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MANAGING THE STEALTH TBI CLAIM

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MANAGING THE STEALTH TBI

Mental injuries are a fertile area for enhanced damage claims by plaintiffs. The trend in non-catastrophic cases, with few or no symptoms, is for plaintiffs' counsel to abandon medicine and science in favor of lay evidence to support otherwise undetectable mental injuries beyond general emotional distress connected with an accident. Memory loss, headaches, fatigue, confusion, inability to work or function and personality changes are among these types of claims. This panel will discuss what these trends are, what plaintiffs' tactics are and what strategies the defense might consider to counter this trend.

A. Traumatic Brain Injury ("TBI") Overview

a. What is a TBI?

The definition of a TBI is "an alteration in brain function, or other evidence of brain pathology, caused by an external force." *See* Brain Injury Association of America. A TBI is a brain injury. However, a head injury may not include a brain injury, even though the two terms are frequently used interchangeably. Importantly, a person can have a TBI with no evidence of any abnormality on a diagnostic study.[1] A primary question for doctors is whether the injury is to the head, the brain, or both. Common causes of TBIs include the following:

- Motor Vehicle Accidents
- Falls
- Work Related Injuries
- Assaults
- Struck by or Against Something

The most common cause of a TBI is a direct injury. A direct injury arises from acute head trauma – an injury to the head from an external force. A less common cause of a TBI is an indirect injury which does not involve any contact between the head and any other foreign object or surface. Instead, head acceleration or linear forces subject the brain to stress causing injury. This is commonly called a coup contrecoup injury, where the brain accelerates in the skull, and then decelerates causing injury.

There are two basic types of TBIs – severe and mild. This article focuses on the mild TBI as they are the most common and the current trend in litigation is to claim mild TBI. Generally, these cases involve an injury to brain without observable physical damage to the brain – more commonly referred to as a concussion. These cases should be litigated completely differently than severe TBIs, and can be more difficult to defend.

Mild TBI Symptoms are generally referred to as Post Concussive Syndrome and include the following:

- Headaches
- Fatigue
- Sleep difficulty
- Anxiety
- Depression

[1] A diffuse axonal injury can occur, where the connections in the brain called axons become altered. There is no current diagnostic test that can be performed on a living person to detect if this exists. A postmortem pathologic examination of brain tissue can make a definitive diagnosis.

- Dizziness/Lightheadedness
- Memory Problems
- Confusion/Agitation

Mild TBIs are diagnosed based on neurological signs present shortly after traumatic event. Only one of the following neurological signs needs to be present:

- Loss of consciousness
- Altered consciousness (i.e., confusion, dizziness, agitation, etc.)
- Post-traumatic amnesia (i.e., memory loss)
- Positive finding on diagnostic imaging (MRI or CT)
- Concussion

To be clear, very little must be shown for a diagnosis. A mere complaint of altered consciousness is enough. In some medical records, a mere headache is diagnosed as a concussion. So, this is a very low bar. In addition, many of the symptoms are very subjective which raise issues that are discussed below.

b. Why are mild TBIs Significant?

i. Growing Trend in Civil Litigation

Studies show that lawsuits alleging brain injuries have tripled in the past 20 years – why? One reason is large verdicts in mild TBI cases. Plaintiffs' lawyers have noticed the occasions where relatively minor accidents result in seven and eight figure verdicts because of mild TBIs. Another reason is public awareness of brain injuries. There is no better example than the NFL. Take, for example, the 2015 movie Concussion. Set in 2002, the film stars Will Smith as Dr. Bennet Omalu, a forensic pathologist who fights against the NFL trying to suppress his research on CTE brain degeneration suffered by professional football players. As a result, the NFL is forced to take the concussion issue more seriously. And, as we all know, the NFL has faced numerous lawsuits related to the concussion issue in the past few years.

ii. Present Unique Litigation Challenges

Mild TBI cases present unique litigation challenges. First, loss exposure can be deceptively high. Seemingly minor injuries can turn into large damages claims. Claims professionals or defense counsel may initially hear that the accident victim sustained a bump on head and was released immediately from hospital or sought no medical treatment. Then, once suit is filed, we are told the victim will never return to work and is disabled for life.

