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Malingerer or Maligned: A Comparative Study of Multiple Chemical Sensitivity Case Law

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MALINGERER OR MALIGNED: A COMPARATIVE STUDY OF MULTIPLE CHEMICAL SENSITIVITY CASE LAW

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I. INTRODUCTION

> *I live in pain from Multiple Chemical Sensitivities with burning skin and sinuses and lungs and aching teeth and numbing of my face with eventual anaphylaxis. What I would like others to know is this: when you have been informed that scented products cause pain to others, believe them. This is not a dreamed up control tactic, it is real. Please don't say to me, "Well it didn't bother you last time." Every interaction requires we endure a level of pain. Each moment brings a different mix of chemicals, some easier to manage than others. I try to endure for the sake of being in the company of family and friends and being employed.*
> – Jo-Anne[1]

Jo-Anne describes what it is like for her to live with multiple chemical sensitivities ("MCS"). It is a life not only marred by illness, but also marred by suspicion. People with MCS must live with the daily fear of having an adverse reaction to any number of chemicals we all use in everyday life.[2] Because these are chemicals many of us come in contact with regularly without any kind of unusual response, the person with MCS is often viewed as the paradigmatic hypochondriac. She is either cast as the malingerer who feigns ill health for personal benefit or she is seen as self-deluded in her suffering.[3] In some ways, these stereotypes can be understood as symptoms of our society's attitudes toward disability, particularly those that are

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1. The above comment was made on May 10, 2011 and appears below a blog post. Lindsay Coulter, David Suzuki Foundation, *Be Sensitive to Those with Environmental Sensitivities*, QUEEN OF GREEN (May 9, 2011), http://www.davidsuzuki.org/blogs/queen-of-green.

2. For more discussion about the definition, symptoms, and triggers of MCS, please see Part II.A.

3. I use the pronoun "she" because women make up the vast majority of people with MCS. *See infra* note 18 and accompanying text.

invisible. Because MCS is a relatively new and contested illness, skepticism of the diagnosis expresses itself not only in the everyday judgments Jo-Anne describes, but also in the judgments of courts and tribunals.

Using MCS as an example, the overarching objective of this Article is to examine and compare disability law in Canada and the United States to better understand how disability is defined and then accommodated in the realm of employment discrimination. Examining the law in these two jurisdictions through an MCS prism provides some unique insights. MCS is an invisible disability and it remains a contested illness.[4] And, because we cannot see that a person has MCS in the same way we can see that a person uses a wheelchair, for example, there may be additional cognitive obstacles that stand in the way of our ability to understand the disability that results.

MCS is also a condition that implicates society in a unique way. If we adopt the dominant social approach to disability—that is to say that we see socially constructed environments and attitudes as the root cause of disablement as opposed to an individual's medical condition—then MCS presents us with a unique opportunity for self-examination. Effective accommodation of MCS ideally requires widespread social awareness and change.[5] It would have us modify our behavior on both an institutional and an individual level. Practices and habits related to everything from how we construct our built environment, to the products we buy and consume, to how we clean our homes and workplaces, to our morning grooming rituals are implicated.[6] Because of this, an examination of MCS case law has the potential to reveal how far our law, as a social institution, is willing to go to accommodate someone who is disabled.[7]

Employment is also an important site for analysis, particularly in a capitalist society. In part, this is because of the importance of work to our

4. See the discussion in Part II.A and Part II.B.

5. For information on accommodations and best practices in Canada, see CARA WILKIE & DAVID BAKER, CANADIAN HUMAN RIGHTS COMMISSION, ACCOMMODATION FOR ENVIRONMENTAL SENSITIVITIES: LEGAL PERSPECTIVE 28-31 (2007).

6. It should be noted here that this Article does not attempt to address the issue of third-party accommodation and disability and any conflicting rights that may result. While an employee with MCS may make a claim against an employer for accommodation, other parties may also have some responsibility in ensuring that a workplace is safe. For example, third parties in a workplace context could include coworkers, clients, customers, etc. This topic is ripe for legal exploration. For the purpose of this Article, it is safe to assume that third parties may currently be under more moral obligations rather than legal ones and that the author favors accommodation over convenience or consumer preference in most cases.

7. I chose to use the word "disabled" here and not person-first terminology because I believe that disability, for the most part, is a socially constructed phenomenon. As well, the passive verb "disabled" is used in an effort to invite questions of social hierarchy and dominance. As Sheila McIntyre points out, by using such language "the focus shifts from debates about appropriate comparators to analysis of relations between excluders and the excluded, stigmatizers and stigmatized, expropriator and dispossessed." Sheila McIntyre, *Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination*, *in* MAKING EQUALITY RIGHTS REAL: SECURING SUBSTANTIVE EQUALITY UNDER THE *CHARTER* 99, 103 (Fay Faraday et al. eds., 2009).

economic well-being; but also, because our jobs define us. As Vicki Schultz argues in her essay, *Life's Work*, paid employment forms the foundation for equal social citizenship, provides a means for community contribution and membership, and allows for the formation of identity and aspirations.[8] Thus, the workplace becomes an important place for us to demonstrate our collective responsiveness to disability.

The goal of this Article is to use MCS legal claims as a way to compare U.S. and Canadian employment discrimination law to better understand how an invisible, controversial disability is regarded in each jurisdiction. Isolating the focus to a contested illness helps shed light on the nuances at play in terms of how disability is defined in each jurisdiction and how these definitions are actually applied to the lived experiences of disabled workers. This brief study reveals that courts and tribunals in both countries demonstrate disbelief about what it means to live with MCS making it difficult for people with the condition to be heard and accommodated. While the limited statistics demonstrate that claims are more likely to succeed in Canada, it appears that it is actually the U.S. system that is currently advancing in terms of valuing the experiential knowledge of MCS plaintiffs.

Part II provides some background information on the history and controversy of the MCS diagnosis and explains why this illness should be considered as a class of disability. Part III briefly sets out the relevant employment discrimination law in the United States and Canada and then provides an analysis of the MCS case law in each jurisdiction with particular attention to common themes found in the decisions concerning issues of credibility, prioritization of scientific evidence, and the exaggeration of disability. Part IV compares the results of the case law in each country and demonstrates that, while U.S. plaintiffs have traditionally been disadvantaged, recent changes to the Americans with Disabilities Act may have a significant impact in widening the definition of disability. The discussion then moves on to consider why MCS cases are so challenging to establish and whether there is room for change. Finally, the Article concludes by pointing to a need for legal analysis that increases reliance on experiential knowledge and an understanding of what it means to live with MCS as opposed to scientific skepticism as a way forward. By doing this, the law will be more responsive to the needs of people impacted by ever new and evolving health conditions.

8. Vicki Schultz, *Life's Work*, 100 COLUM L. REV. 1881, 1886-92 (2000).

II. UNDERSTANDING MCS

It is important to know something about MCS as an illness and its history in order to understand the legal responses to employees with the condition. Below is a brief description of the medical diagnosis followed by some discussion about the recognition of MCS as a disability. This information serves as a frame for the rest of the discussion.

A. What Is MCS?

MCS is regarded as an emerging illness and one that still lacks medical explanation.[9] The illness's etiology is controversial and the medical diagnosis is still contested.[10] That said, there is a consensus about what it entails.[11] In general terms, MCS is a chronic condition in which a person's exposure to small amounts of chemicals—usually doses that would otherwise be undetectable by many people—triggers an adverse, multisystem reaction. MCS is just one of a number of conditions that are considered under the umbrella of "environmental sensitivities."[12]

The experience of MCS varies widely among individuals impacted. Different people experience different reactions to different chemicals and with different degrees of sensitivity to exposure. The nature, duration, and severity of a person's reaction to a chemical trigger vary and may include difficulty breathing, palpitations, digestive problems, skin rashes, headaches, dizziness, depressed mood, memory loss, joint and muscle pain, fatigue, weakness, and sensations of numbness or tingling.[13] All of these symptoms, depending on their severity, may interfere with a person's ability to do many daily activities, including work.[14]

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9. Statistics Canada lists MCS as one of a number of conditions with "medically unexplained physical symptoms," or "MUPS" for short. Jungwee Park & Sarah Knudson, *Statistics Canada, Medically Unexplained Physical Symptoms*, HEALTH REPORTS, Feb. 2007, at 43.

10. Randall M. Packard et al., explain that the "emergence" and acceptance of new illnesses involves both "an epidemiological phenomenon and a social process." As they note, both arenas are fraught with politics, often related to the class of people affected by the illness. Randall M. Packard et al., *Introduction· Emerging Illness as Social Process*, *in* EMERGING ILLNESSES AND SOCIETY: NEGOTIATING THE PUBLIC HEALTH AGENDA 1, 2 (Randall M. Packard et al. eds., 2004).

11. According to a 1999 consensus definition, there are six criteria for diagnosis: (1) The symptoms are reproducible with repeated chemical exposure; (2) The condition is chronic; (3) Low levels of exposure result in symptoms; (4) The symptoms improve or resolve when the triggering substance is removed; (5) Responses occur to multiple chemically unrelated substances; and (6) Symptoms involve multiple organ systems. *Multiple Chemical Sensitivity: A 1999 Consensus*, ARCH. ENVTL. HEALTH, May/June 1999, at 147.

12. MARGARET E. SEARS, CANADIAN HUMAN RIGHTS COMMISSION, THE MEDICAL PERSPECTIVE ON ENVIRONMENTAL SENSITIVITIES 3 (2007).

