

PSYCHOLOGICAL INJURY

Weighing mental health damages

Gluckstein Lawyers' **Jonathan Burton** explains why every personal injury file carries a psychological component – and what that means for how lawyers build their cases

INITIAL CONVERSATIONS with clients tend to centre on one thing: the physical. Did you break your leg? Have the concussion symptoms eased? Did you have surgery? For Jonathan Burton of Gluckstein Lawyers, that line of questioning captures only part of what an accident does to a person, and often not the most consequential part.

Over 21 years in personal injury law, Burton has watched mental health awareness grow and, in turn, influence how cases involving psychological injury are built and argued. The firm is increasingly seeing a psychological component in injury files, with clients and their family members grappling with injury management and the aftershocks of the accident. He advocates for a shift in how lawyers approach the intake conversation from the very first meeting.

"Tragedy, trauma, health – these are things everyone experiences, and there's a mental component to all of them, with resilience and strength at one end, demoralization and deterioration at the other," Burton says, adding that plaintiff-side lawyers must determine a client's full functional picture and whether there's a psychological component to the damages.

"We're hoping that not every person who comes in has a mental injury, but if they do, we need to find out because it's part of the recovery."

The social media Catch-22

Because these cases can take years to reach trial, lawyers have an opportunity to develop

that full picture. The strongest evidentiary record combines testimony from lay witnesses and medical experts. Colleagues and friends who knew the plaintiff before the accident can describe what has changed, while treatment records from psychologists, social workers, and psychiatrists can document other indicators, including functional evidence such as withdrawing from a career, becoming socially isolated, or experiencing significant weight loss or gain.

The strongest plaintiff is a credible one, and the same era that has normalized conversations about depression and anxiety has given insurers and defence counsel an unprecedented tool for challenging that credibility.

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"You can be sure that the first thing an insurance company or defence lawyer is going to do is plug your name into Google and look you up," Burton says. "It's free surveillance."

The result is a genuine Catch-22. A client who reports anxiety, a fear of crowds, and



an inability to function in public spaces but appears in a video at Canada's Wonderland does not necessarily have a fraudulent claim. However, that footage exists and may be used

to undermine the client's credibility. Even a professional who must maintain an active online presence to keep a business viable faces the same problem: the image of competence projected online can be used to contradict the injury documented in the litigation.



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diagnosis is not required to establish that a mental injury has occurred.

“Don’t overlook the fact that there’s no immediate psychiatric diagnosis of a client and think that maybe there isn’t a psychological injury,” he says, noting that lawyers should use every tool available.

For example, a client injured in a motor vehicle accident who has access to accident benefits should also use those funds for psychological therapy, social work, and family counselling. Burton has found that the benefits extend further than anyone expects: clients who had never sought counselling before discover resources and insights that reach well beyond their immediate recovery.

“It’s about rebuilding their lives – taking the individual as we find them and helping them as best we can,” Burton says. “Get to know them,

Burton addresses this risk at the outset. He tells clients that a personal injury claim is a significant invasion of privacy, from the disclosure of medical records dating back three years before the accident to the opposing parties combing through Facebook posts.

“They must assume and expect that everything they put out there will be available to the other side. Be ready to talk about it,” he says.

Burton advises clients to be more selective about what they share on social media and to keep sensitive personal information off public platforms. He’s seen far too many details posted on GoFundMe pages, for example, as well as people describing on family members’ public Facebook walls how their injuries are – or are not – improving. He also stresses the importance of keeping contemporaneous, private notes about how they are genuinely feeling on any given day.

“It’s tricky because there’s so much interplay between social media, life, and litigation in these cases,” Burton says. “From

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the outset, we provide our clients with a letter that gives them a real heads-up about social media safety and encourages them to be mindful.”

A holistic view

What an accident does to a person is never merely physical. The law, practised well, should account for all of it. The Supreme Court of Canada’s decision in *Saadati* confirms a principle Burton believes every personal injury lawyer should bring to each file: a formal psychiatric or psychological

get to know the whole picture, and include it as part and parcel of their recovery and their case in every situation. Everybody has a mental health component.” 

Jonathan Burton joined Gluckstein Lawyers in 2005. He received his bachelor of laws from the University of Western Ontario in June 2006 and returned to the firm to complete his articles. Following his call to the Ontario bar in June 2007, he assumed his current position as a senior litigation lawyer. Burton restricts his practice to insurance litigation, including personal injury, disability matters, occupiers’ liability, medical malpractice, and product liability.

