MEDICO-LEGAL ASPECTS OF OSTEONECROSIS

JOHN TEED

I shall discuss some of the legal remedies currently applicable to divers in the United States who are suffering from osteonecrosis and how the problem is handled judicially.

The principal remedy available to a diver who sustains a disability as a result of his employment is the so-called Jones Act in combination with the general maritime law. To qualify for relief, an individual must meet certain criteria designating him as a seaman. The term *seaman* has been interpreted so broadly that I have considerable difficulty in imagining a situation in which a diver would not be so classified.

The remedy theoretically imposes a liability upon an employer for negligence or for subjecting a seaman to conditions of unseaworthiness. By negligence is meant the employer's failure to act in a manner that a reasonably prudent employer would under the same or similar circumstances. The second theory, a doctrine of liability without fault, concerns the concept of unseaworthiness, referring to equipment that fails to function as intended.

With respect to the osteonecrosis syndrome, to make a monetary recovery under the Jones Act, a diver must identify a specific incident and attribute to that incident one or both of the concepts of fault — that is, negligence or unseaworthiness. I shall not presume to comment on the medical aspects of osteonecrosis. But the participants of this Symposium are now aware that certain persons appear to have a particular susceptibility to the disease. They may sustain the disability without there having been an identifiable negligent act or omission or an identifiable piece of defective equipment connected with it.

I might add that, if the individual is a seaman, he also has the right to what in law is called "maintenance and cure." This right ensures free medical care and living expenses during the time in which he has not reached maximum recovery. The U.S. Public Health Service provides free medical care for deep-sea seamen, thus satisfying the obligation of cure binding upon a seaman's employer.

A second remedy that a diver may seek under specific circumstances is provided by the Longshoremen's and Harborworkers' Compensation Act. This is a federal compensation statute, administered by the Bureau of Employees' Compensation of the Department of Labor. Its provisions are adjudicated by various deputy commissioners stationed around the country as tribunals. The harborworker, for purposes of this discussion, is defined as a maritime worker who is not a seaman. A man who so qualifies may receive certain compensation benefits, based on whatever disability rating may be adjudicated by the deputy commissioner or by agreement between the insurance carrier and the claimant and/or his attorney.

The third type of remedy that should be mentioned is called a third-party suit. Consider, for example, a diver in the employ of a diving contractor who is working off a vessel owned by a second contractor, such as a pipeline or drilling contractor. Under the law in this instance, the diving equipment becomes an appurtenance of the vessel, and the warranty of seaworthiness applies. A claimant diver may therefore seek compensation from his employer and simultaneously proceed against the second contractor with a negligence or unseaworthiness claim.

To make things more interesting in these cases, the contractor typically comes back against the man's employer with the claim that the employer failed to do his work in a reasonably safe and workmanlike manner, as prescribed by the maritime contractual warranties implied by the law. In effect, the claimant sues the second contractor, who then impleads the employer for indemnity. At the same time, the employer is paying the claimant benefits through his insurance carrier under the Longshoremen's and Harborworkers' Compensation Act. There are currently pending some proposed amendments to the compensation act that may radically alter the action that the second contractor

can take against the employer.

There are some other possible remedies, which are somewhat technical — *e.g.*, special contractual arrangements, additional to the usual legal remedies, entered into by the contractor. Diving in certain foreign waters may also, in some circumstances, impose some of those countries' legal remedies. And there are certain situations — for example, diving off a fixed offshore platform — in which the workmen's compensation laws of the adjacent state would be applicable.

I should like to relate some of these legal ramifications to the specific problem of osteonecrosis. First of all, the Jones Act is obviously less than wholly satisfactory in this particular disease because fault must be established before monetary recovery is possible. In practice the courts have simply perverted the concepts of negligence and unseaworthiness to fit almost every situation, based upon a vague humane attitude that a seaman injured in the course of his work should be compensated in some fashion. The real need is for a seaman's compensation act, with appropriate limitations, that will compensate an individual for an industrial injury or illness without reference to the concepts of negligence or unseaworthiness.

With respect to compensation under the longshoremen's act or the various state statutes, I should also like to mention that a functional disability must exist before payment of compensation is required, or, under certain acts (including the longshoremen's), a loss of wage-earning capacity. We have heard in this Symposium that a patient with necrosis of the femoral shaft may well be asymptomatic. The individual may have sustained a systemic insult that has resulted in a weakened shaft. But he may *not* have, from a legal standpoint, a functional disability or loss of wage-earning capacity — unless he is willing to stretch the truth and say that his leg hurts or something of the sort (which is not unheard of, I might add). But if there is no current functional disability or loss of wage-earning capacity, osteonecrosis hardly fits into any of these compensation schemes.

One aspect of these cases is, I think, of particular interest to this Symposium — the very important role played by the medical expert, whether for purposes of prosecution or defense. The usual case has two basic parts: liability (who is responsible?) and damages (how much?). Normally the medical witness is used to help assess damages. He is asked to rate disability, confirm pain and suffering, project future necessary medical or surgical treatment, and give a prognosis. The finder of fact — who may be a judge or jury, or a Department of Labor deputy commissioner under the compensation acts — then has some basis on which to evaluate what the man's disability is worth in dollars.

But the medical expert's role in divers' compensation cases is different, in that he is customarily a primary liability witness. It is often left to him to criticize or ratify the techniques used in decompression, the safety standards that the particular employer imposed on his workers, and so on. I therefore try to involve the medical witness whom I intend using in the case very early, whether it is likely to be settled out of court or come to trial. It has been my experience that most underwriters do the same, because it falls to the medical expert to give us some direction on both the liability and the damages issues.

My experience — and, I think, that of most lawyers — is that doctors are often reluctant to take time from their patients or research projects to assist in matters involved in an adjudicative dispute. It not only is time-consuming but also involves teaching the layman-lawyer a great many fundamental facts of medicine or physiology. Then, at some time that inevitably will be inconvenient to his schedule, the doctor must appear for a deposition or on a witness stand in a trial court. There simply is no compelling reason for doctors to be greatly interested in participating in this legal process — except for one, and I believe that one overrides all the other considerations.

It is this: The quality of justice done before the Deputy Commissioner or in the trial court is absolutely proportional to the quality, objectivity, and fairness of the medical witness involved. If a medical witness of great expertise and high caliber does not participate, time-consuming and inconvenient though it may be, by default this crucial part of the adjudication is left to inexperienced persons, so that the quality of justice is perforce much lower. Or it is left to the charlatan, who is equally willing to testify for the plaintiff or defendant, according to whichever side calls him, without any real objective reference to the truth or to the accuracy of the medical diagnosis in the matter.