13. Park & Knudson, *supra* note 9, at 43; Michael K. Magill & Anthony Suruda, *Multiple Chemical Sensitivity Syndrome*, 58 AM. FAM. PHYSICIAN 721 (1998); Courtney V. Vierstra et al., *Multiple Chemical Sensitivity and Workplace Discrimination: The National EEOC ADA Research* Project, 28 WORK 391, 392 (2007).

14. Magill & Suruda, *supra* note 13.

The list of possible triggering agents is very long and includes chemicals used in many everyday items. For example, scents appear to be a common trigger and turn up in personal care products like perfume, aftershave, shampoo, soap, body lotion, and even laundry detergent. Other culprits include various household cleaners, solvents, paint, new carpets, new computer equipment, pesticides, some foods, cigarette smoke, car exhaust, mold, and even electromagnet fields.[15] Again, experiences vary and a reaction to one trigger does not necessarily mean a reaction to another.

Regarding prevalence, the American and Canadian statistics concerning MCS medical diagnosis rates are fairly consistent. The U.S. numbers range from anywhere between 1.9% (New Mexico) to 6.3% (California).[16] In Canada, 2.4% of people over the age of twelve, and 2.9% of people over the age of thirty report a diagnosis.[17] Women are disproportionately diagnosed, with one report noting that as many as 85% to 90% of MCS patients are women.[18] The onset of symptoms usually occurs during the most productive working years of a person's life, between the ages of thirty to fifty.[19] It is also important to consider that studies focusing on rates of medical diagnoses may not accurately reflect the extent of the illness if people who have mild forms chose not to seek medical attention.[20]

The genesis of the contemporary understanding of MCS is largely credited to the work of Chicago doctor Theron Randolph in the 1940s and 1950s.[21] While the condition has been known by a number of different names,[22] it was finally labeled Multiple Chemical Sensitivity in 1987 and

15. For a more detailed list of triggers by type, see SEARS, *supra* note 12, at 16-17.

16. When asked more generally about allergies or unusual sensitivities to chemicals, the numbers jumped to 17% and 15.9% in the respective studies. A summary of a number of these state studies from the late 1990s can be found in Albert H. Donnay, *On the Recognition of Multiple Chemical Sensitivity in Medical Literature and Government Policy*, 18 INT'L J. TOXICOLOGY 383 (1999). A more recent study conducted in Georgia found that 3.1% of respondents reported a diagnosis and 12.6% reported hypersensitivity. Stanley M. Caress & Anne C. Steinemann, *Prevalence of Multiple Chemical Sensitivities: A Population-Based Study in the Southeastern United States*, 95 AM. J. PUB. HEALTH 746 (2004).

17. Park & Knudson, *supra* note 9, at 44; *Statistics Canada, Health Division, How Healthy are Canadians?*, HEALTH REPORTS, Feb. 2006 (supplement to vol. 16), at 24.

18. Magill & Suruda, *supra* note 13.

19. *Id.*; Vierstra et al., *supra* note 13, at 392.

20. SEARS, *supra* note 12, at 4.

21. Donnay traces the history of MCS from the 1800s to late 1990s. *See supra* note 16. An account of the history can also be found in Ruby Afram, *New Diagnoses and the ADA: A Case study of Fibromyalgia and Multiple Chemical Sensitivity*, 4 YALE J. HEALTH POL'Y L. & ETHICS 85, 99-105 (2004).

22. *See, e.g.*, Magill & Suruda, *supra* note 13 (Other names for MCS and related conditions include terms such as "chemical AIDS, 20th century disease, total allergy syndrome, sick building syndrome, chemophobia, immune dysregulation.").

given formal definitional criteria.[23] The medical community was divided about the scientific validity of the MCS diagnosis. In a 1989 position paper, the American College of Physicians questioned the practice of clinical ecology and the validity of MCS as a diagnosis by extension.[24]

A turning point came after the Gulf War. Military troops were returning from the Middle East with mysterious health problems, similar to MCS, that many believed were the result of exposure to chemicals during Desert Storm.[25] Veterans' groups were able to use political clout to get their health concerns onto the public health agenda and push for a recognized diagnosis.[26] A resulting shift came in the form of validation from organizations like the American Medical Association that were suddenly willing to say that MCS was not simply a psychological disorder.[27]

The debate about whether, and to what extent, MCS is a psychological or psychiatric condition persists.[28] Canadian disability rights advocates caution that this "scientific confusion" can lead to social stigma and, in turn, denial of accommodation when a person is told that "[MCS] is in their head."[29] Regardless of the cause, it is clear that people who have MCS experience very real, physical symptoms as a result of environmental triggers.[30]

B. MCS as a Disability

The question of definition is a central consideration when it comes to determining disability, particularly in a legal context. How we understand whether a particular impairment is actually disabling is socially and culturally specific. Beyond that, legal definitions of disability determine who may be able to access entitlements like social assistance, disability leave, or workers' compensation, to name a few.[31] Definitions vary from one legislative scheme to the next and typically are inversely related to the

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23. Donnay, *supra* note 16. Two years earlier, in Canada, a provincial government report was issued on "environmental hypersensitivity" that also proposed diagnostic criteria and recognized that the diagnosis had "validity." ONTARIO MINISTRY OF HEALTH, REPORT OF THE AD HOC COMMITTEE ON ENVIRONMENTAL HYPERSENSITIVITY DISORDERS 228, 238 (1985).

24. *Clinical Ecology*, 111 ANNALS INTERNAL MED. 168 (1989).

25. Afram, *supra* note 21, at 102.

26. Packard et al., *supra* note 10, at 21; *see also* Stephen Zavestoski et al., *Patient Activism and the Struggle for Diagnosis: Gulf War Illnesses and Other Medically Unexplained Physical Symptoms in the US*, 58 SOC. SCI. MED. 161 (2004).

27. Afram, *supra* note 21, at 102.

28. *See, e.g.*, Jason W. Busse et al., *Managing Environmental Sensitivity: An Overview Illustrated with a Case Report*, 52 J. CAN. CHIROPR. ASS'N 88 (2008); *but see* Mariko Saito et al., *Symptom Profile of Multiple Chemical Sensitivity in Actual Life*, 67 PSYCHOSOMATIC MED. 318 (2005).

29. WILKIE & BAKER, *supra* note 5, at 8.

30. *Id.*

31. SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 11 (1996).

resources at stake. In other words, criteria are narrower when the expenses are potentially greater and broader when there are fewer anticipated costs. Rights legislation falls on the broader end of the spectrum.[32]

As Part III demonstrates, MCS may meet the definition of disability in an employment discrimination context under the law in both jurisdictions examined here.[33] Beyond the law, it is also important to articulate why an invisible health condition fits within the rubric of disability.

In *Unhealthy Disabled: Treating Chronic Illnesses as Disabilities*, Susan Wendell explains the objections some people have to grouping together people who are chronically ill with people who have physical or functional limitations but are otherwise healthy.[34] Wendell notes, for example, that considering people with chronic illnesses as disabled risks the medicalization of disability as a class, a move that is perceived to displace the social model of disability.[35] She also points out that the "unhealthy disabled," her term for those people with chronic illnesses, may experience fluctuations in health and impairments and are often able to pass as nondisabled. In combination, these aspects of illness may lead to suspicion that a person is not truly disabled or is responsible for their own condition.[36] Indeed, there may be some tendency resulting from the social model of disability for the creation of a group ethos that marginalizes those people who are not visibly impaired.[37]

Under the social model of disability, it is generally understood that disablement is the result of society's responses to a person's impairments. It is this conception that is echoed in international law and definitions of disability.[38] The World Health Organization also views disability as the "outcomes of interactions between *health conditions* (diseases, disorders

32. A.J. WITHERS, DISABILITY POLITICS & THEORY 110 (2012) (comparing definitions related to accessibility, antidiscrimination, and social assistance legislation in both Canada and the United States).

33. Again, it is important to note that this Article, as set out in the main text, only deals with the definition of disability as it relates to employment discrimination. Statutory schemes for other entitlements such as social assistance, for example, have different definitional criteria. *See, e.g.*, Cleveland v. Pol'y Mgmt. Syst. Corp., 526 U.S. 795 (1999) (Definitions concerning if a person is work qualified versus social security qualified are different tests.).

34. Susan Wendell, *Unhealthy Disabled: Treating Chronic Illnesses as Disabilities*, HAPATIA, Fall 2001, at 17.

35. *Id.* at 22.

36. *Id.* at 28-29.

37. Jill C. Humphrey, *Researching Disability Politics, Or, Some Problems with the Social Model in Practice*, DISABILITY & SOCIETY, Jan. 2000, at 67. In contrast, Tobin Siebers, viewed the shared experiences of pain, in an epistemological sense, as creating a unified class of disabled persons. Tobin Siebers, *Disability and the Pain of Minority Identity* (unpublished manuscript at 7) (on file with author).

38. For example, the United Nations regards disability as relational by "[r]ecognizing that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others." Convention on the Rights of Persons with Disabilities, G.A.Res. 61/106, U.N. GAOR, 61st Sess. Supp. No.49, U.N. Doc. A/RES/61/106/Annex II, at 65 (Dec. 13 2006).

and injuries) and *contextual factors*," including social attitudes and the built environment.[39]

This framework makes it clear that a person with MCS is disabled by virtue of the fact that adverse reactions to chemicals in her environment impair her ability to work and otherwise live, and are disabling where the chemical trigger is not managed regardless of whether or not her disability is visible or readily apparent to others. This also means that the actual diagnosis or label for the condition is not as important as its effect on the person impacted. Meeting the legal definition of disabled in an employment discrimination context is not as straightforward.