Second, the conventional use of structural imaging (CT/MRI) rarely reveals objective evidence of a mild TBI. This "invisible injury" can lead to a proof problem. Indeed, the plaintiff has the burden of proving that he or she "more likely than not" suffered a mild TBI – not just the possibility of a TBI. How can one prove an invisible injury where there is no objective evidence of brain injury and the only symptoms are subjective and common (i.e., headache, dizziness, forgetfulness)? We discuss this in further detail below.

Third, "TBI" may not be mentioned until plaintiff identifies retained experts. When this occurs, the plaintiff and fact witness depositions are usually already completed. Therefore, a defense strategy needs to be developed early and explored prior to plaintiff's identification of expert witnesses.

Fourth, mild TBI cases are expensive to defend. The nature of the injury expands the issues to be tried (i.e., the injury itself is not a given). This requires a lot of work, experts and money and plaintiff's attorneys believe that

there is a better chance of getting a higher settlement because defendants are unwilling to incur the costs of fully working up a defense of the claim.

B. Plaintiff's Strategies in mild TBI cases

As noted above, in cases of an "invisible injury," there is a claimed mild TBI, but the CT and/or MRI show no evidence of it. The plaintiff must prove that he or she suffered a mild brain injury, but the only symptoms are subjective and common (i.e., headache, dizziness, forgetfulness). As a result, there is a juror bias hurdle to overcome. Since plaintiff looks and sounds normal, the jury will be skeptical about the authenticity of his or her injury. Plaintiff's counsel must overcome this lack of proof and jury bias. We discuss below how plaintiff's counsel approaches this dilemma.

a. Fact Witness Testimony

Witness observations before and after the event are one key to overcoming jury bias in mild TBI cases. The witnesses must be intimately familiar with plaintiff before and after the injury so they can speak to how he or she is different since the accident. For example, has the plaintiff experienced memory loss or changes in comprehension, attention, ability to reason, mood or behavior, sense of taste or smell, motor control, balance, headaches, etc.? These witnesses will likely be deposed and then testify at trial, so plaintiff's counsel ideally wants great communicators. Sometimes witnesses who do not know the plaintiff are used, such as witnesses who stopped for an accident and testify plaintiff appeared "concussed" or was confused or was unsteady on her feet.

The plaintiff's testimony is also crucial in a mild TBI case. A good plaintiff's attorney leaves nothing to chance and extensively prepares the plaintiff. The plaintiff should be able to clearly and credibly explain all impairments and how they affect his or her daily life.

b. Expert witnesses

Plaintiff's counsel may also use experts to help overcome the proof problem and juror bias. Many different types of experts may be used:

- Neurologist – essentially brain specialists; can explain how the brain is affected by trauma; can diagnose and treat TBIs
- Psychiatrist/Neuropsychiatrist – specialize in mental and emotional disorders; can diagnose mental disorders and identify TBI as the cause
- Psychologist/Neuropsychologist – usually conduct psychological testing and evaluation of mental impairments
- Radiologist/Neuroradiologist – may be used to support argument that plaintiff's radiology images support a claim of mild TBI
- Vocational Consultant – evaluate ability to obtain employment
- Life Care Planner/Economist – determine future expenses that are brought to present value

Advanced neuroimaging techniques are often used in mild TBI cases due to the limitations of basic structural imaging such as an X-ray, CT scan, MRI, DTI, CAT scan, PET scan, MEG, or EEG. Such basic tests very rarely provide any evidence of mild TBIs which has long been a concern for plaintiff's lawyers. Thus, counsel has begun relying on emerging, advanced neuroimaging techniques. These tests create visual, appealing demonstrative evidence that purports to demonstrate the existence of mild TBIs to jurors at trial. Such techniques are often used in research for group comparison analysis, but there is insufficient evidence supporting clinical use for individual

patients. This makes many of the tests susceptible to exclusion at trial as unreliable.

