



BRAIN DAMAGE CASES

DEFENSE AND EVALUATION OF BRAIN INJURY CASES

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DEFENSE AND EVALUATION OF BRAIN INJURY CASES

I. Organizing a Defense Team in Brain Injury Cases

One thing that history has taught us regarding litigation is particular types of injuries, which might otherwise not seem very serious, can be turned into something entirely different. In the context of traumatic brain injury cases (TBI), it is possible to find cases which probably would have warranted minimal medical attention yet turn into something that sometimes approaches a catastrophic loss. Cases where individuals either go to the hospital and are released almost immediately after sustaining a bump on the head, to situations where people bump their head and do not even visit a medical provider until days afterwards, can become cases where we are told that the plaintiff will never return to work and is disabled for life.

The fact is, in the vast majority of these cases, medical literature would suggest that the person allegedly so grievously injured should have recovered and proceeded about his or her life in a normal fashion. Given the fact that there are likely millions of potential brain injuries in the United States annually, there are many opportunities for very mild TBI cases to turn into catastrophic cases.

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. In some of these cases, the medical professionals are frankly hoodwinked by plaintiffs because the medical professionals do not delve into the underpinnings of the plaintiff's alleged injury or background. Thus, by virtue of not having a full history, the experts sometimes gloss over what would otherwise be very detrimental to the plaintiff's claims, either because the expert has been fooled, or, worse, knows that his or her remuneration depends upon being favorably inclined to plaintiffs.

This paper is designed to discuss how these cases should be approached and evaluated by defendants and their counsel.

No claim of a TBI, whether delineated as mild, moderate, or severe, should be handled without the assistance of a defense team that is knowledgeable regarding the issues and experts presented by these cases. The team necessarily should consist of a lawyer who is knowledgeable regarding the issues presented in these cases and who, therefore, has the knowledge to retain experts that have specific experience in dealing with these matters.

The first task is to realize that a TBI case may be in the works. Ferreting out brain injury cases from a typical personal injury case is not difficult for counsel who understand the subtleties of these cases. If one is dealing with a matter and it

was initially reported that the plaintiff at the accident scene lost consciousness (no matter how briefly) or that the plaintiff was dazed, or that the plaintiff was complaining of memory problems, those types of red flags should set off alarm bells. If the plaintiff is represented and retained a plaintiff's attorney skilled in dealing with brain injury cases, plaintiff's attorney will skillfully control the flow of information. Quite often the lawyer will wait months or possibly even years before suddenly revealing that his client has allegedly sustained a catastrophic brain injury.

This is why it is important for the defense to realize either pre-litigation or very early in the litigation that they may be facing a TBI case.

Inherently, these cases are not cheap to defend. They are time consuming because of the amount of material to be studied and comprehended, as well as the intensive work that must be undertaken to fully analyze the history of the plaintiff. This necessitates that a cost-benefit analysis be done early in a case, which often times will warrant consideration of paying more than the case may really be worth simply because of the expenses and fees that may ultimately be incurred in its defense. It is also advantageous if the defense counsel has at their disposal a team of nurses to assist in the evaluation of various medical issues that may arise in conjunction with the traumatic brain injury and to provide the lawyer support in

understanding the case. After all, the hourly rate of nurses is generally half that of defense counsel. Economically, having nurses involved to collect, evaluate and summarize medical records is the most efficient way to go about it.

II. Discovery Issues in Brain Injury Claims

Discover, discover, discover is the phrase that must be applied by defense counsel in a brain injury case. Discovery is critical in the defense of these cases and the goal is to establish a reliable baseline of the plaintiff's functioning before the accident occurred. This can generally be done fairly easily except in cases involving young children. All of us, knowingly or unknowingly, have allowed a significant amount of history regarding our past to be recorded. Most of that history is easily obtainable and contains a treasure trove of information regarding one's pre-accident functioning. The ultimate end to this discovery is to show the jury exactly how the plaintiff was functioning in the months and years before the accident. Consistently, it is learned that a plaintiff that has allegedly sustained a mild traumatic brain injury had numerous problems functioning issues in his or her past. These can be evidenced by a number of things: poor performance academically, employment problems, past psychological issues, and abuse of prescription or non-prescription drugs and alcohol.