III. JUDGING MCS

In some ways, comparing case law between the two jurisdictions is very much an exercise in comparing apples and oranges and some critics may argue that there is little to be gained from the exercise. By focusing on MCS as a single disability, I have attempted to limit the variables to provide a useful contrast.

While the United States and Canada are both common law countries, the law in each nation has evolved differently to reflect particular culture and values. Very generally, both jurisdictions require that a plaintiff—in Canada a complainant or grievor—first make out a *prima facie* case by demonstrating that she is disabled under the relevant law and faces discrimination as a result. An employer may then attempt to justify the discrimination by showing accommodation is not feasible because of things like essential qualifications for the job or undue hardship. The similarity between the frameworks, however, ends there.

Additionally, it is important to understand that using case law to determine the actual social conditions of disability discrimination in employment is problematic. This is for two reasons inherent in studies of civil or human rights cases. First, many disputes are resolved without resort to litigation including through mechanisms provided by the Equal Employment Opportunity Commission ("EEOC") in the United States or human rights commissions in most Canadian jurisdictions. This means that any statistics related to case law only portray part of the issue and leave out all of the claims that have been resolved without resort to formal mechanisms.[40] Conversely, negative outcomes for plaintiffs may not be

39. WORLD HEALTH ORGANIZATION, TOWARDS A COMMON LANGUAGE FOR FUNCTIONING, DISABILITY AND HEALTH: ICF 10 (2002) (emphasis in original).

40. I thank Canadian lawyer and disability rights advocate David Lepofsky for this important observation.

reported with the same frequency as decisions in their favor.[41] Putting that aside, the purpose of this Article is to examine the existing legal analysis as a framework for attempting to grapple with wider social understandings of disability in general and MCS in particular. The actual numbers are less important.

For each country, and with the above in mind, I set out some basic information concerning the legal landscape followed by analysis of the available and relevant MCS case law.

A. The U.S. Context: Statutory Definitions and Tort-Style Litigation

1. The Legal Framework

Disabled employees in private and public sector workplaces may pursue recourse against discrimination under Title I or Title II, respectively, of the Americans with Disabilities Act ("ADA").[42] Federal employees and contractors may also make claims under the Rehabilitation Act,[43] which uses the same standards as the ADA to determine discrimination.[44] The American legislation requires reasonable accommodation of disability and an employer's failure to meet this duty is considered discriminatory.[45]

A three-prong definition of disability is set out in the ADA:

(1) a physical or mental impairment that substantially limits one or more major life activities of such individual;
(2) a record of such an impairment,[46] or
(3) being regarded as having such an impairment.[47]

Disability is assessed under this definition by the courts on a case-by-case basis and turns on a number of factors, including whether a plaintiff can demonstrate substantial impairment of a major life activity and if this limits her ability to work in a broad class of jobs or perform the essential functions of her position. A plaintiff bears the onus, not only for demonstrating disability, but also proving that she can be reasonably accommodated.[48] There is no list of conditions that automatically or

41. *See* Ruth Colker, *The Americans with Disabilities Act. A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999).

42. Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (1990) [hereinafter ADA].

43. Rehabilitation Act, 29 U.S.C. § 701 *et seq.* (1973).

44. Ellis v. England, 432 F.3d 1321 (11th Cir. Fla. 2005) (The standard for determining liability under the Rehabilitation Act is the same as that under the ADA.).

45. ADA, 42 U.S.C., § 12112.

46. Because MCS is a new and contentious diagnosis, it has been noted by the U.S. courts that a claimant may have difficultly establishing disability based on the record of disability prong under the ADA. *See* Gits v. 3M, 2001 U.S. Dist. LEXIS 20871 (D. Minn., June 15, 2001).

47. ADA, 42 U.S.C., § 12101.

48. U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002). After a plaintiff makes out a prima facie case, an employer defendant may then try to prove that the employee cannot be accommodated without

exclusively qualify under the definition and no requirement for an actual diagnosis.[49] This is an especially important point to consider when the disability is not readily apparent and the medical science is controversial.

How the courts continue to apply the ADA is currently in a state of flux.[50] This is because interpretation of the original statute had become increasingly restricted. Court holdings gradually moved toward very narrow readings of the definition meaning that fewer and fewer people qualified for protection under the legislation. Most notably, two decisions by the U.S. Supreme Court made it much more difficult to demonstrate an impairment, and thus be considered disabled, by limiting what could be considered a major life activity and requiring that the use of mitigating measures—such as assistive devices or mobility aids, for example—be part of the analysis.[51] The definition of disability became so limited that Congress stepped in and seemingly admonished the courts by passing the ADA Amendments Act ("ADAAA"), changing the definitional criteria with the express aim of restoring broader coverage.[52] Because the changes to the Act are so recent and the newly expanded definition of disability does not apply retroactively, there is insufficient case law to assess the overall impact of the amendments. Only one of the MCS cases listed below is a post-ADAAA decision.[53]

In general, ADA employment discrimination claims are rarely successful. According to a 2009 article exploring employment discrimination litigation trends from 1998 to 2006, disability claims

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undue hardship, the standard for which appears at first blush to be lower than in the Canadian context. Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538 (7th Cir. 1995) ("The employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs."); Central Okanagan Sch. Dist. No. 23 v. Renaud, [1992] 2 S.C.R. 970 (Can.) ("The use of the term 'undue' infers that some hardship is acceptable.").

49. The ADA sets out a list of excluded conditions such as those related to gender and sexual identity and the use of illegal drugs, etc. *See* ADA, 42 U.S.C., §12211. It is interesting to note that Title II Regulations, with respect to public services, does include a list of examples of accepted "physical or mental impairment[s]" for that part of the Act. The U.S. Department of Justice declined to categorize MCS as a disability for the purpose of this regulation. Americans with Disabilities Act Title II Regulations, 28 C.F.R. § 35 app. B (Mar. 15, 2011).

50. Following the amendments to the ADA, Elizabeth Emens calls this "a fascinating and uncertain time for U.S. disability law." This is because it remains to be seen how higher courts will interpret changes to the definition of disability. Emens theorizes that the courts will find new ways to narrow the definition of disability to conform with prevailing social attitudes that characterize disability as an individualized medical concern and accommodation as too costly. Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMP. L. 205 (2012).

51. Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184 (2002); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

52. ADA Amendments Act, Pub. L. No. 110–325; 122 Stat. 3553 (2008). In its purpose provisions, the ADAAA specifically refers to the Supreme Court's decisions in Toyota and Sutton as having "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect."

53. Feldman v. Charlotte-Mecklenburg Bd. of Educ., 2012 WL 3619078 (W.D.N.C. Aug. 21, 2012).

succeed about 9.12% of the time.[54] This represents the lowest success rate out of all the categories considered.[55] The statistics alone demonstrate the high level of scrutiny disabled plaintiffs face.

2. The Case Law

The survey of U.S. case law reveals twenty-three MCS decisions.[56] Using these cases, it is not possible to determine if any of the plaintiffs ultimately succeed. This is because all of the available decisions are either motions for summary judgment and/or motions in limine concerning the exclusion of evidence at trial. If survival of a motion for summary judgment is viewed as a success—or at least not an outright failure—then MCS plaintiffs are able to proceed to trial approximately 13.5% of the time.[57]

Although not the subject of the analysis here, many discrimination claims are resolved by the EEOC without proceeding to court. A 2007 study of confidential EEOC records compares outcomes in MCS cases against a control group composed of claimants with various other invisible disabilities.[58] According to their findings, MCS claimants are successful 15.7% of the time compared to a 23% success rate for the control group.[59]

That said, the courts' analysis is more striking than the statistics and arguably even more relevant given the small sample. Questions of plaintiff credibility loom large in many of the decisions, sometimes in the shadows, but often in the foreground. The plaintiff is either viewed as having insufficient knowledge to speak on her own behalf, or she is a liar seeking to deceive her employer. The cases discussed below are grouped under the following main headings: Credibility and Malingering, Prioritization of Scientific Evidence, and Exaggerating Extent of Disability. I then look at what impact the ADAAA may have on future decisions.

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54. Kevin M Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 117 (2009).

55. *Id.*

56. The survey used to gather the cases cited was designed to be thorough but is in no way scientific. Relevant decisions were located using a keyword-search on Westlaw using the following parameters: "Americans with Disabilities Act" & MCS "Multiple Chemical Sensitivities." Cases were later added to reflect decisions under the Rehabilitation Act following the effective date of the ADA. Additional cases found through reading of relevant literature were also added. Opinions were selected based on the centrality of MCS as the relevant disability at issue. Rulings made on strictly procedural grounds were also discarded. Also, please note that only some of the cases are examined below.

57. Of twenty-two cases clearly involving a motion for summary judgment, three claims were able to proceed, and nineteen claims were terminated before advancing to trial.

58. Vierstra, et al., *supra* note 13 (The study compared the employment discrimination experiences of people with MCS as an "emerging disability" to a control group, or "general disability group," comprised of people with allergies, asthma, HIV/AIDS, gastrointestinal impairments, cumulative trauma disorder and tuberculosis.).

