

ADVOCACY FOR THE BRAIN (HEAD) INJURED CLIENT

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I. Introduction

The representation of a client who has received a traumatic or secondary brain injury can be both very rewarding and difficult. If you choose to handle these types of cases you must be prepared to deal with a type of personal injury case wherein the defense will spend a great deal of time and money to fight you on the issue of causation. There will be challenges to the qualifications of your experts as well as challenges to what is medically accepted from a scientific standpoint in this area of medicine. Your client's pre-accident mental and physical history will be placed under a microscope to look for "mental and physical defects or cracks". The purpose of my presentation is to give you some suggestions on how to better prepare and try these type of cases. The following material is by no means exhaustive.

II. Use of the correct Terminology

1. Never use the term "closed head injury".

- closed to some people may mean something is finished or is over with. To some it may mean that you will never be able to figure out if their was an injury because you can't get inside the head to examine the brain and its anatomical subparts. How can the brain be injured if there are no visible signs of trauma or injury? In these type of cases the focus should be on the brain and how it now functions for your client.

2. Stay away from the medical terminology of "mild", "moderate", or "severe" in cases where you represent a client who suffered a brain injury.

Traumatic brain injuries are generally medically classified in the following manner: 1. **Severe**-in these cases the injured individual is unconscious for more than six hours, and the head injuries are severe enough to cause an obvious deficit. These individuals normally regain the capacity for conscious activity after some period of time. Kosieradzki, M.R. and Engelking, M.E., "Mild to Moderate Brain Injury: Proving the Invisible Injury," Trial Diplomacy Journal Vol. 20, pp. 333-339 (1997). 2. **Moderate**- generally involves head injuries wherein the victim is unconscious for one to six hours with an initial Glasgow coma score of less than 13. In a lot of cases like this, there is a skull fracture. Id. 3. **Mild**- these head injuries are characterized by a traumatic brain injury wherein there is a period of unconsciousness less than one hour. There is no "persistent hard or focal neurological deficits but subtle neuropsychological and behavior deficits." Id. at 33, citing D. Nathan Cope, "the rehabilitation of Traumatic Brain Injury in Analysis, Understanding, and Presentation of Cases Involving Traumatic Brain Injury," (Charles & Simpkins, Ed. 1994).

3. Refer to your case as one involving a "subtle brain injury", "traumatic loss of brain function" or "brain dysfunction".

The Brain Injury Association(formerly the National Head Injury Foundation) defines traumatic brain injury as follows:

"An insult to the brain, not of a degenerative or congenital nature but caused by an external physical force, that may produce a diminished or altered state of abilities or physical functioning. It can also result in disturbances of emotional or behavioral functioning. These impairments may be either temporary or permanent and cause partial or total functional disability or psychosocial maladjustment. (Brain Injury Association, Inc. Defining Brain Injury: Official Brain Injury Association definitions) adopted March 14, 1997, by Brain Injury Association Board of Directors.

III. Representation of Individual's who have suffered a Traumatic Brain Injury requires strength in your convictions not connections.

1. Believe in Your Client's Case

One of the saddest events that can occur in a traumatic loss of brain function case is accepting the responsibility to handle these type of cases and then not believing that your client is seriously hurt. It is not uncommon for a client who has suffered a brain injury following trauma to develop confusion, anger, depression forgetfulness, etc. This type of client is usually sent to a lot of different medical providers and may very well receive different diagnoses of their problems. A lot of times it is left up to the lawyer to explain to the client what is going on with regard to his/her medical treatment. You need to be willing to invest the time and resources to fully develop and prepare their cases. You need to be willing to deal with unannounced office visits, calls from family members, and repeated explanations of what is happening in their case. Often times your client will do things that will have a potentially negative affect on their case. You can never stop believing in your client or their case. If you do, the defense has gained an advantage. Your belief has to be: "Brain Injury is never Minor. It should always be compensable"

2. Don't Build Your Client's Case.

You should not be the one who suggests to your client that perhaps he/she suffered a traumatic brain injury. You also should not be the one to suggest to your client that any condition that he/she has following a traumatic injury to the brain may be permanent. Leave the medical issues to the doctors and other health care providers. Don't refer your client to any doctor for the purpose of an evaluation concerning possible traumatic brain injury. If your client is complaining of problems you recognize to often be associated with traumatic brain injury, have your client, family member or nurse case manager set up the referral. Likewise don't give your client any medical articles about traumatic brain injuries. A common defense tactic in these type of cases is to argue that traumatic brain injury cases are the creation of plaintiff's lawyer's.

IV. Thoroughly Investigate Your Client's Past Medical, Employment, Educational, Military, and Personal History.

1. Obtain a copy of all employment and unemployment files that exist with regard to your client's past employment.
2. Obtain social security earnings records.
3. Get a copy of all school records including any testing of basic skills.
4. Get a copy of the complete military file, including any psychological evaluations.
5. Get a copy of all medical records from birth to present.
6. Determine your client's past history with regard to alcohol and drug usage.
7. Obtain a copy of all prescription records.
8. If possible obtain a copy of all applications for health insurance, disability insurance, or life insurance.
9. Obtain a copy of all records with regard to counseling of any type.
10. Get a copy of any criminal records.
11. Obtain a copy of court files especially if those matters involve personal injury; work related injuries; or dissolution.