A. Medical Records

This discovery process usually begins by obtaining all of the plaintiff's pre-accident medical records. The family practitioner is the best place to start, because family practitioners are routinely involved in the overall scope of a plaintiff's health care. In those records one can find referrals to other physicians, as well as insight into the plaintiff's functioning. The search for medical records can move forward from the family practitioner to ob-gyns, orthopedists, neurologists, and just about any other medical specialty that exists. All of these records must be obtained and carefully reviewed by the defense team. Within these medical records, oftentimes there will be references to hospitals or other facilities where the plaintiff may have received care. Those records also need to be obtained.

The potential that the plaintiff had a past history of depression or other psychiatric disturbance, either diagnosed or undiagnosed, must be explored because many symptoms that are generated by those conditions mimic the symptoms that plaintiffs contend they are suffering from after a traumatic brain injury. It is almost universal that plaintiffs suffering mild traumatic brain injuries will report emotional distress, lack of ability to concentrate, headaches, depression, and memory problems. But, if the plaintiff has ever been treated for depression in

the past or other psychiatric type issues, many of these same conditions will have been reported to those healthcare professionals.

If the medical records are really helpful, they may even report a prior head injury. This sort of finding can be used to do great harm to the plaintiff's case because any expert, at least one with any indicia of honesty, will acknowledge that damage from brain injuries is cumulative and that a past brain injury may, in fact, explain the symptoms that the plaintiff is complaining of today. They will also admit that it is virtually impossible to determine which injury caused which symptom.

Any type of medical record may also reveal a history of drug or alcohol abuse. This is another extremely important finding in records because it can be used to argue that many of the symptoms that plaintiff is complaining about now are related to addiction problems, as opposed to a traumatic brain injury. Pre-incident infections and disease processes also need to be explored because, once again, these type of past medical problems can sometimes replicate the plaintiff's current complaints of cognitive dysfunction.

There is plenty of support in medical studies that many of the symptoms complained of by plaintiffs alleging a TBI are in fact seen very frequently in the population as a whole. In other words, just because someone is complaining of

cognitive dysfunctioning does not mean it has any relationship, whatsoever, to a head injury.

Finally, even records far in a plaintiff's past cannot be overlooked. Particularly in cases involving younger plaintiffs through the teenage years and into the 20's, it is helpful to actually obtain the birth records. Birth records may reveal complications at birth or in utero that could explain some of the plaintiff's symptoms. For the same group of plaintiffs, it is also helpful to obtain pediatric records, as they could document childhood injuries or developmental problems that could offer an alternative explanation for the claimed injuries or problems. In the end, the goal is to have as complete a picture of the plaintiff before the accident as possible.

Of course, it is also equally important to obtain all of the medical records post-accident. The most important of these, many times, turn out to be the descriptions of the plaintiff's condition from the emergency medical services that first encountered the plaintiff after an accident, as well as the notes and records from all the treaters in the emergency room. Many, many times these records will demonstrate that the plaintiff frankly either sustained no brain injury, or, if medical science is to be believed, only the most minor type of head injury from which almost-universal recovery is expected. It is truly amazing how many times one

will encounter a plaintiff claiming either partial or complete disability from a traumatic brain injury, yet the medical records from the day of the accident offer no support whatsoever for that conclusion.

The plaintiff's score on the Glasgow Coma Scale (GCS) given by the EMTs or in the ER needs to be examined closely. The GCS has gained almost worldwide acceptance in the medical community as an indicator of the severity of an acute head injury. The GCS is a grading system used to determine the patient's level of consciousness. A score of 15 is the maximum score and connotes generally normal mental functioning. Scores of 13-15 on the GCS are generally considered a sign that there is a high probability for complete recovery. While it is not impossible to have sustained a head injury with a GCS of 15, the universal opinion of honest healthcare professionals is that there is almost always a full recovery. The only time a full recovery may not be seen is when the plaintiff has some underlying problem that pre-dates the subject accident.

