Medicolegal

Retrial ordered in "medical negligence case of the decade"

CLARE DYER

If ever a case bolstered the argument for the introduction of a system of no fault compensation that case must be *Wilsher v Essex Area Health Authority*, which was decided by the House of Lords last week. The law lords unanimously set aside a judgment for £116 119 and ordered a retrial in the case of a 9 year old boy who was allegedly blinded in the special care baby unit that looked after him in the first few weeks of his life (23 August 1986, p 497).

Nine years after the events giving rise to it, the litigation is still not at an end and might drag on for years. Unless a settlement can be reached in this case, which has already cost an estimated £200 000 for both sides, the question of what caused Martin Wilsher's blindness will have to be fully argued again in the high court. With possible appeals he could be well into his teens before a final decision is reached on his entitlement to compensation, which by then could be dwarfed by the costs.

But the case also shows that no fault compensation is not a panacea for every medical accident. Patients will still have to prove their injury was caused by an "accident" and not just by their medical condition. It is over the issue of causation, often difficult to pinpoint in medical cases, that Martin Wilsher's case will go back to the High Court. Fault is no longer an issue in his case: the high court judge's finding that the health authority was negligent was not challenged in the House of Lords. Under a no fault system, however, Martin Wilsher could still confront the hurdle of proving that doctors' intervention caused his injury in the face of conflicting expert opinion.

No fault compensation schemes do not compensate for medical conditions that are not caused by any outside intervention. The New Zealand scheme, for instance, will pay compensation for an "accident," including an illness or disability caused by a doctor, but not for the same illness or disability occurring fortuitously. Babies may be compensated if they are born with brain damage because a doctor pulled too long and hard on the forceps but not if they are born with brain damage for genetic reasons. Arguments over negligence are avoided, but arguments over causation, which in some cases may be a much more complex issue, still rage.

Did the negligence cause the blindness?

Martin Wilsher, born three months prematurely weighing only 1200 g, went through a series of crises and nearly died in the special care baby unit at Princess Alexandra Hospital, Harlow. He is totally blind in one eye and has severely impaired vision in the other as a result of retrolental fibroplasia. Two days after his birth a senior house officer mistakenly inserted an arterial catheter for connecting to an oxygen monitoring system into a vein, which thus gave the wrong oxygen readings. The catheter passed across the heart and lodged in the left atrium such that the blood sampled was a mixture of arterial and venous blood and the readings therefore not low

enough for the mistake to be obvious. As a result the oxygen content of the gas given to Martin was raised and he was supersaturated with oxygen. Neither the senior house officer nor the registrar who checked what had been done spotted the mistake on the radiograph.

The crucial question was whether this mistake—which the Court of Appeal found amounted to negligence on the part of the registrar but not the senior house officer—caused or materially contributed to Martin's blindness. Excess oxygen is one known cause of retrolental fibroplasia, but it was common ground among expert witnesses at the trial that this condition may occur in premature babies who have survived without any artificial administration of oxygen. The retrial is necessary because the trial judge, Mr Justice Peter Pain, failed to make a proper finding on causation.

Normally the burden of proof is on the plaintiff to show that the defendant's negligent conduct caused his injury. But in this case the judge decided to apply the judgment of the House of Lords in a 1973 case of industrial injury, *McGhee v the National Coal Board*, to shift the burden to the defendants, the health authority, to show that their negligent acts did not cause the damage. The House of Lords decided that this was wrong. In the *McGhee* case only one possible cause existed for the workman's dermatitis, brick dust from the kiln in which he worked. The workman was unable to prove whether the dermatitis was caused by brick dust landing on his skin in the kiln, where the coal board was not in breach of its duty to provide safe working conditions, or staying on his skin while he bicycled home, where the coal board was in breach of its duty because of failure to provide proper washing facilities.

In the *Wilsher* case, said Lord Bridge of Harwich, several other conditions in premature babies were linked (though no definite causal connection could be shown) with retrolental fibroplasia: apnoea, hypercapnia, intraventricular haemorrhage, and patent ductus arteriosus. The *McGhee* case had decided no more than that the coal board's negligence had materially contributed to the workman's injury. It laid down no new principle of law whatever and did not modify the nature of the burden of proof of causation.

If the judge had decided that it was for the plaintiff to prove causation on a balance of probabilities (in other words, more likely than not likely), and had accepted the plaintiff's evidence over the evidence given for the authority, a finding in the plaintiff's favour would have been unassailable, said Lord Bridge. But because he did not, a retrial was necessary.

The House of Lords decided last year in the case of *Kay v Ayrshire and Arran Health Board* that the *McGhee* principle could not be invoked in the case of a deaf boy given a massive overdose of penicillin after contracting meningitis. In that case deafness was a known complication of meningitis, but there had been no recorded case of deafness after an overdose of penicillin. Lord Griffiths said that if it were an accepted medical fact that penicillin in some cases caused or aggravated deafness the question would then arise whether the law should presume that the tortious, in this case, negligent, cause was responsible for the damage.

That is precisely the situation in the *Wilsher* case, but the law lords have now decided that the answer should be no. Their decision will substantially restrict plaintiffs' scope for using the *McGhee* principle to try to overcome difficulties in establishing causation in complex cases of medical negligence.