

Linking Environmental Exposure to Illness in Human Health Claims

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Injured individuals seeking to prove in Court a health claim that arises from an environmental exposure can experience evidentiary challenges. Plaintiffs can overcome these challenges by leading evidence (including expert evidence) to prove, on a balance of probabilities, that:

- ◆ They were exposed to an environmental factor (i.e., asbestos, ozone, talcum powder, benzene or volatile organic compounds such as industrial degreasers) that is toxic
- ◆ They experienced a health condition relating to that exposure, and
- ◆ Their health condition was caused by the environmental exposure for which they seek a legal remedy.

Show Me The Proof

Documentary evidence of chemical exposure is helpful in proving health claims, although this evidence may be difficult to come by.

Often the only available evidence is subjective evidence – a plaintiff’s own experience of feeling unwell – which may or may not be believed by a Court.¹ Disbelief may occur where the Court concludes that a plaintiff’s health problem is “psychological” rather than physical.²

In these cases, the success of the health claim depends on the plaintiff’s credibility. Where a Court finds a plaintiff incredible, that Court may decide that the claimant’s evidence is “exaggerated”³ or that his or her symptoms result from other factors or pre-existing conditions.⁴ Courts have found plaintiffs’ subjective evidence not to be credible where the plaintiffs did not report the symptoms to others or did not seek medical care.⁵

¹ *Moseley v Director, Ministry of the Environment*, [2014] OERTD No. 23.

² *Nichols v Koch Oil Co*, [1998] BCJ No 1944 at para 72.

³ *Stucke v Richard McDonald & Associates Ltd.*, 2006 ABQB 239 at para 49.

⁴ *Stucke v Richard McDonald & Associates Ltd.*, 2006 ABQB 239, *Nichols v Koch Oil Co*, [1998] BCJ No. 1944, and Manitoba, Workers Compensation Board Appeal Commission, Public Decision No. 99/2013.

⁵ *Stucke v Richard McDonald & Associates Ltd.*, 2006 ABQB 239.

Timing Is Everything

To establish that an environmental exposure caused a health condition, proof of timing and duration of that particular exposure is important. Proving a causal connection can be challenging where individuals were exposed to multiple toxic compounds for varying lengths of time and thereafter develop health conditions. Proof can also be challenging after much time passes between the time of exposure and development of symptoms of the illness. Although, some exposures, such as to asbestos fibers, are medically known to have a long latency.

Judges Are Not Scientists Or Doctors

Health claims involve the added challenge for claimants of Courts having to rule on complex scientific or medical issues. While absolute scientific or medical certainty is not required to prove in law that a particular event caused a plaintiff's injury,⁶ Courts have in some cases required plaintiffs to prove the cause of their symptoms with near scientific certainty. Scientific certainty presents a much higher burden than the "more likely than not" standard of legal causation.

Medical experts can assist Courts to rule on complex scientific issues. Often Courts will recognize that the cause of a medical condition is beyond the expertise of a judge or jury, and will determine that expert evidence is necessary⁷. Where experts are involved, a "battle of the experts" often ensues. Winning the Court's favour can involve the Court believing one expert over another. The expert that is more objective and persuasive is often the one that wins the day.

Judicial Inclination

Plaintiffs bringing health claims may also experience a Court's reluctance to accept alternative medicine. Some Courts prefer the evidence of traditional medical practitioners over alternative medical practitioners.⁸ There is bias in the health care system that pits traditional versus non-traditional medicine against one another. This is so even though the subjectivity of the claimant's medical complaint is often better told through both forms of medicine.

⁶ *BC (Workers' Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25.

⁷ *Pettipas v Bell Aliant Regional Communications Inc*, 2015 NSSC 58 at para 58.

⁸ *MacIntyre v Cape Breton District Health Authority*, 2009 NSSC 202.