c. Advanced Neuroimaging Techniques

Advanced neuroimaging techniques include the following:

- Diffusions Tensor Imaging (DTI)
    - Most popular new technique
    - Creates detailed, 3D images of brain structures
    - Used to demonstrate "shearing" or injuries to brain white matter Functional Neuroimaging (PET and SPECT)
    - Examines the brain's functioning, rather than the physical appearance or structure of brain tissues
    - Attorneys use it to argue that a mild TBI has disrupted the functioning of the brain in some way, even if it has caused no physical brain damage
- Functional MRI
    - A technique that indirectly measures brain activity by measuring magnetic properties of hemoglobin (iron containing protein in blood)
    - Not thought of in the scientific community as a reliable method of diagnosing a mild TBI
- Quantitative Electroencephalography
    - Forms of physiological measurement used to detect electrical brain activity
    - Often referred to as "brain mapping"

d. The "Surprise" TBI Claim

Plaintiff's lawyers often privately build up a mild TBI claim during litigation and purposely conceal the claim from opposing attorneys. The claim is relatively easy to conceal because mild TBI evidence is typically revealed through experts. Experts are generally disclosed at the end of a case which can sometimes be years since the case was filed. This late disclosure provides a strategic advantage to plaintiff's counsel in that defense counsel at that point lacks evidence to refute the claim. For example, defense counsel did not ask the right questions during depositions; did not obtain the necessary records to assess the TBI; and did not retain defense experts to refute the TBI. The defense's remedy at that point is generally only a continuance. Below, we discuss how defense counsel can avoid such a predicament.

C. Defense Strategies in TBI cases

a. Preliminary Considerations

i. Strong Experts

If defense counsel faces a good, experienced plaintiff's lawyer familiar with TBI litigation, he or she is also likely to be up against a team of strong experts. There are any number of experts both in the medical and psychological fields who will testify favorably for plaintiffs in cases of very mild to non-existent brain injuries and testify vigorously that the plaintiff has sustained a catastrophic injury. These are professional, slick witnesses. Accordingly, most TBI cases will not be won on cross-examination.

However, these experts may often not have a full history of the plaintiff and thus will gloss over what would otherwise be detrimental to plaintiff's claims. Defense counsel can use this lack of knowledge to their advantage by coordinating with their own defense experts to note these oversights or deficiencies in their own testimony.

ii. Liability, Causation, and Damages

Contrary to the belief that counsel "concedes liability" by presenting a case on damages, a brain injury case must address all three aspects of a case at trial – liability, causation, and damages. The best way to do this is to attack through an expert. Expert testimony is a powerful tool in getting the jury to consider smaller numbers even in "high damages" cases. It is important to consider damages experts in areas such as life care planning, economics, and annuities. However, experts such as neuroradiologists, neurosurgeons and neurologists are also helpful in TBI cases. Neuropsychologists differ from these types of medical doctors because they do not prescribe medications or perform surgery.

iii. Pre-Morbid I.Q. Level

The primary goal of the defense, particularly in mild TBI cases, is to show how plaintiff was functioning in the years and months before the accident. This is the weakest link in the causation chain in that it is usually always an area of vulnerability. The plaintiff's neuropsychologist must show that so much brain damage has occurred that the plaintiff actually lost I.Q. points. They must show not only that the plaintiff's I.Q. is low but that it is lower than before the accident as a result of the injury.

