

# ADVANCING OR DEFENDING INVISIBLE INJURY CASES

*THE SCIENCE, THE LAW, THE STRATEGIES*

A distinguished faculty of legal and medical experts explain the essentials and illuminate the subtle challenges of invisible injury cases. Topics include:

- Critical facts concerning the diagnosis and treatment of fibromyalgia, chronic pain, mild TBI and similar conditions
- The contributions of the relevant medical and psychological specialties to building the case
- The best use of lay witnesses in establishing or casting doubt on the plaintiff's credibility
- Long-term disability claims based on the effects of invisible injuries
- Surveillance tools and techniques – their strengths and limitations
- The seminal Canadian cases in this area and how they're being applied

Register today at:

[osgoodepd.ca/invisible-injury](http://osgoodepd.ca/invisible-injury)

## Program Chairs

**David Lackman**  
Gluckstein Personal Injury  
Lawyers

**Dena Oberman**  
Brown & Burnes

## Program Details

DATE AND TIME

**April 19, 2017**

**9:00 a.m. – 4:30 p.m. EDT**

**In Person or Webcast**

LOCATION

**Osgoode Professional  
Development**

1 Dundas St. West, 26th Floor  
Toronto, ON

ONLINE REPLAY

**May 25, 2017**

# Advancing or Defending Invisible Injury Cases

## *The Science, The Law, The Strategies*

Too often, counsel “skip to the bottom line” of experts’ reports without fully understanding the basis for the opinion and its vulnerable points. They have only a hazy or out-of-date understanding of the roles of various medical/psychological specialties in making or breaking the case, or of the most recent judicial pronouncements in the field.

**Even experienced counsel can benefit from the opportunity to upgrade or refresh their knowledge in such areas as:**

- How counsel can use experts’ specialized knowledge to identify fruitful areas for questioning
- What plaintiff’s counsel must bear in mind in preparing the “before and after” lay witness
- Extent of the plaintiff’s duty to mitigate
- How defence counsel can effectively use IMEs and meet the onus of justifying the proposed treatment
- Ethical and professional challenges facing counsel in these often highly-charged cases

## Who Should Attend?

- Plaintiffs’ and defendants’ counsel
- In-house insurance counsel
- Senior adjusters and other insurance professionals
- Paralegals and litigation law clerks

### What attendees said about OsgoodePD programs on chronic pain/personal injury:

“Intellectually stimulating...provided practical solutions.”

**Peter Lingard**, Martens Lingard LLP

“Terrific program. Great faculty. Good quality papers that address case law and legislative developments.”

**Catherine Zingg**, Flaherty McCarthy LLP

“As an adjuster, learning plaintiffs’ and defence perspectives on file handling is a benefit.”

**Christine Fizell**, Trillium Mutual

“Very informative and well run. Great to have both sides, defence and plaintiff’s, all in one room talking about upcoming issues.”

**Emil Calixterio**, Northbridge Financial Corporation

## Agenda

**8:30**

**Registration and Continental Breakfast**

**9:00**

**Chairs’ Welcome and Introductory Remarks**

**9:05**

**The Medical and Psychological Background**

**Dr. Karen Wiseman**, Psy.D., C. Psych., ABPP  
Practice in Clinical Psychology and Clinical Neuropsychology; Board Certified in Clinical Neuropsychology

**Dr. David Berbrayer**, Psychiatrist & Consultant, Traumatic Brain Injury Clinic Sunnybrook Health Sciences Centre, & Physical Medicine and Rehabilitation, Department of Medicine, University of Toronto

Successful conduct of the invisible injury case requires an up-to-date understanding of condition(s) involved, along with their diagnosis, prognosis and treatment. In this session, medical experts will provide key points on the range of conditions comprehended by the term “invisible injury”, such as:

- Fibromyalgia
- Chronic pain/complex regional pain syndrome
- Post-traumatic migraine
- Mild-to-moderate traumatic brain injury
- Post-concussion syndrome
- Chronic fatigue syndrome
- Thoracic outlet syndrome
- Reflex sympathetic dystrophy

Our experts will address the uses and limitations of diagnostic tools and technologies and the contribution which each medical specialty can make to establishing the plaintiff’s or the insurer’s case.

- Who are the qualified diagnostic and treating experts you will call upon in building your case, and why?
- The relationship between psychological causes and physical symptoms
- Identifying the “malingerer”

**10:30**

### Refreshment Break

**10:45**

### The Law Of Invisible Injury: Where It Stands, Where It’s Going

**David Lackman**, Gluckstein Personal Injury Lawyers

**Susan Gunter**, Dutton Brock LLP

**Meghan M. Hull Jacquin**, Howie, Sacks & Henry LLP

This session opens with David Lackman’s thoughtful discussion of leading Canadian cases in the area of invisible injury/ chronic pain, including the latest judicial applications and pronouncements. Topics include:

- Pivotal points on the nature and sufficiency of evidence in these cases
- Invisible injuries and the threshold-defining Regulation 461/96 on permanent serious impairment
- Firestone J.’s recent decision in *Valentine vs. Rodriguez-Elizalde* (in which a \$150,000 costs award was added to a \$15,000-\$20,000 economic loss claim)

The session continues with one plaintiff’s and one insurer’s counsel discussing/ debating whether the current state of the law is satisfactory, where the problems are and where the law seems to be heading.

