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Review

On matters of causation in personal injury cases: Considerations in forensic examination

Robert Ferrari[1], Lewis Klar[2]

Abstract

Rheumatologists are often called to be independent examiners of injured claimants and to address the question: "What is causing the injured person's symptoms?" This article deals with the legal principles that arise in these cases, including causation, convenient focus, secondary gain, and thin skull rules. We shall first set out two hypothetical scenarios of personal injury cases that set the scene for a discussion of legal principles in personal injury law. With the same two scenarios of personal injury in mind, we shall review the legal principles and the biopsychosocial models of the illnesses concerned and consider the importance of examiners going beyond diagnostic labels towards a more in-depth analysis of illness factors and mechanisms that in turn assist the trier of facts.

Key words: Chronic pain, causation, fibromyalgia, secondary gain, whiplash injury

Introduction

Scenario 1

The plaintiff's motor vehicle had been stationary, as the plaintiff was attempting to merge into traffic. Without warning, it was struck along the rear end by another vehicle at a speed of 5-10 miles per hour. The striking driver came to the assistance of the plaintiff, who felt too shocked and dazed to move. The plaintiff was subsequently taken to the hospital, and she was told that she suffered soft tissue injuries to her neck, shoulder, and back, for which she was given minimal treatment at the hospital. The plaintiff underwent treatment with medications and physiotherapy for several months. The plaintiff's physician found the plaintiff to be improving physically, but her progress was inordinately slow. She was of the opinion that the plaintiff had developed a chronic pain syndrome and was still suffering significantly and unable to work 1 year after the collision. The plaintiff went on to receive numerous medications, massage therapy, acupuncture, chiropractic therapy, and herbal remedies, with little overall improvement by 2 years post-collision. At that time, her family physician felt the plaintiff had been compliant with therapy yet still had not been able to return to work and would likely need long-term therapy, with a low likelihood that she would return to her pre-accident health. The family physician noted over time that the plaintiff had become considerably depressed and anxious, and this was thought to be likely contributing to a chronic pain syndrome. She was deemed likely to have long-term chronic pain to some degree. According to testimony of Dr. A, an independent medical expert, the patient was deemed to have a permanent impairment of 7% due to whiplash injury.

The defense argued that the plaintiff had been in a minor collision and had injuries that should have resolved within months to 1 year of the accident and that the continuance of chronic pain was primarily due to psychological factors. The defense added, however, that the plaintiff had a pre-existing condition-that she was at high risk for developing psychological disorder in time-and that this could be expressed as chronic pain. They noted that she had a recent divorce, in which she was unable to receive the expected financial settlement, had been unable to succeed in her business ventures, and had suffered from a lifelong history of recurrent depression. They expressed further that the plaintiff was receiving numerous gains from her illness and was not motivated to get better. They indicated that the plaintiff tended to seek passive therapies and not engage in exercises that she was prescribed.

Scenario 2

The plaintiff was operating his motor vehicle at the time of the accident. It was struck by a police vehicle traveling through a red light with emergency gear in operation. The vehicles were at an approximate 90-degree angle to each other at impact. The plaintiff had no loss of consciousness or head impact but had, within hours, pain in the neck, low back, and left shoulder and a headache. These symptoms remained fairly minor over time. The plaintiff's counsel submits on the evidence that he also sustained posttraumatic stress disorder (PTSD). The collision involved a significant impact, requiring the use of the Jaws of Life to extract him from the vehicle. He was taken by ambulance to a local hospital and had some limited recollection of being in the ambulance. There was no loss of consciousness. He was treated in the emergency department

1 Department of Rheumatic Diseases, University of Alberta Faculty of Medicine, Alberta, Canada

2 University of Alberta Faculty of Law, Alberta, Canada

Address for Correspondence: Robert Ferrari, Department of Rheumatic Diseases, University of Alberta Faculty of Medicine, Alberta, Canada

E-mail: rferrari@shaw.ca

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and released to his parents' care. The next day, he was taken to see their family physician, Dr. S. Dr. S noted the plaintiff's complaints of headache. His neck was tender but with fairly good range of motion, about 70% to 80% of normal. He had pain rotating through his low back and his thoracic spine. He was diagnosed with minor whiplash injury. It was weeks later that the family physician became more concerned with psychological problems.