If there is no pre-accident I.Q. test, there is simply no well-validated, accurate method of determining pre-accident intelligence or I.Q. So, defense counsel should do their homework by collecting the plaintiff's records that evaluate his or her abilities. This includes pre-accident records such as school, employment, military, as well as post-accident and current employment or school records. For many students who participate in sports, some schools perform or require concussion baseline testing prior to participating in the sport.

b. Dispel the Myth: Head Injury ≠ Brain Injury

As noted above, many lay people confuse head injury with brain injury. It is important to dispel this myth as early as possible. For example, in voir dire, ask jurors "Who here thinks an injury to the head is the same thing as an injury to the brain?" Or ask jurors to raise their hand if they have suffered a head injury. Most will remember a time when they were kids or while playing sports. And most will not have suffered a brain injury as a result. Bring the concept within their realm of experience. Likewise, in opening statements, concede that the plaintiff has suffered an injury to his head but not to his brain. Distinguish the two early in the case.

c. Organize your Defense Team

Now we will address what tools are needed to approach and evaluate these cases. Step one is to organize your defense team. No claim of TBI, whether mild, moderate or severe, should be handled without a defense team knowledgeable about the specific issues and necessary experts. This should of course include a lawyer experienced in TBI cases. A well-experienced lawyer knows to look for red flags early in the case. If there is documented or claimed loss of consciousness or memory loss, or if the plaintiff hires counsel skilled in TBI cases, this should set off alarm bells. As noted above, a skilled TBI lawyer may wait months or even years before revealing that his client has suffered a TBI. Thus, it is crucial to identify any red flags early in the case.

d. Discovery

Defense counsel's goal in discovery is to establish a reliable baseline of pre-accident functioning. Consistently, it is learned that a mild TBI plaintiff has had numerous problems functioning in the past. Defense counsel should use discovery tools to obtain any and all records possible to establish and compare pre- and post-accident functioning. There should be no stone left unturned. Much of the information sought is relatively easy to access and may include:

- Medical Records
- Employment Records
- Educational Records
- Internet Records and Social Media
- Other Claims and Litigation
- Testing Raw Data
- IME
- Criminal and Financial Records

Once all of this information is obtained and reviewed, it is very helpful to create a Comprehensive Medical Chronology along with a Timeline to give an overall view and assist in identifying patterns.

e. Depositions

Depositions in many cases are the single-most important piece of discovery in TBI cases. The plaintiff's deposition is likely to be long and tedious in order to cover the ground needed to establish pre- and post-accident functioning. Therefore, preparation is key. But a lengthy deposition also provides more opportunity for the plaintiff to make mistakes, particularly if he or she is malingering. Such deposition should also always be videotaped – whether for later use at trial (for impeachment or comparison purposes) and/or to provide to defense experts for evaluation. Videotaping the deposition of plaintiff can be important, so the jury can see demeanor, response time to questions, and other important visual clues. This is especially true where a PTSD claim is being made, to see the witness's presentation as the event is reviewed.

As noted above, depositions of friends and family as well as employers and co-workers may also help prove or disprove just how much (if any) a plaintiff has changed since the accident.

f. Experts

A defense expert's credentials must be impeccable, especially if the defense will be conducting an independent neuropsychological assessment. Equally important is the expert's presentation. Study the expert's past deposition and trial testimony. How they present at trial is most important. The best kind of expert teaches the jury and communicates well. Availability is also important. Defense counsel needs an expert who has the time to fully engage and digest the vast amount of material to be reviewed, especially in these cases where details matter.