The EMS records will quite often reveal a plaintiff who is able to give the medical technician an incredibly thorough history including the exact facts of how the accident happened. Yet, a year after the accident, when the plaintiff is deposed, the plaintiff reports in the deposition no memory of the event. While such a scenario may be true, if it is true it has nothing to do with a traumatic brain

injury. (The only caveat to this is that there are rare circumstances where an individual sustains a blow to the head, reports either no loss of consciousness or minimal loss of consciousness, and later develops a bleed into the brain or between the dura of the brain and the skull, which can cause anything from minor brain damage to death.) The same history that is given to the EMS technician is oftentimes repeated in the emergency room to the nurses and doctors that first see the plaintiff. These records often times conflict immeasurably with the plaintiff's reports to his own medical experts and to the defense lawyers.

Even well-meaning healthcare providers of a plaintiff can be fooled if the plaintiff decides to be dishonest regarding the history of the accident and the symptoms reported thereafter. Frequently, healthcare professionals are sympathetic to the plaintiff and do not bother to look thoroughly into the plaintiff's accident and injury because they see no reason to do it. Those types of circumstances generally can be used to great advantage in defending a case because many of those unwitting providers will turn on the plaintiff when confronted with the fact that they have been deceived and have therefore rendered medical treatment and opinions based upon either incomplete or inaccurate information or even outright lies.

It is always necessary to obtain any CT or MRI films taken of the plaintiff's head. Because of medical malpractice issues, these tests are routinely ordered in situations where a plaintiff makes a complaint of a brief loss of consciousness or a substantial impact to the skull. The vast majority of the time the studies are read as completely normal by the hospital radiologist; but there are plaintiffs-oriented experts who will later arrive at findings that vary from those of the hospital radiologist. It may therefore be necessary to obtain a defense radiologist or neuroradiologist to assist in the evaluation of these films. Further, in cases involving more elderly plaintiffs, these studies of the brain may reveal pre-existing problems that could explain many of the symptoms that the plaintiff complains about after an accident.

One of the things that makes these cases difficult to defend is that frequently plaintiffs will often treat with a myriad of providers. Sometimes this is because the plaintiff realizes that he or she is not going to have a sympathetic ear with the original provider and instead wants somebody sympathetic to his or her cause. In some situations, it becomes apparent that the plaintiff is seeing a variety of doctors and not reporting to each doctor the other doctors' involvement because the plaintiff may be seeking multiple sources of pain medication. Other times, the plaintiff may have a preexisting psychological disorder and is simply searching for

a validation of the current complaints. This is why it is vitally important to make sure that every stone is overturned in looking into the plaintiff's medical history. As with the case of plaintiffs not giving complete histories to their healthcare providers, in situations where a provider has been deceived by his patient relating to other providers providing the same or similar treatment and medications, those experts will sometimes turn on their patient and become favorable witnesses for the defense. More importantly, all these types of shenanigans on the part of plaintiffs generally do not sit well with judges or juries.

B. Employment Records

Another valuable resource for establishing a baseline for the plaintiff are employment records. These records should be identified during discovery and then obtained and reviewed by the defense team. Employment records can reveal significant problems in functioning. They can reveal prior injuries and similar symptoms. They can show that the plaintiff had financial problems or other significant stressors in his or her life that could lead him or her to want to malingering or that could have an impact on the reliability of neuropsychological testing. In fact, employment records can contain some neuropsychological assessments because more and more companies are using those assessments as a hiring tool, particularly in circumstances involving executive level employees. Included

within the term employment records are military records. Anyone that has served in the military generally has a thorough military file that contains much information that is helpful in establishing baseline performance pre-accident. Employment records will also inevitably yield names of associates of the plaintiff who may be interviewed to assist in establishing a comprehensive baseline.

C. Educational Records

Educational records are crucial in developing a defense. It is incredible how often a plaintiff testifies that their academic endeavors were stellar, yet, when the records are obtained, they are replete with C's, D's and F's. Academic records are particularly important in cases involving children, teenagers, and young adults. These records will almost always establish a baseline of intellectual functioning and also reveal a treasure trove information about social functioning and behavioral issues.

