

Litigation MRI: How to use it and why you need it

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INTRODUCTION

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 healthcare system that cannot currently fully bear the burden of assessing the seriously ill in our community. In such circumstances, doctors are loathe 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 practicing 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 utilized 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 healthcare system.

WHAT IS MRI?

MRI is a radiology technique which uses magnetism, radio waves and a computer to produce clear images of virtually any body structure. The magnet creates a strong magnetic field, which aligns the protons of the hydrogen atoms in the body (hydrogen is the most abundant element in the body), and then exposes them to radio waves. The radio waves spin the protons and produce a signal, which is then processed by the computer and an image is produced. In some instances contrast agents are utilized to increase the accuracy of the images. MRI is a very low risk procedure, as it does not expose the patient to ionizing radiation.

MRI has opened up visualization possibilities that did not exist until relatively recently. MRI is able to create clear images of any tissue containing hydrogen and is able to detect disease or injury in muscle structure or along ligaments and tendons, as well as in tissue within the central nervous system. MRI allows visualization of soft tissue structures around joints, in the spinal column and the skull. The ability to visualize soft tissue and the vascular system makes MRI the preferred diagnostic technique for the brain.

WHY MRI?

MRI is the gold standard for diagnosing and assessing soft tissue injuries in personal injury claimants. As a diagnostic tool, it is far superior and safer than x-ray (which measures the absorption of ionizing radiation) and (in most instances) CT (Computed Tomography) scans. Unlike PET (Positron Emission Tomography), which is a computerized scanning technique utilizing radioactive isotopes, there is no controversy in the British Columbia courts about the admissibility of MRI as evidence.² 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.

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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 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 which 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, the radiology departments in public hospitals (where all public-pay MRI scanners are currently located) only accept requisitions from specialists and not from family practitioners. Since very few of these claimants are referred on by their family practitioner to a specialist, they are never candidates for a publicly funded scan.

However, these claimants are not disenfranchised. The *Canada Health Act*³ 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.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 IS MRI "REASONABLE AND NECESSARY FOR THE PROPER CONDUCT OF THE PROCEEDING"?

MRI is reasonable and necessary for the proper conduct of the proceeding because it matters not whether the finding of the scan is positive or negative as either result provides essential information for both the claimant and their lawyer.

BENEFITS OF A POSITIVE RESULT

Quantum – If there is no objective evidence of injury (i.e. the typical whiplash or soft tissue case), ICBC has a soft cap for non-pecuniary damages. Therefore, if a claimant cannot demonstrate the injury in some objective way (i.e. by showing a disc injury or a meniscus/rotator cuff



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MRI will diagnose and detect abnormalities in a broad range of anatomic sites (including soft tissue) that might otherwise go undetected. CMI utilizes a high field MRI system which is able to

create superior images in multiple planes to more clearly delineate the extent of injury. Moreover, it is non-invasive and doesn't expose patients to ionizing radiation. This makes MRI a very low-risk procedure.

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tear etc.) he or she will be limited in their settlement negotiations with ICBC in the amount recoverable for non-pecuniary damages. Since the insurer is already compensating the claimant as if the MRI is negative, an MRI finding can only increase quantum, not decrease it.

Further Tests or Studies/Pecuniary Loss Issues – The MRI may disclose a condition that may require surgery (i.e. full thickness rotator cuff tears, meniscus tears or nerve root impingements etc.), which could greatly affect future care costs or income 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 Trial – MRI is a computer generated image and therefore can be very useful as a demonstrative exhibit at trial. An MRI image can be enlarged to any size, coloured in any manner and be presented three dimensionally. With enhanced MRI images, injuries can actually be seen, which is a very effective tool at mediation and for juries.

BENEFITS OF A NEGATIVE RESULT

Peace of Mind/Sound Professional Advice – A negative result is a good result for the claimant. In practically all cases (with the notable exception of brain injuries), it means there will be no long term effect of the injury for the claimant. Not only is this good for peace of mind, it is also very helpful with their financial expectations for the claim.

