

Evidence of good character

By Gerard Mullins

The major focus of a trial in which a plaintiff claims damages for personal injury is often the credibility of the plaintiff. The plaintiff, during the course of evidence-in-chief, will narrate a history of the circumstances of the injury, the conduct of the parties at the time of and prior to the injury, the recovery from injury and his or her current symptoms.

The defendant will frequently seek to undermine that evidence by reference to documents created between the time of injury and the event, often relying upon statements allegedly made by the plaintiff to health practitioners about the extent of symptomatology at a particular time.

Most lawyers acting for plaintiffs have been faced with the situation where the records of a medical practitioner were inconsistent with the plaintiff's recollection of symptomatology suffered at a particular time. For example, an orthopaedic surgeon has recorded that the plaintiff's neck pain had significantly improved, yet the plaintiff insists that s/he made no such statement during the consultation.

The medical practitioner will generally have no interest in the outcome of the proceedings (whereas the plaintiff has an obvious interest). Often with no recollection of the conversation in question, medical practitioners will simply rely on their notes of the consultation, and claim that they would not have recorded such a statement had they not been advised by the plaintiff at the time. The plaintiff will often furiously deny having made such a statement.

The trial judge is left to resolve the issue on the basis of the competing versions. The reality is that medical practitioners often record a slightly different version to what the plaintiff believes has been said. There are many reasons for this. The plaintiff's version may not be expressed with clarity. Sometimes leading questions are asked that might elicit a response which is incorrectly interpreted. But the court is left to decide between two competing versions. If the medical practitioner's version is accepted, then the credibility of the plaintiff is significantly undermined. Often, these inconsistencies can be used as the basis for asserting a lack of credit across many issues.

In these circumstances, it is not unusual for plaintiffs to say that they are happy to call a dozen witnesses who will attest to their honesty and the extent of their symptomatology. Evidence as to the latter is clearly admissible. Witnesses may give evidence that they observed the plaintiff with significant restrictions and, to a limited extent, demonstrating physical pain. But what of the former? Can evidence be led by plaintiffs of their good character?

In criminal proceedings at common law, evidence of good character might be taken into account in determining whether the Crown has discharged its onus of proving a charge beyond reasonable doubt. The 'good character'

evidence might go to the issue, not only of the credibility of the witness (where the accused gives evidence), but also as to the proof or otherwise of guilt. In *Attwood v R*,¹ the High Court stated:

'The expression "good character" has of course a known significance in relation to evidence upon criminal trial; for it denotes a description of evidence in disproof of guilt which an accused person might adduce. He may adduce evidence of the favourable character he bears as a fact or matter making it unlikely that he committed the crime charged ... Evidence of good character is regarded as really bearing on the probability or improbability of guilt. As Cockburn CJ said:

"The fact that a man has an unblemished reputation leads to the presumption that he is incapable of committing the crime for which he is being tried."

The position in respect of civil proceedings is somewhat different, with the exception of defamation proceedings.² The reasoning behind the difference is that the general good character of a party does not go to the key issue in the proceedings. In the criminal sphere, the evidence of good character of the accused is admitted because there is a fair and just presumption that a person of good character would not commit a crime. But in civil cases, evidence of good character is not admitted because no presumption would fairly arise, in most cases, from the good character of the defendant (or the plaintiff) that s/he did not commit the breach of contract or civil duty alleged against him.³

But the prohibition on calling evidence of good character does not preclude the plaintiff from presenting evidence to prove that the symptoms from which s/he was suffering at the time of the conversation with the relevant medical practitioner were significant. For example, evidence from the partner or relative of a plaintiff that s/he was unable to participate in family activities over an Easter weekend would be inconsistent with the record of a medical practitioner on Easter Tuesday that the plaintiff was largely recovered from symptoms associated with their injuries. A careful and thorough analysis of inconsistencies in the medical evidence will assist plaintiffs and their lawyers in presenting a case that does not permit the plaintiff's credibility being undermined by prior inconsistent statements. ■

Notes: 1 (1960) 102 CLR 353. 2 See, for example, *Bickel v John Fairfax & Sons Limited* [1981] 2 NSWLR 474 at 482-3; *Anderson v Mirror Newspapers Limited (No. 2)* (1986) 5 NSWLR 735 at 737-8. 3 *Attorney-General v Radloff* (1854) 156 ER 366.

Gerard Mullins is a barrister at Ronan Chambers, Brisbane.

PHONE (07) 3236 1882. EMAIL gerrymullins@ozemail.com.au