



SURVEILLANCE: OBJECTIVE CREDIBLE EVIDENCE

In light of the increased complexity in the changing auto injury claims environment, many insurers are exploring and implementing new and not so new, but more focused ways, to help manage soft tissue auto injury claims including:

- Getting back to basics in identifying the claims at the very front end that will likely require more focused and thorough medical and non medical investigations and actions – utilization of early warning indicator systems for questionable minor injury and possible tort threshold injury claims – new front end processes and protocols
- Utilizing the insurer's best injury people at the front end of the claims process rather than in the middle or at the back end to manage the output of these front end indicator systems and create a claims investigation/management plan to fit the particular circumstances of each claim
- Proactively managing claimants back to their pre-loss condition through early treatment programs in alliance with health care providers
- Performing more thorough first and third party vehicle investigations to understand if the alleged injury is consistent with the physical damages and impact forces, crash test results in similar circumstances in all respects, and with the facts of the collision as reported by the claimant and witnesses – use of collision reconstruction/kinematics experts – may provide a complete defence to the claim and are of importance re claimant credibility
- Improving claimant interviewing and statement taking – use of experienced investigation experts - important re claimant credibility
- Use of soft tissue injury specialists pre-eminent in their specialties to provide expert medical opinion on the injury, its cause(s), its effects on the claimant's activities, its likely permanence, its functional importance and its functional seriousness - important re claimant credibility
- More thorough verification or non verification of claimed physical limitations of the claimant through the observation of the claimant's day-to-day activities and the documentation of these observed facts in the form of visual evidence and specific narrative evidence over a period of time – use of experienced surveillance experts - important re claimant credibility

TSI provides investigative, statement taking, collision reconstruction and surveillance services in most of the areas highlighted in green above.

The goal of all of TSI's services is OBJECTIVE FACT FINDING which directly or indirectly ultimately focuses on claimant credibility. The degree of claimant credibility depends largely on the consistency of the claimant's statements with provable facts.

For example, if the physical damages sustained to the vehicles and the vehicle occupant movements are inconsistent with the claimants account of the circumstances of the collision, or the impact forces, the claimant's credibility will be significantly and adversely affected when it comes to his/her account of his/her physical or mental limitations. So a claimant's credibility will depend to

*AB AND TORT SOFT
TISSUE AUTO CLAIMS
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- ... *Double Digit Increases in Liability/Casualty Loss Cost Trends*
- ... *No More DACS, New Protocols and Procedures*
- ... *Bill 198 Threshold Eroding - Recent Case Law*
- ... *Novel Heads of Damage Appearing in Threshold Claims*
- ... *More Claims for Improper Benefit Termination*
- ... *Personal Information Protection and Electronic Document Act (PIPEDA) Compliance*
- ... *The Growing Importance of Claimant Credibility in Court/Arbitration Case Outcomes*

some extent on proven facts. Without a thorough factual investigation there will be less opportunity to verify the accuracy of the claimant's statements. Cases where there is exaggeration or opportunism by claimants will not likely become apparent. And we all know that a claimant's credibility will affect the outcome of the dispute resolution process, the size of settlement amounts, and court/arbitration decisions.

INVESTIGATE THE FACTS THOROUGHLY

Experienced defence and plaintiff counsel will vouch for the importance of a Plaintiff's/Applicant's credibility in court or FSCO arbitration in deciding highly fact dependent personal injury cases. This is in part because there is often conflicting medical evidence that sometimes all but cancels each other out or answers only some of the disability questions at issue. The introduction of evidence regarding subjective pain, daily activity level, functional abilities, and physical limitations by a credible plaintiff/claimant and other witnesses will likely ultimately influence the judge/arbitrator a great deal in deciding these issues on a balance of probabilities. This is so in AB claims but particularly the case when it comes to deciding whether the following threshold test questions will have been met in tort cases:

1. Has the injured person sustained permanent impairment of a physical, mental, or psychological function?
2. If yes, is the function which is permanently impaired an important one?
3. If yes, is the impairment of the important function serious?

