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DOCTOR NEWSLETTER NO. 6: MEDICAL OPINION

Throughout the years, we have seen many personal injury cases where proof of the injuries and eventual success of the claim, or case, depends on an expert medical opinion. Often times, in the claims stage any injuries that are not typically expected to be incurred are routinely dismissed as non-accident related. This is often true of "eggshell plaintiffs" and claims involving TMJ, or Temporomandibular Joint Disorder. However, the claims may be the subject of a jury verdict if the injuries are documented well and the expert medical opinion utilizes the correct legal standard.

While nothing in this practice pointer should be construed as a direction as to what should be written in all cases, you as a doctor, and potential expert witness, should be aware of a slight distinction in vocabulary which has the effect of allowing or precluding a claim of injury.

"POSSIBLE" VERSUS "PROBABLE"

The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. (Jones v. Ortho Pharmaceutical Corp., 163 Cal.App.3d 396; Morgenroth v. Pacific Medical Center, Inc., 163 Cal.App.3d 403; Johnston v. Brother 190 Cal.App.2d 464; Pacific Employers Ins.Co. v. Industrial Acc. Com., 182 Cal.App.2d 162.

As discussed in Jones, the distinction between reasonable medical "possibility" and reasonable medical "probability" needs little discussion. There can be many possible causes, indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause only becomes "probable" when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action.

The reasoning set forth by the court in Jones is very sound, and self explanatory. However, we continue to see cases where the doctor will assert in personal conversation that an injury is caused by a particular cause, only to follow the conversation with a written report, indicating that the injury was "possibly" caused by the discussed set of facts. It should be noted that even referring to an injury as "quite possibly caused by" does not rise to the proper legal standard and as such forms the basis for nonsuit.

From another jurisdiction, the rationale behind this rule could not be more clear. "If the experts cannot predict probability in these situations, it is difficult to see how courts can expect a jury of laymen to be able to do so." (Parker v. Employer's Mutual Liability Insurance Company of Wisconsin 440 S.W.2d 43,47)

In many instances, as discussed above, a personal injury claim which is not typical in nature may force said claim into becoming a litigation case, requiring expert testimony. If the treating doctor's notes reflect that a particular injury "might have been", is "possibly" , or "quite possibly" caused by a particular event and a retained expert renders the opinion that the injury was caused by the event based on a "reasonable medical probability" the defense attorney will use the opinions of the plaintiffs witnesses against each other. For that reason, careful attention must be given to exactly what opinion you are rendering in the case of causation.