

Overcoming Problem Areas in Brain Injury Litigation

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Introduction

When representing a survivor of a brain injury, it is imperative that one recognizes the vulnerability of the client and the necessity for specialized legal services. This article is directed specifically to considerations to be taken into account by legal counsel. In addition, this paper may be used to instruct individuals with TBI and their families so they may assist in the preparation of the case.

Initial Interview

Advocating for individuals with TBI is a serious commitment which can be highly rewarding, both personally and professionally. Conversely, brain injury cases offer a certain challenge since the physical impairments associated with TBI are often complicated by behavioural or cognitive concerns. The anatomical structure of the brain makes the frontal and temporal lobes particularly vulnerable to trauma. Injury to the frontal lobes interrupt executive functions and may lead to: inability to concentrate, a lack of insight and motivation, poor judgment, loss of impulse control, and rigidity. This makes these individuals vulnerable to the legal system and decreases opportunities for self-advocacy.

A complete list of symptoms may be difficult to obtain because of the lack of insight and denial that often results from a frontal lobe injury. The attorney must be careful initially not to suggest symptoms to the client through questioning unless they have strong independent information to confirm the problems. These clients are susceptible to suggestion and may develop some of the symptoms suggested. However, once the deficits are known, it is important for the person to be aware that it is normal to have these deficits following brain trauma. Accordingly, most brain injury rehabilitation centers supply information to their patients to give them insight into their problems.

The temporal lobes and adjacent structures direct memory. It is very likely that, if the incident involved a traumatic event, the temporal lobes will be affected. The combination of problems with concentration and memory, result in the client's inability to recall historical details, and their inability to process new information. Consequently, it is often difficult for these clients to follow legal and medical advice.

Capacity

In consideration of the deficits which may ensue after a brain injury, it is imperative at the initial interview to determine whether the injured person has the capacity to retain an attorney. In cases where the attorney is in any doubt regarding capacity, an opinion from the supervising professional is necessary. In persistent cases, (i.e. slow to emerge from a coma), a "guardian" may have to be appointed by the court.

Circumstances of the Accident

In most cases when a person sustains a brain injury, they may have amnesia for the events surrounding the incident. Immediate investigation into the facts and circumstances

of the incident is critical. The attorney must take steps to preserve physical evidence, obtain photographs, confirm the names of eyewitnesses and obtain statements from them while their recollections are fresh. All reports from police, ambulance and other individuals in the incident should be obtained. Depending on the degree of the injury, early consideration may be given to retaining an accident re-constructionist or consulting engineer.

Exhibit Documents to be Obtained

Documentation of every aspect in a brain injury case is extremely important since the client may not be a reliable historian. The attorney must have all aspects of the case investigated and documented in advance of any examinations by doctors and other experts hired by the defendant. Although the following list is not exhaustive, it enumerates important documentation:

- Educational background/ school records;
- Employment records;
- Tax returns/ accounting records, bank statements
- Previous psychiatric, psychological or aptitude testing (if appropriate);
- Previous brain injuries;
- Complete hospital charts and records;
- Pre-accident records from family doctors and specialists.

Expert Evidence Necessary

Brain injury cases may be difficult to present at trial. Many with a brain injury look perfectly normal. There may be no external evidence of disability. Further, to the lay person, the client's deficits may not always be discernible, and clients with brain injury often over-represent their abilities. They are invariably optimistic about their recovery and capacity to return to a high level of functioning. They do not want to be labeled as brain-injured. Much confusion and misunderstanding surrounding the effects of brain injury stems from what is referred to as the "Hollywood Head Injury Myth", or the "Three Stooges Model" of head injury . In the movies or on television people are often hit over the head with heavy objects, kicked, punched or thrown, sustaining blows that would be fatal in real life, only to shrug them off with no apparent adverse effects. These falsely innocuous injuries present doctors, nurses, judges, juries and attorneys with erroneous images of head injury which are later brought into the clinic and courtroom. The attorney's challenge is complicated by the fact that the healthcare system often lets persons with brain injury down. There is very little follow-up built into the system and, because of the inability to initiate and follow through, patients are often left untreated. Accordingly, it is very common for people with brain injuries to become confused, depressed, and feel abandoned.

Rehabilitation Case Manager

The attorney's job will be significantly eased by retaining an experienced case manager. The case management field has been expanded in recent years, and many of the people who are holding themselves out as case managers sometimes have very little experience.

Management of a brain injury case is a highly specialized area. The attorney should be familiar with those people in the industry who are specialists in managing brain injury cases. If the insurer suggests a caseworker that does not have a known reputation for dealing with TBI cases, the attorney should meet with that person and become satisfied as to their qualifications and ability to manage the client's treatment. If attorneys are still in doubt about the case manager's competence, then they should consult with a local brain injury association, known experts in the brain injury rehabilitation field or with other attorneys who devote their practice to brain injury cases. Failure to involve an experienced case manager (CM) can rob clients of important opportunities for treatment and exacerbate problems thereby setting back the client's ultimate recovery. If the attorney is going to handle brain injury cases, they must keep in constant communication with the case manager and monitor the CM's involvement through periodic case conferences. The client is entitled to feel comfortable with all the professionals involved in their life. It is important for the attorney to listen to their client's feedback about the CM. However, it is common for the people with brain injury to complain about their CM and these complaints are not always informed or legitimate. The attorney should encourage the client to cooperate with the CM selected, otherwise the defence will allege non-compliance and failure to mitigate damages.