THE MORE OBJECTIVE FACTUAL EVIDENCE THE BETTER

The focus of this newsletter is primarily on one aspect of such objective evidence – claimant day-to-day observed activities through surveillance. Are these activities consistent with the claimant's evidence? Objective surveillance evidence may support the permanent impairment of a physical, mental or psychological function, that such function is important, and that the impairment of the important function is serious. Or the objective surveillance evidence may support the opposite conclusion. Either way, the fundamental investigative objective, will be fulfilled ... that is, to obtain the real facts, no more, and no less, whatever they may be, in good faith, fairly and legitimately in accordance with privacy and legal standards.

Here are a few examples of the surveillance observations TSI has documented through its experienced (35 years) surveillance experts over the years where the observation of the activities of the claimant clearly did not support the claimant's claimed significant physical limitations, permanent or otherwise. All observations were documented in exact timeframes over days of observation and video taped.

1. Attending Collegiate Institute - No Observed Physical Limitations

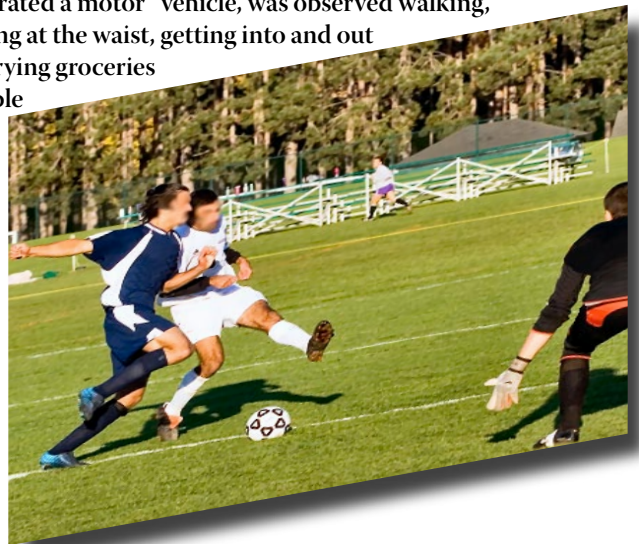
The Claimant attended courses on a full-time basis, as observed over several weeks. The Claimant with alleged serious walking, bending and lifting physical activity limitations operated a motor vehicle, was observed walking, running, dancing, turning his head in both directions, bending at the waist, getting into and out of vehicles, carrying a child, lifting his arms head-height, carrying groceries and performing other activities without any apparent or visible difficulties or limitations to body movements.

2. Delivering Newspapers – No Apparent Physical Difficulties

The Claimant was observed over several days walking, bending at the waist, picking up newspaper bundles, carrying a grocery bag and getting into and out of a vehicle with no apparent difficulties. He delivered newspapers with his vehicle in the early mornings. He drove a vehicle at various other times during the days observed.

3. Working – Playing Soccer

The Claimant was observed to be working for a telecommunications company. He participated in an



organized adult soccer league, played in a game and then participated fully in a team practice afterwards.

4. Seated, Playing Slot Machines For 7 Hours

The Claimant, with alleged physical limitations in standing and sitting for extended periods of time was observed on numerous occasions without any apparent difficulty grocery shopping, lifting her arms, carrying individual articles in one hand, her purse in another, driving and getting in and out of vehicles, carrying grocery bags, lifting the trunk of a car, loading groceries into the car and turning her head. She was observed sitting for extended periods of time in restaurants. She played slot machines for over 7 hours on the same day.



In order to have to have an accurate and fair representation of a claimant's usual daily activities, the insurer should authorize the surveillance expert to document the claimant's pattern of activity over a period of time, not just isolated days or certain activities within such days. Claimants can have days when they can perform certain activities with pain, take days to recover but could not do so over longer periods of time and courts will understand this. So insurers need to be thorough in their claimant observations over periods of time if the initial observations indicate concerns about claimant credibility.

PRIVACY COMMISSIONER OF CANADA 2005 PIPEDA DECISION

A woman's activities recorded and videotaped by a private investigator hired by an insurance company

A woman alleged that an insurance company, with the use of a private investigator, collected her personal information without her knowledge or consent when it conducted surveillance and videotaped her activities.