59. *Id* at 399.

i. Credibility and Malingering

A number of the decisions clearly question whether the plaintiff is telling the truth about her illness and its impact on her ability to work. The first example can be found in the 1995 *Whillock* decision in which an airline reservation agent with MCS sought accommodation by being allowed to work from home.[60] The defendant's motion for summary judgment succeeds and the court states that, even if the accommodation requested was reasonable, the plaintiff is not credible. In a footnote, no less, the judgment outlines evidence advanced by the defendant that she "regularly goes grocery shopping, visits her doctor's office, visits her mother-in-law at least four times weekly, and goes out to eat an average of once a week."[61] Even the fact that the plaintiff was able to participate in the court process by attending depositions is used against her.[62] We never get to hear from Whillock about why she is able to do certain activities and not others. Subsequent decisions also use such evidence as an opportunity to view a plaintiff with suspicion and characterize threats to health as "unwillingness" to work.[63]

Only in one decision does the court consider evidence about how a plaintiff manages her MCS in the course of other daily life activities. In *Davis*, the employer argues that the plaintiff is not disabled because she only experiences symptoms when working near a particular individual, and anyway, her testimony is subjective.[64] In response, the court allows the plaintiff to explain why she has difficulty breathing at work, yet still manages many daily, public interactions:

> Because of the nature of her alleged MCS, Davis is not always symptomatic. The evidence demonstrates that Davis *always* faces the possibility of having her breathing impaired, but that she can usually avoid prolonged exposure to irritants outside of work. For example, she testified in her deposition that she avoids certain stores entirely and she

60. Whillock v. Delta Air Lines Ltd., 926 F.Supp. 1555 (11th Cir. 1996).

61. *Id.* at n 4.

62. *Id.* ("This significantly undermines Plaintiff's contention that she can be accommodated only at home.").

63. Keck v. N.Y. State Office of Alcoholism & Substance Abuse Servs., 10 F.Supp.2d. 194 (N.D.N.Y. 1998) (The plaintiff, who was sensitive to perfume and cigarette smoke, asked to be accommodated by working after hours. The court refers to her "unwillingness to work under certain conditions," as opposed to her inability. It also refers to her ability to do aerobics and go hiking as evidence that her ability to breathe was not substantially limited); Owen v. Computer Sci. Corp., 1999 WL 43642 (D.N.J.) ("The record indicates that Owen was able to ride a bicycle ten miles to mail her appeal of the denial of her long-term disability benefits, is able to attend church and grocery shop on a regular basis."). It is also worth noting that there is an irony in the fact that the court in Owen does not seem to want to hear from the plaintiff regarding her situational impairments because the decision is cited in a survey of MCS case law as a progressive reading of the law based on the court's articulation of the need to prioritize an individual's lived experience over scientific evidence when determining disability. *See Afram, supra* note 21, at 118-20.

64. Davis v. Utah Tax Comm'n, 96 F.Supp.2d 1271 (D. Utah 2000).

> avoids certain aisles (candles, soaps, etc.) at the grocery store, wears a mask when she cannot avoid going through the perfume area at a department store, asks to be moved when she is seated next to someone with strong perfume at restaurants, on airplanes, or at performances, etc. At times, she has had to leave certain events to avoid prolonged exposure. Thus, her alleged MCS affects her daily life, but she becomes symptomatic usually only at work because she cannot avoid, escape, or control her surroundings.[65]

What the court does here is validate the plaintiff's individual experience of impairment and give her the authority to define her disability. Davis survives the motion for summary judgment. In part, the decision may hinge on the fact that the people in her workplace were "surprisingly" unwilling to yield to a simple accommodation. More significant is the fact that Davis had opportunity to communicate the realities of her own experience with MCS.

ii. Prioritization of Scientific Evidence

Another consistent and related theme in the U.S. case law is the prioritization of scientific evidence over the lived experiences of plaintiffs. As mentioned above, MCS is still a new medical diagnosis and controversy persists. Dating back to the 1997 decision in *Treadwill*,[66] much of the argument in the MCS case law focuses on the admissibility of scientific evidence.[67] In 2004, Ruby Afram examined MCS and firbromyalgia cases to determine what impact high thresholds for the admission of expert evidence would have on ADA cases concerning new or emerging illnesses.[68] What she found was that in MCS cases defendants have been able to exploit such stringent evidentiary rules to the detriment of plaintiffs. Since the publication of Afram's article in 2004, the number of motions to exclude expert testimony regarding MCS has declined, although such a motion was granted in a 2007 education accommodation case.[69]

The problem is not whether scientific evidence should be heard. Rather, it is that the science behind the illness is taken to be more important than the actual experience of the disability. An ironic illustration of this is found in *Coffey*.[70] In this case, the court rules against the use of medical

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65 *Id.* at n.12 (emphasis in original).

66. *Treadwill* provides a somewhat paradoxical result in that the employer's motion limine to exclude expert evidence on MCS succeeds, while its motion for summary judgment on the ADA claim fails. Treadwell v. Dow-United Techs., 970 F.Supp. 974 (M.D. Ala. 1997).

67. The following cases are examples of instances when scientific evidence was contested via motions in limine to exclude expert evidence. Comber v. Prologue, Inc., CIV.JFM-99-2637, 2000 WL 1481300 (D. Md. Sept. 28, 2000); Coffey v. Hennepin, 23 F.Supp.2d 1081 (D. Minn. 1998); Frank v. New York, 972 F.Supp 130 (N.D.N.Y. 1997).

68. Afram, *supra* note 21.

69. Kropp v. Maine Sch. Admin. Union No. 44, 471 F.Supp.2d. 175 (D. Me. 2007).

70. *Coffey*, 23 F.Supp.2d.

evidence because the plaintiff is unable to demonstrate that "diagnosing MCS has progressed to a point that it is scientific knowledge capable of assisting a fact-finder."[71] The court seems to provide an alternative means for Coffey to demonstrate her case stressing that the "[p]laintiff herself can testify to how she feels."[72] In the final result, the court finds against Coffey because she has no substantial evidence "beyond her own statements."[73] It is a catch 22 for Coffey: she must prove her case based on experiential evidence of her own illness and impairments; and yet, she has no case with her testimony alone. Even though scientific evidence is not able to speak to her experiences of MCS, she is unable to win without it.

iii. Exaggerating Extent of Disability

Some of the more recent decisions accept MCS as disabling, but to an extreme. Instead of saying that MCS cannot possibly limit the employee's ability to work, as in the credibility cases above, the employer argues that the condition makes it impossible for her to be employed. Again, a plaintiff's own experiences are negated.

Dickerson, a 2011 case under the Rehabilitation Act, is a prime example of how the extent of disability is exaggerated.[74] The plaintiff, a nurse at a veterans' hospital in Georgia, had a series of severe reactions to latex gloves and floor wax at work. While she was accommodated for a period of time through reassignment to the nursing education office and she suggested transfer to a carpeted hospital ward, the employer expressed doubts regarding her disability and reassigned her back to her original ward. This resulted in what might be described as a standoff: the employer forcing the employee to work in a position she felt would endanger her health, the employee refusing to comply even after reprimand. Dickerson was made to obtain more and more medical evidence to prove her disability to her employer until the medical information began to paint a picture that could be construed as totally uncontrollable and infinitely dangerous. The employer then terminated her. While the decision notes that Dickerson was pressed for more medical information, the court fails to acknowledge the degree of pressure she was under to demonstrate disability for the sake of accommodation necessary to retain her employment in the face of her employer's disbelief.

The decision hinges on whether Dickerson meets the definition of a qualified individual under the ADA and if she is able to "perform the

71. *Id.*
72. *Id.*
73. *Id.*
74. Dickerson v. Peake, 2011 WL1258138 (M.D. Ga. Mar. 31, 2011), *aff'd* 489 F. App'x 358 (11th Cir. 2012).

essential functions of the job of Staff Nurse, either with or without reasonable accommodation."[75] The court frames the issue in terms of "whether Dickerson has identified any position that the [employer] could assign her to in which she could escape the *possibility* of suffering these debilitating reactions."[76] In granting the summary judgment, the court writes, "Here, Dickerson is limited by her sensitivity to an indeterminate and, by all appearances, growing list of substances. *Nonetheless, her limitations must be evaluated against the total body of medical evidence, not just her preferred subset of substances to which she is sensitive.*"[77]

Dickerson's view that she is able to work is trumped by medical evidence designed to make her employer take her condition seriously. Instead, the court uses this evidence to nullify her own experiential knowledge of life with MCS.

Moreover, while some of the medical evidence in the case speaks to the possibility of interference with patient care, neither the employer nor the court pursue this line of logic by advancing an argument that accommodating her could result in a "direct threat" to anyone's health or safety, real or perceived.[78] Instead, the reasons reflect a tone that is more paternalistic than cautionary.

This kind of paternalism does not always succeed. For example, in *Saunders*,[79] the defendant employer tried to argue that the plaintiff's MCS, which was triggered by chemicals found in some kinds of paper, could be linked to any number of other products and tried to expand the list of triggers to things like office furniture, coworkers' perfumes, and even money.[80] This time, the defendant's motion for summary judgment is denied and the court finds that the "[f]acts in the record could support plaintiff's theory that defendant overdetermined the limitations imposed by [her doctor.]"[81]

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75. *Id.*

76. *Id.* (emphasis added).

77. *Id* (emphasis added).

78. Both the ADA and the Rehabilitation Act provide that an individual with a disability who poses a direct threat to the health and safety of others that cannot be eliminated through reasonable accommodation in the workplace is not qualified. ADA, 42 U.S.C., § 12113(b); Rehabilitation Act, 29 U.S.C., § 504(a). Elizabeth F. Emens explores the harm done by expanding the direct threat analysis to instances of perceived risk in cases of mental illness in *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 454-55, 469 & n.304 (2006) (citing *Calef v. Gillette Co.*, 322 F.3d 75, 87 & n.9 (1st Cir. 2003)).