Other Experts Required

Each brain injury case must be viewed individually and the selection of experts should be based on the particular deficits of the injured person, as well as the expert's personality, location and expertise. A great disservice may be done to the client and eventually the case, if attorneys simply have a static list of experts to whom every client is referred. The attorney must keep in touch with the medical community and be aware of the special qualifications of a growing number of experts.

Communication with the Client

People who have sustained brain injury can be very demanding clients in many respects. Because of problems they may have with memory and concentration, clients often forget information that has been provided to them or they focus only on a single issue and forget anything else that has been discussed. It is also important to keep a "paper trail" flowing to the client, including copies of correspondence sent to others. This informs the client that work is being performed on the file. It may also be helpful to provide them with written reports of any meetings between the attorney and the client to highlight issues that were discussed and decided upon to avoid misunderstanding later. As a general rule, clients with brain injury should not, however, be provided with copies of their medical reports. Treating clinicians usually prefer to discuss their findings with the client in person and are often reluctant to express a negative prognosis in writing if they think the client will read it.

Examination for Discovery

The attorney cannot prepare individuals with brain injury for a legal examination in the same way other clients are prepared. Individuals with brain injury are usually not able to remember many of the details discussed during preparation. More often than not, they are

not even able to provide complete lists of all their problems, without prompting. It may be helpful to start of the Examination of such clients by making a statement o the record advising the opposing counsel that the answers which these clients give may not be reliable because of the nature of the injury. As mentioned earlier, the attorney's time in preparing for legal examinations is well spent if family members are asked to corroborate information provided by the client. It is imperative that the attorney be familiar with medical records so that if the client says anything inconsistent with those records, a correction on the record can be provided.

One of the most common features of brain injury is fatigue. Especially under stressful circumstances, the client will tire very easily. Attorneys should not subject the client to long periods of examination without a break. Additionally, the client's answers are likely to become more unreliable as they become more fatigued. When the attorney sees this happening, the examination should be adjourned and continue later. If impulse control is a problem for the client, then the attorney must be extremely careful to observe signs of agitation and take a break to avoid complete loss of control. Although the inability to control temper and other impulses is a serious feature of many brain injuries, it remains very difficult for others to understand. Often a person being belligerent and angry during examination causes the defence counsel to dislike clients and to assume that they will make a bad impression as witnesses at trial.

Common Tests, Scales, and Measurements to Determine the Extent of Brain Injury

Glasgow Coma Scale

Jennett and Teasdale(Scotland) devised the Glasgow Coma Scale (GCS), which is a simple objective measure of a person's ability to respond to the environment or consciousness- by testing motor response, verbal response and eye-opening. Current use of the GCS shows that it is most reliable when the lowest score in the first 24 hours post-trauma is used as the objective measure. Although this scale is helpful and easily administered, it is not absolutely predictive of the nature and the extent of injury and long-term disability; in fact, there is a wide variability in all three sub-categories of head injuries using the GCS.

Glasgow Outcome Scale

The Glasgow Outcome Scale was developed by the same two individuals in Scotland. This scale is a very global measure of outcome that characterizes patients and divides them into five very large categories. It provides little insight into the person's functional capabilities or real life skills. It can rarely be used to adequately predict income for mild or moderately brain injured persons.

Duration of Loss of Consciousness

Here is considerable evidence reporting that one does not have to experience a loss of consciousness (LOC)to sustain a brain injury. However, duration of loss of consciousness is one common tool used by neuropsychologists and others to determine the extent of the

brain injury. The period of LOC may vary from a matter of seconds to a persistent loss of consciousness or coma that may last days, weeks, months or years. Duration of coma is a direct correlate to the severity of traumatic brain injury and resulting impairments. Thus, individuals who have a LOC of less than a minute have a minor brain injury; those with a LOC between a minute and an hour are deemed “mild”. Loss of consciousness that last from one hour to one day are termed “moderate” in severity and LOC that persists between one week and one month is “very severe” and between one month and three months is extremely severe. Those who remain comatose for longer than three months are in a persistent vegetative state (PVS).

Period of Post-Traumatic Amnesia

As related in Jennet and Teasdale’s text on the management of head injuries, emergence from coma is generally marked by the return of speech or an equivalent signal from the patient and by the capacity to obey spoken commands. The return of continuous memory and the end of post-traumatic amnesia (PTA) do not occur until much later. Duration of PTA is commonly three to four times that of the period of observed unconsciousness and, therefore, with the severity of the overall injury. Other investigators have determined that PTA may indeed be more reliable as the measurement of severity of injury.