V. Thoroughly Prepare Your Client For His/Her Deposition and Independent Medical Evaluation

1. Use of medical history notebook.
 - a. used in doctor appointments
 - b. used in deposition
 - i. to refresh recollection of important events

- ii. to chronologically present occurrence of medical treatment
- c. used at IME's

2. Use of nurse case manager.
 - a. organize pertinent medical past and present
 - b. coordinate medical plan and treatment
 - c. obtain medical recommendations and evaluations
 - d. attend medical appointments and evaluations including IME's

3. Use of informed family member, close friend, or concerned fellow employee.

- a. Develop a strong relationship with one of these individuals. These individuals can assist you in informing the client of important appointments; help insure that your client follows doctor's advice; and serve as someone to reinforce your work and representation of the client.

- b. These individuals can serve as important before and after lay witnesses.

4. Prepare your client for the deposition at the outset of your representation. Your client must know from the beginning that he/she will probably be deposed and then testify in court. You should continually remind your client to keep a record of important events; keep a record of difficulties in daily living; and to maintain contact with friends, family members and co-employees.

- a. Schedule a conference with your client a few days before the deposition to go over their case and actually conduct a sample examination.

- b. Schedule a conference with your client a few hours before their deposition to go over last minute questions and concerns.

VI. Voir Dire In a Traumatic Loss of Brain Function Case.

" Your client walks and talks-- what's the problem".

1. Jurors will be resistant to the idea that a minor blow to the head or no trauma to the head can cause an injury to the brain. When you first start talking to the jury about your client's case ask them general questions initially about their experiences concerning head injuries. Have you ever suffered a blow to your head? Ever been dazed following a blow to your head? Ever been knocked out? Ever been unconscious?

2. Then ask the jurors if they have or if someone they know has ever suffered an injury to the brain? How did they know the brain was injured?

3. Then ask the jurors questions about their experiences concerning brain damage following accidents or injuries.

4. Ask the jurors if they or someone they know has ever been told by a doctor following a blow to the head to call the doctor immediately if the injured person experiences dizziness, confusion, vomiting, headaches, nosebleeds, nausea, etc. Also ask the jurors if they have ever been told by a doctor that after an injury to the head the injured person should be watched to make sure they don't fall asleep for a certain number of hours.

5. Talk to the jurors about their experiences or knowledge with regard to boxers who today suffer from brain dysfunction following repeated blows to the head.

6. Talk to the jurors about their experiences with regard to dealing with a physical problem and having to go to several doctors before they found someone who would listen to them and fully examine them. Have they or someone they know ever had an experience where all of the medical diagnostic test were negative and yet after several examinations by different doctors they were finally able to get to the bottom of the problem?

7. Ask them if they know of anyone who is disabled from the standpoint of seizures and yet all of the diagnostic tests were negative? Do they have any experience with negative CT scans, negative x-rays and negative MRI's and yet there was still a problem?

8. Ask jurors about what they would expect to see in a person who following brain injury suffers from problems with their behavior, emotions, or memory? Do they know of any tests that can be done that will show what amount of damage to the brain has to be present before there is a change in behavior, emotion or memory?

9. Ask jurors what they would do if they had a physical or emotional problem and after treatment by several doctors their problems weren't any better.

VI. Know How To Use Medical Literature To Support Your Case

IOWA RULES OF EVIDENCE

1. Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the trial or hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

a. The determination whether a particular fact or data not otherwise admissible are of a type reasonably relied upon is to be decided upon by the court

b. You must demonstrate that the information is the type that is customarily relied upon by experts in their work and that the information is sufficiently trustworthy to allow reliance upon it to be reasonable

- your expert's reliance on the facts or data is not enough

c. the facts or data may be disclosed to the jury on direct or cross examination to demonstrate the basis of their opinion

d. you can probably get a limiting jury instruction that the facts or data admitted under this rule are only to be considered for the purpose of determining the basis of the expert's opinion and not as substantive evidence

2. Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

a. Rule 703 and 705 read together allow the court to permit the expert to state his/her opinion right after they have been qualified.

b. This rule allows the discovery of the underlying bases of the expert's opinion both before or after their opinions are given.

c. This rule does allow the court to require use of hypothetical questions.

d. This rule does allow the court to permit an adverse party to conduct a preliminary voir dire examination of the expert to uncover the facts or data upon which their opinion is to be based. If the expert doesn't have sufficient facts or data upon which to base their opinion, the trial court can exclude their opinion.

3. Rule 803(18). Hearsay Exceptions-Learned Treatises

To the extent called to the attention of an expert witness upon cross examination or relied upon by that witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of ... medicine, or other science ... established as reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial

notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

a. The medical treatise or journal article can be established as a reliable authority by the plaintiff's expert and then be used in cross examination of the defense expert.

b. The statement may be read into evidence but the treatise or article itself should not be given to the jury.

c. The statement from the treatise or article should be called to the attention of the testifying witness and then have the witness explain the statement to the jurors.

d. In cross examination of the expert witness, questions can be asked of the witness to discover what data was relied upon, including the failure to rely upon authenticated treatises or articles.

VII. Conclusion

The representation of clients who suffer loss of brain function following trauma is very challenging. If you decide to handle these type of cases, you must never stop believing in your case and be willing to do the following:

a. Learn and stay current with the vast amount of medical literature.

b. Understand the biomechanics of brain injury; and

c. Want to work with a client for life.

If you have a loss of brain function case in your office and you don't believe that at the present you are prepared as you need to be, give consideration to affiliating with someone with more knowledge and experience. For you it is only one case-- for your client it may literally be everything.