Cross-Examination of Defense Medical Experts in Traumatic Brain Injury Cases: A Diligent Search for the Truth

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Introduction:

The cross-examination of a defense expert in a traumatic brain injury case is not as daunting a task as might be first assumed. The first step in contemplating and organizing the cross-examination is to ask, "What am I as the cross-examiner afraid of?" The fear that the expert will destroy your client's meritorious case is the biggest impediment to an effective cross-examination. Fear can cause a lawyer to lose judgment and attack the witness in an argumentative, hostile way, provoking the witness to mirror the examiner's aggression with counter-aggression, and to fight the perceived personal assault rather than making legitimate concessions. Juries tend to identify with the witness, not the lawyer, and we must treat the witness with respect or risk a backlash from the jury. Jurors are not usually thinking, "Oh what a magnificent cross, he destroyed the witness," but more likely, "Thank God I'm not in the witness chair, the SOB would do it to me what with all his verbal tricks. He'd make me look like a fool." The trial lawyer should consider the dynamic created in the confrontation between the witness and the attorney. In a contest between a lawyer, who in his or her fear and outrage, attacks and brutalizes a witness who is a threat to the case and the client, the witness can seem reasonable to the jury. "To the jury, the witness seems calm, informed, well-schooled in his area of expertise and a man or woman with years of experience. Why would anyone attack him so? The lawyer can unwittingly transform himself/herself into the villain in the courtroom. Suddenly the jury may want the witness to win. The problem is that no one has advised the young lawyer that you cannot attempt to "kill" any witness until the jury wants him killed–until

he has been carefully, quietly exposed as a fake."[1] The reasonable lawyer must slowly, deliberately and with respect and compassion put himself in the shoes of the expert and try to understand what motivates him or her. With patience the lawyer can put the witness in the "black hat" by causing the witness to display anger, frustration, arrogance, hostility, bias, greed, exaggeration or evasiveness. At a minimum the witness must agree to some of the basic scientific principles of brain function and cause of brain damage. The lawyer must, as the director of this play (this trial), control not only the substance of the cross but the interpersonal dynamic including the body language between the lawyer, the witness and the client. The jury views all verbal and non-verbal communication as being as important as words spoken. The lawyer should use real words and language and not become so bound up in having mastered the jargon of brain injury that he or she comes across as stilted or fake. Realness, caring, and compassion for the client must come across to the jury in the direct and cross of this witness, as well as other witnesses in the case. Above all, be cognizant of what is communicated in the case through the play, the drama that is being presented in the trial. Do not only pay attention to the mere words, which are but part of the communication. Remember to pay attention to the answers, both verbal and non-verbal, that the witness gives so that appropriate follow-up questions will be asked. The lawyer must be prepared enough so that he or she is not so focused on the page of written questions that the answers of the witness are only partly heard and understood. The second goal of the cross-examination is to set goals for the cross. The lawyer should develop an achievable number of finite goals for the cross-examination, such as showing bias because of financial incentives, prior inconsistent writings or testimony, lack of preparation, etc.

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[1]Spence, Gerry: With Justice for None: Destroying an American Myth, pg. 254, N.Y. 1989.

Focused finite goals, rather than arbitrary meandering approaches, in preparing for and cross-examining the expert are extremely important, especially when the outcome of the cross-examination can have such a profound effect on the overall verdict.

Basics of Cross-Examination of Defense Expert:

1. Master all of your client's medical records, so that any errors of the expert in reviewing them can be pointed out in deposition or trial.
2. Obtain expert's written report before the deposition.
3. Obtain any testing data from the expert. (Halstead Reitan raw test data, etc.)
4. Review the defense expert's report in conjunction with the report of your own plaintiff's expert. (Compare similarities and differences.)
5. If possible, find prior testimonies, depositions, articles, and seminar presentations before the deposition, i.e., www.trialsmith.com. In the expert's deposition, ask questions sufficient to find these source materials for cross-examination at trial.
6. Prior to the deposition, review the defense expert's entire file, including correspondence and billing. Ask the expert if any materials have been removed from the file.
7. Master the science of traumatic brain injury especially areas of brain function, neuropsychological testing and cause of TBI.