The plaintiff's girlfriend testified that they had a break-up of their relationship after this accident. She said the reason for their break-up was that his demeanor seemed to have changed and that he was not the same sort of person after the motor vehicle accident. From the time of the accident, she described him as drinking more, being "distant" in his relationship with her, more short-tempered, and fighting with his mother. She added that he did not seem to be "growing up" and that he was more like he was in high school, and he did not have the same interest about his future as he had before.

The plaintiff's mother described her son's conduct when she arrived at the hospital after the accident. She said he seemed upset and a bit confused. At home, he remained confused and became very irritable and grumpy. She made an appointment for him to see Dr. S, because he seemed reluctant to do so immediately after the accident. In the early days and weeks following the accident, the plaintiff's mother found that the plaintiff was becoming increasingly difficult to get along with, that he had been "moping" and that he "lay around more." She thought it would be a good idea for him to go back to work and encouraged him to do so. He would come home from work and lie down. He was not as energetic or good-natured as before. He would "fly off the handle" when she tried to get him to talk about the motor vehicle accident. He was becoming so moody and forgetful. She had to wake him up to go to work. He did not seem to realize the importance of getting up in time to go to work.

Mrs. T also described her son as becoming more withdrawn. She encouraged him to go back to see Dr. S. He resisted this. He drank more. Concerning PTSD, the plaintiff's family physician had noted ongoing flashbacks of "two cars crashing," avoidance of being a passenger in a motor vehicle, and/or watching car crashes on television. The plaintiff reported frequent nightmares about the accident and woke up with cold sweat, causing ongoing sleep disturbance.

Mrs. T contrasts her son's attitude with the way it was prior to the motor vehicle accident. He used to be "happy-go-lucky," outgoing and a lot of fun and had a lot of friends. He was very mechanically minded and "could fix anything." Now, he could not "sit still;" prior to the accident, he had a paper route, worked in the kitchen for a pizza parlor, and played hockey for many years. This all changed after the motor vehicle accident.

One year after the collision, a psychiatrist assessed the plaintiff. He concluded that the plaintiff had posttraumatic stress disorder after the accident. He concluded the patient may also be mildly to moderately depressed. The psychiatrist had noted that from his mother's description, the plaintiff may have had a tendency to keep his emotions to himself. Thus, this would make it difficult for others around him to know what he was experiencing emotionally.

Dr. S, in his medical report, expressed the opinion that by 5 months after the motor vehicle accident, the plaintiff had recovered substantially from his physical injuries. The ongoing problem was a psychological disorder, and this would require perhaps 2 years of therapy with a psychologist to gradually resolve.

The defense indicated that the plaintiff had considerable behavioral problems prior to the accident. He had been a poor student in high school and more than once had undergone disciplinary actions. They also stated that the plaintiff had a difficult and strained relationship with his parents previously, had experimented with drugs, and had been abusing alcohol prior to his collision. They also indicated that they had evidence of a poor employment record, with employer conflict. The defense argued that the plaintiff was using the accident as a convenient focus to blame his life troubles on and as an excuse to continue his erratic and irresponsible behavior.

Establishing the causal connection: Legal principles

There are two basic principles underlying the issue of cause in negligence law action. First, a defendant wrongdoer is only liable to the plaintiff claimant for those injuries that were caused by the defendant's negligent act. It is the fact that the defendant injured the plaintiff by his negligence that leads to the obligation to compensate. As stated by Sopinka J. for the Supreme Court of Canada in Snell v. Farrell (1) (1990), 72 D.L.R. (4th) 289 at 298-99, "causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former."

Second, once it is established that the defendant's negligent act caused the injuries of which the plaintiff complains, the defendant's responsibility is limited to compensating the plaintiff only for those losses that flowed from the injuries. The defendant is required to restore the plaintiff to its pre-accident state, in so far as this can be accomplished by the payment of money. The plaintiff is not to be left in a worse position, nor is the defendant required to put the plaintiff in a better position than he would have been in had the accident not occurred. A useful explanation of the difference between "injury" and "loss" is provided by Brenner C.J.B.C. in Blackwater v. Plint (2), (2001) B.C.J. No. 1446, a case involving a sexual assault claim. As explained by the Chief Justice, the "injury refers to the physical or mental impairment of the plaintiff's person," while the loss refers to "the pecuniary or non-pecuniary consequences of that impairment."

