

Causation: an expert's guide

Giles Eyre & Dr Linda Monaci discuss the challenges of completing complex medico-legal reports



IN BRIEF

- ▶ Clinical experts must be aware of the applicable legal principles in their medico-legal practice and must apply them in providing opinion.
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- ▶ A neuropsychological case study.

For medical experts one of the most difficult areas to address, and to communicate, in civil claims is that of causation. For lawyers too medical causation is difficult—it is frequently difficult to discern where the medical expert stands in terms of the applicable legal tests. Particular difficulty is experienced where there is a pre-existing condition impacting on deficits caused by the index event.

Experts must be fully aware of the legal principles and be able to apply them when writing reports so that their opinions are meaningful to the lawyers and the court in determining the value of a claim, while lawyers must be able to guide the expert to provide useful opinion on causation.

This article illustrates appropriate application of the legal principles in a case arising out of a claim for damages for personal injury resulting from a traumatic brain injury (TBI) on a 28-year-old man involved in an accident who had suffered a stroke two and a half years previously (for the purpose of this article it is assumed that the stroke was a single event and the medical reasons that had caused it were under control).

Legal principles

The following legal principles or legal tests must be considered:

Causation

The 'egg-shell skull' principle means that someone who causes injury to another person must take that other person as they are. If, therefore, the injured person has a particular vulnerability, which means that the impact of the accident or injury on them is more severe than would normally be expected, the person who causes the injury is responsible for all of the consequences. The claimant's pre-existing condition is likely to have made him more vulnerable to the effects of an injury. While a moderate TBI is likely to cause permanent cognitive problems, arguably this is more likely and the effects will be more extensive in an individual whose cognitive reserve has been diminished by a previous stroke. Damages will not be reduced because of this increased vulnerability—the defendant is liable for all of the consequences of the injury as they arise in this individual.

However, due to the nature of the claimant's pre-existing condition, his functioning is already compromised. The expert must seek to clarify the difference between the situation consequent on and after the accident (and the likely future prognosis) and the situation as it would have been but for the accident, and therefore how the claimant's life has been affected by the index event. The first question therefore is: 'What would the claimant's functioning have been over time had the accident not taken place?' Where the claimant's post-accident condition, or parts of it, would have arisen in any event because of his pre-existing condition, this will not sound in damages.

Prognosis & future risk

Where an accident has long-term effects it is necessary to continue to compare the

situation into the future, including possible future risks and complications (as it would have been in the absence of the accident) with what it will now be. The balance of probabilities is no longer the test and the likelihood of both situations (the 'but for' situation and the situation consequent on the accident) should be addressed according to the level of risk, using, so far as is possible, a range of percentage chances rather than the vagaries of language.

The claimant's life expectancy may be adversely affected by the index event, and must then be addressed. In contrast with prognosis and future risks and complications, life expectancy is decided 'on the balance of probabilities'. The issue is to what age, or for what period, is the claimant more likely than not to survive. That should be compared with the age but for the index event.

A neuropsychological case study: applying the legal principles

Opinion on causation

1 What would the situation have been in the absence of the TBI given the claimant's history of stroke?

At the time of the accident the claimant was 28 years old; he had reached a plateau in his recovery from a right parietal/frontal stroke sustained two and a half years previously.

1.1 Physical functioning

The claimant was left with some residual left-sided weakness, manifested by reduced dexterity with his left hand and some unsteadiness in the left leg. No further recovery or deterioration was expected at the time of the TBI (other than age-related decline). These difficulties did not impact on activities of daily living sufficiently to curtail activities or require assistance.

1.2 Cognitive functioning

The claimant had recovered from significant difficulties with multi-tasking, disinhibition and slowed speed of processing, but continued to experience difficulty with some aspects of problem-solving, eg he needed to follow lists and written instructions to cope with work demands, and in social communication, eg he could be more direct with others while at the same time not being able to pick up on social cues so others had to be more open and direct with him.

1.3 Emotional/neuropsychiatric problems

Prior to the stroke there was no history of mood disorders. After the stroke the claimant was affected by mood disorder for a few months, but this did not require psychotropic medications and responded well to rehabilitation. At the time of the index event the claimant's mood was within normal limits. Subsequent reported low mood is attributable to the accident. Although there were some difficulties in social communication, he benefitted from a strong support system (his parents, wife and two children) and a supportive employer (he had worked for the same employer for the previous 15 years).

