MEDICAL REPORTS ON PERSONAL INJURIES

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In that symbiosis of law and medicine, the personal injury action, what does the lawyer look for in a medical report, and how does the court regard it? The practising lawyer, whether barrister or solicitor, and ultimately the judge if the case is not settled out of court, is faced with the almost impossible task of evaluating an injury in terms of money. To achieve this end he needs firstly to consider liability and secondly damages.

Liability

Liability will frequently be an entirely non-medical matter; for example, in the case of an injured workman the evidence will usually be factual as tending to show whether or not a safe system of working was in operation in the factory or other place of work concerned. There are, however, aspects of liability (as distinct from damages) on which medical evidence is relevant. Until the abnormal be known, there is no additional duty towards a person suffering from a disability; but an employer in order to fulfil his obligation to provide a safe system of work must take into consideration the known disability of a particular worker. For instance, a workman known to have an old, healed phthisis should not be allowed to work in a dusty or gritty atmosphere; a man known to have a hernia should not be required to lift heavy weights; an antecedent bone disease is likely to lead to limb fractures after a very slight injury. Examples could be multiplied, but the moral is that a history of antecedent illness or injury may well be important in considering liability and, as will be seen later, is always vital when assessing the appropriate damages. This rule does not mean however that the employer is a super-nanny, for to take excessive precautions might be to exclude an employee from any type of employment. Thus in a recent case in which a factory foreman died as a result of his addiction to inhaling trichlorethylene vapour, the

employers, who knew of this addiction, were held to be under no duty to deprive the man of his employment because he was not prepared to take care of himself when he could well have done so.

It is revelant on the issue of liability to consider whether the plaintiff is in law guilty of contributory negligence, in which case the liability will be divided between plaintiff and defendant and the damages paid to the plaintiff reduced accordingly. Contributory negligence depends on the foreseeability of possible harm to oneself, and may be evidenced by non-disclosure on the part of the plaintiff. For instance, in one case a painter failed to inform his employers that he was subject to epileptic fits and that his doctor had forbidden him to work at a height above ground. On a claim by the widow for damages for breach of statutory duty, the damages were reduced by half because of the contributory negligence of the deceased.

The Time Factor

Where there is obvious physical injury the date of the occurrence does not arise as a medical factor; but in actions based on an occupational disease the date of the onset may be vital, since personal injury cases must be commenced within three years from the date on which the cause of action accrued, and personal injury includes any disease and impairment of a person's physical or mental condition. Probably the most difficult of these cases are those in which a workman suffers from a disease such as pneumoconiosis. The cause of action accrues when the injury is inflicted but the limitation period may pass before a reasonable man would think his symptoms seveie enough to issue a writ. A committee is at present sitting to consider " whether legislation is desirable to amend the law relating to the limitation of actions in cases of personal injury, where the injury or disease giving rise to the claim has not become apparent in sufficient time to enable proceedings to be begun within three years of its inception ". In one case arising out of pneumoconiosis the court differentiated between " innocent " and " guilty " silica dust. There was no known protection against the former, but the latter resulted from a breach of regulation due to not keeping a dust-extractor plant in good order. The House of Lords held that the workman, whose disease was certainly caused by the inhalation of silica dust, was entitled to recover damages because the " guilty " dust materially contributed to his illness.

