

# HANDLING A BRAIN INJURY CASE: SPEAKER NOTES

*To Accompany Corresponding  
PowerPoint Presentation of the Same Name*

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### Introduction

- The most complex case a plaintiff's lawyer can face is one where his client suffers a brain injury as a result of an accident. It is difficult because 9 out of 10 traumatic brain injury cases involve injuries that are not visible to ordinary people. So how will a jury believe that your client suffered a brain injury?
- Obviously there are the straightforward brain injury cases where the plaintiff suffered a fracture to his or her skull and all experts agree that there was organic damage which is causing the plaintiff's symptoms.
- The problems lie in the case where the physical damage does not show up on CT scans or MRI's. The plaintiff often looks normal, and this appearance can be terribly deceptive. He or she may speak well, and this is an even greater problem to overcome. But the brain, like an atom if broken or split, causes an explosion of misery and pain that is horrendous. When the brain is damaged, there is no tool available for the surgeon to come and fix it. We depend on nature and nurture and the ability to compensate.
- Family and friends of the person who suffered a brain injury will feel the devastation sometimes as much or more than the injured party.
- The overall objective for a lawyer in a brain injury case is to convince a jury that an organic injury has occurred, that it is permanent, and that it is the main reason for your client's impairment.

- As much has been written with respect to proving liability, economic loss and family loss related to a negligence case, this paper is only intended to cover aspects of preparing a brain injury case for trial.
- Taking the Case
- Agreeing to take a brain injury case is a dramatic investment for a lawyer in many ways.
- Consider the following case:
- Your client, Mrs. Reynolds, was a driver in a car accident that occurred on a relatively busy road. The accident occurred at night. Mrs. Reynolds was proceeding on a road when a van pulled out from a side road to make a left turn. Mrs. Reynolds slammed into the right front corner of the van as the driver of the van made his turn. Both drivers were seriously injured. When the ambulance arrived, Mrs. Reynolds was dazed but able to respond to verbal and physical stimuli. She scored 11 out of 15 on the Glasgow Coma Scale for her loss of awareness. She was lucky to survive the accident.
- The Initial Visit
- When the client visits the lawyer for the first time, the lawyer usually has little or no information about the case. These first meetings are extremely important. Both the client and the lawyer have to like each other right away. Clients, for the most part, are not familiar with the intricacies of the legal system and don't know the lawyer, so they are usually a little apprehensive and uneasy. The lawyer, being familiar with the system and cases like this one, should help put the client at ease.

- During the interview, the lawyer thinks of two main issues in an accident case: liability and damages; whereas a client may be thinking of any number of things and is anxious just to tell the entire story. Therefore, the lawyer in an initial interview must be a good listener as well as a persuasive speaker.
- Once mutual trust is established, the client and lawyer can work well together.
- The client should get information from the lawyer such as:
  - "Have you handled cases like this before?" ... "How many?"
  - "Are you familiar with the medical aspects of a case in which there is a brain injury?"
  - "Have you written any articles?"
  - "What references can be supplied?"
- Finally, the lawyer should satisfy himself or herself that the client has a genuine injury by examining the most reliable evidence. It is essential to speak to the family members and friends closest to your client in order to find out how your client was before the accident. In brain injury cases, you will often hear that your client was high functioning before the collision and now is unable to concentrate in a busy environment. They may also tell you that your client is no longer the same person, lacks motivation and fatigues easily. Finally, you are told that your client's personality has changed, gets frustrated easily and lacks confidence, traits rarely displayed before this accident.
- *Clients Dissatisfied with Prior Counsel*
- Many plaintiffs who have suffered traumatic brain injuries have unrealistic expectations regarding how their lawsuits should be handled or how they should eventually turn out. Most lawyers are contacted by brain injured plaintiffs who are dissatisfied with the

legal counsel they have previously employed. The most common complaint heard is that the present lawyer doesn't understand the client's brain injury and the problems that flow from such an injury. Lawyers should be guarded in taking on these cases. The lawyer should, in most cases, get the client's consent to discuss the case with the previous lawyer before agreeing to handle the case.

➤ Acquiring Documentation

➤ In building your case for trial, you must obtain all relevant records relating to your client's accident. In brain injury cases, a lawyer will have to assemble massive amounts of documentation. Medical, employment, school and accident benefits documentation will comprise the bulk of such evidence.

➤ From the outset, the lawyer must thoroughly investigate the facts surrounding the case. Obtaining a copy of the Motor Vehicle Accident Report and police field notes will provide a basic understanding of the factual circumstances surrounding the accident. If liability is an issue, an investigator will need to be retained to interview any witnesses, police and visit the accident scene to assist in accident reconstruction.

➤ *Evidence of Vehicular Damage*

➤ Whenever your client's vehicle or the defendant's vehicle is obviously damaged, photographs of the vehicle's damage are powerful. Photos may have been taken by witnesses, newspapers, the client, family members, police or the insurance company for property loss insurance. Any obvious damage to the interior of the car caused by your client's head should be demonstrated visually and discussed by every witness who can do so.

