had occurred in August 1991. It is an example of a case in which the plaintiff's credibility was entirely destroyed because:

- she lied about her education;
- she made false statements to ICBC;
- she created false T-4 slips to inflate her pre-accident income and which she filed with Revenue Canada the day after she failed to show up for an examination for discovery and after she was aware that defence counsel had requested the T-4 slips from Revenue Canada;
- she produced income tax records to her counsel which differed from those filed with Revenue Canada;
- she mislead her doctors about a number of facts including grossly inflating her pre-accident income, that she had been rendered unconscious in the accident, that she had been admitted to hospital for two days, and told doctors that she saw for a 1994 accident that she had fully recovered from her 1991 injuries;
- she approached her two claims in a separated manner (retaining different doctors etc.) inflating her income prior to the 1991 accident and again prior to the 1994 accident hoping that each insurer would not learn of the other;
- she testified that she was unable to drive and disputed traffic tickets which contained her signature saying she was living in Ontario at the time (which evidence was contradicted by other witnesses);
- she claimed she was unable to work but collected unemployment insurance representing that she was able to work;
- she gave evidence at trial that she had been forced to leave a job because of her injuries but gave a different reason for her termination when she applied for UIC;
- her ex-husband gave credible evidence that the accident resulted in no significant change in her circumstances or condition.

Mr. Justice Taylor found that he could place no reliance upon the evidence of the plaintiff and stated at paragraph 207:

> In my assessment of the plaintiff's credibility I have kept in mind that I should begin an assessment of credibility with the presumption of truthfulness. I regret that the evidence convinces me that the presumption has been displaced by my conclusion that the plaintiff has deliberately proffered false evidence to advance her claims.

His Lordship found that "many of the medical opinions submitted by the plaintiff were flawed by the passage of time, the briefness of examination, the reliance upon the plaintiff herself or the intervention of the substantial accident that occurred on September 8, 1994" (paragraph 236).

The court accepted the medical opinion that she had suffered a laceration, some bruising and moderate whiplash of the sort that should have resolved within two years and the defence psychologist's opinion that her injuries made her less able to deal with her life stressors and precipitated a depression that could have been resolved by timely treatment (which had not been pursued) within two years. His Lordship concluded that the plaintiff recovered from the consequences of the Accident within approximately two years and awarded her $35,000 for her pain and suffering, $10,000 in past income loss and dismissing the remainder of her claim.

In *Hall v. Day*, 2006 BCSC 874, the *Maslen* "improbability" test was not overcome despite supporting medical evidence, the history of convalescence or Mr. Hall's testimony. The plaintiff had: contradicted himself in his evidence; pursued a loss of income for a fictitious claim; contradicted his discovery evidence about whether the defendant vehicle sustained any damage; demonstrated a selective memory regarding statements made to his caregivers; testified that his recovery had plateaued in January 2004 which was inconsistent with the clinical records. The court also commented that much of his evidence was given through leading questions. There was an absence of collateral witnesses and evidence from a defence medical expert that it was improbable for the MVA to have caused the complaints at the time he examined him.

Another case in which there was a successful attack on credibility is *Dempsey v. Oh*, 2011 BCSC 216. The factors included:

- The plaintiff's description of his pre-accident state of health was contradicted by the medical records, which were not minor but "quite glaring and significant"; and,

- The plaintiff contradicted his evidence in chief on cross-examination on a number of points such as: testifying in chief that his pre-accident symptoms were minor aches and pains and agreeing on cross that at times his symptoms were excruciating; contradicting his earlier evidence that he threw away medication before the accident; testifying that he played hockey up to the time of the accident and subsequently admitting on cross that he had given up hockey years before the accident due to concerns about his back; downplaying his use of heroin; blaming the accident for his near alleged inability to work for an extended period of time after the accident but never described why he could not do work tasks or how the pain stopped him from his job functions; not being able to remember what a frequently recurring cryptic entry in his daytimer referred to).

In finding that the plaintiff was not credible, Mr. Justice Meyers commented "[t]here is no reason to believe that he was more truthful about what occurred after the accident than he was about his condition before it" (paragraph 47).