79. Sanders v. City of Newport, 2008 WL 2234085 (D. Or. May 30, 2008).

80. *Id.*

81. *Id.*

iv. The ADAAA's Impact

Only one of the MCS cases surveyed was decided following the passage of the ADAAA. The facts in *Feldman* are not very compelling.[82] Nor is much of the argument or analysis when compared to the cases examined above. Simply put, Feldman left her job as a teacher and claimed that the employer failed to accommodate her because of the presence of perfumes and certain cleaning products at the school. The employer succeeds on a motion for summary judgment and the court determines that there is insufficient evidence to support her claims of discrimination, hostile environment, and failure to accommodate. What is most interesting about the decision is that the court cites new EEOC regulations to say that neither a diagnosis nor scientific or medical evidence is required before a court can make a finding of discrimination based on disability and that the threshold for proving disability is lowered in favor of scrutinizing any possible acts of discrimination.[83]

The analysis in *Feldman* may also extend to accommodation claims. *Howard* is a recent decision involving a woman diagnosed with fibromyalgia.[84] The employer moved for summary judgment arguing that Howard does not meet the definition of disability because she is not substantially limited in any major life activity. In ruling against the employer, the court cites the same EEOC regulations as in *Feldman* noting that the intent of the ADAAA is to "broaden the scope of disabilities covered by the ADA."[85] The court goes on to rely on evidence provided by the plaintiff and her husband, bolstered by medical records, showing how fibromyalgia impacts her life. This is a promising development for people with new or controversial illnesses because it increases the value of their own experiential evidence.[86]

As noted, the above analysis considers surviving a motion for summary judgment as a positive outcome. I found only one pre-ADAAA case with a trial win for a plaintiff with MCS. In *Muovich*, the appeal court affirms a jury trial result in favor of an elementary school teacher.[87] The

82. Feldman v. Charlotte-Mecklenburg Bd. of Educ., 2012 WL 3619078 (W.D.N.C. Aug. 21, 2012).

83. Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R § 1630.2(j)(1)(iii), (v).

84. Howard v. Penn. Dep't of Pub. Welfare, 2013 U.S. Dist. LEXIS 3251 (E.D. Pa. Jan. 9, 2013).

85. *Id.*

86. At least one commentator has flagged this decision as a demonstration of how the ADAAA "makes it much easier for an employee to prevail in an ADA failure to accommodate case." *ADA – Failure To Accommodate Fibromyalgia Interpreted Broadly Under ADAAA*, EMPLOYEE DISCRIMINATION REPORTER (Jan.13, 2013, 3:42PM), http://jobdiscrimination.wordpress.com. It is worth noting here, however, that in her comparison of MCS and fibromyalgia cases, Afram found that the courts were slightly more accepting of fibromyalgia claims. *See supra* note 21.

87. Muovich v. Raleigh Cnty. Bd. of Educ., 58 F. App'x. 584 (4th Cir. 2003).

2003 decision was not noted in the analysis above because for whatever reason the ADA claim was dropped and the claim was advanced under state law.[88] The treatment by the employer was particularly egregious and may have made the plaintiff more sympathetic to the jury.[89] Most interestingly, when the employer objected to the admission of scientific evidence regarding MCS, counsel for the plaintiff "agreed that MCS was not a legitimate diagnosis," and the case was tried on the basis of a different illness.[90] If anything, this decision demonstrates how extremely difficult it was to ensure that the realities of MCS would be considered seriously prior to the ADAAA.

B. The Canadian Context: Broader Definitions and Less Formal Proceedings

1. The Legal Framework

The Canadian legal context is distinct from the U.S. context in at least three fundamental ways. First, the legislative framework is vastly different.[91] Protection against discrimination, including the duty to accommodate,[92] is the purview of federal and provincial human rights law.[93]

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88. The test under state law is similar to the test under the ADA, and it was outlined by the court as follows:

> To succeed in a failure to accommodate claim under the West Virginia Human Rights Act, Muovich was required to demonstrate that: (1) she was a qualified person with a disability; (2) the Board was aware of her disability; (3) she required an accommodation to perform her job; (4) a reasonable accommodation existed that would have allowed her to perform her job; (5) the Board knew or should have known of her needs; and (6) the Board failed to provide the accommodation.

Id.

89. For example, the school principal refused to accommodate the plaintiff and called her "nuts" and "ridiculous." After the employee had a reaction to a particular product, the principal told a janitor to spray the offending product in the air saying that "he'd be damned if he would change any cleaning procedures to suit one person." *Id.*

90. *Id.* Instead of MCS, it was argued that Muovich had chemical irritant rhinosinusitis.

91. As a point of interest, Canada does not have legislation on par with the ADA. The provinces of Ontario and Manitoba have enacted accessibility laws, but these statutes are not as comprehensive in their scope and do not cover issues of discrimination and accommodation in employment that are still the terrain of human rights law. *See* Accessibility for Ontarians with Disabilities Act, 2005, S.O. 2005, c. 11 (Can.); The Accessibility for Manitobans Act, CCSM c. A1.7 (Can.). During the 2013 election in Nova Scotia, the Liberal Party's platform promised to "[c]reate a more accessible Nova Scotia for persons with disabilities by appointing an Accessibility Advisory Committee with a mandate and strict timeline to develop accessibility legislation for Nova Scotia." The election platform is available at LIBERAL NOVA SCOTIA, https://www.liberal.ns.ca/platform/accessibility-public-transit/ (last visited on Apr. 4, 2015).

92. Under what is known as the "unified approach" in Canada, there is no distinction between direct and adverse effect discrimination. For this reason, the resulting impact of an employer's breach of the duty to accommodate is considered discrimination. British Columbia (Pub. Serv. Emp. Rel. Comm'n) v. BCGSEU (Meiorin), [1999] 3 S.C.R. 3 (Can.).

93. It is worth nothing that discrimination on the basis of disability is also prohibited by the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

There are fourteen different human rights statutes covering all provincial, territorial, and federal jurisdictions. All of these acts prohibit discrimination in employment on the basis of disability. Some contain detailed definitions of disability, some very general definitions, and others no specific definitions at all.[94] Regardless of these regional variations, the Supreme Court of Canada ("SCC") has interpreted the coverage of these statutes to be very broad when it comes to the meaning of disability:

> The liberal and purposive method of interpretation along with the contextual approach, which includes an analysis of the objectives of human rights legislation, the way in which the word "handicap" and other similar terms have been interpreted elsewhere in Canada, the legislative history, the intention of the legislature and the other provisions of the *Charter*, support a broad definition of the word "handicap", which does not necessitate the presence of functional limitations and which recognizes the subjective component of any discrimination based on this ground.[95]

This interpretation adheres to the Canadian approach to antidiscrimination law by focusing on the impact of discrimination rather than the intent.[96] The law is equally unconcerned with diagnostic or other labels. The SCC went on to reject the U.S. approach of definitional criteria with respect to impairment and endorsed a social model of disability that accounts for "socio-political dimensions."[97]

Despite this broad interpretation, the Canadian Human Rights Commission bolstered the protection for people with MCS in the form of a policy recognizing environmental sensitivities:

> This medical condition is a disability and those living with environmental sensitivities are entitled to the protection of the Canadian Human Rights Act, which prohibits discrimination on the basis of disability. The Canadian Human Rights Commission will receive any inquiry and process any complaint from any person who believes that he or she has been discriminated against because of an environmental sensitivity. Like others with a disability, those with environmental sensitivities are required by law to be accommodated.[98]

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94. For examples of a detailed definitions of disability, see Human Rights Code, R.S.O. 1990, c. H.19, s.10(1) (Can.), in Ontario; Human Rights Act, R.S.N.S. 1989, c. 214, s. 3(l) (Can.) in Nova Scotia; and, Alberta Human Rights Act, R.S.A. 2000, c. A-25.5, s. 44(1)(h)(l) (Can.) in Alberta. For an example of a general definition, see Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 25 (Can.) covering federal employers. For an example of a statute without a definition, see Human Rights Code, R.S.B.C. 1996, c. 210 (Can.) in British Columbia.

95. Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City) and Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), 2000 S.C.C. 27 at para. 71 (Can.).

96. Andrews v. Law Soc'y of British Columbia, [1989] 1 S.C.R. 143 (Can.).

97. *Quebec v. Montreal*, paras. 72-77.

98. CANADIAN HUMAN RIGHTS COMMISSION, POLICY ON ENVIRONMENTAL SENSITIVITIES (2007, rev'd Jan. 2014) *available at* http://www.chrc-ccdp.gc.ca/sites/default/files/policy_sensitivity_0.pdf [hereinafter CHRC]. It should be noted that this policy is not binding on other tribunals. Statute and

Second, there are slight variations in how a claim for discrimination is made out and defended against in Canada versus the United States. Of course, a claimant must first establish a *prima facie* case by showing that there has been adverse treatment and that this treatment is related to her disability.[99] She does not need to prove the feasibility of accommodation at this stage.[100] The onus then shifts to her employer to justify the discrimination on the basis of a *bona fide* occupational requirement or to prove that any accommodation would constitute an undue hardship.[101]

Third, because of the legislative framework in Canada, accommodation claims are made in an administrative law context and not via litigation in the courts.[102] For claims concerning accommodation in employment, individuals may seek redress by making a human rights claim or through labor arbitration as a union grievance.[103] Procedural and evidentiary rules are less stringent in these settings than in the courts and there is more flexibility in terms of how a case is managed and determined.