Connection between the defendant's negligence and the plaintiff's injuries

(i) Consider that a plaintiff's stationary vehicle is rear-ended by the defendant's vehicle. As a result, the plaintiff suffers soft tissue injuries to his neck, shoulder, and back. The argument that there is a "causal connection" between the defendant's negligent act-i.e., driving without paying due attention to traffic-and the plaintiff's injuries in this type of case is clear and straightforward. The simple test adopted by courts over a long period of time and reaffirmed by the Supreme Court of Canada in its authoritative decision in Athey v. Leonati (3) (1996), 140 D.L.R. (4th) 235, is the "but for" test. But for the defendant's negligence, the plaintiff's injuries would not have occurred. This must be proven by the plaintiff on the balance of probabilities. Once it is proved to this standard, causation is established as a certainty, and the plaintiff is entitled to be compensated for the losses that he suffers as a result of these injuries.

In most cases of personal injuries caused by accident, a causal connection between the defendant's negligent act and the plaintiff's injuries is relatively easy to establish. The fact that there will be, in all cases, other conditions that are necessary to cause the plaintiff's injuries is understood by the courts and does not pose a problem. When these other conditions are non-culpable, they are ignored. For example, in the illustration above, a necessary condition of the rear-end collision that injured the plaintiff was the fact that the plaintiff was in a stationary vehicle. Being in a stationary vehicle is not, however, wrongful, and although necessary as a factor in producing the collision, it is an irrelevant legal factor. If the other conditions are wrongful, they will be taken into account. Where more than one wrongdoer's actions are necessary factors in contributing to the resultant injury, all of the wrongdoers will be liable to the victim. Where the victim himself was negligent, his damages will be reduced according to the rules of contributory negligence. These subjects of contribution between wrongdoers and contributory negligence can be complex and lie outside the scope of this discussion.

(ii) There are some very difficult cases where the cause of an injury is not known, as a matter of probability, because there are many possible

explanations. Proving a causal connection between the defendant's negligent act and the plaintiff's injury, on a balance of probabilities, may be difficult and perhaps impossible to do. Injuries caused during medical procedures, for example, can present difficult and frequently unanswerable questions of proof. In Snell v. Farrell (1) (1990), 72 D.L.R. (4th) 289, for example, the plaintiff underwent an eye operation to remove cataracts. Some months after the surgery, it was discovered that the plaintiff was blind in his treated eye. One of the "possible" causes of the blindness was the defendant doctor's negligent decision to continue the surgery despite the fact that there was bleeding during the operation. This, however, could not have been described as the probable cause of the blindness, since the blindness could have occurred anyway. The Supreme Court of Canada wrestled with this case and decided that it could draw an "inference" from the evidence that the negligence was a probable cause. It must be stated, however, that on the facts of the case, as found by the trial judge, this had not been established.

As the judgment in Snell v. Farrell illustrates, courts have been creative in either altering the plaintiff's burden of proof or redefining the plaintiff's injury, so that persons possibly injured by another party's negligence may still recover some compensation. These types of cases again lie outside the scope of this discussion and will not be developed further.

(iii) Occasionally, a plaintiff's injuries are much more serious than those that would have been suffered by a normal person because of the plaintiff's latent vulnerability or susceptibility to more severe injury. Such persons have been described as thin skull (or eggshell skull) victims. Consider, for example, that a person with a thin skull receives a blow to the head. A person with a normal skull would have received a minor bruise. The plaintiff's thin skull, however, fractures. The thin skull rule dictates that the defendant is fully liable for the fractured skull; i.e., the defendant takes his victim as he finds him. Similarly, with a thin skull (egg shell) personality or psyche, a seemingly minor injury may trigger in these persons a major psychological problem. The thin skull rule dictates again that the defendant is still liable for these more serious problems.

(iv) A variant on the thin skull victim is the plaintiff who has a crumbling skull. In the crumbling skull scenario, the defendant injures a plaintiff who has been suffering from a manifest, ongoing, pre-existing injury or whose health is an existing degenerative process. The defendant's negligence either makes the pre-existing injury more serious or accelerates the degenerative process so that it becomes symptomatic. The rule is that the defendant is only responsible for the new injury or the acceleration effect on the degenerative process. This applies either to on-going physical or psychological problems. The difficulty in these types of cases is one of proof. Especially in relation to psychological injuries, it may be impossible to distinguish between what problems the plaintiff would have suffered, even in the absence of the negligent act, and what the "new" injuries are.