Contrast the findings of credibility in the above cases with the outcomes in *Szymanski v. Morin*, 2010 BCSC 1 and *Gignac v. Rozylo* , 2010 BCSC 595. In *Szmanski*, the plaintiff's evidence of ongoing injury was accepted despite him having provided inaccurate medical histories to his doctors and failing to disclose pre-accident injuries. In *Gignac*, the plaintiff was involved in a minor accident (the car sustained a scuff) and gave inconsistent histories to a number of different medical practitioners. The court ultimately accepted that the plaintiff had suffered persistent injury. In both of these cases, the plaintiff called collateral witnesses.

Requirement to Cross-examine on Credibility Issues

The case of *Wahl v. Sidhu*, 2010 BCSC 1466, is another good example of the import of evidence from lay witnesses. The collateral evidence led in *Wahl* convinced the court that there was no doubt there was change in the plaintiff's physical and psychological condition pre and post accident despite the plaintiff having very serious reliability issues.

The case is an important reminder that defence counsel must put the theory of their case, including on credibility matters, to the plaintiff in cross-examination. The defence had specifically argued that the plaintiff was "intentionally faking symptoms" relying upon evidence from medical practitioners that had formed negative impressions of the plaintiff's efforts on certain testing.

At paragraphs 213 to 217, Mr. Justice Chamberlist comments:

> Before dealing with the considerations I must deal with in accordance with the dicta of the Court of Appeal in *Yoshikawa v. Yu*, supra, I wish to comment on what occurred and what did not occur with respect to the evidence of Mr. Wahl at trial. My notes of his evidence, particularly his evidence given under cross-examination, indicate that negative comments made by the various treators and Mary Richardson and Gerard Kerr were not put to him under cross-examination so that he would have an ability to deal with that evidence. It is my view that the witness must be confronted with these opinions before the opinion can be properly dealt with (*Browne v Dunn* (1893), 6 R. 67 (U.K.H.L.)). This is especially required in a case such as this where the defence submits that the plaintiff, in this case, is not motivated to get better and that the credibility of the plaintiff is at issue.
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> With respect to the issue of credibility, the defence submits that the plaintiff is not at all credible and in that light refers to the incidents in the plaintiff's past to sustain that argument. I have already commented on the fact that I do not find the fact that the plaintiff did not report income for landscaping work, moving work and construction work that he did some years before the

accident materially affects his credibility. In addition, the defence relies to some extent on the reporting by the plaintiff that he lost consciousness shortly after the accident. I accept that the ambulance report and the Surrey Memorial Hospital record do not note a loss of consciousness. It is noteworthy that the independent witness to the accident, Janessa Ferguson, by her own evidence, indicated that she attended on the plaintiff's vehicle only after attending at the defendant's motor vehicle, a passage of some minutes. In any event, embellishment or exaggeration do not go to the core of credibility.

The defence also relies on what appears to be incorrect reporting by the plaintiff to Dr. Zoffmann's report, at page 7, where she mentions that the plaintiff told her that he had "intense fear" of travelling in a vehicle when his roommate Greg drove him home from the hospital on the same date of the accident. However, Greg Massender did not give any indication of such problems. Similarly, the plaintiff relies on the fact that Dr. Zoffman noted from her interview the plaintiff that he had told her that the x-rays were done at the hospital which is not confirmed by the Surrey Memorial Hospital records or Dr. Hay's records. I do not believe the credibility of the plaintiff turns on this misinformation or embellishment to Dr. Zoffman some years post-accident.

The defence also relies on the fact that the various expert medical reports in evidence show that the plaintiff exhibited a significant amount of pain behaviours during medical assessments and demonstrated some poor levels of effort on his testing with Ms. Richardson and Mr. Kerry. As I have already indicated, this evidence was not put to the plaintiff when he was on the stand. As such, I am not able to conclude that the plaintiff's presentation is unreliable as urged by the defendant. I accept that in a chronic pain case the plaintiff's credibility must be the cornerstone of the claim but surely he must be given the opportunity to answer the assertion that he is not credible when he is in the witness box.

Subjective Reports of Pain and Medical Opinions

Expert medical opinion is often based entirely on the self reporting of the plaintiff. Where a plaintiff's subjective reports of pain are inaccurate and unreliable, it calls into question whether any weight can be placed upon the doctor's opinion.