Damages

Once liability, with its limited medical relevance, has been

established, the testimony of the doctor looms very large indeed. Before considering the well-established heads of damage which will probably arise in every case, it is worth while to focus attention on some general legal principles which may depend on medical history or medical opinion. A defendant is liable for the type of injury which a reasonable man should have foreseen as a consequence of his negligent act. None the less, though the defendant be held liable, the damages may be lessened if it can be shown that something fresh happened subsequently to retard recovery or increase the initial disability. This fresh happening may take the form of the plaintiff's own conduct or the act of someone wholly unconnected with the original event. Medical evidence plays a part here. In one case the failure of a surgeon to discover a fracture-dislocation of the shoulder increased the original injuries, and thereby lessened the damages which at first sight appeared to be recoverable. In an Australian case the anxiety from which the plaintiff was suffering was held to be caused not by the original accident but by the erroneous belief induced in her mind by medical evidence that she had suffered a fracture of the skull. This was held to be a new intervening case for which the defendant was not liable. Similarly, the plaintiff's own conduct subsequent to the initial injury must be considered. A plaintiff claiming damages for personal injuries must act reasonably, but he need not act with perfect knowledge and ideal wisdom. It is important to know whether he has refused treatment which was medically recommended; whether he has despite advice engaged in forbidden activities. In particular has he refused to submit to an operation to remove or ameliorate the disability? The test here is not whether, on the balance of medical opinion, the operation might reasonably be performed, but whether the plaintiff in refusing to undergo the operation acted unreasonably. This may depend on the advice which the patient has received; it is not a question of the abstract reasonableness of the operation considered as an operation, but the reasonableness of the plaintiff in the circumstances. In one case the Court of Appeal decided that where the plaintiff in good faith follows the advice of his own doctor, whose honesty and competency are not questioned, the plaintiff has acted reasonably.

Damages must be assessed once for all, either at the trial subject to the right of appeal or perhaps earlier when litigation is settled out of court by agreement. Even if it is found later that the injury suffered was much greater than was originally supposed, no further action can be brought. Consequently, if a medical report is interim

and not final this must be clearly stated. Furthermore, in dealing with the patient's future every possible contingency must be considered; prognosis is probably the most important function of the medical witness. Possibilities cannot be converted into certainties, but they should be mentioned. Second thoughts after the action has been finalized are of no avail.

The various aspects to be considered in assessing damages in an action arising from personal injury have gradually been evolved by the courts in a series of decisions of some legal nicety. From the doctor's point of view it is enough to know briefly what the lawyer is driving at—in other words, what he wants to know in order to advise his client or represent him in court, as the case may be.

The various heads of damage to be considered are:

1. *Bodily pain and suffering, past, present and future*

Any painful treatment should be mentioned, also the question of disfigurement if it arises.

2. *Mental or nervous shock*

Damages may now be recovered for mental or nervous shock, even when there is no physical impact, provided the shock is not too remote and is really the result of the actionable wrong-doing. At one time the crude view prevailed that the law should take cognizance only of physical injury resulting from actual impact, but this has been discarded and it is now well recognized that an action will lie if injury by shock is sustained through the medium of the eye or the ear without direct contact.

The deliberations of the courts in assessing and defining liability for shock at times seem to have become almost metaphysical. Shock has been held to mean something more than shock in the popular sense of fright, but shock may be a factor in assessing damages when it results from fear not only for oneself but for one's children. Damages have also been recovered by the mourners at a funeral who saw the coffin overturned. The law has now reached the stage of dividing the consequences of nervous shock. For instance, in a recent case the remoteness of damage rule was probably stretched to its furthest point in favour of a plaintiff. The plaintiff, who suffered physical injuries at the same time as her husband was killed in a car smash, was rendered unconscious. She did not hear of her husband's death until later. The shock of hearing this news was admitted as a proper factor in estimating the amount of damages recoverable in her own cause of action.

No damages were awarded however for the neurodermatitis suffered by the plaintiff, on the basis that shock perpetuated by a widow's day-to-day misery was too remote to entitle her to damages. In a Scottish case no damages were awarded on similar facts and it was held that a widow when not present or, if present unaware because of unconsciousness, of her husband's injuries cannot recover damages for nervous shock caused by discovering those injuries.

3. *Impaired health and vitality*

Quite apart from loss of earning power, a plaintiff is entitled to damages for his inability to perform the functions or reap the enjoyment of a normal life. All activities including hobbies must be considered.

4. *Care and treatment*

Damages may have to cover past and future expenses incurred in efforts to cure or ameliorate the plaintiff's condition. The expenses must be incurred honestly and reasonably, and each case will be considered on its merits. It is not essential to take advantage of facilities available under the National Health Act, nor if treatment is prescribed by responsible experts need it be proved to have been in fact necessary.