Preliminary Questions to Explore:

1. How many patients with traumatic brain injury has the expert treated or evaluated?
2. What involvement has the expert had in brain injury rehabilitation?

3. What education, training, and research in traumatic brain injury has the expert completed? Is he or she board certified neuropsychologist?

4. Has the expert written any articles regarding traumatic brain injury?

5. What familiarity does the expert have with medical literature?

   a. What articles, authors, or authoritatives are on the expert's bookshelves?

   b. What has the expert reviewed?

   c. Are there similar cases in which the expert has given testimony/depositions?

6. Are there transcripts from other lawyers to obtain?

7. What are all the injury/impairments that this expert attributes to the traumatic event?

8. What is the expert's hourly rate for preparation, depositions, trials?

9. What percentage of the expert's income is derived from testimony as an IME or other expert?

10. What percentage of the experts time is spent actually evaluating and treating brain injured clients?

11. Has the expert actually seen and examined the patient?

12. What percentage of testimony is a treating neuropsychologist vs what percentage is a defense expert?

Client Credibility:

1. Is the client faking, malingering, exaggerating symptoms? (MMPI malingering scale)

2. Does the client a express desire to get better?

3. Is the client still working despite deficits?

4. What coping strategies is the client using to continue living?

expert your understanding and knowledge base of TBI will tend to keep him or her honest in the cross-examination.

A very basic summary of brain anatomy and TBI mechanics is as follows: Brain injuries can result from a traumatic event. These include skull fractures, contusions of the gray matter, lacerations of brain tissue, shearing injuries, diffuse axonal injuries, intra-cranial/intra-cerebral hemorrhages.

Delayed or secondary brain injuries can arise from post-injury elevated intra-cranial pressure, epidural subdural and arachnoid hemorrhages, hypoxic injuries, ischemic injuries, excito-toxicity injuries, status epilepticus.

Skull fractures may be linear, with or without displacement of bone fragments, or depressed when fragments of bone are forced towards the brain. Diastasis fractures occur when a blow to the head causes plates of bone to separate from each other. Damage to the brain may occur without fracture to the skull, causing permanent damage. Even fatal injuries occur without skull fracture (i.e. shaken baby syndrome).

The brain itself may be injured in an Acceleration/Deceleration injury even in the absence of a blow to the head, where the brain tissue strikes the interior of the skull, which is not smooth, but has many sharp boney protrusions or where the tissue is twisted, torqued or sheared. The skull decelerates faster than the brain, which is floating within cerebral-spinal fluid. Tears of the brain may occur when the brain strikes boney protrusions within the skull, or when the mechanism of the injury causes twisting, shearing, or deformity of the brain tissue, which has the consistency of oatmeal or jello. Microscopic damage to brain tissues (neurons, axons, dendrites) may or may not

appear on CAT scans or MRIs. Moreover, tearing or shearing injuries may take place at the time of the initial injury or the injury may take as long as 24-48 hours for the process to be completed because of swelling secondarily causing lack of profusion and excito-toxicity.

Intra-cranial hemorrhages are caused by the result of direct tearing of brain tissue, or tearing of thin-walled bridging veins within the brain. Damages result from direct tearing of brain tissue, or compression by the expanding mass of blood and chemical damage to surrounding brain tissue (excito-toxicity). Increased pressure within the brain is caused when bleeding occurs within the brain. The brain is surrounded by a rigid structure of the skull, and the swelling compresses the brain tissue. Blood, glucose, and oxygen supplied to brain tissues are diminished as intra-cranial pressure, relative to mean arterial blood pressure, increases. As intra-cranial pressure rises, cerebral blood flow decreases. MRI or CT may demonstrate shrinking ventricles or midline shift showing increased intra-cranial pressure.

Hypoxia or anoxia injuries are caused when oxygen is cut off from brain cells, which need oxygen and glucose for survival. Below certain critical levels, permanent brain damage occurs. Such injuries can occur from lack of oxygen or blood flow.