It is also very important information for the lawyer. Once the claimant's symptoms subside, the lawyer will be in a better position to assess quantum and have a higher level of confidence in advising the claimant to sign a release which will forever compromise the claimant's right to compensation for the injury. For this reason alone, the MRI disbursement can always be argued as being a reasonable, necessary and proper litigation expense.

Baseline – While most claimants only get in one accident per 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 2 were in fact caused in accident 1, for which they have a release. However, if a claimant obtained an MRI for accident 1 he or she will have a snapshot of the area with which to compare the MRI results from accident 2. This baseline MRI information will curtail this type of defence.

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 may reduce their exposure to the risk of negligence claims in situations where an injury might have been detected by MRI.

INJURIES MRI IS HELPFUL IN DETECTING

A fully accredited high field (1.0+ Tesla) scanner is excellent for practically all types of injuries a claimant may suffer in a tort claim. With the exception of brain injuries, it is highly probable that a properly conducted MRI will detect the injury.

Brain injuries are excepted because many still go undetected with the current MRI technology. Though MRI is (at least at the moment) the best accepted litigation tool for assessing brain injuries (with PET scan technology yet to be fully accepted by our courts) MRI will often miss some of the more subtle and/or historical brain injuries.

The following is a list of the areas where MRI is especially useful in a tort claim:

Soft Tissue – MRI provides outstanding soft tissue contrast with the ability to image in multiple planes. MRI is used to evaluate traumatic muscle and tendon injuries and tears, ligament tears, hematomas, compartment syndromes, entrapment syndromes and bursitis.

Trauma – MRI can evaluate hemorrhagic and nonhemorrhagic

contusion, parenchymal hematoma and subdural and epidural hematoma.

Head & Neck – MRI is useful in evaluating injury to orbits, sinonasal cavities, pharynx, floor of the mouth, tongue, larynx, temporomandibular joint, mandible and salivary glands and parapharyngeal space.

Spine – MRI is extremely useful in examination of a variety of injuries to the spine. These include disc bulging and herniation, nerve root compression, wedging, annular tears and any spinal cord or disc abnormality.

Brain – Subject to the limitation described above, MRI is the preferred imaging technique to detect abnormalities in the brain. In some instances it may be necessary to introduce contrast to increase the sensitivity of the MRI.

Musculoskeletal – Joints, Muscles and Bones – MRI is the most sensitive non-invasive imaging method for a broad spectrum of injuries affecting the musculoskeletal system. MRI can evaluate traumatic injury to joints and adjacent muscles, tendons and ligaments, selected articular cartilage injuries, bursitis, fragment stability and cartilage status in osteochondritis dissecans, posttraumatic osteonecrosis and loose bodies. It is also useful in the detection and evaluation of subtle injury to bones.

Abdomen, Pancreas, Kidney, Prostate and Pelvis – MRI provides contrast resolution and multiplanar imaging capability for examination of abdominal organs, as well as visualization of the pelvis.

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. An MRI has a great potential to benefit the claimant, lawyer and doctor.

Failure to send the claimant for an MRI increases the risk of misdiagnosis, potential delay in the resolution of the claim and future liability claims against the involved professionals.

The key to litigation driven MRI is not that it is medically necessary (it likely will not be), but rather that it is reasonable and necessary for the proper conduct of the proceeding. It is for this very reason that 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 practicing law not medicine.

- 1 Todd Cherniak is the president and general counsel of Canadian Magnetic Imaging based in Vancouver, British Columbia.
- 2 Slater, Michael, "Admissibility of Pet Scan Evidence in Mild Traumatic Brain Injury Cases", *the Verdict*, Issue 79, February 1999.
- 3 *The Canada Health Act* 1984 c.6 s.1.
- 4 See: *The British Columbia Rules of Court*, BC Reg 221/90, Rule 57(4) and the cases following. See also in particular: *Zahynacz v. Kozak*, (May 4, 1999), BCSC, New Westminster Registry, Docket No. SO1201 and, *Hazbawi v. Lucier* [2001] BCJ No. 2842 BCSC New Westminster Registry No. SO51663.