1.4 What impact did the stroke have on the claimant's everyday life?

After the stroke, the claimant received acute and post-acute neurorehabilitation as well as community input. He was supported with returning to work (he worked as one of the floor managers in Waitrose and he managed 15 to 20 staff; he was line-managed by the shop manager). His employer was supportive of him due to his previous performance and although there had been some difficulties with individuals he managed due to changes in his interpersonal skills after the stroke, generally he was well liked by his manager, colleagues and the people he managed. His potential for career progression had been hampered slightly by the stroke.

1.5 Personal/relationships

At the time of the stroke he was married and had two children: five and seven years of age. After the stroke there had been interpersonal difficulties but his parents and wife had actively supported his rehabilitation, helping him gain insight and acceptance into his residual problems. He continued to remain involved with his children, although he needed input from other adults within the family because of his lack of tact and its consequences.

Following completion of the rehabilitation programme, the claimant had no care needs. He returned to driving and his hobbies (attending the gym and playing pool).

2 What difference has the accident/TBI made?

In the accident the claimant sustained a mild to moderate TBI which caused frontal contusions and skull fracture. He is unlikely now, over two years on from the accident, to make any further improvements, and he is left with permanent residual difficulties due to the TBI (but also because the pre-existing stroke had made him more susceptible to the effect of a further brain injury).

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2.1 From accident to age 70

Following the TBI the claimant's functioning declined. He received further neurorehabilitation but two years later his recovery was thought to have plateaued. His main difficulties remain his cognitive problems and the impact on his family life and on his life style has been considerable. His wife and parents remain supportive of him, but there have been periods of time when he has moved to his parents due to arguments with his wife mainly due to his poor insight and irritability with his children. Social services have become involved due to concerns in relation to the children; respite care has been suggested. The claimant's insight is variable. He is unable to return to the gym or play pool on a regular basis on his own but is able to go out in the community, including engaging in these activities, with the help of a support worker.

Were he to find himself living alone, it is most likely (75%–85% chance) that he would be able to cope although somewhat chaotically with daily living and domestic tasks. Provision should be made for a support worker on a regular basis for activities, and additional provision in the event that he lives alone in the future.

He experiences some disinhibition, difficulty in problem-solving and irritability, which means he is unable to return to his previous employment. He has lost any opportunity of career progression in that field. His employer has offered him work in a lower capacity (stocking up shelves at night) but the claimant was not

consistently performing adequately at work. The likelihood of his finding future paid employment is poor and it would need to involve little responsibility, be of a menial nature and consequently insecure.

Because of these continuing difficulties a case manager has been drawn in to set up a privately funded support and rehabilitation plan, which it is anticipated he will require for at least the next five years (see case manager's preliminary report for details of support)

2.2 In old age

As the stroke was considered a single event (non-progressive) his functioning in old age was not anticipated to decline further. The TBI is also considered to be a single non-degenerative event. The claimant's functioning is not now expected to decline apart from age-appropriate decline unrelated to the TBI.

2.3 Future risks as a result of the TBI

There is an increased risk of epilepsy as a result of the TBI and there may also be an increased risk of mortality (reduced life expectancy) as a result of epilepsy and/or the combined effects of the stroke and TBI. These matters should be addressed by a neurologist or other appropriate expert with appropriate specialisation.

The risk of dementia following a TBI remains an area of debate but some studies indicate that a TBI that is sufficient to cause loss of consciousness increase the risk for dementia by two to four times. It is, however, certain that should he develop dementia, the disability resulting from the dementia would worsen quicker than would have been the case had he not had the TBI.

Summary

Clinical experts must be aware of the applicable legal principles in their medico-legal practice and must apply them in providing opinion. Lawyers must direct experts in their instructions. Whether dealing with a complicated and involved case, such as this example, or a straightforward minor injury, the same process should be followed in every medico-legal report. A failure to do so will result in a sub-standard report and an inaccurate valuation of the claim. **NLJ**

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