- If there is no vehicular damage, a biomechanical engineer, supported by a reconstruction engineer's estimate of speeds, can explain how the force of the collision can cause a brain injury notwithstanding minimal damage.
- *Photos of Injuries*
- Not surprisingly, jurors find it easier to believe the brain is injured if the head or face is injured. Not infrequently, there are very early photos available which record black eyes and cuts to the head. These photographs are important corroborative evidence which are especially effective when enlarged or when projected.
- Later, when an expert is explaining the area of the brain which has been affected, it is persuasive to refer to the photograph and have the expert confirm that the affected part of the brain is in the general area to the laceration or bruising.
- *Ambulance Call Report*
- The first record to review is the Ambulance Call Report. If the Ambulance Call Report contains any evidence which demonstrates a brain injury, it presents demonstrative evidence which is objective. This evidence, once shared with a Court, will be important for describing your client's condition shortly after the accident.
- You may highlight a reference to disorientation or recording of a period of unconsciousness. Secondly, there may be a record of bruising or lacerations to the head. Finally, you will want to emphasize the Glasgow Coma Scale that supports your case.

- Every expert who comments on your client's injuries will refer to the Ambulance Call Report and this is why this document may be one of the most important pieces of evidence in the case.

- *Hospital Records*

- Next, the emergency records of the hospital where the client was taken must be carefully reviewed. The records will contain the initial history taken and nurses' notes and assessments while at the hospital. Records that indicate a low Glasgow Coma Scale score or disorientation will help demonstrate the continuation of the injury at the hospital. Oftentimes a patient with an acquired brain injury may become violent or aggressive to the hospital staff, which can demonstrate a frontal lobe injury.

- Hospital records can also be used to demonstrate the consistency of symptoms of your client. For example, if your client complains of headaches and the nurses' notes reveal the same complaint, this can be compared to your client's later complaints to other specialists.

- *Radiographic Evidence*



From the time of a patient's arrival at the ER through follow-up treatment, a wide variety of complicated testing can be done to help demonstrate the brain injury.



There are two types of neurological tests: those that examine the structure of the brain and those that examine the function of the brain. The CT scan and MRI look at the structure of the brain. The electroencephalogram (EEG), SPECT scan, PET scan and evoked studies examine the function of the brain.

- **MRI and CT Scans**



The MRI and CT scan slice the brain radiographically into slabs. The MRI does this with magnetic fields while the CT scan uses x-rays. The MRI provides more detail than the CT scan. Hence, brain damage as seen on an MRI, as small as 1-2 mm in size, may escape detection by a CT scan. The CT scan is superior to the MRI in detecting fresh blood in and around the brain, while the MRI is better at detecting the remnants of old hemorrhaged blood, called hemosiderin. CT scans are often repeated to ensure that a brain injury is not becoming more extensive, usually in the early stages of ER treatment.



Being so very sensitive, the MRI commonly detects clinically silent (asymptomatic) "brain damage" in the normal population. For example, as we age it is common for myelin in the white matter to degenerate (myelin is a jacket of insulation around axons to help them conduct their electrical discharges quickly down the axon). An MRI can detect this myelin degeneration as white matter hyperintensities. The MRI is also sensitive to cerebral atrophy (shrinkage), another normal phenomenon as we age. Excessive numbers of white matter hyperintensities or excessive atrophy signal a possible neurologic illness or injury.

#### ➤ **PET Scan (Positron Emission Tomography)**



PET scanning is based on the fact that the brain uses glucose for energy. By labeling a glucose molecule with a radioactive "tag" and then inhaling radioactive glucose and placing the patient's head under a large geiger counter, one can identify abnormal areas of the brain that are underutilizing glucose. Because cyclotrons are needed to generate the radioactive gas, PET scanning is not widely available.

#### ➤ **SPECT Scan (Single Photon Emission Computed Tomography)**

➤ SPECT scanning is similar to PET scanning in that a radioactive chemical is administered intravenously to the patient, but the radioactive chemical remains in the bloodstream and does not enter the brain. As a result, the SPECT scan maps the brain's vascular supply. Because damaged brain tissue normally shuts down its own blood supply, focal vascular defects on a SPECT scan are circumstantial evidence of brain damage. The advantage of a SPECT scan over a PET scan is it is readily available and is relatively cheap. Recent studies have demonstrated abnormal SPECT scans after head trauma when the CT and MRI were normal, suggesting that the SPECT scan is more sensitive to brain injury than either CT or MRI scans. Because the radioactive chemicals used in SPECT and PET scans are carried to all parts of the body by vascular tree, SPECT scans and PET scans are used judiciously in patients of reproductive age.

➤ Obviously there are great limitations to medical science in revealing the intricacies of brain injury. As advocates we must not forget that most jurors will be relying on the evidence of the experts in making their decisions regarding the case. Most jurors will be learning about brain injury for the first time. The lawyer must remind the jurors through expert testimony that although science has come a long way, it is still in its primitive stages. Thus, more reliance can be placed on the lay witnesses who describe how the plaintiff has changed.

➤ Referral to an Expert for an Evaluation

➤ While the plaintiff has probably seen a number of experts since his or her accident, there are often occasions where the plaintiff has not seen the appropriate medical care provider. For this reason it may become necessary for solicitors to refer their clients to additional experts for further clinical evaluation.