As observed by Madam Justice Southin, sitting as a trial judge, in *Landry v. Cadeau*, [1985] B.C.J. No. 1396:

> Of those who examined her, Dr. Hunt, Dr. Rees, Dr. Fenton, and Dr. Ross, were relying on her account of her symptoms. If her description of her symptoms is not believed, much of what they said is of no moment because the foundation for their diagnosis and prognosis does not exist. In saying

> this, I wish to make it clear that I accept that a physician ordinarily must proceed on the assumption that a patient is telling him the whole truth. I do not fault a physician for believing a patient even if I may think that he or she is a little more credulous than I.

Mr. Justice Voith recently discussed credibility in a chronic pain case in *Sevinski v. Vance*, 2011 BCSC 892 in doing so commented about a physician's ability to discern whether their patient was misleading them.

Ms. Sevinski sought significant damages arising from largely subjective complaints sustained in a 2007 car accident. The defence argued that Ms. Sevinski was not credible and her evidence should not be accepted. Mr. Justice Voith agreed that there was a "proper basis for some of these submissions" in that the plaintiff was a "poor historian", "unreasonably ascribed many of her current problems to the accident" and there were "several instances where she simply has not been forthright". For example:

- She had no memory of what a number of short term jobs were that she held in the summer of 2008;
- She could not recall pre-accident knee pain as disclosed by the clinical records;
- She advised a doctor that she had not had any long term problems as a result of a 2001 car accident when she had symptoms for at least two years;
- She denied pre-accident depression;
- She testified that her social life had been diminished by the accident; whereas the available limited evidence revealed she complained during a pre-accident relationship she was often alone and an earlier clinical record noted "sociopathic/antisocial behaviours";
- She alleged she gained weight after the accident and which prevented her from engaging in her activities; whereas the records revealed she gained weight after the birth of her daughter more than two years before the accident;
- She testified that she had not used marijuana since becoming pregnant in 2008, but when shown a clinical entry for October 2009, acknowledged marijuana use saying that it was not "regular";
- Testified that she suffered significant levels of constant pain at work after the accident; however her employers were unaware that she had even been injured;
- She refused to acknowledge that her poor performance, tardiness and drinking contributed to her inability to hold down a job, as testified to by her former employers;
- The records from her family doctor (who was not called) made virtually no reference to her injuries or her complaints that she struggled in the years after the accident;
- She undertook no physiotherapy or other rehabilitative therapy in the first two years after the accident;

- She told an IME doctor that she had been fired from several jobs because of her injuries (untrue); and,
- She told an IME doctor, in August 2010, that she drank socially; however, at trial testified that she drank heavily in 2010 causing her to enter rehab.

The court also commented unfavourably upon the evidence led from Mr. Rambold, the only collateral lay witness called by the plaintiff.

Starting at paragraph 41, Mr. Justice Voith said:

> [41] The defendants have argued, as I have said, that as a result of these and other difficulties with the plaintiff's evidence, the court should not accept her testimony. The defendants further argue that because the assessment of pain is subjective, an assertion accepted by each Dr. Finlayson and Dr. McDougall, the difficulties with the plaintiff's evidence also infuses and undermines the medical evidence before me.
>
> [42] I am quite troubled by the plaintiff's evidence. Aspects of that evidence go well beyond a frailty of memory or a natural and excusable tendency to exaggerate or place given evidence in a positive light. Here the plaintiff sought to mislead and to create a history that is not forthright. Having concluded that significant aspects of the plaintiff's case, which are directly relevant to both the severity of her injuries and to her efforts to mitigate, are not reliable, where does the truth lie…
>
> …
>
> (His Lordship then referred to, inter alia, *Le v. Milburn*, *Maslen v. Rubenstein* and *Eccleston*, supra)
>
> …
>
> [46] Two propositions emerge from these cases. First there is an inherent level of frailty in the case of a plaintiff whose assertions of injury are not supported by any objective evidence or symptoms. Accordingly, it is appropriate, in such cases, to treat the evidence adduced by or on behalf of a plaintiff with caution. Second, either the evidence of the plaintiff or collateral corroborative evidence may be sufficient to persuade the Court of the plaintiff's position.
>
> [47] In this case the usual difficulties associated with the wholly subjective complaints of a plaintiff are compounded by the reliability problems which are associated with the evidence of Ms. Sevinski.