Earlier we discussed the types of experts used in TBI cases, but often overlooked is the biomechanical engineer. This expert is an engineer with a medical degree who can calculate the amount of force, vector, and duration of impact to plaintiff's skull and determine if these items are below the threshold required to cause injury.

g. Objective Medical Testing

As discussed above, objective testing is the best kind of testing to have in TBI cases. Tests such as CT scans, MRI's and X-rays are subject to very little interpretation and are more difficult to defend. Defense counsel should use

experts to challenge such results. The expert should explain why, even if the interpretation was correct, it does not explain the plaintiff's symptoms.

h. Subjective Testing

Most of the time, there are no objective test results available, but the plaintiff will choose to rely on a neuropsychologist to establish and allege brain damage. There are hundreds of subjective tests that serve such purpose; however, they are easier to attack. A variety of factors can influence the results or tests, such as medications or depression. There is also the problem of intentional manipulation. Defense counsel should lay the seeds early for the jury to question the reliability of such tests. The goal is to show that the testing does not establish the cause of the symptom or deficit. Other causes can include sleep problems, medications, stress, or psychological problems. Defense counsel should retain his or her own neuropsychologist to assist in cross examination of the plaintiff's expert. This expert can help identify other factors that may influence the results and/or attack the validity of the tests themselves.

D. Hot Topics and Ethical Considerations

a. Symptom Magnification and Malingering

Malingering is a prevalent problem in TBI cases. It is the subject of more articles than any other subject in personal injury trial law. There are ethical issues to consider with malingering as well, and counsel should be familiar with his or her jurisdiction's Code of Professional Conduct, including the following ABA Model Rules of Professional Conduct:

- Rule 3.3 Candor Towards the Tribunal
    - A lawyer shall not knowingly make a false statement of material fact or law to a tribunal
    - A lawyer shall not offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measure
    - A lawyer may refuse to offer evidence that the lawyer reasonably believes is false
- Rule 4.1 Truthfulness in Statements to Others
    - In the course of representing a client a lawyer shall not knowingly:
        - Make a false statement of material fact or law to a third person; or
        - Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

b. Third Party Observers and Videotaping at the IME

Perhaps the most contentious issue with regard to the use of neuropsychologists is whether third party observers will have the effect of altering test results. In most cases, the plaintiff's lawyer wants to be present or videotape the IME to undermine the defense neuropsychologist's findings. Defense lawyers and experts argue that this affects the validity and reliability of the testing. However, failing to tell opposing counsel that the exam is being observed or recorded raises ethical and legal concerns. Various industry groups have issued statements or publications on this topic. Third party observers are allowed in limited circumstances, such as with a parent/child or a disinterested party (i.e., physician's assistant). If counsel or another third party is permitted to attend the IME, he or she should stay out of the way and not speak or interfere with the exam.

c. Releasing Psychology and Neuropsychological Test Questions and Raw Data

Another highly contentious issue regarding psychological and neuropsychological testing is plaintiff's lawyers demand that a defense psychologist or neuropsychologist release the test questions and the plaintiff's test scores and other raw data.

Test security is a fundamental and critical issue, which, without meticulous adherence, threatens the entire enterprise of psychological and neuropsychological testing. For example, the California Board of Psychology has adopted the American Psychological Association's ("APA") Ethical Principles of Psychologists and Code of Conduct ("APA Ethics Code") as the ethical standard for all California-licensed clinical psychologists. (*See* Bus. & Prof. Code, § 2936.) The APA Ethics Code has provisions requiring the protection of both "test data" and "test materials." Test data are defined as "raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during an examination. Test materials refers to "manuals, instruments, protocols, and test questions or stimuli." (APA Ethics Code p. 14, Standard 9.11.)

With respect to test data, APA Ethics Code Standard 9.04(a) states: "Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misinterpretation of the data or the test, recognizing that in many instances release of confidential information is regulated by law." (APA Ethics Code p. 13, Standard 9.04.) Standard 9.04(b) reads: "In the absence of a client/patient release, psychologists provide test data only as required by law or court order."

Additionally, Cal. Code of Regulations Title 16 1396.3 (which is based upon Cal. Business & Professions Code 2930 and 2936) provides the following guidance on "Test Security": "A psychologist shall not reproduce or describe in public or in publications subject to general public distribution any psychological tests or other assessment devices, the value of which depends in whole or in part on the naivete of the subject, in ways that might invalidate the techniques; and shall limit access to such tests or devices to persons with professional interests who will safeguard their use."