(v) In some cases, one injury may lead to subsequent injuries. Consider, for example, that the defendant's negligence causes an injury to the plaintiff, such as a neck injury that limits the plaintiff's mobility. As a result of this diminished mobility, the plaintiff falls down the stairs and suffers another, different injury. Tort doctrine dictates that the defendant is liable not only for the immediate injuries that he causes but for any subsequent injuries that are within the risk set in motion by the initial act of negligence. This is said to be a matter of "legal cause;" i.e., the defendant is only liable for those injuries that are factually caused by his negligence and that are not too "remote" from that negligence.

(vi) A defendant is again only liable for the injuries that result from his negligence. In cases of multiple accidents or other occurrences that result in injuries, it is important to attempt to assign responsibility for the injuries only to the events that caused them. Only those injuries that can be traced to the defendant's act should be the defendant's responsibility.

In "successive accident cases," this task of dividing up the injuries can become quite complex. Take, for example, the case of Kozak v. Funk (4) (1998) 5 W.W.R. 232 (Sask.C.A.). The plaintiff was involved in a car accident in 1986. As a result of this accident, he suffered a whiplash injury. The plaintiff experienced pain and missed several months of work. One year later, the plaintiff injured his neck and shoulders in a work accident, caused by his own fault. This injury was a recurrence of his prior injury. He suffered a disc herniation. In the next year, the plaintiff was involved in another car accident. He suffered a soft tissue injury with renewed pain. He was then laid off from work for reasons unrelated to his injuries, and his pain symptoms and depression worsened. He was diagnosed as having chronic pain syndrome. One can easily see the difficulties that this type of case presents in attributing the injuries and their consequences to the plaintiff's various misfortunes. Although the tort law rules that apply are straightforward, the overlapping that occurs when successive events result in similar injuries and consequences makes the task of attribution very difficult.

Connection between the plaintiff's injuries and claimed losses

The plaintiff is entitled to be fully compensated for his injuries. That is, he is entitled to be restored to the position he was in before the wrong occurred. Since all of the plaintiff's losses, both past and future, must be determined at the date of trial and are not subject to review or variation at a future time, the court must determine which losses the plaintiff has suffered from the time of the wrong to the time of the trial and which losses the plaintiff might expect to suffer from the time of the trial to the end of his life. These losses include both pecuniary and non-pecuniary losses. Pecuniary losses include such things as lost past income, loss of earning capacity for the future, past and future health care costs, and other actual past and future expenses resulting from the injury. Non-pecuniary losses include such things as pain and suffering, loss of the ability to enjoy life, and loss of amenities.

Establishing which losses the plaintiff suffered as a result of his injuries from the time of the accident to the time of trial is relatively straightforward. In terms of pecuniary losses, things, such as medical and other expenses and loss of income, are usually easily determined. It is important to emphasize that the point of the exercise is to put the plaintiff back into the position he would have been in had the accident not occurred. It is not to improve what would have been.

Take, for example, the case of Penner v. Mitchell (5) (1978), 6 C.C.L.T. 132 (Alta.C.A.). The plaintiff was injured in a motor vehicle accident and as a result was required to be absent from work for a period of 13 months. During these 13 months, the plaintiff became ill from a cause totally unrelated to the defendant's tort, which would have necessitated 3 months absence from work. Was the plaintiff still entitled to receive compensation for 13 months' loss of work from the wrongdoer when the case against him came to trial? The Court of Appeal held that to award the plaintiff 13 months' loss of income when 3 months of that loss of income would have been suffered by the plaintiff notwithstanding the tort would be to overcompensate the plaintiff. The wrongdoer is only required to put the defendant back into the position he would have been in, had it not been for the wrong. Compensating the plaintiff for 13 months' loss of income, when he would have only worked for 10 months anyway, due to his illness, would be to overcompensate the plaintiff by improving his position.

Calculating a plaintiff's future pecuniary losses is more difficult, because they are entirely speculative. In terms of loss of future earnings, for example, the court has to determine what the plaintiff would have earned in his lifetime had he not been injured and what he will now earn, in light of his injuries, and award the plaintiff the difference.