Intra-cranial hemorrhages can occur in different fibrous membranes, creating several compartments. The dura mater is the thick, outer-most membrane surrounding the brain. The pia-arachnoid is a thin, inner membrane. Hemorrhages (epidural, subdural or subarachnoid) can occur within the epidural space (the space between the inner surface of the skull and the dura mater, in the subdural space (the space between the dura mater and the pia-arachnoid), or the sub-arachnoid space(the space between the pia-arachnoid and the surface of the brain). When brain cells are injured, damaged neurons release their neuro-transmitters, the chemical messengers by which brain

cells communicate and transfer information. Excessive release of excitatory neuro-transmitters, including glutamatensaspartate, over-stimulate neighboring neurons, causing a chain of events culminating in death of brain cells over 24-72 hours.

Sometimes brain injuries cause seizures such as status epilepticus, a condition in which an individual experiences a single seizure lasting more than 30 minutes, or a series of seizures lasting at least 30 minutes, where the individual does not regain consciousness between seizures. The brain's need for blood flow, oxygen, and glucose can increase five fold during such seizures. An enormous increase in metabolic needs, which may not be met, may result in an additional brain injury.

Once you have been retained to represent a client in a brain injury case, and the defense has named its neurosurgery/brain injury expert or neuropsychologist, you should follow these basic guidelines in preparing for the cross-examination of this most vital and pivotal expert, who can make or break a brain injury case.

Mechanics of the Closed Head Injury:

1. Obtain concessions regarding anatomy and known mechanics of injury.
2. Is a blow to the head necessary? (i.e. Shaken Baby Syndrome, where the head strikes nothing; or Acceleration/Deceleration injury, where the body is arrested by a seatbelt or airbag before the head strikes an object.)
3. Does a concussion constitute an injury to the brain or brain damage?
4. An Acceleration/Deceleration injury slams the brain (which floats in spinal fluid) into the

interior of the skull, which has sharp, bony protrusions. It is not smooth like the inside of a basketball. The brain may then bounce back into other opposite side of the skull, resulting in a contrecoup injury. Such a mechanism can also tear and shear brain tissue.

5. Can the brain be concussed without loss of consciousness?

   a. Phinneas Gage: a railroad worker tamping dynamite had long steel spike blasted through the bottom of his jaw through the top of his skull, without losing consciousness.

   b. Are there any signs of altered consciousness/amnesia, as evidence of concussion?

   c. Patient's memory is notoriously inaccurate as to whether patient lost consciousness. If he/she is unconscious, how much would he/she know? Sometimes a person whom observers saw unconscious only reports being "dazed."

6. Is it common for traumatic brain injury patients to have normal neurological exam?

7. Is it common for traumatic brain injury patients to be oriented three times: to know who they are, where they are, what day it is, and who is the President?

8. X-rays: the plain film x-rays will not diagnose a brain injury. They can only show possible skull fractures, bone injuries or swelling of soft tissue.

9. CT scans and MRIs frequently are normal because most traumatic brain injuries cause damage to microscopic tissues such as neurons, axons, or dendrites. In these diffuse microscopic areas of the brain, injuries will not show up on imaging studies unless the injuries are concentrated in one area.

10. An EEG will only demonstrate a seizure if one is actively occurring at the time the test is performed.

11. Sleep studies will sometimes demonstrate seizures during a night of sleep.

9. Have you seen normal studies of this type in your own patients, who had traumatic brain injuries?

10. Does the traumatic brain injury patient having normal findings in these areas rule out traumatic brain injury?

Types of Typical Symptoms of Post-concussion Syndrome/Mild TBI:

1. Physical
2. Cognitive
3. Behavioral
4. Emotional

What are Client's Symptoms By History?

1. Facts of the traumatic event.
2. Pre-trauma symptoms.
3. Post-trauma symptoms.
4. Are these symptoms consistent with post-concussion syndrome?
5. What is your diagnosis?

Attacking Opposing Experts

When cross-examining experts in TBI injury cases, you must give the jury reasons to doubt their opinions.

