Admissibility of Evidence of "Possible" Future Medical Damages and Anxiety Over Possible Future Medical Condition or Treatment

By Daniel R. Denton

In many personal injury cases, the plaintiff's treating physician will discuss with his or her patient the possibility of future surgery or other medical treatment that may become necessary if the patient's condition worsens, or to improve (or maintain) plaintiff's present condition. Defense counsel will undoubtedly argue that such information is inadmissible unless the doctor's opinions are based upon "reasonable medical certainty" or that the related medical expenses are "reasonably certain to occur." However, in an appropriate case, strong arguments can be made that testimony about plaintiff's possible future medical condition and anticipated need for medical treatment in the future is admissible as to: 1) the future related medical expenses the plaintiff may incur; and 2) plaintiff's fear and anxiety about possible future worsening of conditions, medical treatment and increased disability.

In a case in which the facts indicate that the plaintiff may require medical treatment in the future, plaintiff's counsel should attempt to elicit testimony to establish:

- the treating physician's opinions as to plaintiff's possible future worsening or change of conditions and need for future medical treatment, or plaintiff's need for certain treatment to maintain or improve his or her present physical or psychological condition;
- the type of possible medical treatments under various scenarios;
- the estimated percentage chances of plaintiff having such future conditions and need for medical treatment under each scenario;
- whether the physician's opinions as to future medical conditions and treatment are based upon authoritative studies or his or her own experience or both;
- if a worsening of condition occurs, whether plaintiff will have any increased permanent impairments following the additional medical treatment;
- the estimated cost of the possible future medical treatment (which could be based upon costs already incurred if plaintiff had received similar medical treatment);
- whether the future scenarios were discussed with the plaintiff;
- the physician's knowledge that most patients experience fear and anxiety after discussing possible future medical problems and need for more treatment; and
- the plaintiff's concerns, fear and anxiety about his or her future medical condition and possible need for future surgery or other treatment based upon the information discussed with the physician.

In the appropriate case, the case law discussed below can support plaintiffs' counsels' arguments for the admission of evidence relating to future medical damages.

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Admissibility of evidence of possible future medical expenses does not require proof that such expenses are reasonably certain to occur.

Any question as to the factual basis of an expert's testimony regarding future damages goes to its credibility, not its admissibility; the credibility of evidence is properly a question for the jury. *Weaver v. Lentz*, 348 S.C. 672, 561 S.E.2d 360 (Ct. App. 2002) (expert's opinion as to economic calculations of future lost earnings held admissible).

The standard of admissibility for evidence of future damages is "any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of the defendant's acts ... if otherwise competent." *Pearson v. Bridges*, 344 S.C. 366, 372, 544 S.E.2d 617, 620 (2001), quoting *Martin v. Mobley*, 253 S.C. 103, 109, 169 S.E.2d 278, 281-82 (1969) (*Martin* court held admissible plaintiff's doctor's testimony as to percentage of permanent disability which generally follows the type of surgery he performed upon plaintiff, where doctor had not further examined the plaintiff after her discharge from care, with the court concluding that this affected only the weight and not the admissibility of the evidence).

In *Pearson*, the S.C. Supreme Court agreed with the Court of Appeals' holding that "the most probable standard required to prove causation is not the standard to be applied in determining the admissibility of evidence of future damages." *Id.* at 372, 544 S.E.2d at 619. However, the Court disagreed with the Court of Appeals' holding that whether future medical expenses are "reasonably certain" to occur is the standard to use in determining admissibility. The Court explained that, "[w]hether future damages are 'reasonably certain' to occur is the *standard of proof* for future damages, not the *standard of admissibility.*" *Id.* at 373, 544 S.E.2d at 619 (emphasis added; italics in original), citing *Haltiwanger v. Barr*, 258 S.C. 27, 186 S.E.2d 819 (1972). *See Burroughs v. Worsham*, 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002) (standards of admissibility of evidence of future damages as discussed in *Pearson* applied in case involving expert testimony of future loss of income); *Means v. Gates*, 348 S.C. 161, 170, 558 S.E.2d 921, 926 (Ct. App. 2001) (where non-treating psychologist opined that auto accident caused plaintiff's chronic pain syndrome and that he was a "very good candidate" for a pain management treatment program with an estimated cost of $6,000.00, court held "any flaws in [expert's] analysis would go to the weight and credibility of his testimony, not its admissibility ...").

The medical expert in *Pearson* testified that four possible scenarios could result from the alleged medical malpractice. For each scenario, he presented a declining statistical chance of occurrence and the possible damages that could result. In ruling that evidence of future medical expenses for possible surgery was admissible, the Supreme Court explained:

> The evidence of the medical expenses of scenarios two, three, and four was admissible. These scenarios tended to establish the extent of Pearson's injuries. The fact that Pearson's experts testified that the possibilities of scenarios two, three, and four occurring were 30 percent or less went to the weight of the evidence not its admissibility. Whether Pearson proved the expenses were "reasonably certain" to occur so she would be entitled to an award of future damages was a question for the jury to determine. (emphasis added).