Non-pecuniary losses are awarded based on the severity of the plaintiff's injuries and are limited by a cap. In Canada, a cap for non-pecuniary damages of $100,000 was set by the Supreme Court of Canada in 1977 in its trilogy of damage judgments-Andrews v. Grand & Toy (6) (1978) 2 RCS, Thornton v. Prince George Board of Education (7) (1978) 2 SCR 267, and Arnold v. Teno (8) (1978) 2 S.C.R. 287-and, due to inflation, now stands at approximately $275,000.00.

Because a plaintiff is only entitled to be put back into the same position he would have been in, courts must consider a variety of factors in coming up with a final assessment. These include such matters as contingencies of life (i.e., negative things that might have affected the plaintiff anyway, even in the absence of the accident), the changing value of money, the effect of taxation, compensation from other sources, and so on. Plaintiffs are also required to act reasonably in mitigating their losses by taking steps to reduce them if these steps are reasonable.

Application of legal principles to the two scenarios

Scenario 1

The plaintiff's initial injuries-i.e., "soft tissue injuries to his neck, shoulder, and back"-were clearly caused by the defendant's negligence. The "chronic pain syndrome," which one would describe as a further injury, is also claimed to have been caused by the defendant's negligence. The chronic pain syndrome raises some interesting questions.

The defense argues that a "normal" person would have been better within months to 1 year of the accident. The chronic pain syndrome, which the plaintiff was experiencing, however, was "long-term." This was due to "psychological factors." It was also due to "a pre-existing condition such that the plaintiff was at a high risk for developing psychological disorder in time." The defense also argues that other factors in the plaintiff's life, unconnected to the motor vehicle accident, such as the divorce, failed business ventures, and bouts of recurrent depression, contributed to the plaintiff's chronic pain syndrome. Applying the general principles discussed above to these facts, one could conclude the following.

The plaintiff was either a "thin skull" victim or a "crumbling skull" victim. If a "thin skull" victim, the plaintiff was vulnerable to chronic pain syndrome but had not been suffering from it, and the defendant would be liable for the full extent of the plaintiff's injuries. If considered a "crumbling skull" victim-that is, the plaintiff was or would eventually be experiencing chronic pain due to factors unconnected to the accident-the defendant would only be partly liable for the losses flowing from chronic pain syndrome, as determined by the extent to which the accident exacerbated or accelerated the condition.

How would the fact that the plaintiff was receiving numerous gains from her illness and was not motivated to get better affect the defendant's liability? If these feelings were non-conscious (subconscious) and not under the plaintiff's control, one would argue that they should not reduce the plaintiff's damages. They could be classified in the same way as other vulnerabilities and susceptibilities that a person may have that make her injuries more serious.

The plaintiff's refusal to engage in prescribed exercises that would have improved her condition, if unreasonable, can be treated as a failure to mitigate. This would result in a reduction of the plaintiff's award.

The plaintiff's pre-disposition to developing psychological disorders at some point, even if the accident had not occurred, can lead to a negative contingency award being applied to whatever the total damage assessment is. The plaintiff's award, for example, can be reduced by 25%, if that represents the possibility that negative events unconnected to the accident would have occurred to the plaintiff at some time.

Scenario 2

The plaintiff will have to establish that his injuries were caused by the defendant's negligence. The issue of negligence is more contentious in scenario 2 than in scenario 1. The liability of the police for this accident raises issues of standard of care in common law, as well as introducing statutory provisions that may limit or exclude the police officer's liability. In addition, the issue of the plaintiff's possible contributory negligence might be raised. If the plaintiff was negligent in his driving, which contributed to the accident, then his damages will be reduced. These issues of the defendant's negligence and the plaintiff's contributory negligence lie outside the scope of this paper. We will assume that the accident was caused by the police officer's negligence.

The defendant is liable for both the physical and psychological injuries caused by his negligent driving. If the psychological problems were "triggered" by the accident, then the plaintiff is treated as having "an egg shell personality" and is entitled to compensation for them. If the plaintiff was already experiencing psychological problems prior to the accident, which became more serious after the accident, the defendant is liable to the extent of the worsening. The facts that the defendant had been a poor student in school, had a poor relationship with his parents, experimented with drugs and alcohol, and had a poor employment record are irrelevant unless the symptoms that the plaintiff was complaining of after the accident are an extension of symptoms that the plaintiff was suffering prior to the accident. These factors can, however, be considered in assessing the plaintiff's losses by the use of a negative contingency deduction; i.e., the plaintiff would have probably experienced some of these things anyway due to his personality and his desire to find "a convenient focus to blame his life troubles on." The plaintiff is also required to mitigate his damages by taking reasonable steps. such as seeing his doctor for treatment.