WSIB to Review GE Worker Claims

The Ontario Workplace Safety and Insurance Board (WSIB) is poised to rule on these issues as the Board reconsiders health claims made by 250 former General Electric (GE) employees who worked with toxic substances at the GE Plant in Peterborough.⁹

The WSIB's reconsideration follows a Toronto Star investigation which found that "more than half of the 660 occupational disease claims made by employees of GE Peterborough have been denied, abandoned, or withdrawn for apparently insufficient evidence" that the employees' diseases are work-related.¹⁰

In their initial hearings, some GE workers had difficulty finding documentation to prove what chemicals they were exposed to and the duration and timing of their exposure.¹¹ The WSIB previously dismissed one GE worker's compensation claim because he could only prove that he was exposed to asbestos for 11 of the 15 years alleged.¹²

The WSIB has awarded compensation to 30 of the first 47 GE workers whose claim files were recently reopened.¹³ As of early 2018, the WSIB has reviewed two-thirds of the reopened claims.¹⁴

Be Proactive

Injured individuals who initiate health claims must be prepared to confront evidentiary challenges head on. Individuals injured from environmental exposures should act proactively to:

- ◆ Gather documents that indicate what the individual was exposed to, and the timing and duration of that exposure
- ◆ Record the nature, timing, and progression of any symptoms experienced during and after the exposure(s) and detail how those symptoms differ from those of any pre-existing condition. Consider expressing the severity of symptoms to friends and colleagues and seek medical

⁹ Monsebraaten, L. and Mojtehdzadeh, S. WSIB to review more than 250 General Electric plant claims in Peterborough, September 18, 2017, online at: <https://www.thestar.com/news/gta/2017/09/18/wsib-to-review-more-than-250-general-electric-plant-claims-in-peterborough.html>.

¹⁰ Mojtehdzadeh, S. Lethal Legacy: General Electric's Peterborough plant was a symbol of opportunity for generations of workers – but did it also make them sick? Toronto Star, December 17, 2016, online at: <http://projects.thestar.com/lethal-legacy/> [Lethal Legacy]; Mojtehdzadeh, S. and Monsebraaten, L. GE workers paying price for decades of exposure to toxic chemicals: Report, May 18, 2017, online at: <https://www.thestar.com/news/canada/2017/05/18/ge-workers-paying-price-for-decades-of-exposure-to-toxic-chemicals-report.html>.

¹¹ Lethal Legacy.

¹² Lethal Legacy.

¹³ Mojtehdzadeh, S. WSIB reverses majority of denied GE Peterborough cancer claims: Toronto Star, Dec. 17, 2017, online at: <https://www.thestar.com/news/gta/2017/12/17/wsib-reverses-majority-of-denied-ge-peterborough-cancer-claims.html>.

¹⁴ Giunta, Mark. GE Peterborough occupational health claims review more than half complete: WSIB: Global News, February 27, 2018, online at: <https://globalnews.ca/news/4048388/ge-peterborough-occupational-health-claims-review-more-than-half-complete-wsib>.

attention. Suffering in silence can work against the claimant if the individual later chooses to proceed with a claim

- ◆ Consider retaining legal counsel to assist in determining the strength of the potential claim and whether the individual should pursue a claim, and the deadline date by when the law requires commencement of a claim, and
- ◆ Work with legal counsel to retain a medical expert(s) to opine about the causal connection, prepare an experts' report and testify. Consider carefully and early on how any Court or Tribunal will receive the medical expert's credentials, experience and opinion.

Looking Forward: Change is coming

More and more, links between environmental exposures and health impacts are being uncovered through scientific study, brought to public attention through journalistic reporting, and considered by Courts in deciding health claims. Scientific, public, and judicial understanding of the causal connection between environmental toxic exposure and health impacts is growing.

As judicial understanding catches up with the science and as the relationship between certain environmental exposures and illnesses are better understood, more health claims will succeed and the authors predict that more companies will be held accountable.

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