1. You should choose your territory carefully. It is important not to rehash and argue with the defense doctor about each of this opinions. This strategy will merely reemphasize the doctor's points, and position yourself on the doctor's own turf. You must choose your own battleground.

2. Use your expert as a resource for ideas to attack the opposing expert's opinions.

2. Review the doctor's report carefully. Compare it to the medical records concerning the patient to find inconsistencies.

3. Obtain admissions and concessions of important evidence. Find the weak spots on which to focus your attention on trial, regardless of what the doctor said on his/her direct examination.

4. Focus on the financial incentive the doctor has to testify in a certain way, and paint him/her as a hired gun. Fees of $300-$400 per hour are common and could be more at trial. Sometimes experts require first class airfare, luxury accommodations and limousines. Middle class jurors are frequently "shocked" at these fees.

5. Obtain concessions that the doctor is not a treating doctor, but merely an expert witness, who is critiquing and criticizing based on the plaintiff's reports, not "hands on" examination of the patient.

6. Have the doctor admit the quality and credibility of his opinion depends on complete information and then demonstrate that he does not have it. Expert opinions regarding traumatic brain injury require knowledge, training, and experience, as well as a fair and accurate analysis.

7. Catching the defense doctor in a few "black and white" errors can be devastating to his

credibility. For example, in the deposition (attached to this paper), an excellent neuropsychologist affiliated with the Shepherd Center hired for a neuropsychological IME, criticized Dr. Larry Hartlage, neuro-psychologist from Augusta, Georgia, as to Hartlage's methodology in investigation of background information. The doctor felt that it was improper for Dr. Hartlage to ask the plaintiff, Mr. Tillman, if he had lost consciousness, feeling that his opinion would be inaccurate. The IME neuropsychologist went on the state that he could not tell from the medical records whether the plaintiff was unconscious. During cross-examination, I was able to show him four places in the medical records where the police officer, the EMT, the emergency room physician, and a consulting neurologist all indicated that Mr. Tillman had been unconscious at the scene. I was able to further discredit the IME doctor's diagnosis, as he described a fracture of the maxillary sinus, contradicting all of the medical records describing the injury as a zygoma fracture. The IME neuropsychologist's report stated there was no indication in the medical records that Mr. Tillman was confused, however, we proved in cross-examination that Tillman was described as confused in the EMT report and the emergency room report by the emergency room doctor and nurses. On cross-examination, the IME doctor was forced to read the record stating that the patient was awake, alert, confused, and that he was not oriented times three. Also, the IME doctor, I feel, exaggerated the patient's history, accusing him of being a substance abuser because someone in his car had a "joint" on them, and calling him an arsonist because he had been arrested when some boys were burning a forklift pallet inside of an abandoned building to keep warm. The cause of these discrepancies was that the defense lawyer hadn't provided the defense expert with all of the pertinent medical records.

8. Always be on the look out for a lucky break. After concluding the deposition of the defense neuropsychologist, I noticed an article by Dr. Hartlage on the expert's desk. It turned out that the defense neuropsychologist was citing an article on malingering written by Hartlage in a paper the defense doctor was writing. Before the court reporter left, I had her set up again and elicited questions from the IME neuropsychologist indicating he was using a published Hartlage article concerning malingering as a learned treatise source in an article he was writing concerning traumatic brain injury, even though he attacked Hartlage's opinions concerning my client.

9. It is important to establish that the doctor has incomplete information in some important aspects of his/her diagnosis. If possible, establish the defense doctor's deficiencies or limitations in knowledge, training, or clinical experience in traumatic brain injury. Usually, the plaintiff's lawyer can establish a bias on the part of the defense expert. Prove that the defense expert testifies frequently for the defense; that he has an ongoing relationship with insurance companies and their counsel. Aim to demonstrate that he has an ongoing relationship with worker's compensation lawyers, and insurers, that his hourly charges are exorbitant, and that the total amount paid for his work on the case is outrageous. Their amounts are usually shocking to most jurors.

10. Attempt to show faulty, unfair, or judgmental analysis. Establish that the doctor did not correctly analyze data. If you can find a few areas where deficiencies are "black and white" and obvious, the credibility of the expert will be neutralized.