Neuropsychological Tests

The use and abuse of neuropsychological testing is an extremely complex issue. The attorney advocating on behalf of a brain injured client must have a good working knowledge of the type of tests administered and how they support the theory of the case. On the other hand, the attorney must recognize the limitations of psychological tests in order to cross-examine the neuropsychologist or psychometrist retained by the defence. Certain extraneous factors could produce inappropriate interpretation of raw data- i.e. pain, depression, anxiety disorders, psychiatric illness, fatigue, and test anxiety amongst others. In addition, the practice of having two Examinations within six months of each other will probably cause the scores on the latter exam to be higher. Other factors such as the inability to compare the pre-accident level of functioning may make it impossible for the neuropsychologist to come to an accurate opinion. Subjective human judgement in the interpretation of the raw data and the tests administered can also result in extreme variances.

Recovery from Acquired Brain Injury

Often the defence experts state that the plaintiff has recovered from the brain injury. The issue of whether or not an injury to the brain is one which will recover is often the central medical/ legal issue. It is well understood that the brain is one of the few organs in the body which has no capability naturally to regenerate its primary tissue after cellular damage. The brain cannot grow new neurons to replace those which have died. Physical recovery of function after brain injury occurs fastest in the first six months following injury. However, recovery may continue for a considerable length of time. In the case of significant brain injury, disabilities are usually long standing and often take on a new importance as time passes. The fact that overall outcome relates to the original severity of

injury is helpful. This does not necessarily mean that, in an individual case, a severe brain injury will lead to a severe disability in all realms, or conversely that a mild brain injury will lead to mild problems or none at all. Other predictors seem to relate to the individual's traits.

However, the long-term outcome for individuals with moderate and severe brain injuries, in general, is poor. This does not imply that life is not worth living or that the investment in rehabilitation efforts is inappropriate. In the case of children who have sustained a serious brain injury, long-term outcome is complicated by the fact that the brain itself has not finished developing prior to adolescence. Therefore, the impact of a brain injury cannot be fully assessed until this maturation process has been completed. The impression that young children have a better capacity to recover from TBI than adults is unfounded and in fact contrary to the research evidence.

Lay Witnesses

Probably the most important evidence in a TBI case is that obtained from lay witnesses. Family members, friends, relatives, employers, co-workers and others who knew the person before and after the accident are the most difficult witnesses for the defence to overcome. They should be able to describe in graphic detail changes in personality, loss of initiative, indecisiveness, inability to cope, deterioration of friendship and the limitations that affect the ability to work. Video and other demonstrative evidence to supplement the testimony of lay witnesses can be helpful. Photographs, awards, certificates of excellence, letters etc., help supplement this testimony. A video of the plaintiff's job function demonstrating every detail of the mental and physical requirements cannot be replaced by a simple job description by his employer.

Defence/ Medical/ Health Care Professional Examinations

One of the most difficult problems facing lawyers handling TBI cases is overcoming the dreaded defence "medical" examination of the plaintiff. The negative impact of these examinations can be minimized with proper preparation. When you have incontrovertible evidence documenting the deficits of the plaintiff, a brief should be prepared by the solicitor to summarize the deficits. This brief should include copies of all supporting medical reports, excerpts from evidence obtained from lay witnesses, a full job description, a description of the problems that the client is experiencing in fulfilling the job function and any other relevant information. Not only does this brief help refresh the plaintiff's memory but it also will help you get as favourable opinion from the defence experts as possible.

Rehabilitation Complications

Chronic Pain/ Fibromyalgia- frequently a person sustains other injuries along with the brain injury. The most common are soft tissue injuries which often develop into "*chronic pain syndrome*" or "*fibromyalgia*". It is important for the solicitor to alert all providers of rehabilitation about other injuries so that the appropriate treatment can be obtained. If the rehabilitation provider is aware of all injuries, allowances can be made for abhorrent behaviour.

Post-Traumatic Stress Disorder- Similarly in some cases where the diagnosis of *post traumatic stress disorder* (PTSD) has been made, inappropriate treatment may be pursued if the brain injury is overlooked. Seldom is a diagnosis of PTSD made where the brain injury is severe. However, there is considerable evidence that it can co-exist with brain injury if the injury is mild and there is little or no amnesia of the event which caused the recurrence of the traumatic event.

Development of Future Care Plans

One of the largest damage components to any brain injury claim is the cost of the future care. It is important to retain an expert who can perform this type of investigation. Such experts can come from many disciplines. Case managers, physiatrists or others who have been coordinating the rehabilitation for your client should be the first line of choice. Their evidence can later be supplemented by evidence from other experienced experts. The solicitor should make sure that all anticipated costs are considered, i.e., health care examinations, drugs, therapeutic appliances, modifications to vehicles and homes, specialized hardware and cognitive rehabilitation tools, etc.

Conclusion

People with brain injury are extremely vulnerable and require specialized legal assistance. These people will have a difficult time facing life with their deficits. It is the responsibility of the TBI advocates to ensure that clients obtain the maximum treatment, rehabilitation, and financial compensation the civil justice system provides.

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