Establishing the causal connection: Forensic principles

Forensic examiners are often called upon to examine an injured person and answer the question of what is causing their symptoms. In the two scenarios presented here, it is necessary for the examiner to present more than simply diagnostic labels, such as whiplash injury or post-traumatic stress disorder. Whatever one considers the likely model of illness that explains the plaintiff, stating the mechanisms of the illness as explicitly as possible allows the trier of facts to place the negligent act within this framework. The legal author (LK) has examined the two scenarios above from the perspective of legal principles. As a result of doing so, questions arise, the answers to which affect judgments.

Chronic pain following an accident, whether labeled as chronic pain syndrome, myofascial pain syndrome, fibromyalgia, etc., is being explained by some using biopsychosocial models, wherein psychosocial factors act to generate the pain reporting (9-12). In "soft tissue injury" cases, although biological factors are involved, these models exclude chronic physical damage (pathology) by way of the initial injury as a perpetuating factor. Whether or not one agrees with this view is not the issue here, but rather how the forensic examiner who adopts these models can apply medical principles to their explanation in the context of personal injury cases.

Scenario 1: Chronic pain via psychological factors

Two well-known Canadian cases have addressed cases of chronic pain arising through psychological factors: Mackie v. Wolfe (13) (1994) A.J. 467, Court of Queen's Bench, Action 9201-12776 and Maslen v. Rubenstein (14) (1993) 83 B.C.L.R. (2d) 131. From these cases, and others described by Gregory and Crockett (15) (1988):

It is not sufficient that the Defendant's actions caused the onset of pain, where the Court is satisfied the continuation of that pain is attributable to pre-existing or other psychological factors not attributable to the Defendant's actions.

The Defendant's actions can not be held as the cause of the psychological factors or disorders if they arise from a desire for secondary gains (including care, sympathy, and others we cite below).

The Defendant's actions can not be held as the cause of the Plaintiff's symptoms if the Plaintiff could be expected to overcome them by his own inherent or internal resources (i.e., "willpower").

If the operative psychological factors exist or are maintained because the Plaintiff has motivations to maintain them or wishes that they not end, the cause of such factors is said to be subjective or internal.

It is not sufficient to ask whether the pain syndrome is compensable. It may or may not be. The determination is dependent on having an understanding of the mechanism of the pain.

The first conclusion above is debatable, because it may be that the Defendant's actions trigger a process of activation of pre-existing disorder-a thin skull case. On the other hand, if it is considered likely that the patient's chronic pain would have developed even without the Defendant's actions, then the chronic pain may not be fully compensable. As well, the Plaintiff acting on wishes and desires for secondary gain would be likely not considered a thin skull. The most vital information in addressing these issues, therefore, is the answer to the question: "Why is the claimant behaving this way?" The answer deals with, among others, intervening factors and with potential exceptions to the thin skull rule. Without this information, the task of the Jury or Judge seems difficult, and this also explains why similar cases result in quite different judgments, though the legal rules seem straightforward.

Our contention is, for example, that a case like that in Scenario 1 represents adoption of the sick role, in individuals whose lives are such that illness brings more gains than losses. (Again, other examiners may disagree, but this model is used here to explain how the medical and legal principles interact.) In seeking the maintenance of the sick role, the individual attempts to convert a pre-existing life of discontent or misery into a socially acceptable from of disability that then leads to secondary gain (16). Outside the setting of an accident, these individuals generally can not secure the sick role, because psychological disability or "failure to cope" is often partially or completely blamed on the individual, for lack of willpower or character flaws. As such, the sick role is thus granted usually only when the individual's behavior is "not their fault" and "beyond their control." Individuals seeking the sick role must represent themselves in a fashion that is likely to convey to others they have indeed a "no-fault illness." Presenting with symptoms suggestive of injury or disease is the most common measure towards this end. An event that is someone else's fault (like an accident) may then be seized for this purpose, no matter how minor that event may seem to others. In a life of personal disarray, disharmony, and psychological turmoil, the individual takes this event as a convenient focus and as the solution to all of their long-standing miseries and difficulties.