The broad definition of disability combined with the slight variance in the doctrine and the less formal nature of adjudication in accommodation claims may account for higher success rates in Canada. A 2007 survey of labor arbitration cases from the provinces of Alberta, Ontario, and British Columbia found that grievances for accommodation of disability are likely to succeed about 41% of the time.[104]

2. The Case Law

There are eleven relevant Canadian cases.[105] Determining wins and losses is a trickier exercise with the labor arbitration decisions. This is

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common law in Canada require labor arbitrators to apply relevant human rights legislation and arbitrators frequently look to the field of human rights law for guidance. Parry Sound (Dist.) Soc. Servs. Admin. Bd. v. O.P.S.E.U., Local 324, (2003) S.C.C. 42, para. 23 (Can.) ("[T]he substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement.").

99. Ontario Hum. Rts. Comm'n & O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536 (Can.); British Columbia (Pub. Serv. Emp. Rel. Comm'n) v. BCGSEU (Meiorin), [1999] 3 S.C.R. 3 (Can.).

100. Under Canadian law, the duty to accommodate rests primarily with the employer, who is seen as being in the best position to determine accommodation that would not lead to undue hardship. Obligations are also put on the complainant employee who must facilitate the search of accommodation and accept reasonable, as opposed to ideal, measures. Central Okanagan Sch. Dist. No. 23 v. Renaud, [1992] 2 S.C.R. 970 (Can.) (citing *O'Malley*, [1985] 2 S.C.R.).

101. *Meiorin*, [1999] 3 S.C.R.

102. Seneca College v. Bhadauria, [1981] 2 S.C.R. 181 (Can.) (The Supreme Court held that human rights legislation provides recourse for discrimination and forecloses civil actions.).

103. The onus on the parties and burden of proof required by human rights law are the same in either setting.

104. Kelly Williams-Whitt, *Impediments to Disability Accommodation*, 62 INDUS. REL. 405, 410 (2007).

105. Searches were done in QuickLaw of all labor and human rights law databases for both tribunal and court decisions using the following parameters: employ! AND ("multiple chemical" OR environmental) /4 sensitivit! OR illness. As was done with the U.S. law, cases were selected based on the centrality of MCS as the relevant disability at issue and rulings made on strictly procedural grounds

because labor law is often concerned with the overarching objective of repairing employment relationships and the forum allows for more flexibility than in a court context. An arbitrator may apportion blame for a failure to accommodate or rule that particular intervening events transform an employer's duty to a disabled employee so that only partial damages are owed.[106] For this reason, grievances allowed in part, of which there are two, are counted here as a half win for both the employee and the employer.[107] The claimant or grievor clearly won in two of the cases surveyed, for a total of three positive outcomes out of eleven cases or approximately 27% of the time.[108]

Again, with such a small number of cases what is more important here is the analysis used by the adjudicators. The Canadian decisions, in general, do allow more space for the employee's perspective, but still demonstrate some of the same problems found in the U.S. law.

i. Credibility and Malingering

The malingerer trope is perhaps best illustrated by the multiple decisions in *Hutchinson*.[109] Hutchinson was an environmental engineering technician with a clean twenty-five-year record of federal government employment.[110] She was terminated after refusing to work under conditions she believed were unsafe because of her sensitivities to chemicals. The decisions in this case focus on two related issues: whether the grievor's health is in danger; and, if the parties meet their respective accommodation duties. The question of danger arises because Hutchinson had made a workplace safety complaint under the Canada Labour Code.[111] In response, a series of environmental tests were done and showed that the levels of chemicals present did not pose a danger to the general population. At no point is there any consideration of Hutchinson's particular circumstances or her particular sensitivities.[112]

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were discarded. In some cases, the same parties were involved in a number of hearings. Where that was the case, they were considered only once; that is, each claimant or greivor is counted only once for a total of eleven.

106. Central Okanagan Sch. Dist. No. 23 v Renaud, [1992] 2 S.C.R. 970 (Can.) (Trade unions are also bound by the duty to accommodate.).

107. Toronto Cmty. Housing Corp. v. C.U.P.E., Local 416 (Rodriques grievance), [2009] O.L.A.A. No. 677 (Can.); Ms. P. Grievance, *infra*, note 128.

108. Cyr v. Treasury Bd. (Dep't of Hum. Res. & Skills Dev.), 2011 P.S.L.R.B. 35 (Can.); Halidmand-Norfolk (Reg'l Health Dep't) & O.N.A. (Campbell Grievance), [1994] O.L.A.A. No. 604 (Can.).

109. Hutchinson v. Treasury Bd. (Env't Can.), [1996] C.P.S.S.R.B. No. 72; [1998] C.P S.S.R.B. No 2; [1999] C.P.S.S.R.B. No. 39; [2000] F.C.J. No. 1764; [2003] F.C.J No. 439 [hereinafter *Hutchinson*].

110. *Id.* para. 88.

111. Canada Labour Code, R.S.C. 1985, c. L-2, s. 128(1).

112. *Hutchinson* 1996, *supra* note 109.

The question related to the duty to accommodate is somewhat complicated by the fact that there are three separate Board decisions, each highlighting different aspects of what accommodation was requested, offered, or refused. The conclusion of the Board is that Hutchinson should have applied for telework thereby casting her as uncooperative and unwilling.[113] Only a full survey of the decisions reveals that Hutchinson made a number of alternative requests including asking for an office as opposed to a cubical workspace so she could control the air in the room around her. The employer rejected that proposal, in part, because such privileges were reserved for senior staff.[114] Again, to be fair, the picture of who asked for what and why some forms of accommodation were refused is not entirely clear. What is clear, is that the first decision in the matter does not include an undue hardship analysis and fails to give an account of the grievor's perspective concerning her impairments and needs.[115]

The result of the cumulative rulings in Hutchinson's case is that she effectively loses because of disbelief about her illness. The adjudicators seem to take up the employer's view that if she had been truly disabled—i.e. "sick in bed"—she would not have lost her job.[116] The reasons refer to Hutchinson as attention seeking and unwilling to work. It concludes with harsh judgment stating, "What we have here is a classic case of abuse of the Code to justify not working and is a frivolous use of her rights under the Code."[117] Hutchinson becomes the archetypical malingerer.

In the human rights context, the complainant in *Brewer* lost at the investigation stage.[118] Just like in some of the U.S. cases, evidence that she "[was] observed in uncontrolled public places . . . with no apparent restrictions," is used to disprove disability without apparent opportunity for Brewer to comment.[119]

Sometimes a grievor is able to triumph in the face of disbelief about her condition. The *Cyr* grievance is allowed after the employer's attempt to end Cyr's ability to work from home.[120] In a letter to the grievor, the employer expressed skepticism about the true nature of her disability stating that it "was not questioning Ms. Cyr's environmental sensitivity but that

113. *Hutchinson* 1999, *supra* note 109, para. 94.
114. *Hutchinson* 1996, *supra* note 109, para. 26.
115. *Id.*
116. *Hutchinson* 1998, *supra* note 109, para. 41.
117. *Id.* para. 77.
118. Brewer v. Fraser Milner Casgrain LLP, (2006) A.B.Q.B. 258, *rev'd* (2008) A.B.C.A. 435 (reversed on the basis of standard of review) (Can.).
119. *Id.* paras. 40-43. The use of this evidence is particularly distasteful considering that it was gathered via surveillance conducted by an insurance company and not with respect to the human rights claim. It is also worth mentioning that the judicial review decision also notes that Brewer's compliant was not followed through with because of inappropriate emphasis on diagnosis and too much weight on medical assessments. At paras. 29, 37.
120. Cyr v. Treasury Bd. (Dep't of Hum. Res. & Skills Dev.), 2011 P.S.L.R.B. 35 (Can.).

Ms. Cyr had been seen in other buildings with a mechanical ventilation system in recent months."[121] Not only is the employer found to have failed in its duty to consult with Cyr about her needs,[122] but the adjudicator awards damages for the expenses Cyr incurred to obtain additional medical documentation.[123] The decision compares Cyr's invisible disability to a visible one, stating that it is "akin to telling a sight-impaired person that one is opposed to having a guide dog in the office."[124] In this way, the adjudicator's analogy does something unique by literally rendering Cyr's invisible condition into one that is objectively visible. The comment also underscores some of the challenges faced by people with MCS. That is, it is not until the disability is portrayed as physical, permanent, and perceptible that it can be comprehended as real and warranting accommodation.

ii. Prioritization of Scientific Evidence

The need for scientific and medical evidence is also apparent in Canadian case law. In *Juba*, the grievor loses a claim for a reimbursement of sick leave days taken prior to the introduction of a workplace scent-free policy for procedural reasons.[125] The adjudicator explains why the outcome would have been the same on the merits. In doing so, he accepts the employer's assertion that the employee is not disabled. He acknowledges that Juba has "sensitivity" to scents, but also that "he is not a doctor." The adjudicator elaborates, "An occupational health and safety report essentially establishes that no significant air quality problem existed in the workplace. Apparently, there is no standard for scent."[126] Clearly, Juba's evidence is viewed as insufficient without medical corroboration or scientific verification.

While the adjudicator concludes that Juba is not disabled, he goes on to state, "From the information before me, it appears that the grievor has an underlying condition. He suffers when he is exposed to scents. However, scents are ubiquitous in our society[.]"[127] This remark about scents being everywhere is important. On one level, it can be inferred from this use of language that the adjudicator places the responsibility with the individual to manage his "condition" and not with society to accommodate. On another level, it may also be that the idea of managing fragrances is seen to be just too big a problem to be dealt with in the workplace.