11. Obtain an admission from the doctor that the plaintiff is honest. This may include an admission from the neuropsychologist that the testing was valid (MMPI).

12. Establish that the plaintiff complained of certain symptoms, which are consistent with brain injuries such as impaired memory, fatigue, confusion, distractibility, sleep disruption, etc.

13. Show that the expert focuses on the negative and does not concede obvious positive factors.

13. Obtain concessions from the expert that a mild traumatic brain injury does not necessarily mean a mild deficit for people who are involved in mentally demanding careers.

14. Obtain an admission from the defense expert that if there is injury to the brain, any damage is significant. Since the brain regulates, coordinates, and organizes the systems of the body and provides us with the ability to think and know who and what we are, any injury, including mild injury, can be devastating.

15. Juries usually decide cases for reasons other than expert witness testimony, therefore, if you can score clear, obvious points against an expert, the jury will probably discount his or her testimony and rely on your expert's testimony. Victory is achievable.

16. Obtain admissions about the bio-mechanics of how brain injuries are caused and how areas to different areas of the brain are manifested in clusters of recognized behavioral and cognitive symptoms.

17. Remember competing expert witnesses hired by opposing litigants usually cancel each other out. Frequently these cases are won based upon what lay witnesses have to say about the TBI victim, not what the experts say.

Conclusion:

Slay the giant, gather the plunder and when all is over, remain humble in your heart, and move on to the work of helping your next client. If you are fortunate and win, be gracious to the

court, the jury and your opponent above all. Remember, "sometimes you're the windshield, sometimes you're the bug."[2] Effective cross-examination in the traumatic brain injury case, like any other cross-examination, can only be accomplished when the attorney knows which of the cross-examination goals can be successfully achieved with a particular witness. The goals should be developed and ascertained in advance. The purpose of the cross-examination should be to obtain admissions to achieve specific, pre-determined goals. All attorneys can accomplish a successful cross-examination of witnesses, if he/she first determines what goals can be achieved with the particular witnesses. Cases are not won or lost based on cross-examination. Usually, cases are merely retained on cross-examination.

There are only four main goals in any cross-examination. These four goals are: (1) obtain admissions from the adverse witness; (2) create an impression of agreement: (3) indicate bias or prejudice (i.e. the expert witness is unusually financially motivated); and, (4) discredit the adverse witness. Usually the lawyer can only obtain one or two of the goals and not all four. Frequently this is enough.

Approach cross-examination like a baseball game, understanding, as in trial, that the games are not usually won ten to zero, but rather five to three.

At the deposition, one should obtain admissions from the witness in such a fashion that the witness cannot reverse his or her position at trial. Not only should admissions be obtained, but also those admissions should be locked in for effective use during the trial. The witness must be pinned and boxed in such a fashion that he cannot escape the admission at trial. If the defense doctor has made any positive findings, these are key facts that he has admitted and these need to be emphasized

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[2]Dire Straits: song entitled, "The Bug"

in cross-examination. PowerPoint or enlargements help highlight these admissions. Cross-examination can demonstrate the medical or psychological validity of the plaintiff's theory.

In my opinion, a "soft" cross-examination is usually best. A hard-edged, threatening cross-examination, while it may seem rewarding to the lawyer performing it, may cause the jury to sympathize with the witness. Often, jurors feel that if they were on the stand, the lawyer would butcher them as well. To the jury, the cross-examination becomes an exercise in "lawyer tricks," rather than an effective and respectful cross, neutralizing of the witness. Remember, jurors tend to identify with the witness and not the lawyer. Jurors look at the trial lawyers skill of cross-examination with great awe and fear, as they imagine themselves being cross-examined. Remember, cross-examination is the art of creating an overall impression about either the lack of trustworthiness of a witness' testimony, or about an apparent agreement between you and the witness.

Always end the cross-examination on a high note. Always be able to turn your back on the witness and walk away with your head held high. This comportment will non-verbally communicate to the jury that you have been successful in your cross-examination, you have shown that the witness agrees with you, or that the witness' testimony is untrustworthy.