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Handling Traumatic Brain Injury Cases

I. Initial Evaluation of a TBI Claim

More and more often, claimants who suffer minor injuries as a result of an accident are adding “brain injury” to their list of claimed injuries. It seems that nearly every rear-end automobile accident, for example, now allegedly results in a minor traumatic brain injury in addition to the classic whiplash type injury. It is important to determine from the outset whether the claim of brain injury is legitimate since this will greatly affect the way the claim is handled, evaluated for settlement, and ultimately defended if necessary. Brain injuries that are legitimate can result in claims for permanent impairment, loss of earning capacity, future medical and therapy expenses, life care costs and ultimately, significant jury awards. Therefore, it is vitally important in the early stages of evaluating a brain injury claim to obtain and carefully review any and all information available and to develop a good understanding of the medicine behind brain injuries as well as the claimant’s pre and post-accident level of cognitive functioning.

Medical Records

The Centers for Disease Control and Prevention in its 2015 Report to Congress on Traumatic Brain Injury, defines TBI as a disruption in the normal function of the brain that can be caused by a bump, blow, or jolt to the head or a penetrating head injury. Observing one of the following clinical signs constitutes an alteration in brain function:

- a. Any period of loss of or decreased consciousness;
- b. Any loss of memory for events immediately before (retrograde amnesia) or after the injury (post-traumatic amnesia);
- c. Neurologic deficits such as muscle weakness, loss of balance and coordination, disruption of vision, change in speech and language, or sensory loss;
- d. Any alteration in mental state at the time of the injury such as confusion, disorientation, slowed thinking, or difficulty with concentration.

The CDC further explains as follows:

Not all bumps, blows, or jolts to the head result in TBI. Additionally, not all persons who experience a TBI will have behavioral effects or a TBI-related disability. However, the combination of several factors—trauma from the head striking or being struck by an object, an object penetrating the brain, acceleration/deceleration movement of the brain not caused by direct trauma to the brain, and the presentation of signs and symptoms of TBI either immediately or shortly after the suspected event—is sufficient to classify a person as having sustained a TBI.

Keeping the definition and guidelines in mind, a close examination of the claimant’s medical records can provide great insight into the legitimacy and severity of a brain injury claim. Some common medical evidence in the records can either support a brain injury or be used to refute one.

1. AOX3 – If a patient is deemed to be “alert and oriented times three,” it means that the patient knew whom he or she was, knew where he or she was, and had an understanding of time.
2. GCS score – The Glasgow Coma Scale is a simple test given to patients to assess whether the patient may have sustained a brain injury. The score is a sliding scale from 3 to 15. The higher the score, the more cognitively intact the patient is. Many experts opine that a patient with a score of 13 to 15 is considered to have a “mild” brain injury. A score of 9 to 12 typically indicates a “moderate” brain injury while a score of 8 or less reflects a “severe” brain injury. Of course, experts also say that a GSC of 15 does not rule out brain injury. The GSC simply indicates the patient’s level of responsiveness at that time.
3. LOC – Records from the first responders are particularly helpful in determining whether the patient experienced a “loss of consciousness” as a result of the accident. Typically, the longer the period of unconsciousness, the greater the potential for a more severe TBI. One of the criteria for the classification of TBI by the CDC is the period of loss of consciousness with less than 30 minutes being mild, 30 minutes to 24 hours being moderate and greater than 24 hours being severe.
4. Amnesia – The medical records will often contain a detailed history from the patient. It is important to note what detailed facts the patient relates to the medical care provider regarding the accident. The more details the patient remembers regarding the circumstances leading up to and immediately following the accident, the more likely the TBI, if any, is in the mild end of the spectrum. The CDC notes that post-traumatic amnesia of 0 to 1 day is considered mild, 1 to 7 days is considered moderate, and greater than 7 days is considered severe.
5. Neurological deficits – A neurological examination should always be performed when a TBI is suspected. Objective findings in the records such as vision changes, abnormal eye movement, dizziness, balance problems, paralysis, difficulty moving body parts, weakness, poor coordination, loss of hearing, etc. can all be indications of brain injury.