**12:00**

### Lunch

**12:45**

### Building the Plaintiff’s Case: Making the Invisible Visible

**Wendy H. Sokoloff**, Sokoloff Lawyers

**Alfred M. Kwinter**, Singer, Kwinter

Explore the practical realities of getting what you need to substantiate your position and present it effectively at mediation or trial

- Establishing the credibility of the plaintiff and of the plaintiff’s experts
- Judge or jury: the strategic choice
- How to address up front the absence of traditional objective test findings (e.g. MRIs) so as to take the wind out of the opposing party’s sails
- Demonstrative evidence, e.g. charts comparing pre- and post-accident employment and health records (number of medical visits, patient complaints, symptoms before and after the accident, etc.)
- Choosing the lay witnesses most helpful to establishing the plaintiff’s psychological and life quality changes and overall credibility (family, friends, colleagues, clergy)
- Where and when plaintiff’s counsel differ on strategic approaches

**2:00**

### Refreshment Break

**2:15**

### Constructing the Winning Defence Case: Tools and Strategies

**John Burnes**, Brown & Burnes

**Mark Elkin Q.C.**, Thompson, Tooze, McLean & Elkin

**Antonella F. Albano**, Senior Legal Counsel, Legal Claims Dept., Intact Insurance Company

- Defence surveillance (including surveillance of social media): what’s proper, what’s effective, what must be disclosed and when
- Selecting the right defence medical expert and how objective is objective?
- Challenging economic damage claims in chronic pain cases
- Jury notices in defence cases: are they always appropriate?

- Multiple causes: overlapping injuries and pre-existing conditions
- Arguments based on secondary gain
- Spotting and capitalizing on inconsistencies between plaintiff medicals or between reports and discovery evidence; detecting bias
- The disgruntled spouse and other alternative witness accounts

**3:30**

### Ethical and Professional Issues In Advancing or Defending Invisible Injury Claims

**Ronald P. Bohm**, SBMB Law

**Gregory Neinstein**, Neinstein LLP

**Paul Tushinski**, Dutton Brock LLP

- *You have asked a doctor five times for an essential medical-legal report but without success. Your last resort is to report the doctor to the College of Physicians & Surgeons, but you fear that if you do so the doctor will kill your client’s case. What do you do?*
- *The defence has conducted surveillance on your client and in the course of the surveillance it becomes apparent she is having an affair. But producing the surveillance will destroy the client’s family.*
- *The client tells you he has been involved in three previous accidents but does not want this revealed to the defence and is telling all treating doctors that he has never had any such involvement.*

A variety of ethical and professional challenges commonly arises in invisible injury cases. This session will examine a number of realistic fact situations to illustrate where the pitfalls lie and how to avoid or surmount them—with reference to the *Rules of Professional Conduct* and the OTLA and Advocates Society codes of conduct.

**4:30**

### Program ends

## Chairs

**David Lackman**  
Gluckstein Personal Injury  
Lawyers

**Dena Oberman**  
Brown & Burnes

## Faculty Includes

**Antonella F. Albano**  
Senior Legal Counsel,  
Legal Claims Dept., Intact  
Insurance Company

**Susan E. Gunter**  
Dutton Brock LLP

**Meghan M. Hull Jacquin**  
Howie, Sacks & Henry LLP

**Dr. David Berbrayer**  
Physiatrist & Consultant,  
Traumatic Brain Injury  
Clinic, Sunnybrook Health  
Sciences Centre, & Physical  
Medicine and Rehabilitation,  
Department of Medicine,  
University of Toronto

**Alfred M. Kwinter**  
Singer Kwinter

**Gregory Neinstein**  
Neinstein LLP

**Wendy H. Sokoloff**  
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**Paul Tushinski**  
Dutton Brock LLP

**John Burnes**  
Brown & Burnes

**Dr. Karen Wiseman**  
Psy. D., C. Psych, ABPP,  
Clinical Neuropsychologist  
and Clinical Psychologist

**Mark Elkin Q.C.**  
Thompson, Tooze, McLean  
& Elkin

## Registration Details

### Fee per Delegate

**\$595 + HST**

Fees include attendance, program materials, continental breakfast, lunch and break refreshments. Group discounts are available. Visit [www.osgoodepd.ca/group-discounts](http://www.osgoodepd.ca/group-discounts) for details. Please inquire about financial assistance.

### Program Changes

We will make every effort to present the program as advertised, but it may be necessary to change the date, location, speakers or content with little or no notice. In the event of program cancellation, York University's and Osgoode Hall Law School's liability is limited to reimbursement of paid fees.

### Cancellations and Substitutions

Substitution of registrants is permitted at any time. If you are unable to find a substitute, a full refund is available if a cancellation request is received in writing 14 days prior to the program date. If a cancellation request is made with less than 14 days notice, a \$75 administration fee will apply. No other refund is available.



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