A biopsychosocial model suggests that while biological factors often provide the symptom pool as a starting point, the illness behavior is best accounted for by the motivation to adopt the sick role. The claimant must then emphasize pain from "injury" and must seek out others who will allow him through the no-fault gate. Many physicians and other health care professionals are more than willing to act as the enabling no-fault gatekeeper, often because of the associated tertiary gains (17).

In scenario 1, the forensic examiner must consider what effect the plaintiff's psychosocial environment had. As noted, she had a recent divorce in which the settlement was not in her favor, had been unable to succeed in her business ventures, and had suffered with a life-long history of recurrent depression. The examiner needs to consider the extent to which the plaintiff receives numerous gains from her illness and to what extent she seems motivated to get better. The plaintiff's tendency to seek passive therapies and not engage in exercises that she was prescribed is suggestive that she is not prepared to make a reasonable effort, which seems odd, since one expects most people to want to be free of chronic pain, because the losses of chronic pain usually outweigh the gains. Only a careful review of this lady's history would suggest otherwise.

Interactions of convenient focus, quantum of damage, and the thin skull rule

Convenient focus, as described above, may be an exclusion to compensation. It is linked, in some cases, to a consideration of the quantum of damage as well. Consider that the Plaintiff's alleged injury is judged to be a psychological disorder. The question remains whether such is compensable. Is the event the cause or the opportunity? Clearly, a determination of convenient focus must be considered but so, too, can the quantum of damage.

Some have argued, for example, that the event impinged on the plaintiff, although minor, is occurring in an individual with a lifetime of misery. The argument is made that the stressor (that is, the event) is the last straw. Such individual may thus be "at risk" in a life of losses if they suffer another loss, even if relatively minor. The Plaintiff's history may reveal indeed a number of significant life stressors, but these, however, are typically more severe than the stressor (the event) being claimed as causing disability. It is indeed likely that many of these claimants have psychological distresses or disorders in much of their lives, but clearly, they do not always have a disability syndrome while suffering in such states. Do they experience a "last straw phenomenon" or do they experience a convenient focus? Is it the last straw or the "straw of opportunity?"

One asks why the individual did not adopt the sick role earlier. Recall that a number of events are necessary for this individual to ultimately seek out the no-fault gatekeeper and a no-fault entry to the sick role. This is why many of these individuals appear to be at least "coping" with their life, working full-time, etc.: they have no choice but to do so until their opportunity arrives. They carry an "at-fault" illness until an opportunity arrives for transforming this into (or presenting it as) a no-fault illness. Such opportunities do not necessarily come along at one's wishes but often fortuitously.

One further considers that at other points in the claimant's life, they might have had a work-related injury, motor vehicle accident, loss of a loved one, and firing at a job and yet did not adopt the sick role then. Why now? There are many reasons for the timing of adoption of the sick role, including difficulty in finding a willing gatekeeper (which may delay the use of an opportunity) and having no one blameworthy, etc. Yet, it may be that the timing of the adoption of the sick role depends on that claimant's stage of life when the opportune event occurs. Illness is associated with secondary losses, as well as gains. It is a matter of how desirable the secondary gains are (for example, how desperately one needs a reprieve from work and social opportunities) to, on balance, make the secondary losses affordable. When one's existence is most miserable is the time when this is most likely to occur.

Still, the Plaintiff could simply be viewed as someone whose life is a "set-up" or pre-disposition for beginning this process of being granted the sick role and then finding that it provides him with a sense of relief from his previous existence. Hence, a thin skull case may be present. It is possible that all of this happens with the Plaintiff who is not deliberately or knowingly choosing to remain ill but simply having his behavior continuously reinforced by the community that grants him the sick role and its benefits. In such cases, a psychological make-up predisposes the Plaintiff to this series of events, condoned by societal reaction to the illness. On the other hand, if the Plaintiff is knowingly focusing himself and others on his illness and suffering to maintain the gains, this conscious or even partly conscious behavior would seem to be an exclusion to the thin skull rule.