Also, recent California appellate case law also calls into question Plaintiffs' claim that their counsel are entitled to receive a copy of the test data. In *Roe v. Superior Court* (2015) 243 Cal.App.4th 138, the court of appeal refused to set aside the trial court's order concluding that the requirement in Code of Civil Procedure section 2032.610 that an examining psychologist produce a written report does not also require production of raw test data. (See *Roe*, *supra*, 243 Cal.App.4th at pp. 146-150.) Furthermore, in *Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, a psychologist was retained by and administered standardized psychological testing to the plaintiff. (*Id.* at pp. 1536-1539.) On defendant's motion, the trial court ordered that unless the plaintiff's psychologist "produced forthwith" the test data to defendant's counsel, the plaintiff's psychologist would be excluded from testifying at trial. (*Ibid.*) Citing ethics standards, the plaintiff's psychologist in *Lewis* produced the test data to defendant's expert but not to defendant's counsel. (*Ibid.*) When the trial court excluded the plaintiff's psychologist for not producing the test data to opposing counsel, the court of appeal reversed and ordered a new trial, concluding that the exclusion was fundamental error that unduly prejudiced the plaintiff's case. (*Ibid.*)

On December 9, 2021, the Official Position of the American Academy of Clinical Neuropsychology on test security was published, which can be found at: https://www.tandfonline.com/doi/full/10.1080/13854046.2021.2022214. The article addresses the competing interests in litigation between needing to protect test security on the one hand and providing data and evidence that will allow attorneys to best protect their clients on the other hand.

Another argument that is frequently used by such experts is a claim that the material is subject to copyright, and

they are forbidden to copy it so it can be used as a deposition exhibit.

If threatened with a motion to compel, or worse, a motion to exclude the expert's testimony for failure to produce the test materials, the Official Position article should be cited and attached to the defense opposition papers. Defense counsel should also be prepared to offer the expert for a *Daubert* hearing to give him or her an opportunity to explain to the court the expert's obligation to uphold the mandate of the profession regarding maintaining test security. As a final resort, a protective order can be used to guard the security of tests.

d. Post-Traumatic Stress Disorder ("PTSD")

Post-Traumatic Stress Disorder is an anxiety problem that develops after extremely traumatic events. Note that PTSD is a disorder under the DSM-5. A person can have stress from an event, without having the disorder. In addition to higher numbers of TBI claims arising from symptoms that can generally be associated with other factors such as generalized stress, there has been an upswing in PTSD claims as a result of motor vehicle accidents and other trauma. Indeed, there is a nexus between neuropsychological functioning and PTSD, i.e., there is a higher incidence of PTSD in those with pre-existing psychological conditions. Like a mild TBI, PTSD is easy to claim but difficult to discredit.

PTSD symptoms usually begin immediately after the traumatic event. Note that there is a difference between an injury, and a traumatic event. In most cases, symptoms will begin to resolve within a number of weeks or months. Also, flashbacks and nightmares are always associated directly with the event. There are treatments for PTSD, and a majority of PTSD cases, even severe cases, with proper treatment are resolved in three months.

Red flags that a plaintiff is falsely claiming PTSD or exaggerating include symptoms that arise weeks, months or years after the traumatic event; flashbacks and nightmares that do not relate to the event itself; and symptoms that increase instead of decrease over time. Pay close attention to medical records. A plaintiff who suffered loss of consciousness (and therefore has no memory of the event) will have a hard time simultaneously claiming PTSD.

E. Conclusion

Consider early in the defense of a case whether there may be a mild TBI claim. Even if TBI is not pled or announced early, know that it may surface when plaintiff designates experts. Therefore, understand the science of TBIs and consult with your defense experts early. Work on gathering important documents through requests for production, and subpoenas. Taking thorough depositions lays the groundwork for exploring and defending this type of claim.