D. Internet Records

A novel approach in defending any personal injury cases is the use of the internet to obtain information on a plaintiff. Web sites are proliferating that allow individuals to create their own webspace and then post information about themselves. Employers today frequently search the internet sites to learn information about their proposed employee. There is no reason that this resource

cannot be exploited in the defense of any personal injury case. Imagine the look on a plaintiff's face, when, while being deposed and after having claimed that he or she has not been on a vacation in a year because of a claimed injury, they are presented with pictures or posted information from sites like MySpace.com and Facebook.com showing him or her on vacation and frolicking with friends and family in the weeks, months or years after an accident. While surveillance is always a valuable tool in these cases, it is much more expensive than finding nuggets such as those discussed above, which are basically free on the internet and posted by plaintiffs themselves. Why pay for surveillance when the plaintiff is doing it for you?

E. Claims and Litigation

Another obvious set of records that should be obtained on the plaintiff are all records dealing with past or post-accident claims or litigation. Many times we find that plaintiffs who are asserting a questionable traumatic brain injury have been involved in litigation or claims in the past. While these may not include claims of traumatic brain injury, the records and deposition transcripts can certainly reveal valuable information about the plaintiff's contentions in that case, some of which may well mirror those in a case of alleged traumatic brain injury.

F. Testing Raw Data

One set of records that is an *absolute must* is the raw data generated by the plaintiff's neuropsychologist or neuropsychiatrist. This data is generated during the neuropsychological tests that will be relied upon by the plaintiff's experts to allege objective proof of the plaintiff's brain injury. These are the records that generally the defense team must rely upon and must have their own expert review. While many neuropsychological tests given to the plaintiff in a battery are arguably objective, they are subject to interpretation. Over-interpretation of the data is a frequent problem encountered by the defense and the only way to detect that type of problem is by the defense's own expert evaluating the raw data. Plaintiffs' neuropsychologist will often contest a request for these records by contending that the tests and raw data are proprietary in nature and thus cannot be released to the defense lawyer. Generally, however, the plaintiff's neuropsychologist will release the material to the defense neuropsychologist because the defense neuropsychologist is authorized to give the same tests and thus there is no proprietary objection. If the plaintiff's expert continues to resist, a motion to compel must be filed to force that expert to produce the records. Without those records, the defense is seriously hamstrung in their defense of the

case and must rely upon the plaintiff's expert's unrebutted explanation and interpretation of those tests.

G. Independent Evaluations

What always becomes a difficult decision in these cases is whether or not the defense should obtain their own neuropsychological assessment of the plaintiff. This decision is generally best left until after the raw data from the plaintiff's neuropsychological assessment has been reviewed and understood by the defense's expert. The decision often turns upon the reputation of the plaintiff's expert. The last thing anyone wants to do is have a neuropsychological assessment by the defense team with results that mirrors those done by the plaintiff's expert. If the plaintiff's expert appears to have a complete and thorough history of the plaintiff and, thus, completely understood the plaintiff's baseline functioning and the expert has a reputation for integrity and honesty, then the best decision may be to forego a defense analysis and simply rely upon your own expert to develop a way to attack the plaintiff's expert's findings. On the other hand, in situations where the plaintiff's expert did not fully document the plaintiff's history and you know there are damaging aspects of that history that call into question the validity of the plaintiff's experts findings, then if the case, from a financial standpoint, warrants it, a defense assessment is a good investment.

H. Miscellaneous Records

Finally, a thorough background check needs to be performed on the plaintiff to search for criminal and financial records. Repeatedly in TBI cases it is discovered that the plaintiff has financial or criminal problems in his or her background. If the plaintiff is married, the search should also be expanded to check on potential domestic-related filings in the area of the plaintiff's residence. Finally, if the plaintiff is receiving any sort of social security benefits, that file should also be obtained.

I. Create a Medical Summary

Once all of the information discussed in the preceding paragraphs is obtained and reviewed, it is very helpful to create a comprehensive medical chronology and summary along with a timeline. These sort of tools allow for the lawyer to get a comprehensive view of the case and, on occasion, patterns develop once the information is put together in a cohesive package. What may appear on the surface as an insignificant detail, may later develop into a valuable resource to attack the plaintiff's claims.

III. The Depositions

The deposition of the plaintiff in a traumatic brain injury case is, by far and away, the single-most important piece of discovery in one of these cases. It is

strongly encouraged that defense counsel invite the decision maker at the client to attend this deposition if at all possible. It is truly remarkable to see what type of presentations various plaintiffs will make. These depositions tend to be very long and tedious because of the amount of information that needs to be obtained and addressed with the plaintiff.

