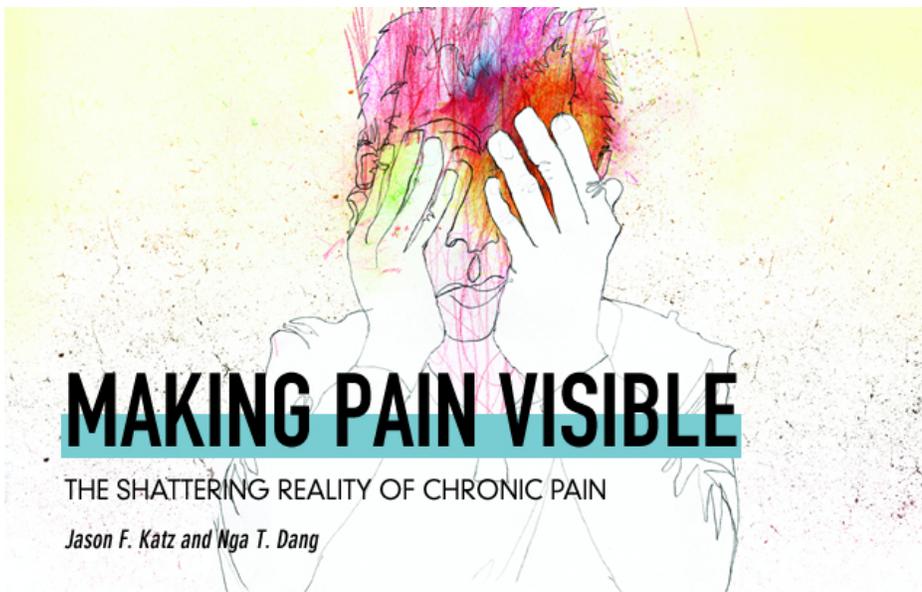


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## MAKING PAIN VISIBLE

THE SHATTERING REALITY OF CHRONIC PAIN

Jason F. Katz and Nga T. Dang

With chronic pain, a person's life is turned upside down. They are in disabling pain for years, suffering an inability to work or participate in the daily activities they used to enjoy. Relationships with family and friends can deteriorate as sufferers experience emotional turmoil due to the change in their quality of life.

The reality of chronic pain was brilliantly illustrated in the 2014 movie *Cake*, in which main character Clair Bennett (played by Jennifer Aniston, who won a Golden Globe for the role) was the victim of a tragic accident that left her with chronic pain, an addiction to pain medication, a terrible attitude towards life, and a trail of broken relationships. The movie is a dark comedy; however, as we watch we grow to understand Clair and to empathize with the physical and emotional pain she suffers.

As personal injury lawyers, the pain our clients experience is very apparent to us, yet on a daily basis we face significant challenges in making the pain of our clients visible to others. When there is an objective injury like a fractured bone that does not heal properly, it is fairly easy to persuade a defence lawyer, insurance company, judge or jury that pain accompanies that injury, along with a number of other functional limitations.

The trickier situations arise when those objective injuries have healed or when there are no objective injuries and yet the client is still struggling with disabling pain for years. In Clair's case, her chronic pain was caused by an unspecified accident. Six months after she is left unable to sit up straight in a chair or ride comfortably in a car, addicted to pain medication. She attends regular physical therapy, yet her own doctor questions why she is not improving and suggests she find care somewhere else.

Chronic pain is recognized by the Supreme Court of Canada. In *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003], the SCC stated:

*"There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real."*

Despite this recognition of chronic pain, these cases still remain extremely risky and difficult to prove. How do you convince a judge or a jury of six regular people from the community that, although your client appears healthy, he or she is still suffering from debilitating pain and will never be able to return to the workforce?

