

## THE MEANING OF "ACCIDENT"

by  
J.R. Kirker

After that learned erudite exposition by Mrs Vennell I am virtually speechless. Luckily however, I was not asked to prepare a paper or anything of that nature but there are just one or two things I would like to say from a medical point of view. I of course sit on the Medico-Legal committee which was set up by the previous Government that Mr Hillyer has already mentioned and we drew up a schedule of disability and various other things we were asked to do and one of the things as he said that we were asked to do was to try to define "accident". Well we turned out by defining personal injury by accident. The definition is not included in the Act at the moment but I think it should be.

It is of no real interest to the medical profession to try and bring down a definition of "accident" as such. We as medical practioners are not concerned with the mechanics of the accident very much. It is of no interest to us really. We are concerned with the treatment and rehabilitation of the injury resulting from the accident and carrying that through to its ultimate if there is any residuum left of assessing the residuum when in a final state for it to be done. So to us personal injury by accident (which is what we came down to defining) although at the end of the definition it says that this is the same thing as "accident" is the thing that is of interest to my profession not to try to legally define accident as such which could be fraught with peril, a lot of wordiness which could be misconstrued or of course construed very well by lawyers depending on how they are thinking at the time. In my profession it is an intellectual exercise only. I am sure the intent of the Woodhouse concept was to accept accident just as a layman interprets it. "Some unexpected untoward type of event or mishap". I think the average man in the street knows in his own mind what constitutes an accident in the commonly accepted way and I think that is as far as one needs to go with the term accident as such, and to a medical man the interpretation of the Act which is the law of the country now, the personal injury by accident is the important thing to us and of course most of it particularly in Orthopaedics is very obvious. If somebody falls over and barks his shin and knocks a bit of skin off that is an accident and he's got the personal injury from it.

There are still going to be lots of grey areas however, particularly in other disciplines in medicine outside of Orthopaedics even if the definition we came down with is incorporated in the Act because medicine is not a completely precise science. These grey areas will just have to be argued out and quite a lot of decisions will have to be made by the Commission itself, no doubt acting with the help of expert medical opinion. I am sure a sort of case law will develop in respect of these grey areas. Despite the grey areas I would still like to see a definition, whether or not it is exactly what we brought down, in the Act because I think it would be a guide to the Commission in getting this thing going. It would also be a guide to the populace at large once it gets to know a bit more about the Act it will help them to understand what sort of claim situation they have and I am quite sure it would be of help to my own profession.

My profession is split almost straight down the middle in this thing as it nearly always is over most things. One attends meetings and my profession argue back and forth. Some take the attitude "why should we be mucking about over these things when we have patients to treat". "Why should I have to nut out whether this is personal injury resulting from an accident. If the patient says he has had an accident then of course his condition, as far as I am concerned is attributable. Lets tick it off as such and Mr Sandford can decide. What we are concerned in is treating the injury." That roughly is the attitude of half my profession and the other half I think would welcome some guidance so that irrespective of their duties as a Doctor treating people, as ordinary citizens they can do their duty to society by trying to help implement something that is now the law of this country and for these reasons I would like to see some guide-line definition in the Act.

In actual fact at the present time the two professions legal and medical have been sent addendums to the medical handbook issued by the Commission saying what the Commission will accept at the moment as being compensatable and really the material in the addendum is basically the definition that we brought down but it is still at the moment not part of the law of the land and one of our quandries as an example is that until it is the law of the land we do not know whether to stop paying insurance policies for negligence or not brought against members of the profession, and that is one of the things that is worrying my profession. They *think* at the present that in future negligent actions resulting in personal injury will come under this scheme and that they will not need private insurance to cover themselves through the Medical Protection Society or some other body, but they of course are not sure of this because the definition is not in the Act at the present time. I am sure the definition has got loopholes in it, I am sure also any definition always will have. These loopholes will just have to be ironed out as they arise in due course and the definition no doubt will have to be added to or altered at various times by other legislation.