6. Evidence of a direct blow to the head - There should be documentation in the medical records regarding objective evidence if the patient sustained a direct blow to the head such as lacerations, bruising, swelling, etc. Of course, many TBIs are the result of injuries sustained in the absence of a direct blow to the head. A prime example would be "coup contrecoup" injuries, typically the result of acceleration/deceleration phenomena. The brain floats and sits atop a bony shelf in the skull. "Whiplash" injuries can result in the brain slamming into the front of the skull before slamming into the rear. A number of studies have shown that the presence or severity of a blow to the head does not predict damage to the brain. However, the lack of a direct blow to the head may help with the defense of TBI cases, particularly when the subject accident does not involve a coup contrecoup type of injury, because juries often put more weight on objective injuries that they can see.

7. Imaging – Often, if a patient complains of head trauma soon after an accident, imaging techniques, such as computed tomography (CT) scans and MRI scans, can be used to identify structural damage that might contribute to the assessment of injury severity. Of course, even if the imaging is normal, a patient may still have experienced a mild TBI. If there are abnormalities on imaging related to trauma, the TBI may be classified as moderate or severe. However, abnormalities related to age or other disease processes may appear and may be interpreted by some experts to be trauma-related. Therefore, if there are abnormalities on imaging, it will be necessary to have a neuroradiologist review the films. Note too that some “plaintiff’s experts” try to use SPECT scans and Neuro Quant to support findings of structural changes in the brain related to trauma. These scans are arguably unreliable and often inadmissible at trial.

Social Media Search

Again, in evaluating a TBI claim, it is important to know the claimant’s pre-accident level of cognitive functioning as compared to his or her post-accident level of functioning. Although it is sometimes difficult to obtain all the information necessary to evaluate this prior to litigation, the claims professional can obtain a lot of useful information through social media searches such as the claimant’s education and professional accomplishments both before and after the alleged injury. Sites such as Facebook and Linked In can provide invaluable information particularly during the time period soon after the accident before counsel instructs the claimant not to engage in social media activity.

Potential for Early Settlement

Defending a TBI claim can be very expensive as it often requires multiple expert witnesses and exhaustive investigations. In addition, jury awards are often very high for legitimate TBI claims or at least for those cases where the jury believes that the plaintiff did sustain a brain injury.

Typically, when there is a severe brain injury that is accompanied by objective trauma to the head and/or other significant physical injuries, there are most often multi-million dollar verdicts. On the other hand, when the alleged brain injury is minor and disputed and not accompanied by direct trauma to the head, these claims are defensible and often do not result in high awards.

Of course, even if the claimed TBI is minor, there are often very high awards if the jury believes that the plaintiff did suffer a TBI and that the associated symptoms are legitimate. For example, in a recent case in Loudon County, Virginia, which is known to be fairly conservative, the plaintiff, a Ph.D. in biochemistry, was injured when he was rear-ended by a pickup truck. He went to the ER with complaints of neck, back and head pain. A CT scan was normal and he was released. He then allegedly developed memory issues, confusion and anger. He was diagnosed with post-concussion syndrome which was disputed by the defense. The jury awarded him \$1.5 million. This type of result is unfortunately not unusual.

In a recent case in Washington County, Maryland, the plaintiff was also rear-ended allegedly resulting in a mild TBI and whiplash injury. She was a 48 year-old occupational therapist who claimed that she suffered from memory issues, dizziness, blurred vision, headaches, and anxiety as a result of her brain injury. She had between \$50,000 and \$60,000 in incurred medical bills. In a bench trial, the judge awarded her \$2.3 million.

In the cases where the plaintiff is awarded high amounts for mild TBI, the plaintiff is usually very high functioning before the accident and can establish through fact witnesses that there is a significant difference in their level of functioning after the accident. This underscores again the importance of doing an in depth investigation in mild TBI cases where the legitimacy of the injury is questionable.

II. Defending a TBI Claim Once in Litigation

Records to obtain and review

In addition to the medical records produced by plaintiff's counsel, it is extremely important to obtain all medical records that pre-date the accident. Often, valuable information on pre-existing conditions can be discovered.

Obtaining all of the plaintiff's academic records is a necessity. Academic records contain valuable information to determine the plaintiff's pre-accident level of cognitive functioning. Not only is academic performance evaluated, but there are standardized test scores included in these records which provide key indicators for defense experts to estimate the plaintiff's pre-morbid level of functioning. In many cases the plaintiff may have continued his or her education even after the accident which again can be valuable in defending a TBI claim.