5. *Loss of expectation of life*

This time-honoured legal cliche means that the loss of the prospect of a predominantly happy life must be compensated for as far as possible in terms of money. The medical witness must focus his attention on whether the normal expectation of life, having regard to the age of the person injured, has been shortened because of the injury suffered.

6. *Loss of earning power*

The question here to be considered is: To what extent is the plaintiff likely to remain unable to work, either at all or to the extent of his pre-accident earnings? This is not purely a medical point, but one on which a medical practitioner should be able to give an intelligent and informed guess.

7. *Pre-accident condition of plaintiff*

The relevance of the plaintiff's condition at the time when he suffered the injury giving rise to the proceedings has been discussed earlier. This also has a relevance to damages once liability has been established. The defendant " takes the plaintiff as he finds him "

and irrespective of any knowledge of an existing disability, the defendant must compensate the plaintiff in full. Thus the damage flowing from a quite small injury could be great indeed, as where a burn on a lip promoted cancer. Such cases are frequently referred to as " the eggshell skull cases ", a physical condition which may at one time have been more prevalent than now. A simple example of this legal rule is that of a one-eyed man whose other eye is lost by reason of the defendant's negligence. Law and justice require that he should recover heavier damages than a man who still retains the use of an eye.

Some Legal " Snags " arising out of Medical Reports

The proper function of a medical witness is to give expert medical evidence and not to give extraneous factual evidence on the issue of liability. None the less, each doctor naturally begins his medical examination, as a matter of routine, by asking the plaintiff for his account of the accident. " How did it happen? " may well be his first remark. This account is then incorporated in the medical report. This is sometimes unsatisfactory if the extraneous material is to be used against a plaintiff in court as evidence of his own admissions. In one Northern Irish case the plaintiff refused to submit to an examination by the defendant's medical adviser except on terms that the latter's evidence at the trial was to be confined to the question of damages, and that no evidence of any statement by the plaintiff relating to the issue of liability would be given. The court held that the plaintiff's terms were reasonable. The evidence excluded in this case was that of the doctor for the purpose of contradicting the party's version of how the injury happened, but the court's ruling did not prohibit the doctor from informing solicitor and counsel that the injuries were not consistent with the plaintiff's version of the accident.

It is axiomatic to say " Always prefer first-hand observation to second-hand hearsay ". Strangely enough in a legal case turning on the cause of an employee's dermatitis the use of a technical term in a first medical report misled consultants, who apparently had to rely on this report, and were unable to make any independent diagnosis owing, it seemed, to the use of red paint on the affected part. The word used was " cheiropompholyx " which, according to the judge, seemed to have different connotations for different people.

Agreed Medical Reports

Agreed medical reports are favoured by potential medical wit-

nesses, because they enable practitioners to avoid spending time in court; they also save costs. Agreed reports are not, however, always possible either from the legal or from the medical angle, and oral evidence subject to cross-examination may be necessary in order that the true facts and medical opinion may be reached.

When a court action is in course of preparation, the usual order by the court is that unless a medical report be agreed between the parties, medical evidence be limited to two witnesses on either side. The parties will probably exchange medical reports; the two doctors will then meet and embody their evidence in a document which both will sign if they can reach agreement. If they cannot resolve points of controversy, strictly speaking there can be no agreed report and the medical witnesses must give oral evidence. Where there are two types of injury there may be two agreed medical reports, each within its own province. The question of prognosis is here very important. In one case the Court of Appeal refused to allow evidence to be called to contradict an agreed medical report which was used in the court below. It was there said that a mistake whether as to the present condition of the plaintiff or the future course which his health is likely to take, may not be re-opened by fresh evidence on an appeal based on after events and after knowledge; to permit this would deprive the word " agreed " of all meaning.

There is also a joint agreed report. In this instance both co-sultants examine the patient together and then produce if they can a joint agreed report based on their joint examination.

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