

Litigation MRI: Why lawyers are asking for it and why your patients need it

The key to litigation-driven MRI is not that it is medically necessary, but rather that it is reasonable and necessary for the proper conduct of the proceeding.

Todd Cherniak, LLB

Magnetic resonance imaging (MRI) is presently used relatively rarely as an evaluation or diagnostic tool in personal injury litigation in British Columbia. This is because MRI is a scarce resource in the public health care system that cannot currently fully bear the burden of assessing the seriously ill in our community. In such circumstances, doctors are loath to requisition an MRI except in the clearest of circumstances and lawyers, for fear of intruding on the doctors' sphere of expertise (and be accused of practising medicine), are similarly dissuaded from pressing for a referral.

It does not have to be this way. There are compelling reasons for MRI to be used in practically every personal injury claim in British Columbia in a manner that will be of benefit to the claimant, his or her lawyer and doctor, and will not in any way be a burden on the public health care system.

Why MRI?

As a diagnostic tool, MRI is far superior and safer than X-ray (which measures the absorption of ionizing radiation) and (in many instances) computed tomography (CT) scans. Unlike positron emission tomography

(PET), which is a computerized scanning technique using radioactive isotopes, there is no controversy in the British Columbia courts about the admissibility of MRI as evidence.¹ Further, MRI is fully accepted by the insurance industry as objective and reliable.

MRI is universally accepted not only because of its accuracy but also because of the objectivity of its findings. It matters not whether the claimant is sent for the test at the request of the plaintiff or defendant, the resulting report will be the same.

In the United States, where access to MRI is not an issue, sending a personal injury claimant for an MRI is now part of the standard of care (the baseline conduct to which the professional must conform to avoid being negligent) for plaintiff personal injury lawyers. This is so not only because of the usefulness of the findings in the claim but also due to the serious risk of potential liability facing both doctor and lawyer should a latent problem be discovered after the conclusion of the claim that would have been detected had an MRI been conducted.

Due to limitations on access to MRI in British Columbia (both real and perceived), MRI is not yet the standard of care in this jurisdiction. Nevertheless, compelling reasons exist

here why MRI should be considered for practically every personal injury claimant.

The current state of access in British Columbia

Access to MRI is limited in British Columbia. While waiting lists for a publicly funded MRI vary, the waiting periods are universally too long, with most people not able to obtain timely access to MRI except in the most serious circumstances.

Though more public funds have been promised for diagnostic imaging, this proposed increase in access is not relevant to most personal injury claimants as they are not currently on, or candidates for, a waiting list. This is because in an effort to control demand, radiology departments in the public hospitals (where all public pay MRI scanners are currently located) typically only accept requisitions from specialists and not from family practitioners. Since (quite rightly) very few of these claimants are referred on by their family practitioner to a

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Mr Cherniak practised civil litigation in Vancouver for 11 years and is currently the president and general counsel of Canadian Magnetic Imaging based in Vancouver, British Columbia.

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specialist, they are never candidates for a publicly funded scan.

However, these claimants are not disenfranchised. The Canada Health Act² permits individuals to go outside of the public system for a diagnostic test like MRI if the procedure is not medically necessary. While this exception is at times exploited by some simply not willing (or able) to wait for their medically necessary scan, it clearly applies for all claimants with a personal injury action. This is because, while there may be important medical benefits that might flow from the MRI's findings, the primary purpose of the scan can always be said to be to assist the lawyer (or any other professional for that matter) in the preparation and presentation of the claimant's case.

It is for this very reason of legal necessity that the cost of the MRI is recoverable from the insurer by the claimant as a disbursement. Simply put, assuming liability, the tort insurer is obligated to pay for the MRI on the same basis it must fund every other disbursement (like any expert report), that it is reasonable and necessary for the proper conduct of the proceeding.^{3,4}

Therefore, due to the ready availability of quality MRI machines in private clinics, personal injury claimants are in a unique (and privileged compared to the general population) position in British Columbia. They are eligible for immediate access to a legal, funded (by the tort insurer), MRI in the private system.

Why do lawyers and patients need this information?

It matters not whether the MRI discloses injury. Either result provides essential information for both the claimant and his or her lawyer (and, in certain instances, the physician).

Benefits of a result showing injury

Quantum

If there is no objective evidence of

injury (e.g., the typical whiplash or soft tissue case), ICBC has a soft cap for non-pecuniary (pain and suffering) damages. Therefore, if a claimant cannot demonstrate the injury in some objective way (by showing a disc injury, a meniscus or rotator cuff tear, etc.) he or she will be limited in the settlement negotiations with ICBC in the amount recoverable for non-pecuniary damages. Since the insurer is already compensating the claimant as if the MRI shows no injury, an MRI finding can only increase quantum, but never decrease it.