> [48] Notwithstanding some misgivings, however, I have accepted aspects of Ms. Sevinski's evidence and am satisfied that these portions of her evidence are supported by additional collateral evidence before me.
>
> [40] During the course of argument I asked counsel for the defendants if it was the defendants' position that the plaintiff's evidence of her ongoing physical difficulties was, in its entirety, a fiction or fabrication. He conceded that the defendants' position did not go that far.
>
> ...
>
> [53] The conclusion that the plaintiff suffers from some level of ongoing pain is consistent with the opinions of each of Dr. McDougall and Dr. Finlayson. While both accepted that their opinions were based on what they were told by the plaintiff, both have available to them skills and means, based on their evaluations, of discerning when they are being misled. Dr. Finlayson, in particular, testified that the plaintiff's Waddell signs were all negative. It is also consistent with the objective record of the plaintiff's periodic complaints of pain which she attributed to the Accident as well as to the fact that she sought some assistance or relief through massage therapy and, to a lesser extent, physiotherapy. Finally, it is consistent with the evidence of Mr. Rambold.
>
> [54] I further find and accept that the plaintiff's pain does impact, to some degree, on her daily life, on her ability to maintain her home, to care and play with her children and to join Mr. Rambold in various recreational activities. I do not accept that these consequences are as intense, wide-ranging or debilitating as the plaintiff asserts.

Ms. Sevinski recovered damages totalling $84,519.25 including awards for future wage loss and care costs.

Judge Voith's comments at paragraph 53 almost seem to be an abdication of the court's role to determine credibility to the plaintiff's treating physicians. However, a trial judge is required to make is own independent assessment of the plaintiff's credibility (*Vasiliopoulos v. Dosanjh*, 2008 BCCA 399, para. 32) As the Supreme Court of Canada has said in R v. J. (J-L), 2000 SCC 51, at paras 56-57:

> The purpose of expert evidence is to assist the trier of fact by providing special knowledge that the ordinary person would not know. Its purpose is not to substitute the expert for the trier of fact. What is asked of the trier of fact is an act of informed judgment, not an act of faith.

There are an abundance of judicial statements about the dangers in accepting medical opinion founded on subjective complaints. For example, Mr. Justice Hollinrake in *Sidhu*

v. Ward, (1995) 64 B.C.A.C. 217 at para 6-7 said:

> The first point is the contents of the medical reports which the appellant asserts are favourable to his position on this appeal. Where, as is the case here, the complaints of the plaintiff have a substantial subjective component the medical opinions are of little or no assistance to the court in terms of probative value if the trier of fact does not accept as facts those facts necessarily relied upon by the doctors in giving their opinions. I reproduce the headnote in part in *Leanard v. British Columbia Hydro and Power Authority* (1964) 50 W.W.R. 546, a decision of Wilson, C.J.S.C.:
>
> > It has long been recognized that an expert medical witness giving evidence in a personal injury case may relate what his patient has told him without objection as a preliminary to giving his opinion, although such narrative is strictly hearsay and inadmissible. The opinion loses weight if the patient does not give evidence of the facts related to his doctor, and equally if, having heard the patient, the court does not find him a credible witness. The court should direct itself, or the jury, that a narrative related by a patient to a doctor and retold in court by the doctor is not admissible in proof of the truth of the facts narrated unless corroborated by the evidence given by the patient. *Enge v. Trerise, Busse and Enge* (1960-91), followed.

Contrast Mr. Justice Voith's comments to the following from Mr. Justice Thackeray, sitting as a trial judge, in *Volzhenin v. Haile*, 2001 BCSC 1591 (affirmed on appeal, 207 BCCA 317, leave to appeal to the SCC refused):

> 179. Mr. Volzhenin deceived his medical advisors as to his condition before the motor vehicle accident. I have no reason to think that he is not continuing to do so. His motivation pre-accident was money driven and he has not given the court reason to think that this motivation is not continuing or that his moral code has improved.
>
> 180. When the issue of the plaintiff's credibility was being considered by Dr. Anderson, he asked the Court "how could Mr. Volzhenin pull the wool over so many doctors' eyes?" Counsel for the plaintiff in his submission used this to suggest that it is unlikely that his client could do that. I would not presume to answer that question but the length of these reasons are as a result of the Court's effort to explain why it believes that he did.