Summary of Investigation

In 2000, the woman was in a motor vehicle accident. She subsequently filed a lawsuit against the driver of the other vehicle. The woman owned a business and claimed that her injuries not only resulted in a loss of income, but also prevented her from performing her domestic duties. The insurance company representing the other driver stated that the woman's testimony at the examination for discovery hearing and her medical reports revealed discrepancies and inconsistencies with respect to the injuries claimed. As such, the insurance company decided to conduct surveillance on the woman to record and observe her functional abilities on a day-to-day basis when she was not explicitly being examined for the purpose of creating a record for litigation. The insurance company hired a private investigator to conduct the surveillance.

The private investigator followed the woman for approximately three weeks. The surveillance took place at her home, place of business, shopping centers, etc. The private investigator prepared a report outlining the date that the surveillance took place, the time, location and what was seen. Some of the woman's activities were videotaped, such as her carrying packages, boxes, leaving her place of business, driving to shopping centers and so forth.

The information collected by the insurance company, including the videotape, was used in Court. The woman then filed complaints with this Office stating that the insurance company and private investigator collected her personal information without her knowledge or consent.

The insurance company and private investigator expressed their view that the woman had consented to the collection of her personal information when she filed a claim against its client – the other driver. The insurance company stated that it has a duty to def^end claimant could put forward a claim and then refuse to consent to the verification of that claim.

DEFACTO

Findings

Issued August 9, 2005

Application: Principle 4.3 states that the knowledge and consent of the individual are required for the collection, use and disclosure of personal information, except where inappropriate.

The Assistant Privacy Commissioner reviewed the circumstances surrounding the insurance company's decision to conduct surveillance, including video surveillance on the woman. She agreed that when an individual initiates a lawsuit there is an implied consent that the other party to the suit may collect information required to defend itself against the damages being sought by the individual who filed the suit. When the woman initiated her lawsuit against the insurance company's client and when her testimony and medical reports revealed discrepancies and were inconsistent with the injuries claimed, the Assistant Privacy Commissioner concluded that she gave her implied consent to the collection of her personal information.

That being said, the Assistant Privacy Commissioner emphasized that implied consent is not without limitations. Implied consent does not authorize unlimited or uncontrolled access to an individual's personal information, but only to the extent it is relevant to the merits of the case and the conduct of the defense. In this case, the Assistant Privacy Commissioner noted that the collection of the woman's personal information was limited to what was necessary for the insurance company to defend itself against her Court action.

The Assistant Commissioner concluded that the complaints were not well-founded.

TSI provides surveillance services using standards that fully meet the implied consent requirements of PIPEDA as outlined in the above case.

TSI would welcome the opportunity to demonstrate that its surveillance services meet the need for the OBJECTIVE FACT FINDING required to establish the credibility or lack of credibility of claimants in your case(s).

Who Is TSI?

In 1999, Jim Jasper, Mark Edwards and Lee Thistle, leaders in Canada in the Property & Casualty and Life & Health insurance industries in the creation of best claims practices, fraud control and legal management programs, came together to form **TSI Solutions Inc.**

TSI helps private and public insurers implement solutions to improve overall performance and efficiency and in particular, reduce unnecessary claims loss and expense leakage.

One of our primary objectives is to strengthen fraud recognition and investigation programs of insurers. Our investigative team includes CFEs, Certified Fire and Explosion Investigators and Level III and Level IV Collision Analysts and Reconstructionists.

We serve our customers not only through providing claims investigation support, but also through our various training programs and our claims best practices tool, "**TSI Claims Scorecard 1000**". This tool objectively and systemically identifies and prioritizes improvement opportunities and benchmarks claims and management practices against outside standards.

Lee Thistle, C.O.O. Recognized as a pioneer and leader in fraud prevention and investigation in Canada, with more than 30 years' experience. Established two

effective SIU's at 2 major P&C carriers. Leads TSI's Claims Investigation Support ("CIS") unit.

Mark Edwards, President. 30 years experience in the Life & Health and P&C industry as VP, General Counsel & Corporate Secretary, VP Claims, a Director of various companies and as a Consultant. A change and performance management leader in best practices claims and legal management.

Jim Jasper, Chairman & Treasurer. 40 years in the P&C industry in the US and Canada. A change management specialist with more than 130 General Management Consulting projects to the P&C industry.



10 Kingsbridge Garden Circle, Ste 704
Mississauga, Ontario Canada
L5R 3K6
Phone: 905-502-3480
Fax: 905-502-3468
Email: qanda@tsisolutionsinc.com
www.tsisolutionsinc.com