These depositions must *always* be videotaped. The videotape is invaluable because it allows the opportunity for later use of the deposition at trial in cases where the plaintiff in fact is malingering, because the vast majority of the time a malingering plaintiff cannot maintain consistency throughout the course of one of these depositions. For instance, the plaintiff may appear for the first hour to have significant memory problems, but by the second hour has grown tired of the charade and suddenly appears to have regained his ability to remember intricate details that did not seem possible during the first hour. Quite often you will see plaintiffs shift back and forth between appearing to have some type of cognitive difficulty and not.

A videotaped deposition is also necessary for purposes of review by the defense's experts. In cases that plaintiffs' counsel have prepared vigorously, there may be neurologists, neuropsychologists, neuropsychiatrists, audiologists, cognitive therapists, ophthalmologists, speech therapists, etc., who have treated the

plaintiff and who will be offering opinions. It is virtually impossible in these cases to obtain more than one or two independent medical examinations. Thus, your own experts may be forced to rely upon the videotaped deposition of the plaintiff as their only means to assess the plaintiff's functioning "in person." This is another reason these depositions should last as long as they do. The longer you can keep a plaintiff answering questions, the more likely it is he or she will make a mistake and the easier it is for the defense experts to pick apart the plaintiff's presentation.

These depositions require immense preparation. Unlike most depositions involving a personal injury claim, a strategy needs to be developed to test the validity of the plaintiff's claims of brain injury. These are not depositions where the lawyer is simply trying to find out some information about the plaintiff's past, how the accident happened, and how the plaintiff is recovering from a broken leg. Instead, these depositions take a plaintiff back as far into their past as they can recall and bring them forward into the present. The defense lawyer's primary goal is to seek to put the plaintiff at ease early on in the deposition so that the plaintiff eventually feels comfortable in responding to questions. Once the plaintiff relaxes, it is more likely that inconsistencies will appear during the testimony.

This deposition is also the only time when the defense will be afforded an opportunity to develop invaluable social history of the plaintiff, including the plaintiff's social and family circumstances. The defense counsel is able to learn in great detail what the plaintiff's activities, hobbies, and social involvement in the community may be. This information, along with the names of the people that are involved with the plaintiff, will allow for a later in-depth exploration of the plaintiff's past.

Cultivation of this type of information is important because one of the things that defense-oriented neuropsychologists look for are what are known as "life stressors." Plaintiffs who live a life full of stress from the standpoint of, perhaps, financial or marital problems, family relationship difficulties or a combination of these factors often times have either an intentional or psychosocial need to remove themselves from the stress. One of the easiest ways to do this is for the plaintiff to take what should have been a mild or non-existent brain injury and try to turn it into a catastrophic case that will allow him or her the financial independence to remove him or her permanently from the stress. A jury will understand that plaintiffs who have faced numerous stressful situations in their lives may have the incentive to not be entirely truthful in the litigation setting. But, this information can only be obtained with a thorough deposition of the plaintiff.

For the same reason that the plaintiff needs to be deposed, the defense team should also consider depositions of the plaintiff's family members. The spouse is, of course, essential. Older children should also be considered as possible deponents. The plaintiff's employer and past employers may need to be deposed, and certainly if it is discovered that there are other individuals very closely involved in the plaintiff's life who may shed additional light on the background of the plaintiff -- those individuals most likely will also need to be deposed.

IV. Experts

One of the few areas in a traumatic brain injury case that the defendant can actually control is the use of the its own expert. It is paramount that the defense team analyze their expert needs quickly in these cases. If the decision is eventually made that an independent neuropsychological assessment should be obtained, it is of course necessary that an expert with impeccable credentials be retained. But, an expert with impeccable credentials who makes a terrible impression when he or she testifies is not going to help the defense's case. An expert who is personable, appears sincere, and who can win the jury's trust, is essential. This not only applies to the defense's neuropsychologist, but any other testifying experts that the defense may choose to retain.

As noted previously, a decision may be made not to conduct an independent neuropsychological assessment and, instead, simply rely upon a consulting expert. In those cases, it is vital that an expert be retained who is not so busy as to never be available. There is nothing worse than having retained an expert with the highest credentials that could be found, but when there is a question that needs to be answered quickly, that expert is unavailable for several weeks.

