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Kinected: Bodily Litigation

Kinesiologist Evidence in Bodily Injury

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In bodily injury litigation across the country, lawyers representing the parties in the proceedings regularly seek the assistance of treating health care professionals to obtain expert opinions in relation to the issues relevant to the case.

In most bodily injury cases, usually the most significant issue that legal counsel will need to address in the litigation is the fundamental issue of the nature and extent of the Plaintiff's injuries / disability and the injured Plaintiff's corresponding right to compensation for such injuries.

Treating professionals such as Kinesiologists can occupy an important role as a expert in such legal proceedings. This role can greatly assist the court in better understanding such important matters as the nature and extent of the injured Plaintiff's injuries and the need for any further corresponding rehabilitative treatment recommendations that may be beneficial to the injured Plaintiff.

Factual Witness vs. Expert Witness

In British Columbia, there are typically two legally distinct, but potentially overlapping roles that a treating professional such as a Kinesiologist may have in legal proceedings. The first role is that of a **"factual witness"** and the second is that of an **"expert witness"**. The line between the two can overlap and sometimes be confusing, but which role the clinician is assuming is an important matter to ascertain, as different and important formal requirements can come into play in the litigation depending upon which role the is being fulfilled.

The **factual witness** will generally testify in relation to the treatment progress of the Plaintiff. Evidence in this context is generally presented in relation to when the patient was treated, what the patient's objective symptoms and subjective complaints may have been during the course of treatment, and how the patient responded to the treatment provided. Usually the clinical records of the patient will be available to the clinician to assist in relation to presenting evidence in relation to the treatment provided.

As a factual witness, you are not required to prepare a written report **for litigation purposes**, however, any treating or progress reports prepared in relation to your treatment of the patient will become part of the patient's treatment record and may be produced in the litigation as any other relevant clinical record. As a factual witness you are also not permitted to venture out and



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provide discreet opinion evidence at trial in relation to such matters as injury diagnosis; functional capacity / impairment; treatment or rehabilitative needs; or injury prognosis.

As an **expert witness**, to the extent you are qualified by your qualifications to provide such expert opinions, you are permitted to provide expert opinion evidence in relation to injury diagnosis; functional capacity / impairment; treatment or rehabilitative needs; or injury prognosis.

One of the most significant issues surrounding the nature of which role you are fulfilling relates to the certain formal legal requirements must be met under the *Supreme Court Civil Rules*, when you seek to tender an expert report as an expert witness.

The Burden of Proof in Civil Proceedings

*What if I am asked to provide an expert opinion in an area that I am qualified and capable of opining upon, but I cannot be **absolutely certain** that I am correct?*

The intersection between science and law often results in a number of misconceptions. Perhaps the most frequently misunderstood issue for many treatment professionals is the fact that the civil courts (the courts that decide bodily injury matters), do not require a strict or precise determination for such an opinion can be used for court purposes.

In this respect, it is important to appreciate the different **burden of proof** that must be established within the context of **civil proceedings**, as compared to the burden of proof that must be established in **criminal proceedings**.

The so-called “civil burden of proof” requires that the injured party establish his or her case on a “**balance of probabilities**”. This “civil” threshold in the burden of proof can be compared to the “criminal” burden of proof, which requires presumes the innocence of the accused and requires the Crown to establish the accused’s guilt “**beyond a reasonable doubt**”.

Generally speaking, to successfully prove a matter on a balance of probabilities simply requires the injured party to persuade the court on the basis of the evidence presented at trial that it is “**more likely than not**” that a particular fact has been proven, or a specific injury has been sustained, or a particular outcome has (or will) “likely” occur.

This civil burden does not require scientific certainty, but simply requires evidence to be presented that exceeds a theoretical threshold of likelihood of as little as 50.1% or better.

Accordingly, provided the expert holds the view that on a balance of probabilities his/her opinion is the correct opinion, they may opine on such matters and the court may put reliance on such an opinion, provided the court agrees with the expert’s opinion.

Why Kinesiologist Evidence?

The nature and extent of the evidence that will be required to be presented in a particular case and at any particular trial will vary significantly, depending upon the nature, scope and severity of the injuries sustained by the injured party.

Although the court setting may be unfamiliar and intimidating to many treatment professionals, the **subject matter is not**. Regardless of what role the treatment professional is assuming in the litigation process, the evidence that a skilled treating professional can offer can be of great assistance in the court coming to a well reasoned and well supported conclusion in deciding such important matters.