- Oftentimes while proving that your client's injuries are caused from an acquired brain injury, a lawyer will retain a neuropsychologist. Test results are open to interpretation and debate. If the client moves about normally, speaks articulately and looks perfectly healthy in the structured environment of the courtroom you can expect the defence experts to disagree with your experts.
- Other experts will be retained who are not part of the medical treatment team, some of which may include vocational experts, life care planners and even economists.
- Discovery
- Before a case goes to trial, the lawyers for both parties know not only the case but also the other side's position on all the issues. The system is designed to prevent surprises. In the discovery phase, a lawyer will ask questions under oath of the adverse party. This form of oral testimony provides both the plaintiff and defendant with the clearest view of anticipated trial evidence. The views of the deponents become "locked down" and difficult to alter later during trial.
- With a brain injured client is important to remind them that all question put to them are assumed answered as if they have a complete and accurate recollection of the evidence. Often the opposite is true. The lawyer representing a brain injured client must take ample time in advance to prepare their client for this examination so that the evidence is not misconstrued.
- Keep in mind that the defence will attempt to use the Examination to undermine your client's credibility by obtaining admissions, which are contrary to your case or commit your client's evidence so that it can later be contradicted through expert opinions or surveillance.

➤ Lay Witnesses

- Lay witnesses are people who have known the plaintiff both before and after the date of injury. These include family members, friends, neighbours and co-workers of the plaintiff who help to validate the testimony of the plaintiff and the experts during a trial. These witnesses can be very persuasive because their testimony is easily understood and can often describe the plaintiff's subtle injuries vividly.

➤ Developing a Theme

- The theme is the word or phrase that constantly reappears in the litigation to focus the jury's attention upon what the case is really about. Selecting one or more themes is of crucial importance. Themes are like magnets, which constantly attract notice. They must be designed to trigger both rational and emotional responses in jurors. In formulating trial themes, lawyers should focus upon facts, which may be expressed using high impact language, and illustrated by high quality demonstrative evidence. Themes that emphasize "quality of life" issues tend to dominate the brain injury cases because of the severe impact a brain injury may have upon the lives of individual plaintiffs.
- There is nothing more effective in persuading any jury of organic injury than evidence that demonstrates that the plaintiff was having a successful and satisfying life before the accident. A timeline can often be persuasive in demonstrating an absence of medical treatment and consistent employment before the injury.

➤ Settlement before Trial

➤ Most times cases settle prior to trial. After a suit is filed and the case proceeds, but before the trial begins, the parties can agree to settle. If that occurs, then one side agrees to pay a sum of money to the other, and the other side agrees to accept it as payment in full for the injuries suffered. Usually a settlement is a good thing. In a settlement, no one loses. The insurance company pays something, maybe a little less than expected by the plaintiff, but the risk of a trial is avoided. In all trials there are big risks for both sides.

➤ The Overall Challenge in a Mild Brain Injury Case

➤ Most insurance adjusters and defence lawyers take a jaundiced view of mild traumatic brain injuries. Some have commented that it represents the "whiplash of the new millennium". Despite this cynical approach, the lawyer taking on a brain injury case must look for proof of an organic injury in order to defeat the following standard defences:

➤ No loss of consciousness: Plaintiffs who sustain mild brain injuries often do not experience true loss of consciousness. Expert witnesses will help present evidence that loss of awareness, confusion or dizziness as a result of trauma can cause significant neurological problems.

➤ The impairment was pre-existing from long standing pre-accident emotional problems.

➤ The injury, if there is one, is only an emotional one that can be cured through treatment.

- Negative neuro-imaging results: The absence of positive findings by examinations such as a CT scan or MRI should not be treated as evidence of a lack of injury.
- The client is malingering: Defence counsel will insist that the plaintiff is intentionally producing false or exaggerated symptoms motivated by the desire to obtain financial compensation through litigation. Usually malingering can be detected in psychological testing.
- Trial
- If the sum of money offered by the insurance company is not accepted by the plaintiff, then the matter will proceed to trial. A trial is a risky venture: one side may win a lot of money or get nothing. In any event, the costs of a trial can be extremely expensive for the loser.
- Trials can be decided by judge alone or by judge and jury. While negligence cases are brought against the individual who caused the accident, there is always the presence of the insurance company behind the scenes as they are responsible for protecting the defendant up to the limits of their policy.
- If you are to persuade the jury that an injury has occurred, you must find a way to overcome the appearance of normalcy as the plaintiff gives evidence. One way to do so is to graphically explain the mechanism of injury so that the jury can appreciate that the brain can be permanently injured without any permanent change to the appearance of the head or face. There is no more effective way to explain the mechanism of injury than to show it, either through the use of medical-legal illustrations, animations or other artwork.
- Conclusion

- In conclusion, the presentation of a brain injury case is extremely challenging. The lawyer undertaking such cases should be familiar with the long-term consequences of brain injury. If the lawyer does not cover all facets of the case with appropriate witnesses and other evidence, he will do himself and his client a great disservice.