How can a forensic examiner test for the degree to which a Plaintiff is consciously maintaining his illness for the sake of secondary gains? While there is seldom direct proof, the currently reasonable criterion has to do with the consistency between the claimed disability and the observ-

able behavior. If the forensic examiner finds the Plaintiff to be inconsistent in his claims of dysfunction (i.e., he claims severe memory loss and severe concentration impairment but manages a business, he fails effort tests on psychological batteries, he enjoys many recreations while being unable to work, surveillance shows him doing things he states that he can not do, etc.), then that evidence is presented to the judge, who in turn assesses the issue of credibility. An non-credible plaintiff is one likely conducting himself for the purpose of achieving his goals. This would tend towards an exclusion of the thin skull rule. On the other hand, a Plaintiff who shows good effort on effort tests, is consistent in terms of the severity of symptoms and his observed function, etc., would tend to likely show greater credibility and less likelihood of conscious influences on illness behavior.

Scenario 2

This phenomenon of adoption of the sick role and convenient focus is not limited to physical injury claims. While it is true that presenting with psychological disorders generally leads others to blame one for the illness, posttraumatic stress disorder (PTSD) is, by definition, a no-fault diagnosis, and we believe that it is for this reason it has become a well-recognized avenue to compensation (18, 19). Until recently, the initial stressor involved was considered to necessarily be truly severe and outside the range of most human experiences (e.g., being a war veteran, prisoner of war, suffering extreme psychological trauma from violent assaults, etc.). No one would blame an individual for having an illness (even psychiatric) when he was a prisoner of war. Most of us would agree that the individual has suffered a form of trauma that he can not readily overcome.

PTSD is being increasingly diagnosed, however, following stressors that appear to be much less severe than those above (20, 21). Indeed, nowadays, the kind and severity of stressors that cause PTSD are to be determined by the victims. The diagnosis is, sadly, one that is readily feigned as well. We suggest that this change in the epidemiology of PTSD reflects (feigning or not) the recognition by the general public of the availability of this no-fault diagnosis and the availability of sufficient gatekeepers to enable entry into the sick role. Certainly, psychologists and psychiatrists are not immune to tertiary gain when acting as the enabling gatekeeper (22).

Riding on the back of this general image of PTSD as an illness for which the individual can not be blamed, one may thus suffer rather common and far less severe stressors and yet be granted the sick role just as readily. Too often, forensic examiners and expert witnesses fail to examine the mechanism of the illness but merely skip to a diagnostic label, carrying the pseudo-scientific imprimatur of the Diagnostic and Statistical Manual of Psychiatry (23).

In scenario 2, it would be necessary for the examiner to carefully assess whether the plaintiff had multiple problems prior to the accident. Being a poor student in high school, undergoing multiple disciplinary actions, having a poor employment record with employer conflict, having a difficult and strained relationship with his parents, and previous episodes of experimenting with drugs and abusing alcohol are all potentially relevant. It would be a relatively simple matter for the Plaintiff to hang these problems on the peg of the accident, serving here as a convenient focus to blame his life troubles on and as an excuse to continue his erratic and irresponsible behavior.

We suggest that claimants suffering from less severe and more common stressors are then finding an opportunity for convenient focus and that there is a parallel concept of adoption of the sick role in these cases. The same issues, and exceptions, of the thin (egg shell) skull rule arise. The negligent event may actually be responsible for the onset of the anxiety disorder, but it is other motivations, similar to those presented in scenario 1, that are responsible for the perpetuation of that disorder. Moreover, one notes that in some claimants, the quantum of damage (e.g., being fired) may be much smaller than many of the other events that the individual has apparently coped with. Again, the quantum of damage may be small, but the quantum of opportunity for amplification is great.

In order for the courts to adequately address issues of causation, thin skull applications, and compensability, it is necessary that the expert witness provides more than superficial diagnostic labels but rather presents the probable mechanisms of the illness. They must attempt to answer the questions "Does this patient have an illness that conforms to established and preferably objective medical criteria? Also, why is this individual behaving in the way that he is?"

We suggest that adoption of the sick role, whether following physical or psychological injury, is a worthwhile consideration as an illness mechanism in some cases. Such considerations for the forensic examiner involve the usual clinical activity of obtaining a careful anamnesis and review of evidence to indicate the risk factors for such behavior and the factors maintaining that behavior, as well as to ascertain the distortions and inconsistencies in the claimed disability and observed behavior. The courts are ultimately relying on this level of assessment by forensic examiners and other experts so that they may properly apply legal rules and concepts to these otherwise complex cases. Better communication between expert witnesses and attorneys on this matter can clarify the information needs of the court (24). This same level of assessment is likely relevant (especially in terms of treatment) in cases of work-related injury and other long-term disability claims.

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