Employment records are also essential in determining the plaintiff's professional achievement both before and after the accident. Often there are evaluations in the employment records that show the level of performance both before and after the accident. It is also important to obtain records from any potential employers with whom the plaintiff has applied for a job, particularly after the accident. These records will also identify the plaintiff's co-workers and supervisors who can provide valuable information regarding the plaintiff's work performance.

Military records, although often difficult to obtain, are often full of valuable information as well. They include testing (ASVAB), promotion history, or lack thereof, disciplinary actions, medical issues etc.

Suffice it to say that the more records that are available for counsel and defense experts to review, the better.

Finding and interviewing/deposing witnesses

As noted previously, plaintiffs with mild TBI's often get higher awards as a result of having fact witnesses testify at trial regarding changes observed in the plaintiff after the injury. Fact witnesses can provide valuable information regarding any decline in functioning or lack thereof. It is important to locate and interview or depose these fact witnesses – not only those identified by the plaintiff, but those who have not been identified. For example, co-workers and work supervisors will often provide information that the plaintiff is still fully functional at work with no decline in performance noted. Teachers often can address the fact that the plaintiff's academic performance has not declined. Members of the same club, sports team sorority, church, etc. can provide information regarding the plaintiff's activities since the accident and whether any decline in cognitive functioning has been observed.

It is also recommended that the plaintiff's expert witnesses be deposed prior to trial. Often, information can be gained during these depositions that can later be used to attack the expert on cross-examination at trial. It is vitally important to know what these experts will testify to at trial in order to adequately prepare. The deposition transcripts can also be provided to defense experts in order to allow them to assist in the preparation of cross-examination at trial.

Videotaping the deposition of the plaintiff.

Plaintiffs claiming TBI often complain of difficulty concentrating, focusing, finding the right words, losing their train of thought, becoming confused, remembering things, etc. Videotaping the plaintiff can be valuable evidence to show that the plaintiff actually does not exhibit the symptoms of which he or she complains. Very rarely will the plaintiff exhibit these symptoms even though the deposition takes several hours. Showing the jury portions of the videotape can be a good way to establish that the plaintiff's complaints are not legitimate. In addition, it can be useful to provide the video tape to the defense experts so they can later testify that they watched the video and never observed any of the deficits the plaintiff claims to have.

It is also helpful to question the plaintiff during the deposition on matters that require a good recollection of facts. For example, details of the accident, a list of medication, a list of health care providers, etc. Despite claims of significant short-term memory problems, plaintiffs very often have no trouble listing each of their medications by name, which doctor prescribed them, the dosage for each medication and the time of day they are taken. This can be an effective tool to establish to a jury that the plaintiff does not, in fact, suffer from any ongoing effects of brain injury.

Use of defense experts

Retaining the right experts for your case is essential in preparing an adequate defense. The following experts are most often needed in TBI claims:

1. Medical doctor (neurologist, psychiatrist, physiatrist)
2. Neuropsychologist
3. Neuroradiologist
4. Economist/vocational expert
5. Life care plan expert

Not only should your experts be knowledgeable and experienced in their respective field, but they should also be able to testify well before a jury and be cooperative during the litigation process. Expert witnesses can make or break a case. Those who are articulate but not arrogant, teachers rather than just talkers, and calm and logical rather than argumentative and defensive will be invaluable to the defense. Strong experts can take very technical and complex material and translate it into simple terms understandable by the average juror (many of whom may have limited education).

It is important to know your expert before you use them and know how they will testify in front of a jury or in a deposition. If you haven't used a particular expert before, ask colleagues who have used them to provide an honest assessment to determine how they may be able to help you for your particular case. Make sure to talk to your expert. Have a face-to-face meeting with your expert and have him or her explain to you the issues in the case and the varying opinions in the field regarding those issues. If they can explain things to defense counsel in a clear and understandable way and seem knowledgeable, they will probably do well with a jury.

Experts should also be able to serve as consultants during the litigation process. They should be able to educate defense counsel, think strategically, assist defense counsel in handling the opposing expert, and serve as a valuable resource during the pendency of the litigation.

In addition, knowing your expert's level of experience in the area relevant to your case is extremely important. Review their C.V., discuss their credentials with them and have them explain to you why they feel they are qualified to serve as an expert in the particular field. You can often learn impressive facts about the expert that they otherwise wouldn't offer.

The most important thing is to retain your experts early. Not only can they help you obtain information you need and guide you through the case, but if you determine they are not suitable for your case, you will have time to retain another more qualified expert.