The only other thing I wanted to say and this is more or less a politico-philosophical thing and perhaps not strictly pertinent to today's discussion; there is concern in my profession as to whether compensation for accident is really a good thing at all, or rather compensation for personal injury by accident because of the grey areas I have mentioned, particularly the difficulties of sometimes sorting out what is the personal injury by accident and what is a result purely of a disease process or maybe a combination of both. We feel really, should there be a privileged class of accident victims? If you take the Woodhouse concept I would think to its logical conclusion although Mr Justice Woodhouse was just at the time considering accident compensation he did intimate that perhaps in due course sickness may also come into it and I think his overall concept philosophically was that he just wanted to get people who were out of the work force for some medical reason or other back into the work force without them being economically embarrassed, give them adequate quick treatment and sound rehabilitation. If that is so then really there is no reason to have a privileged group of accident victims. If you are out of action from production by sickness why should you not be encouraged or allowed to get back again in just the same way as the accident victim and helped along the

line and maybe if you've got a permanent residuum depleting capacity as a result of sickness you could even get compensation for that too.

There is this feeling amongst a lot of my profession that whereas for sickness under the Social Security Act after a means test has been applied you get a miserly sum a week, under the Accident Compensation Act if you are a privileged class accident victim you can get 80% of anything up to \$160 a week. A lot of members of my profession feel that is unfair and they are seriously concerned about it. It is I know a politico-philosophical argument but the extension of this sort of scheme to sickness ultimately much as I hate to say it is inevitable and that of course would mean the complete socialisation of medicine, something I am sure is going to come one of these days.

## QUESTIONS TO PANEL

*Question:*

It has been claimed that in the draft the accident compensation amendment was struck out. Page 5.

*Reply:*

**Mr Hillyer:**

Yes. It was in the Bill.

*Question:*

Might I ask either one or both of the members of the panel what members of the Medico-Legal Committee who suggested definitions to the Commission think the Commission would do in the most likely occupational hazard or untoward event that would face the average professional person here who might find himself working 60-80 hours a week, getting grey hairs at a very fast pace and then ending up with a stroke or heart attack. That seemed to me the sort of grey area. Do those two members think that sort of fate would be compensated under the Act.

*Reply:*

**Mr Hillyer:**

Speaking personally I do not think it would be. It is more in the nature of an illness and would come under "damage to the human system as the result of disease".

**Mr Kirker:**

In actual fact I do not think although as an Orthopaedic Surgeon I am not versed in these matters that there is any medical evidence

that you get a stroke or heart attack in this way. That is largely a laymans theory of events.

**Question:**

Might I ask a broad question. Do we need a definition at all because it is only going to lead as far as I can see, in spite of the magnificent efforts of the committee, to a lot of legal "argybargy" over what it is designed to cover and it is going to lead to a lot of curious things. We had an excellent address from Mrs Vennell. It was a magnificent address and may I compliment her on it and that means of course that it will lead to a lot of legal argument. Has anyone considered the effect of *Marsh v Absolum* round about 1939 dealing with the death of a wife? The Court of Appeal chastised me for daring to suggest that an action for damages might lie. Their Honours held to the contrary. The only one who supported me was the late Sir Archibald Blair. Someone I seem to recall waxed eloquent in the Law Journal as to whether although the decision was probably right in law was it in accord with justice and equity? There was no reply.

**Reply:**

**Mr Kirker:**

My profession are aware of that sort of argument, but the thing is that if we did not have guidelines and I am not talking about me or other Orthopaedic surgeons, we of course have been in the assessing game for a long time and orthopaedics lends itself to this sort of legal argument and after a time one almost thinks like a lawyer. The average General Practitioner is not in the same position. He is not faced with giving expert reports over the years and he is not really au fait with the legal approach. Most of them also don't want to be bothered with trying to make this type of decision. They just want to get on and treat their patient. If there are no guide lines for them in respect of this Act, I think they are going to be over-sloppy. The sort of approach "he says he fell over, I don't know if he did or not, has he an injury by accident or not, I do not know, I will sign the form and let Mr Sandford decide". Now I don't like that sloppy attitude in medicine and I think the average Practitioner does need some guidelines in this respect.

**Mr Hillyer:**

Doctors in the majority of cases will not have any doubt as to whether there has been an injury by accident but there are undoubtedly a large number of questions that can be asked. The effect of a definition is to reduce the number of questions.