344 S.C. at 373, 544 S.E.2d at 620 (internal citations omitted).

An instructive case from another jurisdiction dealing with the issue of admissibility of evidence of possible future surgery and related medical expenses is *Tracy v. Parrish of Jefferson*, 523 So.2d 266 (La. Ct. App. 5th Cir. 1988). In that case, the court held that the trial judge did not abuse his discretion in concluding that it was more likely than not that plaintiff will require future surgery. Accordingly, the trial court did not err in allowing evidence of the estimated cost for future surgery where plaintiff's doctor testified that the lumbar fusion was not completely successful and his patient continued to suffer pain. A new surgical procedure was available that "would provide a better chance to stabilize [plaintiff's] spine," even though it would not eliminate the pain. The doctor further testified that plaintiff will have to make the decision in the future if he wants the surgery, but it "has a good chance of helping him if he decides he cannot deal with the pain." In addition, the plaintiff testified that "if the pain continues to worsen, he will have to have some type of corrective surgery." *Id.* at 275.

Fear or anxiety of a future medical condition or treatment does not require proof to a degree of reasonable medical certainty.

As long as the testimony is not offered for the purpose of proving the party's case, evidence of "possibilities" of a future condition or treatment, and a plaintiff's anxiety or fear relating to such possibilities, may be admissible.

While no South Carolina case could be found on the issue, courts in other jurisdictions have held that a plaintiff may recover damages for fear of possible future surgery or worsening medical condition without evidence based upon reasonable medical certainty that he or she will need surgery or other medical treatment. *E.g., Brantner v. Jenson*, 360 N.W.2d 529 (Wis. 1985); *Sorenson v. Raymark Indus, Inc.*, 756 P.2d 740, 743 (Wash. Ct. App. 1988) ("a plaintiff may recover for anxiety, arising from a current reasonable fear of future injury or illness, and resulting from an injury caused by the defendant.").

In *Brantner*, probably the leading case on this subject, the defendant contended that the trial court should not have allowed the plaintiff and his surgeon to testify regarding possible future back surgery because the plaintiff did not prove to a reasonable degree of medical probability that his injury would require surgery. 360 N.W.2d at 533. The plaintiff's surgeon testified he had discussed "the operation, recovery time, risks,

chances of success and possible subsequent disability" with the plaintiff on numerous occasions. *Id.* at 531. The plaintiff testified as to these conversations, as well as a conversation he had with his father concerning back surgery. *Id.* at 530.

The *Brantner* court stated:

> We conclude that fear of surgery may be reasonably certain, even though there is no certainty that surgery will occur and even though the physician cannot testify to a reasonable degree of medical probability that the consequence feared will occur ... A doctor's realistic prediction as to the possibility of future surgery, illness or disability may give rise to reasonable fear and anxiety in the victim concerning his or her future health and well-being ... Risk is a medical fact and may be used to establish a reasonable basis for compensable anxiety.

Id. at 533.

Testimony of possible complications from future surgery may not be admissible. In the *Brantner* case the court cautioned that the plaintiff may not present evidence of fear of future surgery if the evidence relates to "remotely conceivable complications" or "a fictitious or imagined or highly unlikely consequence." *Id. Accord, Martindale v. Ripp*, 629 N.W.2d 698 (Wis. 2001) (trial judge did not abuse discretion in disallowing doctor's testimony about specific potential complications from possible future surgery).

The plaintiff in *Baylor v. Tyrrell*, 131 N.W.2d 393, 402 (Neb. 1964), "was advised by his physician as to the possibility that the condition of his hip might deteriorate or become worse following his operation and as to the possibility of another operation becoming necessary." The defendant objected to the court's instructions relating to plaintiff's damage element of anxiety or "mental suffering." In approving the trial court's instructions, the appellate court stated:

> These instructions, when construed together, told the jury: (1) that his anxiety or mental suffering must have a reasonable basis, and (2) that the evidence with relation to the doctor's advice as to "possibilities" could only be considered with relation to the determination of a reasonable basis for the anxiety and mental suffering, and for no other purpose. Medical science cannot in all cases predict the prognosis of an injury or disease. Advice by a physician of this fact may reasonably lead to anxiety.

Id.

A plaintiff's testimony about concerns over his or her future health and possible surgery, based upon plaintiff's discussions with the doctor, may be admissible under the hearsay exception of an existing state of mind (fear and anxiety is a state of mind). *See, e.g., Eisenback v. Downey*, 694 A.2d 1376 (Conn. App. Ct. 1997), which held that the trial court did not abuse its discretion in allowing plaintiff's testimony regarding concerns about her future health and possible future surgery

which was discussed with her doctor (who did not testify). The plaintiff testified that she had considered future back surgery, but felt it would be too great a risk and might not alleviate all of her pain; that she was concerned about her future health and that she might need surgery; that she might need continual medical treatment; and that her low back problems might hinder future pregnancies. *Id.* at 1384. Defense counsel objected to each part of this testimony and argued that the lay witness was testifying to medical opinions. The trial court overruled the objections and gave the jury a curative instruction explaining that they were to consider this testimony only to illustrate plaintiff's present state of mind, not as expert medical evidence. *Id. See also* Rule 803(3), SCRE, for hearsay exception of an existing state of mind, emotion, sensation or physical condition.