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121. *Id.* para. 19.
122. *Id.* para. 52.
123. *Id.* para. 78.
124. *Id.* para. 70.
125. Juba v. Treasury Bd. (Dep't of Citizenship & Immigration), 2011 P.S.L.R.B. 71 (Can.).
126. *Id.* para. 71.
127. *Id.* para. 75.

One of the more intriguing cases is also one of the most recent. The *Ms. P.* case involves a number of arbitral rulings.[128] Ms. P. was a high school teacher diagnosed with MCS. The case is interesting because the employer initially seemed very willing to accommodate Ms. P. and agreed to an accommodation plan that allowed for Ms. P. to approve of cleaning and other products before they were used at the school where she worked. It seems as if the agreement was untenable as the parties ended up in repeated disputes about enforcement of the contract. It is the ninety-four-page, 2011 decision that deserves attention because of the use of dueling experts. The union and the employer put forward opposing scientific experts. The union's evidence is that MCS is physiological. The employer tries to prove that it is a psychological condition and, therefore, that Ms. P. cannot actually be accommodated.

Arbitrator Paula Knopf determines that MCS is a disability under Canadian law regardless of which theory prevails.[129] But, the focus is on the expert testimony and not the grievor's experience.

iii. Exaggerating Extent of Disability

The *Ms. P.* case is also about exaggerating the extent of disability in a way that is very different form the U.S. case law. The argument this time is not whether the grievor is in more danger than she alleges; but rather, if MCS can be accommodated as she claims.

Arbitrator Knopf's analysis falters when she says that the conflicting theories about MCS are relevant in determining if accommodation of Ms. P.'s MCS is even possible. Knopf bases this on the argument that the list of "perceived" triggers will be ever expanding, thus implying that the root of her condition is not actually physiological.[130] She writes, "While determination of the cause is not critical to a finding of the duty to accommodate, consideration of the cause is important in assessing the possibility of accommodation."[131] Ultimately, Knopf does not rule on the question of possible accommodation and finds that it is moot following the grievor's resignation from employment.[132] But, the mere fact that the question is even posed is problematic because it necessitates discarding a grievor's testimony about her lived experiences in favor of expert evidence.

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128. Toronto Dist.r Sch. Bd. v. O.S.S.T.F., Dist. 12 (Ms. P. Grievance), [2008] O.L.A.A. No. 450; [2009] O.L.A.A. No. 9; [2011] O.L.A.A. No. 461 [hereinafter *Ms. P.*]. Note that while three of the decisions are cited here, the 2011 decision points out that this is the eleventh issued in the case, para. 1. Also note that there were a number of human rights complaints but those are not considered here because they were dismissed on procedural grounds.

129. *Ms. P.* 2011, *supra* note 128, para. 218.

130. *Id.* paras. 219, 223.

131. *Id.* para. 236.

132. *Id.* para. 258.

And, depending on which side wins the debate, Ms. P. could be viewed as a too psychologically ill to be accommodated through physical changes to her environment.

In *Campbell*, a grievor with MCS and chronic fatigue syndrome was terminated after requesting a gradual reintroduction to work following an extended period of leave.[133] The employer argued that the grievor does not have a disability requiring accommodation and, simultaneously, that it "would be impossible" to accommodate her because her illnesses render her "absolutely unable to work in any capacity."[134] The arbitration panel rejects these contradictory arguments and holds that Campbell's conditions are disabilities and that the employer must present evidence that it could not accommodate Campbell without undue hardship. The case demonstrates that employees with MCS inhabit a very small realm of believability and may easily be cast as either not sick enough or too sick to work.

IV. A CROSS-BORDER COMPARISON OF MCS CASE LAW

The discussion below is divided into two parts. First, in Section A, the MCS case law for each country is contextualized and examined comparatively. This allows for a better understanding in terms of the nuances between the two jurisdictions and helps to determine if one system is better than the other for an employee with MCS. Section B raises questions about why MCS cases are so challenging to make out, what this means for others with contested diagnoses, and possible responses in the tug of war between experiential testimony and scientific evidence.

A. Analyzing Outcomes

Given the case law cited above, what is most immediately apparent in terms of differences between the two jurisdictions is that the success rate for MCS claims in Canada is exactly twice that in the United States: 27% versus 13.5%.[135] Again, the sample size in both jurisdictions is very small. The different forums and slight variations in the legal tests may also account for the some of the disparity. U.S. plaintiffs must manage in a more formal judicial context, whereas Canadians pursue claims via a flexible system of tribunals and often with the support of labor union representation.[136] The nations also differ in terms of how disability is

133. Halidmand-Norfolk (Reg'l Health Dep't) & O.N.A. (Campbell Grievance), [1994] O.L.A.A. No. 604 (Can.).

134. *Id.* paras. 28-32.

135. *See supra* Parts III.A.2 & B.2.

136. All of the favorable outcomes in Canada were in the context of labor arbitrations. This may indicate that those people who are not unionized employees have an even lower chance of success than

defined; although, the broader interpretation mandated by the ADAAA—as exemplified in *Feldman* and *Howard*—may lessen the divide.[137] Impairment, rather than diagnosis, is also supposed to be the central focus of disability-related discrimination analysis in the two countries.

Both the U.S. and Canadian cases demonstrate deep-seated skepticism toward MCS claimants that results in a questioning of their credibility as witnesses as well as their authority to testify about first-hand experiences of illness. Sometimes this is overt. Other times, this is demonstrated through an emphasis on scientific evidence at the expense of the individual's story or a willingness to attribute a higher level of disability than the employee herself claims. What follows is a comparison of the cases above.

The myth of the malingerer has a significant presence in decisions on both sides of the border. This is often demonstrated by the fact that the court or tribunal is willing to accept evidence about other activities that the person with MCS is able to take part in without opportunity for explanation.[138] Sometimes explanation is allowed,[139] or an employer is made to pay for making an employee disprove such assumptions.[140] It is striking that the U.S. courts seem to be nearly a decade ahead of their Canadian counterparts in terms of challenging these kinds of arguments from employers.

Thanks to the ADAAA, the American courts also seem to be making advances where reliance on scientific evidence is concerned. Early MCS cases were virtually doomed in the United States: scientific evidence was viewed as important to proving a controversial illness and yet disallowed for the very same reason.[141] Inherent in these cases is a presumption that scientific evidence is paramount. Again, it seems as if the ADAAA may lead to a significant shift with more emphasis being placed on plaintiffs' first-hand accounts.[142]

The role of scientific evidence in Canadian cases is currently less clear. There are no rulings in which such evidence is deemed inadmissible because of controversy concerning MCS. That said, there have been a couple of 2011 rulings that either fail to recognize MCS as a disability due

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their U.S. counterparts. I am, however, reluctant to make this conclusion based on such a small sample of human rights cases.

137. Feldman v. Charlotte-Mecklenburg Bd. of Educ., 2012 WL 3619078 (W.D.N.C. Aug. 21, 2012); Howard v. Penn. Dep't of Pub Welfare, 2013 U.S. Dist. LEXIS 3251 (E.D. Pa. Jan. 9, 2013).

138. Whillock v. Delta Air Lines Ltd., 926 F.Supp. 1555 (11th Cir. 1996); Keck v. N.Y. State Office of Alcoholism & Substance Abuse Servs., 10 F.Supp.2d. 194 (N.D.N.Y. 1998); Owen v. Computer Sci. Corp., 1999 WL 43642 (D.N.J.); Brewer v. Fraser Milner Casgrain LLP, (2006) A.B.Q.B. 258, *rev'd* (2008) A.B.C.A. 435 (reversed on the basis of standard of review) (Can.).

139. Davis v. Utah Tax Comm'n, 96 F.Supp.2d 1271 (D. Utah 2000).

140. Cyr v. Treasury Bd. (Dep't of Hum. Res. & Skills Dev.), 2011 P.S.L.R.B. 35 (Can.).

141. *See supra* notes 66-67 and accompanying text.

142. Feldman v. Charlotte-Mecklenburg Bd. of Educ., 2012 WL 3619078 (W.D.N.C. Aug. 21, 2012).

to a lack of medical or scientific corroboration[143] or allow scientific debate concerning the illness's etiology to trump a grievor's account.[144] Both of these rulings seem to contradict the broad approach to disability outlined by the SCC[145] and the specific policy of the Canadian Human Rights Commission recognizing environmental sensitivities as a disability.[146]

Exaggerating the extent of disability is largely missing in the Canadian cases. In *Ms. P.*, there was debate concerning whether the grievor could be accommodated but this turned on the character of the disability rather than the extent of the impairment.[147] Perhaps this is because a person in Canada need not reach a "qualified individual" threshold in the same way that an American plaintiff must for coverage under the ADA.[148] The decision in *Dickerson* shows that this may be an area of weakness for future MCS plaintiffs in the United States.[149] While the ADAAA appears to address cases in which there might be insufficient scientific or medical evidence to prove that a disability exists by deemphasizing the need for such proof, it does nothing to address those circumstances in which a defendant argues that a plaintiff is too disabled to be accommodated.

Interestingly, if the most recent cases are any example, it seems as if the American courts are becoming more concerned with a plaintiff's lived experience of MCS as a disability,[150] while Canadian tribunals are increasingly looking for scientific and medical validation.[151]

B. Reimagining MCS Adjudication

The analysis above begs two important questions. The first is the niggling inquiry into why MCS plaintiffs face such challenges to their claims of impairment. The second is whether anything should be done given these observations.

