

Fibromyalgia: Lay Evidence vs. Expert Evidence

By Jean Saint-Onge



On July 9, 2001, the Quebec Court of Appeal rendered a judgment in the case of *Charpentier v. Standard Life*¹ dismissing the appeal of Manon Charpentier relating to a claim for disability insurance benefits, thereby confirming the judgment of the Superior Court of March 5, 1998.² However, the appeal was allowed with respect to the payment of the costs of medical experts.

The Facts

Manon Charpentier sued Standard Life for the recovery of monthly total and permanent disability benefits under a group insurance policy issued in favour of Quebecor Printing under which Manon Charpentier was insured. She was a sales representative and the fact that she suffered from fibromyalgia was not contested. The disability definition in the insurance policy read as follows:

[translation]

“Disability

The total and permanent disability of a participant which results from illness or accidental injury and completely prevents the participant from performing:

a) Each and every one of the duties of the participant’s regular work during the first twenty-four months of disability, irrespective of the availability of such work; and

b) Thereafter, all duties or remunerated employment for which the participant is reasonably qualified because of his or her training, education and experience.

(...)”

At trial, Standard Life acknowledged that Charpentier was totally and permanently disabled for her own occupation since March 21, 1995. However, after this period, Charpentier was required to establish that she was totally and permanently disabled for any occupation for which she was qualified.

In 1995, Charpentier was 31 years old, had obtained a diploma of collegial studies and had taken a one-year secretarial course. She had held various secretarial positions before her employment as a sales representative. She earned a yearly income of \$45,000 per year plus a \$15,000 guaranteed advance on commissions for a period of 18 months.

The Judgment at First Instance

At the proof and hearing, Charpentier called as witnesses Dr. Dupuis, a physiatrist, Dr. Belzile, a psychiatrist and Dr. M’Seffar, a rheumatologist. In addition to filing video evidence showing 50 days of daily activities from the period of 1994 to 1996, the defendant called as witnesses Ms. Larocque, a physiotherapist, Ms. Tremblay, an occupational therapist, Dr. Blondin, a



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¹ *Charpentier v. Standard Life, C.A.*, 500-09-006430-987 July 9, 2001, Justices Gendreau, Baudouin and Forget

² *Charpentier v. Standard Life, C.S.*, 500-05-008660-945, March 5, 1998, Justice François Bélanger

rheumatologist and Ms. Houle, a psychologist. The notes taken by Charpentier's attending physician during her visits were filed at the hearing, although he did not testify.

The inconsistencies raised by Manon Houle in her testimony before the trial judge were decisive. Indeed, in interpreting Charpentier's medical and psychological condition, the Court adopted the psychologist's conclusions. Consequently, the judge of first instance accepted the theory of simulation or somatization which had been Manon Houle's conclusion.

The Court of Appeal's Judgment

On appeal, the main criticism levelled at the trial judge was that he had incorrectly evaluated the file, and especially the lay evidence. According to the appellant, given that the judge was faced with contradictory scientific evidence, he should have relied on the lay evidence. As a second ground of appeal, the appellant argued that the trial judge had analyzed the testimony without considering the very nature of her syndromes.

The Court of Appeal, in a unanimous judgment written by Mr. Justice Paul-Arthur Gendreau, dealt with three preliminary issues before rendering judgment:

- the importance of the lay evidence and the weight it should be given;
- the particularities of fibromyalgia;
- the consequences of this illness on the type of evidence to be provided.

On the first issue, the Court of Appeal ruled that the testimony of an ordinary witness constitutes evidence in the same manner as the testimony of an expert witness. It all depends on its probative force:

[TRANSLATION]"Therefore, I conclude that a judge must consider all the evidence when forming his opinion and that, in carrying out his analysis, he can accept or reject any testimony, whether it be scientific or ordinary, and he must determine the relative weight of any evidence he accepts in arriving at his conclusion. Consequently, there is no evidence which, by definition, should take precedence or be favoured."

With respect to the specific attributes of fibromyalgia, the Court of Appeal performed a detailed review of the scientific documentation and determined that due to its complex nature and the lack of any clear and specific etiology, fibromyalgia could not be analyzed or evaluated following a "classic model".

Adopting this approach and bearing in mind the subjective aspect of the illness, the Court of Appeal ruled that the trial judge had not erred in accepting the testimony of the defence's "expert" psychologist rather than the appellant's "lay" evidence. In fact, the trial judge was fully entitled to do so in the circumstances of the case.

In particular, the trial judge was justified in accepting the testimony of Houle, the psychologist, for the following reasons:

she is a pain expert and was still at the time part of a team of doctors studying this subject.

- in addition to meeting with the patient, she carried out objective tests results confirm the diagnosis of simulation or somatization.



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- she demonstrated the inconsistencies in Charpentier's complaints and in her doctors' assertions.

Only the last reason was seriously contested by the appellant. She argued that she had contradicted Manon Houle's expert reports by submitting evidence of the recurrent major depression from which she claimed to suffer. The Court of Appeal disposed of this argument as follows:

[TRANSLATION]"Major depression is a serious condition requiring medical intervention. As Manon Houle noted, no doctor, not even the attending physicians, saw the patient or, therefore, treated her. However, all stated that she had indeed lived through periods of major depression on a recurrent basis. Their assertions were based solely on Manon Charpentier's statements. However, there is no indication that any medication was prescribed. Certainly, the appellant asked the court to consider Dr. Pilon's note. However, the least that can be said is that this document is less than clear and that its author did not testify to explain its contents."

Under these circumstances, the Court of Appeal refused to intervene given that, in giving credibility and weight to the report of the expert Houle, the trial judge did not err in his appreciation of the evidence.

Conclusion

In cases of fibromyalgia, the defence will have to focus on providing solid medical evidence regarding the psychological aspect of the illness. Expert reports will have to rely on meetings and objective tests, whether regarding matters of rheumatology, psychiatry or psychology. The experts who have been retained will also have to carefully consider the medical documentation and the experts' reports contained in the file.

In order to avoid any "reprimand", the insurer should well before the trial, pay any benefits which it expects to be eventually required to pay.

Indeed, the Court of Appeal was not blind to the fact that the insurer had waited until after the start of the proof and hearing to admit Charpentier's total disability as regards the first component of the definition. This is precisely why the insurer was ultimately required to pay the costs of its own experts.

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