Most defense lawyers that are intimately involved in brain injury litigation have already established a network of experts upon whom they rely and trust. While plaintiff attorneys have used the internet with great success in sharing information about experts and theories of their cases, etc., the defense bar also has the ability to do this. Sharing of information through internet sources can assist tremendously in the selection and retention of the defense's experts. It can also be valuable to study potential defense expert's past deposition testimony. If past depositions can be discovered, they can offer clues as to just how reliable the expert may be for your case. It is not unheard of for experts that may appear to be defense oriented to, in the long run, be favorable to the plaintiff's side of the case. Once again, the sharing of information by defense counsel can prevent these sort of mistakes.

One area that is often overlooked in the defense of TBI cases is the potential to use biomechanical experts. Biomechanics generally have degrees in engineering and also are medical doctors. The combination of these specialties allows these engineer/doctors to calculate the amount of forces imparted to the skull in a particular accident. Because of research accomplished in the automotive and aerospace industry, there are numerous studies that offer insight into the likelihood of particular types of injuries occurring within certain force parameters. For instance, in a slip and fall where the plaintiff bangs his head, a biomechanic may be able to calculate the force of the impact to the plaintiff's skull and establish that, based upon automotive research, the force of that impact should not have caused any significant injury. This strategy has been used for many years in low-speed serious-injury automotive cases, but is equally as effective in an alleged brain injury case.

In very serious cases, the plaintiff may have retained rehabilitation experts, life care planners and economists. Quite often, these teams will create a comprehensive plan to "ensure" that the plaintiff is taken care of for the remainder of her life. These plans, after analysis by an economist, are then reduced into present value and presented to the jury as "just the bare minimum which you need to award to make sure that the plaintiff is taken care of." These plans should be

reviewed by a defense-oriented life care planner and rehabilitation expert in conjunction with the medical records, to determine how inflated the plans may be. Many times the defense will not use testifying experts in this field as they can tend to set a “floor” for damages for the plaintiff, but certainly, they can be called upon to assist in the development of a withering cross examination of the plaintiff’s experts in this area.

V. Comparing The Claim: Objective Medical Testing

As noted previously, there are many different tests that may be performed on an allegedly brain-injured plaintiff. Some of these tests are certainly objective tests subject to very little interpretation. Tests such as a CT scans, MRI’s and X-rays are interpreted by radiologists or neuroradiologists with little room for debate or disagreement. This is not to say that the plaintiff’s interpretation cannot be challenged, but when a CT or MRI shows bleeding into the brain, that is objective medical evidence that will be hard to refute. Generally speaking, claims that involve valid objective findings are much more difficult to defend than those that rely purely upon neuropsychological testing. This is true even though the defense may be able to provide compelling evidence that the findings on the objective studies do not necessarily correlate to the symptoms being expressed by the plaintiff. For instance, a subdural hematoma located in one lobe of the brain which

does not control a particular area of functioning of the brain, may certainly be questionable if the plaintiff's experts are contending that the finding supports proof of causation. Unfortunately, because the plaintiff gets to present his or her evidence first, it is sometimes difficult to sway the jury back to the defense's side once the jury has seen an MRI or a CT scan showing clear signs of bleeding or other structural damage to the brain. Again, this makes it imperative that the defense retain appropriate experts who can not only challenge the plaintiff's expert's interpretation of the test, but also explain to the jury exactly why, even if the interpretation was correct, that it does not explain the plaintiff's symptomatology.

Other studies such as PET scans, Thermograms and BEAM studies are certainly subject to challenge if they survive a *Daubert* motion. If that evidence is allowed into court, there are plenty of defense-oriented experts who can explain to the jury in great detail the problems engendered by that testing, and why it is unreliable. This goes back to a knowledgeable defense team that can understand the significance of the various tests and how to combat the use of those tests in alleged brain injury cases.

Most of the time, there will be no objective findings on MRI, CT or X-ray. There will also not be studies such as PET scans, Thermograms, BEAM studies,

etc. The plaintiffs instead choose to rely upon neuropsychological testing in order to establish the alleged brain damage. There is a plethora of these tests which can be utilized by neuropsychologists. Literally, there are hundreds of them.