Further tests or studies/
pecuniary loss issues

The MRI may disclose a condition that may require surgery (e.g., full thickness rotator cuff tears, meniscus tears, nerve root impingements, etc.), which could greatly affect future care or work loss issues. Further, the nature of the injury may require specialized physiotherapy or referral on to other specialists for assessment, which also may affect quantum.

Demonstrative exhibit at
mediation or trial

MRI is a computer-generated image and therefore can be very useful as a demonstrative exhibit at trial. An MR image can be enlarged to any size, colored in any manner, and be presented three dimensionally. With enhanced MR images, injuries can actually be seen, which is a very effective tool at mediation and trials.

Benefits of a result showing no injury

Peace of mind, sound
professional advice

A result that shows no injury is a good result for the claimant. In practically all cases (with the notable exception of brain injuries), it means there will likely be no long-term effect of the injury for the claimant. The claimant expects his or her symptoms will eventually subside and that he or she

will recover. Not only is this good for peace of mind, it is also very helpful with claimants' financial expectations for the claim.

It is also very important information for the lawyer. Once the claimant's symptoms do subside, the lawyer will be in a position to assess quantum (without waiting the typical two or more years to see if something develops) and have the confidence to advise the claimant to sign a release (which forever compromises the claimant's right to compensation for the injury). For this reason alone, the MRI disbursement can always be said to be reasonable, necessary, and proper.

Baseline

While most claimants only get in one accident in their lifetime, there are some who are not as fortunate and are in two or more. It is not uncommon in such circumstances for the insurer to take the position that the injuries suffered in accident number two were in fact caused in accident number one, for which they have a release. However, if a claimant obtained an MRI for accident one he or she will have a snapshot of the area with which to compare the MRI results from accident two. This baseline MRI information will curtail this type of defence and allow each accident to be properly considered on its own merits.

Professional liability

Though not nearly the issue in British Columbia as it is in the United States, as access increases (there is presently no wait for litigation-driven private MRI in British Columbia), both doctors and lawyers face the risk of negligence claims in situations where an injury that would have been detected by MRI but was not (as the MRI was not done) then manifests into a serious injury after the claim is settled and released. In such circumstances, the claimant is left only to sue the professionals. While this risk is currently relatively small, it can easily be

eliminated by ensuring a scan is conducted prior to the final disposition of the claim.

Conclusion

Since there is immediate, fully funded access to MRI for personal injury claimants, litigation-driven MRI scans should be considered differently from publicly funded scans by lawyers and doctors in British Columbia. The MRI will, in every instance, benefit the claimant, his or her lawyer, and in many instances, his or her doctor.

Failure to send the claimant for an MRI risks the possibility of a misdiagnosis, potential delays in the resolution of the claim and future liability claims against the professionals.

The key to litigation-driven MRI is not that it is medically necessary, but rather that it is reasonable and necessary for the proper conduct of the proceeding. It is for this very reason the cost of the MRI is recoverable, and that when a lawyer requests that a doctor requisition an MRI for his or her claimant, the lawyer is practising law, not medicine.

Competing interests

Mr Cherniak is the president and general counsel of Canadian Magnetic Imaging based in Vancouver, British Columbia.

References

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2. The Canada Health Act 1984 c.6 s.1.
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4. *Zahynacz v. Kozak*, (May 4, 1999), B.C.S.C., New Westminster Registry, Docket No. SO1201 and, *Hazbawi v. Lucier* [2001] B.C.J. No. 2842 B.C.S.C. New Westminster Registry No. SO51663.

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or lawyers may interpret this fact incorrectly in personal injury cases, and discount abnormal MRI findings when the abnormality may in fact indicate a cause for the pain.

Although MRIs may be considered as objective evidence in court, abnormal MRI findings in one patient may be causally related to permanent neurological impairment and pain. In another patient, the same MRI findings may be asymptomatic.

Pitfalls of a normal MRI

The presence of a normal MRI does not imply that a structure is not painful. Musculoskeletal and neurologic structures may cause pain and functional impairment in the absence of MRI abnormalities. Although an MRI showing no abnormality is usually a favorable result for the claimant or patient, there is little basis to advise a patient that his or her symptoms will eventually subside because the MRI is normal.

Conclusions

In order to avoid the pitfalls potentially associated with the use of MRI in musculoskeletal-related injuries, it is important to have an understanding of the indications and limitations of advanced imaging techniques in the individual patient or claimant.

Competing interests

None declared.

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