Can trauma provoke multiple sclerosis?

A Lawyer’s View

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Senator of the College of Justice in Scotland 1983–96
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For many years, Scottish lawyers have struggled to understand complex medical evidence. When considering issues of causation, a judge, who often has little scientific training, is sometimes called upon to hear specialist experts who are working at the frontiers of medicine. Having listened to their sworn testimony, the judge must decide which eminent consultant or professor is more reliable than another. When considering which of several experts to prefer, the judge weighs up their qualifications and their experience. He may be impressed by the fact that one consultant stood up to cross examination better than another. Often it is the evidence of the expert who explains his position clearly that prevails. Whichever method the judge uses to form a view, the disappointed party and the team of supporting medical practitioners frequently read the judgement with a sense of grievance bordering on outrage.

In a recent Scottish case, a former police officer attempted to prove that the onset of his symptomatic multiple sclerosis (MS) was triggered by a road traffic accident [Dingley v Chief Constable, Strathclyde Police (1998 SC 548 and 2000 SC (H L) 77)]. The Lord Ordinary who heard the evidence in the Outer House decided that Mr Dingley had proved the link and awarded hefty damages. The defender successfully appealed to the Inner House. The Lord President, who sits in the First Division and is Scotland’s most senior judge, delivered a detailed opinion overturning
the decision at first instance. Mr Dingley then appealed to the House of Lords but his appeal was dismissed. A summary of the argument that eventually defeated Mr Dingley's action is contained within the speech of Lord Hope:

"In the end the process of reasoning which led the Lord President (Lord Rodger) to this conclusion seems to me to be quite straightforward, and in my opinion it is unassailable. There is a body of clinical evidence that shows that there are many cases of symptomatic MS which cannot be related to trauma. In a small number of cases the onset of symptoms is preceded by trauma. That happened in this case, but coincidences can occur. So the theory that trauma triggers the onset of symptoms of MS has to be tested. Experiments on animals and the study by Gonsette show that violence can open up the blood brain barrier in such a way as to permit the brain to be attacked by activated and deranged T-lymphocytes. But there was no question of such violence in this case. In any event, this evidence still leaves the majority of cases of symptomatic MS unexplained. The epidemiological studies do not support the appellant's case. If anything they tend to support the arguments to the contrary. But, for the present purposes, the important point is that they show that the appellant's case depends upon there being an acceptable theory to explain what it is that overcomes the blood brain barrier and permits the development of symptomatic MS. A satisfactory explanation would go a long way to supporting the appellant's case. But the evidence, which reaches its high point with the study of Oppenheimer [Oppenheimer 1978], does not go far enough to provide that explanation. So the appellant's case fails on a balance of probabilities."

In a civil court case the pursuer has to establish on a balance of probabilities (i.e. better than 50/50) that it was the breach of duty on which his case is founded which caused or materially contributed to the injury. It cannot be emphasized too strongly that the question as posed in the title of this piece is not one to which a lawyer can give an answer which will satisfy a medical specialist. In Dingley, the pursuer was required to prove that, on the balance of probabilities, the onset of symptomatic MS was triggered by an injury of the type he had sustained. In considering this the court was solely concerned with the evidence provided by the parties then appearing. It was not attempting to settle the scientific debate about the question that still divides the medical world. One important consequence of this limitation of the court's function is that, if the weight of evidence does not justify the conclusion that on the balance of probabilities MS was triggered by the pursuer's injury, the matter does not necessarily end there. It remains open to claimants in subsequent cases of a similar nature to provide evidence sufficient to satisfy the court that on the balance of probabilities the causal link has been proved. The advance of medical knowledge may open the door for another court to reach a different conclusion. The court is restricted to examination of evidence set before it in the case that it has to decide. It must therefore be borne in mind that the nega-
tive outcome of previous cases dealing with the alleged link between trauma and MS is not necessarily an indication that subsequent similar cases will therefore fail.

In Nixon v F J Morris Contracting, reported in The Times on 6 February 2001, a plaintiff tried to prove that a falling lamp post had contributed to the early onset of his MS. He failed but the English Judge who heard the evidence made it clear that it would be possible for other claimants to show that their multiple sclerosis had been triggered by trauma. The Judge, Garland J., explained that he was satisfied that, in rare and exceptional cases, trauma could have a role in the development of MS. For a claimant to succeed, His Lordship explained that he or she would have to prove that there had been trauma suffered by the brain or spinal cord. Even if that could be done, the link would not be identified in every instance. Garland J. made it clear that he did not feel inhibited in any way by the decision of the House of Lords in Dingley. He reached a different view because he had had the advantage of considering statistical evidence that was not available to the Inner House and the House of Lords. He also heard evidence that attitudes within the medical profession had changed in the years since the evidence in Dingley was heard at first instance by the Lord Ordinary in the Outer House. In particular, consultants who had once been resolute opponents had mellowed. Many of them exhibited a greater willingness to concede a possible connection between trauma, breach of the blood brain barrier and demyelination.

The difficulty of satisfying the test outlined by Garland J., was illustrated in another recent English case [Perry v The Post Office (unreported 18 October, 2002)]. Mark Corcoran has published a helpful scientific article on the issues raised by the judgement (Corcoran 2002). In Perry the claimant had tripped over a stray mail bag. She injured her back and bumped her head. Her injuries were classed as minor. Approximately 14 months after her accident, she developed symptomatic MS. She established that her employers had been at fault, but her expert witness failed to convince the judge that there was any link between the accident and her neurological condition.

Since Dr Mumford’s article appeared, there has been a significant change of attitude on the part of the House of Lords in cases involving proof of causal connection in medical cases. Various issues which are part of ‘frontier medi-

cine’ have had an important effect on the familiar legal test of ‘balance of probabilities’. At the time when Dr Mumford’s article was published, the courts relied on the test of ‘but for’ in determining whether or not a causal link had been established. They concluded that what is a material contribution must be a question of degree. Any contributory factor must be material if it does not fall into the exception incorporated in the maxim de minimis non curat Praetor. (The Judge does not concern himself about trifles, or, as the maxim may be interpreted, the judge does not apply his equitable remedies in matters of small moment.)

The judgements delivered in the cases of McGhee v NCB [1973 SC (HL) 37 and 1973 1 WLR 1], Fairchild v Glenhaven Funeral Services (2002 3 WLR 89) and Wilsher v The Essex Health Authority (1988 AC 1074) can be cited to illustrate the slow development whereby the Court has allowed exceptions to the time-honoured ‘but for’ test. The modification of the traditional test has been brought about principally because, at present, scientific knowledge has not reached a stage where the claimant can reasonably be expected to pass it. Nowadays therefore he is only required to establish that he has done all that can be expected of him. If other conditions are satisfied, then the Court is prepared to entertain arguments that favour a modified test. Nonetheless, litigants have still to confront the traditional reluctance of the legal profession to support any extension of liability that is driven by considerations of legal policy, for this they regard as ‘an unruly beast’.

REFERENCES
Dingley v Chief Constable, Strathclyde Police 1988 SC 548 and 2000 SC (HL) 77
Fairchild v Glenhaven Funeral Services Ltd [2002] 3 WLR 89
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