



BOLANDHOWE^{LLP}
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MYALGIC ENCEPHALOMYELITIS ASSOCIATION OF ONTARIO – AGM

With Guest Speaker: Russell Howe, LL.B

October 2, 2010



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BIG PICTURE

- Family Law
- Personal Injury Law
- Disability Law



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- Tax Law
- Administrative Law
- Insurance Law
- Tort Law



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Where Are We Now?



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Recognized as a Legitimate Illness



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Battleground Has Shifted



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Case Study:

Ritch v. Sun Life

- Surveillance
- Credibility
- Medical Evidence



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Lessons Learned?



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Bad Facts and Lawyers make Bad Law



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Good Facts and Lawyers make Good Law



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THE BIG SHOW



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Case Study:

Keays v. Honda



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*“Employment Law - Wrongful dismissal
- Notice period - Employee terminated
after 14 years of employment - Factors
determining reasonable notice of
termination of employment - Whether
employee’s position in company
hierarchy factor – Whether 15-month
notice period reasonable.*



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*Damages-Aggravated damages -
Punitive damages - Wrongful dismissal-
Employee diagnosed with chronic
fatigue syndrome - Employer concerned
about employee's numerous absences
and about his doctor's notes to cover
absences, which provided only limited..*



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*...information-Employee dismissed after refusing to meet with employer's doctor-
Circumstances in which aggravated damages resulting from manner of dismissal should be awarded – Whether employee entitled to aggravated and punitive damages.*



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Civil procedure – Costs – Costs premium – Whether costs premium should be awarded – Whether costs should be awarded on substantial indemnity scale.



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Aggravated damages should not have been awarded in this case. The employer's conduct in dismissing K was in no way an egregious display of bad faith justifying an award of damages for conduct in dismissal. On this issue, the trial judge made overriding and palpable errors of fact.



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The employer's March 28 letter to K did not misrepresent the positions of its doctors and it should not have been faulted for relying on the advice of its medical experts. There is no evidence that B took a "hardball" attitude towards workplace absences or that K was being set up when asked to meet B.



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The employer's request for a meeting between K and B was normal in the circumstances. The employer's decision to stop accepting doctor's notes was not reprisal for K's decision to retain legal counsel. Rather the employer was simply seeking to confirm K's disability.



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Lastly, there is no evidence that K's disability subsequent to termination was caused by the manner of termination.



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This is a Wrongful Dismissal case



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Case Study:

Fidler v. Sun Life



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*Damages - Compensatory damages-
Damages for mental distress – Breach of
contract – Insurer wrongly terminating
insured’s long-term disability benefits
for more than five years – Whether
insured entitled to damages for mental
distress.*



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Damages – Punitive damages – Breach of contract – Insurer wrongly terminating insured's long-term disability benefits for more than five years – Whether insured entitled to punitive damages.



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Insurance – Breach of contract – Damages – Insurer wrongly terminating insured's long-term disability benefits for more than five years – Whether insured entitled to damages for mental distress and punitive damages.



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...The termination of benefits relating to an unobservable disability in the absence of any medical evidence indicating an ability to return to work represents conduct that is troubling, but not sufficiently so as to justify interfering with the trial judge's conclusion that there was no bad faith.



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What do we need for CFS?



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Case Study:

Martin v. WCB of Nova Scotia



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Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain....



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...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....



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..patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and



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..non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition...



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...that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians.



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Settlement Stats

- 96% of civil cases settle
- Same in this field



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Proper Tools

- right specialist
- neuropsychologist
- FAE/FCE



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- lay witnesses
- supportive GP
- motivation and treatment
- long work history
- sense of humour



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Results



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