Chronic pain cases are more likely to proceed to trial because they are "swing cases": if the Court believes your client, there can be a substantial verdict but if the Court does not, your client could just as easily be awarded nothing. Therefore, your client's credibility is paramount. As our senior

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partner, Alfred Kwinter, likes to say: "There are three essential elements the Plaintiff must establish or the case is almost certainly lost – they are credibility, credibility and credibility."

There are practical tips every personal injury lawyer should consider in building these cases.

1. Ensure a rigorous gatekeeping system is in place during the intake process. During the first meeting, we extensively question potential clients to evaluate their credibility. We do not usually take on chronic pain cases until at least four to six months after the accident to assess whether they may pass the serious and permanent threshold.
2. Put the Plaintiff's entire life, including childhood, family, education and work history, before the defence lawyer, insurance company, judge or jury to allow them to get to know, understand and like the Plaintiff. The goal is to show our client's trustworthy character. Highlight the positives aspects as much as possible, such as:

- Obstacles, tragedies and other difficulties the Plaintiff has overcome;
- The active lifestyle and the many hobbies the Plaintiff used to enjoy;
- The beautiful family the Plaintiff has raised;
- The amazing friends and social life surrounding the Plaintiff;
- The Plaintiff's consistent work history and achievements;
- How the Plaintiff loved his or her work;
- That the Plaintiff was well liked by employers and co-workers;
- How the Plaintiff attempted to return against doctor's orders; and
- How the Plaintiff returned to work after previous accidents.

From this image, the strong character of the Plaintiff begins to speak for itself and starts to shield the Plaintiff against almost any allegations defence counsel tries to make. This information can be admitted through family members, friends, employers, co-workers, customers and best of all, the family physician. The use of photographs is also effective to demonstrate the difference between the Plaintiff's activities and social life before and after the accident.

3. Ensure that the family physician is the one referring the Plaintiff to the various specialists who treat and understand chronic pain. This papers the file with treating experts rather than hired guns and the opinions do not come with the baggage of medico-legal reports. These specialists, along with the family physician, will help educate the judge and jury that the Plaintiff's pain is real and that the condition is well recognized by the medical community.
4. Before the examination for discovery, obtain and review the Plaintiff's medical records from at least three years before the accident. Review this history carefully with the client so that he or she can answer questions relating to it appropriately. We advise our clients to be open and honest about previous accidents, injuries and illnesses. We instruct our clients to say they do not remember if they are uncertain rather than provide a definitive answer. The client's familiarity with his or her pre-accident medical history is also important for both plaintiff and defence medical assessments. This approach avoids the client being portrayed as a liar or hiding something as a result of inaccurate answers.
5. Inform the client about surveillance. We do not ask our clients to live in a bubble, but we tell our clients to always consider what they are doing and not to attempt anything too heroic that they will later regret, particularly if they claim they cannot do it. Still to this day, I remember being called into defence counsel's office a few days before trial and shown a video of my client lifting a piano in his driveway – no matter what my client now says, that picture will be seared into the minds of the judge or jury. A properly prepared Plaintiff largely neutralizes what could otherwise be damaging surveillance.
6. Inform the Plaintiff of issues arising from the use of social media such as Facebook, Instagram and Twitter. It is basically another form of surveillance for the Defendant. Plaintiffs will damage their own credibility by posting, or allowing friends or families to post, photographs of them being active and attending parties.

These are not easy cases to prove but with an honest, prepared and upfront Plaintiff, supportive witnesses and knowledgeable experts in the area of pain that can help explain the Plaintiff's situation, proper compensation for your clients' suffering with pain is achievable.

While films such as *Cake* help make the struggle with chronic pain visible to the public and foster understanding and empathy, it is our obligation as personal injury lawyers to build these cases and help make our clients' pain visible within the system. These efforts will result in better resolutions for our clients, which in turn provide clients them with the emotional closure they need to move forward with their lives and steers them towards a better path to recovery. We believe that

obtaining the best possible outcome for clients is the most rewarding experience a personal injury lawyer can have.



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