



THE PERMANENCE OF SCARRING, VISIBILITY AND COSMETIC DEFECT

The 13th edition of the Judicial College Guidelines indicate a number of factors to be taken into consideration in the valuation of facial injuries which include the nature of the injury, treatment, the extent of the scarring, the age of the claimant, the subjective impact and the psychological impact upon a claimant. Curiously in my view, the subject of burns is not dealt with separately although the likely severity causing pain and disfigurement of burns injuries is correctly acknowledged. It is now considered to be ‘open to serious doubt that gender itself can be a proper or indeed lawful factor in determining the level of general damages.’ Further very carefully worded guidance suggests the following: ‘that is not to say that factors which inform the appropriate level of general damages for scarring may arise more commonly, or with more general potency, in the case of one gender rather than another.’ Nevertheless, it is notable in my view that the ‘female’ and ‘male’ sections within the guidelines are retained because apparently ‘that is the historical approach,’ although it seems to me to be a paradox in light of the earlier comment within the narrative.

The Oxford English dictionary defines a scar as ‘a mark on the skin or within body tissue where a wound, burn, or sore has not healed completely and fibrous connective tissue has developed.’ In my experience, cases involving the valuation of scars or burn marks tend to give rise to doubt and sometimes the most disparate opinions amongst counsel. Most practitioners will recall having tendered among colleagues in chambers photographs of scarring or burns injuries for a second opinion as to the likely value of a scar. Many cases settle by agreement. Scars and burns appear before the courts for assessment far less frequently than, for example, orthopaedic injuries. Only very few counsel or members of the judiciary I expect will have personal experience of the pain, suffering or cosmetic effect of a scarring or burns injury.



It is sometimes the case that uncertainty as to valuation, and therefore risk, can be of real value in the tactics employed in the negotiation of settlement and it is important in my view that any opportunity to maximize general damages in those cases is successfully driven forwards.

A scar will as a matter of course always reach a degree of maturity. It is not uncommon in medical reports to see an opinion expressed about the probability of a scar or series of scars reaching maturity usually between 18-24 months of the date of the causative injury. On some occasions scars will get better, to the extent that they may no longer may be considered visible but sometimes there can be a worsening in appearance. Where a scar exists at all as a consequence of a traumatic injury, for example a laceration or a crushing injury, the result is always the same – permanent change to the skin. There is always change and where there is change there is permanence. There may be an argument that no medical expert need ever be chased by a CPR Part 35 question in an attempt to clarify an opinion as to whether or not a scar is indeed permanent. It may be a common misconception that only some scars may be regarded as truly permanent. Whether the appearance of a scar may be regarded as a visible or cosmetic defect is a separate matter altogether. Where the integrity of the skin is disturbed, for example into the hairline or through the eyebrow, it is not uncommon for hair growth to cease within the line of the resultant scar. Quite often the scar will be very white in colour and in comparison with darker coloured surrounding hair the appearance can be quite stark. This may also be accompanied by a failure of the skin within the scar to animate, for example when the facial muscles are engaged. The epidermis and dermis have been interrupted and again, the change is likely to be permanent. In a full thickness scar there is unlikely to be future hair growth. An abrasion may have caused a layer of skin to become scraped away.



A friction burn may have caused skin to be pulled away with the heat generated by the burn. Sometimes a severe haematoma - caused for example by significant trauma in a pedestrian being run over and thrown to the ground - can cause massive and unsightly lumps in the skin due to fat fracture or necrosis - death of the fat for example within the leg or arm. It can cause an unsightly concavity and can be distressing for claimants who feel no longer able to wear short sleeved clothing or swimwear. Medical experts sometimes recommend liposuction or lip filling as remedial treatment to significantly improve the appearance of such lumps within the skin.

This means that the treating surgeon will need to find full fat elsewhere in the body, perhaps the buttocks or thigh, and inject a shortage into the affected area. This helps flatten the concavity and may be done over several stages and over the course of several treatments may lead to an improvement in overall appearance.

Cosmetic camouflage using make-up and other specialist products is a matter of professional expertise. Some years ago I was involved in a case in which the Red Cross were consulted by the claimant as to the appropriate camouflage techniques to be used. More recently I have been involved in several cases in which I have advised a claimant to obtain the opinion of an expert in cosmetic and skin camouflage – this may be invaluable in assisting a claimant in a practical way but also in being able to formulate a schedule of loss in respect of future loss and expense. As scars naturally begin to improve over time, experts sometimes recommend the use of products such as bio-oil to aid the process of recovery. Equally though, the use of Vaseline, E45 or other moisturisers as recommended may be used as effectively, as with high factor sun protection creams.



Medical professionals often use photographic evidence to record progress and improvement and also in teaching. The best outcome for a claimant may usually be assisted by good quality professional photographic evidence within the case. It is surprising how many claimants are not asked to attend in order that professional photographs to be taken. Amateur photographs can be very useful however, particularly those taken during the immediate aftermath, sometimes even at hospital, and often during the early weeks and months of injury. Those photographs are invaluable in showing in vivid detail the extent of the injury causative of the resultant scar or burn mark. But it is in the position from which professional photographs are taken as well as the background, lighting etc. which provide the quality and therefore the value in professional photographs. Occasionally more than one set of professional photographs may be required taken some time apart. It is at least worth considering in a case involving facial scarring whether or not it is likely even in the immediate lead up to a trial whether a further set of photographs may be useful.

In my view, it may be unlikely that even the most inquisitive and careful Judge will examine a claimant in person at close up range for more than, say, a period of 10 seconds, particularly so in respect of facial scarring. In addition, the court room may be dimly lit, the background busy, the claimant may be wearing make-up. Any or all of these factors may affect the Judge's perception of the cosmetic defect or lack of effect caused by a scar or burn mark. To achieve greater accuracy as to the position as at the date of trial or very close to it when settlements are often achieved, consideration ought to be given to obtaining further professional photographs if, for example, the existing set are more than 12 months old.



In writing this short article I am grateful to Consultant Plastic Surgeon Rebecca Shirley FRCS (Plastic) Stoke Mandeville with whom I had a discussion on the 21st July 2016. She is a treating rather than a medico-legal expert and we discussed in particular the permanence of scarring; the reasons why hair fails to grow along the line of a scar; how liposuction or lip filling may assist in the treatment of severe traumatic haematoma; revision and remedial treatment and finally, cosmetic defect and photographic evidence.

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October 2016

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