Asbestos cases, where courts have held that evidence of an increased risk of cancer from exposure to asbestos is admissible to show a plaintiff's fear of cancer, are illustrative of the rule that such evidence of a future medical condition does not require proof to a degree of reasonable medical certainty when offered to show plaintiff's fear of a possible future medical condition. *See, e.g., Sorenson v. Raymark Indus. Inc., supra;* and *Beeman v. Manville Corp.*, 496 N.W.2d 247 (Iowa 1993). In *Beeman*, the court reasoned:

> A plaintiff's fear of cancer is relevant in considering damages for past and future mental pain and suffering. In particular, several courts have held in asbestos cases that the evidence is admissible to show the reasonableness of the fear. Such evidence is admissible even though a plaintiff does not presently have cancer and did not show a probability of getting cancer in the future. This is because the claim is for the present fear of cancer, not for a future loss resulting from cancer.
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> Beeman's fear is happening now; it is not contingent upon developing cancer. Whether Beeman will probably develop cancer is thus irrelevant to proving his present, concrete fear of developing cancer. (internal citations omitted).

496 N.W.2d at 252.

There are also many non-asbestos "cancer" cases that address the same issues. *See, e.g., Boryla v. Pash*, 960 P.2d 123, 127 (Colo. 1998) ("... by presenting evidence that her condition physically worsened as a result of the delayed diagnosis [of breast cancer], Boryla established an attendant physical injury which permitted the jury to consider damages for the emotional distress stemming from her fear of an increased risk of cancer recurrence"; jury instructions implied that in order to recover for her emotional distress, Boryla's fear of an increased risk of cancer had to be reasonable); *Ferrara v. Galluchio*, 152 N. E. 2d 249 (N.Y. 1958) ("Disclosure by a physician that a wound 'might' develop into cancer is a reasonable basis for a patient to have anxiety about the possibility of developing cancer, and is recoverable in damages.").

When the issue is a claim of fear of a future medical condition or treatment, the court, in *Bychinski* v. *Sentry*, 423 N.W.2d 178 (Wis. 1988), held the proper degree for a supporting medical opinion is a "reasonable possibility." *Id.* citing *Brantner v. Jenson, supra.* However, in *Tamplin v. Star Lumber & Supply Co.*, 836 P.2d 1102, 1008 (Kan. 1992), the court held there must be a showing that a "substantial possibility" exists for the occurrence of the future condition:

> We conclude that anxiety based upon a reasonable fear that an existing injury will lead to the occurrence of a disease or condition in the future is an element of recovery. However, for the fear to be reasonable, it is not necessary to show that the prospect of such an occurrence is a medical certainty or probability. It is sufficient if there is a showing that a substantial possibility exists for such an occurrence.

The wording of these two standards ("reasonable" versus "substan-

tial" possibility) is probably a distinction without a difference.

Sample jury charge on evidence of anxiety and fear of possible future medical condition or surgery or other medical treatment

Based upon the authorities just discussed, below is a sample jury charge that could be proposed to the court on the issue of anxiety and fear of possible future medical condition and surgery or other medical treatment:

> You are instructed that certain evidence has been received in this case to the effect that plaintiff was advised by his (or her) physician as to the possibility that the condition of his (or her) _____ (state body part) might deteriorate or become worse and as to the possibility of another operation (or other medical treatment) becoming necessary (and of a possible increase in disability). This evidence was received by the court and should be considered by you, not for the purpose of establishing the truth of the statements recited in such evidence, but merely for the limited purpose of forming a basis for mental suffering, if any, and for no other purpose.
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> Fear and anxiety of a future medical condition and possible surgery (or other medical treatment) (and of a possible increase in disability or impairment to the body part) may be reasonably certain, even though there is no certainty that such future event(s) will occur and even though the physician cannot testify to a reasonable degree of medical probability that the consequence feared will occur. A doctor's realistic prediction as to the possibility of future medical conditions, treatment or disability may give rise to reasonable fear and anxiety in the plaintiff concerning his (or her) future health and well-being.
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> However, in order to recover for his (or her) emotional distress, you must find that plaintiff's fear and anxiety concerning his (or her) future health and possible need for future surgery (or other medical treatment) (or an increase in disability) has to be reasonable based upon information that he (or she) was made aware of.

Conclusion

When representing seriously injured plaintiffs, attorneys should utilize all available tools to maximize recovery for all elements of damages suffered by their clients. Possible future medical treatment and related expenses, as well as an injured person's fear and anxiety over a worsening of condition and possible additional medical treatment, can be significant elements of that person's damages and should be vigorously pursued in the quest for full compensation for a plaintiff's lawyer's clients. Hopefully, this article will raise awareness of these issues and the applicable admissibility standards and will provide some guidance in that endeavor.

Daniel R. Denton practices with Daniel R. Denton, PC in Beaufort.