Neuropsychologists put these tests into a “battery” to meet what they describe as the needs of their testing. The end goal is to use the appropriate tests to isolate and identify deficits that an individual may have. The most important point to remember about neuropsychological testing is that while the testing may identify the deficit and explain a particular symptom, the tests do not establish the cause of the symptom or deficit. Additionally, most neuropsychological tests are not entirely reliable because they have a variety of factors that can influence the results of tests themselves. For instance, any number of medications can impact an individual’s ability to take a test and to respond to it appropriately. Depression and other psychological disorders can interfere with results. A neuropsychologist cannot control the impact these factors can have on the testing results. There can be intentional manipulation, although a number of tests have indices built into them so as to attempt to detect malingering or manipulation. There have been too many cases of outright fraud where reputable neuropsychologists have administered neuropsychological test batteries, determined that an individual is brain damaged, and then, after the neuropsychologist has opined that it is “more

probable than not that the plaintiff has sustained a brain injury” surveillance reveals the plaintiff doing just exactly what the neuropsychologist says the plaintiff could never do again.

Thus, these tests must be taken with a very large measure of skepticism. This is why it is imperative that the defense have their own neuropsychologist to assist in the development of a cross-examination of the plaintiff’s expert, at a minimum. The defense neuropsychologist can take each specific test and then identify other factors that might be influencing the plaintiff’s scores on the test. They can assist in attacking the validity of the test themselves because most neuropsychological tests have been the subject of a variety of peer reviews and other studies, many of which point out the fallibilities of those tests.

Many of these tests are somewhat esoteric in nature. They can be confusing to a jury and the manner in which they are scored is often times complex and seems like a jigsaw puzzle. The defense’s job during trial, starting in opening statement, is to begin to lay the seeds for the jury to question the reliability of the neuropsychological tests and, thus, to ultimately come to the conclusion that the tests do not offer significant proof that the plaintiff actually sustained a brain injury.

It is also important to examine the law in each jurisdiction to determine whether or not a neuropsychologist, based solely on neuropsychological testing, can opine that a plaintiff has sustained a brain injury that is caused by a particular accident. In other words, the question is, can the plaintiff's neuropsychologist actually state "it is more probable than not that John Doe's accident on December 1, 2006 was the cause of the deficits and symptoms that he is now experiencing?" Some jurisdictions have either established case law or statutory provisions that provide that neuropsychologists cannot provide causation testimony and, instead, can only testify as to the findings of the neuropsychological examination, and that the findings support the symptoms that the plaintiff is claiming. But, without causation testimony, the plaintiff cannot establish the final link necessary to get the case to a jury. In many situations, the plaintiff will attempt to overcome this hurdle by retaining a neurologist who, after relying upon the neuropsychologist's testimony, will testify that causation is present. Therefore, this may necessitate a defense-oriented neurologist to testify to the contrary. These experts are particularly useful in cases where the plaintiff has other underlying problems, such as psychological problems, addictions, and significant social stress – all of which can be used to assert that the testing was influenced by these facts; while the neuropsychologist may have found certain symptoms, it is simply impossible for

anyone to establish reliably that the cause of those symptoms is a brain injury which occurred in a particular accident.

VI. Comparison of The Claim to The Medical Literature

Finally, every claim of brain injury needs to be evaluated with an eye towards the medical literature that either supports it or cast doubt on it. There are hundreds of treatises that deal with the issues created by brain injuries, whether mild, moderate, or severe. There are thousands of journal articles discussing not only neuropsychological testing, but also numerous aspects of brain injury. A distinct advantage of building a competent defense team is that between the defendant's nurses and experts, enough treatises and articles can be collected to challenge almost any finding posited by plaintiff's expert.

VII. Conclusion

Brain injury cases are never easy to defend. They require vast amounts of time and energy simply to process the information that is generated by these cases. However, they are defensible and some are very defensible, and a number of them involve outright fraud. The fraudulent and questionable cases can be very difficult to detect. Someone without a basic understanding of these types of cases can quickly become frightened by what they see initially, from information controlled by a plaintiff's attorney. In the end, it is simply a matter of understanding the

nature of these cases, properly preparing and evaluating them, and determining those cases which should be settled quickly and those which should be fought vigorously.