In answering the first question, it is reasonable to ask if these outcomes really are unique to MCS employment discrimination claims. While this Article is primarily concerned with contrasting Canadian and U.S. disability doctrine by using MCS as an example, some authors have compared MCS

143. Juba v. Treasury Bd. (Dep't of Citizenship & Immigration), 2011 P.S.L.R.B. 71 (Can.).

144. *Ms P.* 2011, *supra* note 128.

145. Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City) and Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), 2000 S.C.C. 27 at para. 71 (Can.).

146. CHRC, *supra* note 98.

147. *Ms. P.* 2011, *supra* note 128.

148. ADA, 42 U.S.C. § 12111 (1990).

149. Dickerson v. Peake, 2011 WL1258138 (M.D. Ga. Mar. 31, 2011), *aff'd* 489 F. App'x 358 (11th Cir. 2012).

150. Feldman v. Charlotte-Mecklenburg Bd. of Educ., 2012 WL 3619078 (W.D.N.C. Aug. 21, 2012); Howard v. Penn. Dep't of Pub. Welfare, 2013 U.S. Dist. LEXIS 3251 (E.D. Pa. Jan. 9, 2013).

151. Juba v. Treasury Bd. (Dep't of Citizenship & Immigration), 2011 P.S.L.R.B. 71 (Can.); *Ms. P.* 2011, *supra* note 128.

claims to other kinds of disability. The pattern that emerges is that the former are actually less likely to succeed.[152] In particular, Ruby Afram's 2004 study of MCS versus fibromyalgia cases, mentioned above,[153] reveals something interesting about the history of adjudicator willingness to accept subjective accounts of disability versus scientific evidence pertaining to contested illnesses. Her observation is as follows:

> Interestingly, even in the early cases, no court rejects evidence about fibromyalgia as an illness, and several explicitly accept fibromyalgia as a diagnosis, or state that it qualifies as an impairment under the ADA – even though a number of courts recognize the *inherently subjective nature of a fibromyalgia diagnosis*.[154]

Of course, while the courts may be a little less overtly hostile to the subjective aspects of these claims, the increased chances of success for fibromyalgia plaintiffs as compared to MCS plaintiffs are negligible.[155] And, as demonstrated by the numbers above, all disability claims face an uphill battle, statistically speaking.

Why these kinds of cases present such challenges for plaintiffs is open to speculation.[156] It may be that there is an innate inability to understand the invisible pain and suffering of others. Pain is, by its very nature, experienced subjectively.[157] Harvard professor Elaine Scarry has written about the challenges inherent in communicating experiences of pain. She explains that pain defies language and that the natural response to hearing about someone else's pain is doubt.[158]

It may also be that acknowledging MCS as a disability is particularly challenging because the condition so starkly illustrates societal constructs of disablement and, therefore, corresponding social responsibility. Recall that in denying the discrimination claim the adjudicator in *Juba* points out that "scents are ubiquitous in our society."[159] Individuals are implicated for their choices in personal grooming products, for example. Entire industries are responsible for their use of chemicals. Widespread acknowledgment and accommodation of MCS would be costly and require a relational analysis

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152. Afram, *supra* note 21; Vierstra et al., *supra* notes 13; *see supra* note 58 and accompanying text;

153. *See supra* Part III.A.2.ii.

154. Afram, *supra* note 21, at 107-08 (emphasis added).

155. *Id.*

156. Vierstra et al., incorporate a gender analysis when looking at MCS claims. They theorize that the overall success rate of MCS claims is impacted by the gender of claimants. They base this on the fact that most people diagnosed with MCS are women and there is research showing that doctors are less likely to believe female complaints of pain. Thus, women are more likely to be regarded as psychosomatic and the overall success of MCS claims is impacted. Vierstra et al., *supra* note 13, at 398.

157. Tobin Siebers, *Disability in Theory: From Social Constructionism to the New Realism of the Body*, 13 AM. LITERARY HIST. 737, 743 (2001).

158. ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD (1985).

159. Juba v. Treasury Bd. (Dep't of Citizenship & Immigration), 2011 P.S.L.R.B. 71, 75 (Can.).

that is much more difficult to engage in than pity and perceiving disability as personal tragedy.[160]

Conversely, but equally as important, is the fact that medical and scientific evidence is not as objective as we might like to think. The universe of illness and disability is not finite. New diseases emerge[161] just as old ones fall in and out of favor due to changing social conceptions of health.[162] Examples of formerly contested illnesses include conditions that are now well recognized such as coronary heart disease, post-traumatic stress disorder, and bovine spongiform encephalopathy—also known as mad cow disease.[163] It is estimated that at least 5% of Canadians have been diagnosed with "medically unexplained physical symptoms," like MCS, chronic fatigue syndrome, or fibromyalgia.[164] The number of people impacted by new or contested illnesses will continue to grow and fluctuate. The science behind these illnesses will also continue to evolve and change.

Given the inherently subjective nature of impairments (particularly those associated with invisible disability), the difficulty of appreciating how we are all implicated in disablement, and the fact that scientific knowledge of illness is not as indisputable as we often like to think, something has to give way. This brings us back to the second question: what is to be done?

The MCS case law appears to demonstrate an unstated presumption against the credibility of plaintiffs with MCS on one hand, and a presumption concerning the validity of scientific evidence on the other. A rebalancing of sorts is needed. It is insufficient to simply say that a diagnosis is not necessary to establish a *prima facie* case. Even without requiring a diagnosis, the risk is that once a controversial condition is labeled an evidentiary vortex forms pulling competing scientific claims into its whirling mass.[165] Discrimination doctrine in both countries could benefit by clearly articulating an increase in the weight accorded to experiential evidence in disability claims.

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160. *See* SHERENE H. RAZACK, *From Pity to Respect: The Ableist Gaze and the Politics of Rescue*, *in* LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTROOMS AND CLASSROOMS 130 (1998).

161. The World Health Organization defines an emerging disease as "one that has appeared in a population for the first time, or that may have existed previously but is rapidly increasing in incidence or geographic range." WORLD HEALTH ORGANIZATION, http://www.who.int/topics/emerging_dis eases/en/ (last visited Apr. 4, 2015).

162. Jackie Leach Scully, *What Is a disease? Disease, Disability and Their Definitions*, 5 EMBO REPORTS 650 (2004).

163. Anna Donald, *The Words We Live In*, *in* NARRATIVE BASED MEDICINE: DIALOGUE AND DISCOURSE IN CLINICAL PRACTICE 17, 23 (Trisha Greenhalgh & Brian Hurwitz eds., 1998).

164. Park & Knudson, *supra* note 9, at 43; Zavestoski et al., adds Gulf War Illness to the list. *See supra* note 26.

165. Perhaps this is why plaintiff's counsel agreed to substitute the diagnosis when pressed by the employer in Muovich. *See supra* note 87 and accompanying text.

The point of this Article is not that there is no place for scientific evidence. Rather, courts and tribunals need to be able to view a plaintiff with MCS as an expert too—one who has extensive knowledge of how the condition impacts her body and how the actions of others are implicated in the disability that results. Evidence from other sources, scientific or otherwise, must focus on issues of impairment and accommodating a plaintiff's disability. Debate about etiology or the physiological versus psychological nature of her condition do nothing to address questions about whether or not she experiences a reaction to a chemical trigger that interferes with her ability to work. This, after all, is the crux of the matter.

V. CONCLUSION: MOVING THE MCS CASE LAW FORWARD

Regardless of whether a person is seeking accommodation for MCS before a U.S. court or a Canadian tribunal, her chances of success are small. The response to her story of illness and disability is likely to be disbelief and cynicism. This is demonstrated throughout the case law via questions of credibility, reliance on scientific versus experiential evidence, and the ability to minimize the impact of the condition or blow it up to unmanageable proportions.

If there is a theme that underlies the problem, it is that the plaintiff with MCS is often not the person who is given the authority to account for her actual experiences of disablement. What is needed is to find ways to do precisely that: medical and scientific evidence must follow, not lead, a claimant's experiential knowledge.

Prioritizing a plaintiff's testimony is not exactly a novel idea. Over the twenty-five years since the passage of the ADA and thirty years of equality rights under Canada's Charter of Rights and Freedoms, anti-discrimination law in both the United States and Canada has evolved to permit an emphasis on experiential evidence and a de-emphasis of the science. This is clear from both the EEOC regulations[166] and Supreme Court rulings in Canada.[167] While it appears that the Americans may be on a more promising path following the ADAAA's re-expansion of the definition of disability, MCS case law shows us that both jurisdictions must do more to impact what is actually occurring in courtrooms and around tribunal tables.

Pain is a subjective phenomenon. True and lasting accommodation of disability requires that society understand and take responsibility for our

166. ADA, 29 C.F.R. § 1630.2(j)(1)(v) ("The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis[.]").

167. Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City) and Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), 2000 S.C.C. 27 at para. 71 (Can.).

collective actions. Developments in medicine will always lag behind new and emerging diseases. So long as the law imagines these things to be otherwise, those people who have illnesses that are either contested or not recognized risk being seen as malingerers, liars, or lunatics by those who cannot see the everyday impact.[168] In a legal setting, these stigmatizing labels may prevent their evidence from being given the consideration it deserves.[169]

168. Donald, *supra* note 163, at 23 (*citing* ARTHUR KLEINEMAN, THE ILLNESS NARRATIVES: SUFFERING, HEALING & THE HUMAN CONDITION (1988)).

169. WILKIE & BAKER, *supra* note 5, at 8.