Thiessen v. Kover, 2008 BCSC 1445, is another recent example of a successful attack on the credibility of a plaintiff and contains comment about the dangers in accepting medical opinion (see paragraphs 122 and 142 to 145).

Lawyer's Involvement in Client's Medical Treatment

Plaintiff's counsel commonly play a role in the medical treatment of their clients. Our courts regularly hear cases in which privately retained doctors dominate the medical legal evidence called at trial.

In a recent case, *Meghji v. Lee*, 2011 BCSC 1108 the court discussed the implication of a lawyer's involvement in the medical treatment of their client. An adverse inference was drawn because the plaintiff failed to call evidence from a neurologist that had assessed her at the request of her lawyers. Mr. Justice Johnston found that the neurologist probably did not have evidence which would be helpful to the plaintiff's claim saying:

> [240] In ordinary circumstances, I would agree that a claim of litigation privilege should be sufficient explanation for the failure to produce evidence from an expert who examined a party, and no inference adverse to that party should be drawn from the failure to produce the evidence.
>
> [241] However, where, as here, counsel has assumed control of medical management of a plaintiff's injuries, the circumstances are not ordinary.
>
> [242] Dr. Grimwood would ordinarily have been expected to coordinate Ms. Meghji's treatment, including referrals to specialists as he thought advisable. In this case, Dr. Grimwood appears to have largely ceded that responsibility to Ms. Meghji's counsel, largely because counsel were able to arrange examinations by medical specialists much sooner than could Dr. Grimwood.
>
> [243] Where counsel becomes actively involved in arranging treatment, or in treatment decisions, or in selection of treatment providers to the extent that it becomes difficult or impossible to determine whether any particular doctor is involved for treatment purposes, or to advise counsel, the protective cloak of litigation becomes tattered.
>
> [244] In such circumstances, counsel and the party who permit the line between treating physicians and physicians retained to advise counsel to become blurred must accept some risk that the protection ordinarily afforded by litigation privilege might be lost.
>
> [245] Ms. Meghji testified that she saw Dr. Cameron for headaches. In the face of that evidence, I infer, from the refusal to produce evidence from Dr. Cameron, that any opinion generated as a result of his examination of Ms. Meghji was not helpful to the claims that she makes in this trial. I also infer that, while examining for headache, had Dr. Cameron observed any signs that suggested to him that Ms. Meghji had suffered a traumatic brain

> injury in the accident, his observations or opinion would have been produced at trial.

For further discussion as to when it is appropriate for the court to draw an adverse inference see: *Buksh v. Miles*, 2008 BCCA 318, *Hodgins v. Street*, 2009 BCSC 673, *Qiao v. Buckley*, 2008 BSCS 1782.

Costs Consequences in Credibility Cases

There are a number of authorities which address costs consequences where a plaintiff sought to mislead the court and exaggerated his or her claim: Mr. Justice Drost addressed the issue of costs in a case in which he determined that the plaintiff had set out to deceive the court by deliberately exaggerated his injuries in *Medeiros v. Vuong*, 2001 BCSC 326 saying at paragraph 12:

> This is not a case of divided success. A reduction or an apportionment of costs is not sufficient. Instead, the plaintiff's deliberate conduct mandates an order depriving him of his costs. As Madam Justice Kirkpatrick said in *Chan v. Ferreira et al.* (February 12, 1994), Vancouver Registry No. B894244:
>
> > To do otherwise would, in my view, signal to others that the court will ignore attempts to bolster one's case with misleading or false evidence.

Other recent examples of adverse findings on credibility sounding in costs consequences include: *Lakhani v. Elliott*, 2010 BCSC 281 (plaintiff sought to mislead the court and to significantly exaggerate the claim being advanced and such conduct is worthy of censure so the plaintiff was disentitled to the award of double costs that she sought); *Shearsmith v. Houdek* 2008 BCSC 1314 (costs apportioned because the trial took longer due to the plaintiff having grossly exaggerated the claim).